Introduction

Contemporary philosophy of law focuses strongly on the idea that law is a socially recognised standard for conduct. Legal positivism, the dominant tradition in contemporary jurisprudence, seeks to understand the nature of law primarily by unpacking the notion of social recognition and its connection to legal normativity. The legal positivist project proceeds on the basis that an adequate and informative descriptive theory of law, including its claims to authority and role in social discourse, can be constructed by examining its dependence on social sources. Philosophy of law, on this view, does not necessarily rely on ethics or political philosophy for a full account of the nature of law or its place in social life.

Legal positivism, despite its contemporary dominance, is a relatively recent development in the history of legal thought. It is not until the work of John Austin in the nineteenth century that one finds any concerted attempt to construct a theory of law based on a purely descriptive enquiry. H. L. A. Hart, who broadly endorsed Austin's methodology of conceptual analysis (while famously criticising the details of his theory), remarked almost a century later that Austin's work 'established the study of jurisprudence in England'.[1] It marked the beginning of the rise to prominence of what is now known as analytical jurisprudence.

Austin, as well as being the founder of analytical jurisprudence, is also widely viewed as the first systematic exponent of legal positivism. It is perhaps unsurprising that the adoption of an avowedly descriptive approach to analysing the concept of law would tend to yield a theory that focuses solely on describing social institutions. This approach to philosophy of law, however, would have seemed bizarre for much of human history. The history of legal theory prior to Austin is a series of attempts to understand the connections and relationships between law,

[1] H. L. A. Hart, 'Introduction' in John Austin, *The Province of Jurisprudence Determined* (Weidenfeld and Nicolson, 1954) xvi.

ethics and political value. The aim is not to map the necessary features of the concept of law, but rather to understand the role of law in promoting human flourishing.

The vast bulk of legal theories throughout history have proceeded on the basis that an adequate and informative descriptive theory of law must also examine its normative basis in ethics and politics. This assumption flows through the otherwise diverse accounts of law advanced by classical authors such as Plato, Aristotle, Augustine and Thomas Aquinas. These authors adopt a shared methodology that differs sharply from the descriptive orientation of analytical jurisprudence. They begin with an account of practical rationality grounded in the ultimate ends of human action, before exploring the role of the community in promoting human flourishing through engagement with these ends. Law is then understood in terms of its role in enabling the members of the community to lead flourishing lives.

This normatively grounded approach to legal theory is now out of fashion, usurped by descriptive accounts of law focusing on its social sources. It lives on, however, in the school of thought known as natural law theory. Natural law theories are united by the methodological claim that an adequate descriptive theory of law must examine not only its social sources but also its function as a rational guide for action. The natural law outlook, then, can be broadly defined as the view that (1) there are certain forms of life that are intrinsically good for humans by virtue of their nature and (2) these forms of life play a fundamental role in explaining the nature and purpose of social, political and legal institutions.

The most prominent strand of contemporary natural law thought is the 'new natural law theory' that emerged from the work of Germain Grisez and John Finnis in the early 1980s.[2] Grisez and Finnis, in turn, rely heavily on their interpretations of Aquinas.[3] These theorists supplement the broad natural law outlook described above with an ethical theory that combines the incommensurability of the basic forms of good with the logical priority of the good over the right, a political theory that holds that all agents have a duty to promote the common good, and a legal theory that combines a

[2] See particularly Germain Grisez, *The Way of the Lord Jesus: Christian Moral Principles* (Franciscan Press, 1983); John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd edn, 2011). The core elements of the new natural law theory were first articulated by Grisez, whose work heavily influenced Finnis. See Finnis, *Natural Law and Natural Rights*, vii.

[3] Grisez, *The Way of the Lord Jesus*, xxviii; Finnis, *Natural Law and Natural Rights*, vi.

normative account of law as social coordination with the ontological claim that law is necessarily a rational standard for conduct.[4]

Natural law theories, whether they are understood in a broad or narrow sense, rely on the idea that human life is directed toward certain intrinsic goods. Our engagement with these goods is governed by what the new natural law theorists call principles of practical reasonableness.[5] It is these goods and principles that make up the 'natural law' that gives such theories their title. A central question confronting natural law theories is therefore where these goods and principles come from. It often appears, on a casual reading of both classical and contemporary natural law theorists, as if they come out of nowhere. Natural law is often presented as if it were (in the words of Oliver Wendell Holmes) a 'brooding omnipresence in the sky'[6] – a set of timeless, unchanging principles imposed on humans from above.

