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I. 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.

This approach to legal philosophy, however, would have seemed bizarre for much of human history. 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. 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 practical 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

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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.

My recent book, *Natural Law and the Nature of Law*,[1] provides a sustained and systematic defence of the natural law outlook. As such, while it is a book about the nature of law, it is equally a book about the nature and conditions of human flourishing. I argue throughout the book that these two topics are inextricably related. Law is best understood as a kind of artifact with the purpose of marking the boundaries of social conduct. However, the reasons for having law in the first place – as well as the ways in which it succeeds or fails in its function – can only be understood against the normative backdrop of human values and social institutions. Law, viewed from this perspective, becomes a set of communal guidelines for the pursuit of human fulfilment, rather than a collection of rules imposed from above. Any adequate descriptive theory of law must accommodate this wider viewpoint.

II. Normative Foundations

Natural law theories characteristically maintain that there are certain goods and principles that are uniquely conducive to human flourishing. Historically, the content of these goods and principles has often been depicted as timeless and unchanging. This makes natural law seem like (in the words of Oliver Wendell Holmes) a 'brooding omnipresence in the sky'[2] – a set of unwavering rules imposed on humans from above. My book presents a different view. I argue that natural law, rather than simply being posited from above, is shaped over time by both our intrinsic natures and our external environments. Principles of natural law do not arise out of nowhere 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.

Natural law, on this view, has three key features: it is socially embodied, historically extended and dependent on facts about human nature. It is socially embodied because its content is partly derived from social institutions and practices; furthermore, we discern its content primarily by interpreting those practices. It is historically extended because it reflects human efforts to survive and flourish in a changing natural and social environment. And it depends upon human nature because it is shaped by both our biology and our social conditions. Natural law is what is good for humans given our biological, social and historical predicament.

My book tells a story about natural law, thus conceived, and its integral role in social and legal institutions. Here is the story I tell in a nutshell.[3] I begin by exploring

1 Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019).

2 *Southern Pacific Company v Jensen,* 244 US 205, 222 (1917).

3 Each paragraph in the exposition that follows corresponds roughly to a chapter in my book. I have not included pinpoint references, but readers who wish to access the more detailed discussion in the book should readily be able to locate the relevant chapter.

the normative inclinations common to us as humans. Humans have dispositions to both behave in certain ways and believe that those actions are worthwhile or required. Some of these normative inclinations are specific to individuals, but others are widely shared by social groups. Some are plausibly characteristic of humans as a whole. The existence of normative inclinations that are characteristic of humans can be explained by reference to our shared biology and the common elements of our social predicament. These dispositions have evolved over time in response to the challenge of flourishing and cooperating in a social environment.

A theory of natural law is an attempt to theorise the normative inclinations characteristic of humans as a whole. Natural law ethics centres on a collection of basic goods that render human action intelligible. These goods are those objectives that humans are characteristically disposed to pursue and value for their own sake. A theory of the basic goods is an attempt to categorise these objectives in order to better understand human behaviour and promote human flourishing in the community. A plausible way of classifying the basic goods is to place them under nine headings: life, health, pleasure, friendship, play, appreciation, understanding, meaning and reasonableness. There is an underlying unity to these goods, captured by the good of life, understood as openness to human flourishing.

Humans characteristically seek to act for reasons. The basic goods described above supply us with two basic kinds of reasons: reasons to participate in the goods and reasons not to harm a person's participation in the goods. These are best understood as pro tanto reasons: they count in favour of particular actions but are not necessarily decisive. We have pro tanto (but not necessarily decisive) reason to participate in any instance of a basic good. Similarly, we have pro tanto (but not necessarily decisive) reason to refrain from harming any person's participation in the basic goods. Some natural law theorists hold that it is never permissible to intentionally harm a person's participation in the basic goods, but this view leads to strained and artificial reasoning. This moral absolutist stance should therefore be rejected.

The reasons we have to participate in and refrain from harming participation in the basic goods give us weighty reason to help create a community where all members can lead a flourishing life. We have a duty, in other words, to do our share for the common good. This duty calls for further specification both in terms of what form the common good takes in any given community and in terms of what counts as each person's share. This need for specification creates a coordination problem that is solved by social norms. Our duty to do our share for the community therefore translates into a duty to support social norms where these are salient and reasonable modes of coordinating social life in service of the common good.

We often talk about the common good by invoking the notions of rights and freedoms. We appeal to rights to convey prima facie claims to particular forms of treatment. These are rules of thumb that we use to weigh political entitlements. The notion of freedom is often invoked to advance political claims to either non-interference in our life choices or positive assistance to achieve certain objectives. The common good is plausibly best realised by recognising strong prima facie rights

to non-interference but balancing these against potentially more weighty prima facie rights to various forms of positive assistance. This way of thinking about politics affords each person a defined sphere of personal autonomy, while also recognising her positive duty to assist others to pursue the basic goods in their lives.

The state is often seen as playing a necessary role in securing the common good. However, this assumption risks overlooking the role played by non-state forms of legal order in promoting social coordination. Many coordination problems are solved by voluntary agreements, evolved social norms or shared normative dispositions. The efficacy and ubiquity of these forms of non-state law suggests that centralised government may not be necessary to achieve the common good. The kinds of problems that beset all legal systems – such as lawbreakers, gaps in the law or rule of law deficits – present challenges for non-state forms of legal order. However, the state has a very patchy track record at resolving these problems. It exacerbates at least some of the challenges by concentrating political power. The claim that the state is necessary for the common good should therefore be rejected.

III. The Nature of Law

The natural law tradition seeks to explain the nature of law by exploring its role in promoting human flourishing in the community. An adequate descriptive theory of law, on this view, necessarily makes reference to the law's role in ethics and politics. Natural law jurisprudence, therefore, understands the law in terms of its function as a means of social coordination. This emphasis is reflected in the *natural law thesis*: law is necessarily a rational standard for conduct. A putative law that is not a rational standard for conduct is poorly equipped to play its function in coordinating social behaviour. The natural law thesis categorises such standards as either legally invalid (that is, they fail to qualify as law in the first place) or defective as law.

The natural law thesis can be substantiated by examining the law's nature as a human artifact. Some artifacts are intentionally created, while others are produced by social acceptance. Law can fall into either category, but even intentionally created laws ultimately rely on social acceptance for their institutional character. A further prerequisite for something to count as an artifact of a particular kind is that it is constitutively capable of performing its function. Something counts as law, then, only if it is collectively recognised as law and is constitutively capable of fulfilling the law's function as an artifact. I call this the *artifact theory of law*.

What, then, is law's function as an artifact? An artifact function is best understood as a characteristic causal attribute that enables us to explain both what kind of artifact it is and whether it is a successful or failed example of the kind. Law's function as an artifact, I claim, is to serve as a deontic marker by creating a sense of social obligation. This helps us to explain what makes something a law in the first place, as well as offering a yardstick for distinguishing better and worse examples. A putative law that is incapable of performing this function fails to count as law at all, while a law that is not minimally adapted to the function is legally defective.

The capacity of a law to perform its function depends on its rationality. Some putative laws may be so contrary to human reason that they are incapable of creating social obligations. These will be no laws at all. Other laws may be capable of creating social obligations, but only by overcoming their irrationality. These will be defective as law. The artifact theory of law therefore vindicates the natural law thesis. This analysis further suggests that the binding character of law must ultimately be assessed on a case by case basis. Law's function in coordinating social action does not give it generic authority since individual laws may fail to fulfil this role. The fact that a standard is part of the law gives us, at best, a weak prima facie signal that it is a salient and reasonable way of pursuing the common good.

Judges, for their part, should seek to interpret and apply the law in such a way as to render it a non-defective means of promoting the common good. This means they should seek to make the law salient and reasonable as a guide to social action. The law is most likely to be salient if judges presumptively give legal materials their ordinary meaning by interpreting them in light of their contemporary social context. Judges should not seek to give strict effect to the original intentions of the drafters, but rather to reconstruct these intentions from a contemporary point of view, taking into account changes in the social environment, including background values. I call the resulting judicial methodology *wide contextualism*.

Contextual interpretation of legal materials may still, however, give rise to unreasonable or unjust results. Judges in such cases should bring the law into dialogue with practical reason. This will tend to make the law salient because unreasonable laws are poorly equipped to guide social action. More importantly, however, it will make the law reasonable. The duty of the judge to pursue integrity or coherence in the law should be understood in this light. The value of integrity reflects the importance of making law cohere with the underlying demands of human value, rather than with unjust norms or principles found within the legal framework.

IV. Conclusion

That, at any rate, is what I argue in my book. In so doing, I seek to show not only the philosophical coherence of natural law theory, but its continuing relevance – and, indeed, indispensability – for explaining the nature and force of legal institutions. The question is regularly posed to natural law theorists – often by practising lawyers or doctrinal legal scholars – as to why we should care about natural law. On reflection, though, the question is odd – or, at least, just as odd as asking why we should care about family law or criminal law, for example. The answer to the latter query is surely that we care about these areas of law because they play an important role in guiding our actions and shaping society. If they did not play that role, we would have less reason to care about them (although they could still hold academic interest).

Natural law, too, plays an important role in guiding actions and moulding social institutions. It does this through the various mechanisms I describe in detail in my book. First, natural law manifests itself in normative inclinations that humans characteristically use both to guide their actions and to judge those actions as

worthwhile or required. Second, natural law supplies normative reasons that explain why we ought to act or not act in certain ways. Third, natural law gives rise to various kinds of social norms, which may emerge through consensual agreement, emergent consensus or positive legislation. The role these norms play in guiding social action is at least partly explained by their connection with basic human values.

Natural law, then, holds an influential place in both individual decisions and social life. Indeed, it plays a more fundamental role in this respect than any specific field of positive law, because while family law or criminal law, for instance, is limited to a particular domain of social life, natural law concerns those motivations and values that underpin law and society as a whole. Any coherent and comprehensive explanation of why humans are guided by family law or criminal law would have to appeal at some stage to more basic motivations like the importance of family ties and the desire to be free from arbitrary violence. However, once we start exploring those kinds of basic human goals and values, we are well on the way to a theory of natural law, as well as to recognising the explanatory value of the natural law outlook.