The work of Grisez and Finnis does little to dispel this perception. Finnis's account of natural law, in particular, is based on a set of basic goods – such as life, knowledge, friendship, play and religion – that he characterises as self-evident, indemonstrable and underived,[7] along with a collection of principles of practical reasoning that are analogous to mathematical principles and therefore 'have no history'.[8] Finnis draws a distinction between theories of natural law, which form part of the history of ideas, and natural law itself, which is ahistorical. Why, then, does Finnis talk about natural law in this way? Where, in particular, does he think its content comes from? The answer seems to be that he thinks natural law comes directly from God: it 'express[es] aspects, intelligible to us, of [God's] creative intention'.[9] This might seem, at first, to explain why he regards it as timeless.

Further reflection, though, reveals this explanation as inadequate. If Finnis's ahistorical view of natural law is attributable to his belief that natural law comes directly from God, this must be because he thinks that God works in the world in a particular kind of way. Specifically, this approach suggests what I will call a *synchronic* view of God's agency: namely, that God is responsible for creating the principles of natural law at a particular point in time (such as when the first human was created)

[4] For further discussion, see Jonathan Crowe, 'Natural Law beyond Finnis' (2011) 2 *Jurisprudence* 293.
[5] See, for example, Finnis, *Natural Law and Natural Rights*, ch. 5.
[6] *Southern Pacific Company v. Jensen,* 244 US 205, 222 (1917).
[7] Finnis, *Natural Law and Natural Rights*, 33–4, 64–9.
[8] Ibid. 24.
[9] Ibid. 389–90.

and they remain unchanged thereafter.[10] This, however, is not the only way of thinking about God's agency; indeed, I do not think it is even a particularly biblical way of doing so. I will return to this point in the book's Conclusion.

A further striking feature of Finnis's account of natural law is the way that the timeless and unchanging goods and principles he describes just happen to support his highly conservative Catholic worldview – including his strong opposition to contraception,[11] premarital sex,[12] abortion[13] and same-sex marriage.[14] Some readers may suspect that I am being unfair to Finnis here – after all, a significant amount of argument is required to get from his description of the basic goods and principles of practical reasonableness to his substantive views on these issues. There are, however, some important ways in which Finnis's description of the content of natural law is gerrymandered in favour of his moral stances.

Let me illustrate the point by briefly discussing an aspect of Finnis's theory that I take up in detail in Chapter 3. One of the fundamental tenets of practical reasonableness, according to Finnis, is that we must never act so as to deliberately impede any instance of a basic good.[15] This precept plays a central role in Finnis's substantive moral arguments. Contraception and abortion are wrong, he argues, because they impede the good of life; premarital sex and same-sex marriage are wrong because they impede the good of marriage.

The new natural law theorists hold that it is *always* wrong to deliberately impede a person's participation in any of the basic goods, even when doing so might forestall a greater harm or bring about some benefit. This leads them to maintain the existence of absolute duties, such as the duty not to kill an innocent person.[16] The idea that it is always wrong to deliberately impede a person's participation in any instance of a basic good is, however, somewhat counterintuitive. Consider, for example, a mother who tells her

[10] Finnis observes that God cannot be described as either 'changing' or 'unchanging' 'in any sense of "change" that we could apply to contingent entities': ibid. 390. This is because God exists outside change or time. However, it does not follow that God's creative intention necessarily manifests itself in the world in a timeless or unchanging fashion.

[11] Germain Grisez, Joseph Boyle, John Finnis and William May, 'Every Marital Act Ought to Be Open to New Life: Toward a Clearer Understanding' (1988) 52 *The Thomist* 365.

[12] John Finnis, 'The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations' (1998) 42 *American Journal of Jurisprudence* 97.

[13] John Finnis, 'The Rights and Wrongs of Abortion: A Reply to Judith Thomson' (1973) 2 *Philosophy and Public Affairs* 117.

[14] John Finnis, 'Law, Morality and "Sexual Orientation"' (1994) 69 *Notre Dame Law Review* 1049.

[15] See, for example, Finnis, *Natural Law and Natural Rights*, 118–25.

[16] See, for example, John Finnis, *Fundamentals of Ethics* (Georgetown University Press, 1983) 109–27.

daughter to stop playing video games and do her homework. The mother's instruction directly impedes the girl's pursuit of the basic good of play. However, it seems like a perfectly reasonable direction to give.

Finnis's theory has a way of dealing with this kind of scenario. He can say that the mother's intention is not to impede the basic good of play but to promote the good of knowledge by getting the girl to do her homework. The fact that, in doing so, she prevents her from playing games is a side effect of her reasonable intention.[17] This may be one possible way to describe the case, but it seems like a complicated and somewhat unnatural way of doing so. It seems more natural to say that the mother deliberately stops the girl from playing games *in order to* get her to do her homework. Both of these aspects form part of her overall plan.

Finnis, however, cannot say this without violating his description of the principles of practical reasonableness. He is obliged to say that the mother did not intend to impede the good of play, because he believes there is an absolute prohibition on deliberately impeding a person's pursuit of the basic goods. There is, however, an obvious alternative to this position (although Finnis does not consider it). Why not say that the duty not to deliberately harm a person in her pursuit of the basic goods is serious, but less than absolute? We have presumptive reason, in other words, never to intentionally impede a person in her pursuit of the goods, but this reason can be overridden by other serious factors.

This strikes me as a much more plausible way to deal with cases like the example discussed above.[18] However, Finnis steers away from this idea – understandably, because it would undermine his case for an absolute prohibition on contraception, abortion and the like. My aim here is not to say anything substantive about the moral status of contraception, abortion and so on, but rather to point out the gaps in Finnis's argument. The basis of Finnis's views on these issues comes from his formulation of the goods and principles of natural law, which are supposed to be timeless and unchanging. However, Finnis does not tell us where these goods and principles come from. Rather, he seeks to defend them by applying them to particular cases, but without considering obvious and compelling alternatives.

What more can we say, then, about where natural law comes from? Must we regard the principles of natural law as arising fully formed out of nowhere? This book outlines and defends an alternative to Finnis's

[17] Compare Finnis, *Natural Law and Natural Rights*, 122–3.
[18] I will argue for it in more detail in Chapter 3.

position on this issue. This alternative approach involves rejecting the proposition that natural law is outside history. Rather, I want to argue that natural law is objective and normative, but nonetheless socially embodied, historically extended and dependent on contingent facts about human nature. Principles of natural law are not created ex nihilo, but reflect the ongoing human quest to work out how best to live flourishing, fulfilling lives given the nature we have and the social worlds we inhabit.

Let me say some more, then, about each of these components of my theory of natural law, as a way of foreshadowing the argument advanced throughout this book. First, natural law is *socially embodied*. This is true in both epistemological and ontological senses. The way we discover the nature of the basic goods and principles of practical reasonableness is by interpreting social practices. We will generally start by looking at practices in our own community, asking what goals we value for their own sake and what constraints we place on practical reasoning. We will then compare these ideas with our intuitions about particular cases and perhaps also the practices of other communities that we know about.

It is by looking beyond our own community and considering human societies in general that we can potentially identify goods and principles that are common to humans as a whole. This kind of inference works two ways. First, it is by observing different communities that we form knowledge about what values and principles are universal and not merely relative to one's own society. Second, it is the fact that natural law provides guidance for humans in a range of settings that makes it natural law in the first place. Our investigation into social practices therefore potentially bolsters our confidence in the objectivity of value.

Second, natural law is *historically extended*. Human history is, at least in part, the story of the human quest to work out how best to live flourishing and fulfilling lives in a range of different natural, social and economic environments. This is not knowledge that can be gained or processed all at once. Rather, it is something that human communities have struggled to work out over time. The precepts of natural law, in this sense, are the product of a process of social evolution stretching over multiple generations. We learn what works and what does not work through a social and historical process of trial and error.

Our grasp of natural law, in this sense, changes and grows with our self-understanding. More fundamentally, however, natural law itself changes as it adapts itself to our changing environment. The best way of living a fulfilling and harmonious life in centuries past may not be the best way of doing so today. A distinction can perhaps be drawn here between the basic

precepts of natural law, which change relatively little, and their detailed applications. However, to maintain that the precepts themselves are entirely unchanging is, I think, to overlook the massive shifts that have occurred in the course of human history.

Let me offer a brief example.[19] Finnis says friendship is one of the basic goods. He uses this idea very broadly to cover everything from intimate relationships to social bonds within a community.[20] It can hardly be denied, however, that the human concept of community and the social bonds it produces has changed very fundamentally over time. Human societies were once structured around families and tribes, whereas now we organise ourselves by nations (and even supranational communities like the European Union). This massive shift in the nature of communities has also radically changed how we live together within them. This seems to be a change in the central facets of natural law, not merely its details.

Third, natural law (as the name suggests) *depends on facts about human nature*. Our nature as humans is partly a product of our biology. However, it is also a product of our social environment. The precepts of natural law instruct us in the best way to live flourishing lives given the nature we have and the environment we inhabit. It follows from this that if human nature was significantly different, then the content of natural law would also be different. Human nature, however, is at least partly a contingent matter, in the sense that it logically could have been otherwise. Indeed, if we accept that human nature changes with shifts in our social environment, it follows that our nature has changed throughout our history.

All of these factors indicate that natural law cannot be adequately understood in an ahistorical way. A potential worry about this conception of natural law is that by emphasising its responsiveness to social and historical conditions, we thereby undermine its objective and normative character. However, I think this worry is misplaced. I have suggested that by observing the practices of different human communities we can identify those fundamental values and principles that humans have in common. These universal precepts have a plausible claim to be regarded as objective components of human flourishing.

It might be objected that this methodology violates the separation between fact and value famously pointed out by David Hume.[21] However, the suggestion is not that the values and principles common to human

[19] I return to this example in Chapter 1.
[20] Finnis, *Natural Law and Natural Rights*, ch. 6.
[21] David Hume, *A Treatise of Human Nature* (Clarendon Press, 1978) 469–70 (bk. III, pt. I, §I).

communities are normatively binding because they are found in different social settings. Rather, the fact they are found in different societies provides plausible evidence that they are conducive to human flourishing.[22] It would be surprising if human social evolution, over a long period and across diverse environments, did not select for precepts that are at least presumptively valuable as guides to human behaviour.

The picture of natural law I have outlined above – and which I defend in more detail throughout the remainder of this book – has some important advantages over Finnis's theory. The most important of these, to my mind, is that it enables us to answer the question of where natural law comes from. The idea that natural law is imposed fully formed on humans from above makes it difficult to engage in reasoned disputes about its content, particularly if people also have different intuitions about specific issues or cases. The view I develop in this book, by contrast, enables us to place natural law within a broader discussion about the evolution of social practices and how they promote the goal of human flourishing.

This evolutionary approach to natural law further enables us to place legal institutions in a broader explanatory context that incorporates both social practices and deeper human values and principles. It therefore offers explanatory advantages over contemporary versions of legal positivism. Legal positivism, as mentioned previously, is premised on the idea that it is possible to offer an adequate descriptive theory of law without engaging ethical or political values. However, such a theory offers, at best, a relatively thin understanding of *what law is for* or, in other words, why we have legal institutions in the first place.

The idea that law exists to confer obligations or establish authoritative reasons for action holds far greater explanatory power when we consider why these mechanisms hold value in promoting human flourishing and the common good. Any answer we might give to this question is likely to prove more illuminating when grounded in an understanding of how law succeeds or fails at promoting harmony and fulfilment in human communities, particularly when this exercise is informed by cross-cultural and historical perspectives.

The present book aims to build on contemporary natural law scholarship – particularly, but not only, the work of the new natural law authors – to defend an original theory of the nature of law. The methodology of the book reflects the natural law claim that an adequate descriptive theory of law must engage with its role as a rational guide for conduct. This involves

[22] Compare Finnis, *Natural Law and Natural Rights*, 33–4.

discussing law's normative foundations in ethics and politics. Natural law theories, as we have seen, traditionally begin with an account of practical rationality, before exploring the role of the community and the function of law. The first part of this book therefore considers the normative foundations of legal order, including the fundamentals of ethics (Chapters 1–3) and political theory (Chapters 4–6). The second part then builds on this discussion to offer a theory of the nature of law (Chapters 7–12).

I argue in Chapter 1 that natural law ethics can usefully be understood as a type of dispositional theory of value, which identifies the basic goods that orient human action with those objectives humans are characteristically disposed to pursue and value for their own sake. Natural law theories of practical rationality can then be understood as attempts to capture the principles that would govern engagement with the basic goods under conditions of full imaginative immersion. I build on this framework to explore a number of other meta-ethical issues, such as the role of the basic goods in practical rationality, whether the goods may change over time and the connection between the goods and human nature.

A theory of the basic goods involves careful reflection on the normative inclinations shared by humans and manifested in their communities. It requires us to engage hermeneutically with normative social institutions and practices. I apply this methodology in Chapter 2 to offer a description of the basic goods themselves. I argue that there are nine basic forms of good for humans: *life*, *health*, *pleasure*, *friendship*, *play*, *appreciation*, *understanding*, *meaning* and *reasonableness*. I examine each of these goods in turn, exploring their roles in structuring purposive human action and facilitating existential meaning. I also consider the fundamental unity of the good, arguing that the basic good of life – understood as *openness to human flourishing* – can be conceived as an underlying source of value.

The basic forms of good render human action intelligible, but they do not answer the question of how we should behave. That requires a theory of practical rationality or, in other words, the normative reasons we have to engage or not engage with the goods in particular ways. I argue in Chapter 3 that there are two primary types of normative reasons: reasons to participate in the basic goods and reasons not to harm a person's participation in the basic goods. I contend that each of these kinds of reasons is best understood as pro tanto, rather than decisive. I reject the new natural law claim that it is never permissible to intentionally harm a person's participation in the basic goods (a position I call *moral absolutism*). Rather, we should refrain from harming participation in the goods without adequate reason.

The natural law theory of ethics outlined in Chapters 1–3 supplies the basis for the account of politics offered in Chapters 4–6. Chapter 4 examines the role of the common good in natural law political theory. The notion of the common good captures the interest each person has in creating a community where all members can lead a flourishing life. I argue for a multidimensional account of the common good that incorporates insights from what are often called instrumental, distinctive and aggregative understandings of the concept. The reason each person has to participate in and avoid harming participation in the basic goods gives her weighty pro tanto reason to do her share for the common good. This yields a duty to support salient and reasonable modes of social coordination.

The duty of each person to do her share for the common good provides the basis for a natural law account of political obligations. Chapter 5 examines the implications of this theory for the structure of political discourse on the allocation of common good duties. The chapter begins by clarifying the conceptual content of political appeals to rights and freedoms. I argue that rights are best understood as prima facie claims to a particular form of treatment, while freedoms are usefully viewed as rights to either non-interference or positive assistance. I then explore how these ideas can be used to supply a normative framework for political discourse. I argue that resolving political questions consistently with the common good involves balancing strong prima facie rights to non-interference with a range of less pervasive, but potentially more weighty prima facie rights to various forms of positive assistance.

The theory of political discourse offered in Chapters 4 and 5 gives an important role to social institutions in solving coordination problems and balancing competing rights claims. However, it is an open question as to what role the state should play in this picture. Finnis argues that the state plays a necessary role in promoting the common good by serving as a centralised mechanism for social coordination. However, I argue in Chapter 6 that this conclusion is mistaken. I describe three common forms of legal order that can and do operate independently of the state, which I call *consensual law*, *emergent law* and *natural law*. The efficacy and ubiquity of these forms of non-state law suggest that natural law theorists should reject the proposition that the state is necessary to achieve the common good.

The remainder of the book offers a theory of the nature of law that builds on the normative framework in Chapters 1–6. Chapters 7–9 consider topics in general jurisprudence. I argue in Chapter 7 that the debate between natural law and legal positivist views in jurisprudence is