The Nature of Law

John Finnis

Recent work in philosophy of law includes many discussions of law’s ‘nature or essence’, understood as those properties of law that are necessary, or at least important and typical or characteristic of law as such, wherever it may be found1 (or that help explain how and why law can be considered a kind, and laws or legal systems its instances or instantiations). Some hold that law has no nature; only natural objects have a nature, and law is artefactual, not natural. Others reply that there are kinds of artefacts: paper clips differ in nature from printer drivers, and being a soft cheese blob excludes being a paper clip – excludes being something of that kind or nature. Attention is shifting promisingly to paradigms of artefact more relevant to law than paper clips are: assertions, for example.2

Discussions of law’s nature need a better inventory of kinds and paradigms of description(s), explanation(s), and kind(s). Consider the inventory (still improvable) with which Aquinas began his Commentary on Aristotle’s Ethics.3 It identifies four kinds, or domains, of pattern (ordo) and correspondingly of explanatory (analytical and synthesizing) description (scientia), each irreducibly distinct though all found in the life and nature of human persons and their groups.

First domain: patterns (and patterned things or subjects of inquiry) that are what they are quite independently of our thinking -- the domain of nature, investigated by the natural sciences, in which natural kinds and natural laws are discerned and experiments are accordingly expected to be replicable in many times and places.

Second domain: patterns or systems of thought by which we make our thinking coherent and fruitfully non-fallacious: logical. This is logic, not just formal or symbolic. Aquinas put linguistic skills and language here, but they belong more to the fourth domain, artefacts. Assertions, for example: as linguistic acts of communication, they are artefacts, and could each have been constructed differently in every detail. Still, they belong to the very logic of rationality’s and discourse’s intrinsic structure, moving from questions about givens, through insights as hypotheses about why the givens are as they are (and thus about what they amount to, or are evidence of), to judgments asserting that such and such is (or is not) the case.

Third domain: the order one can bring into one’s deliberating towards acting to attain ends by means in the open horizon of one’s life (as individual or group). This practical rationality, in its developed forms, amounts to a morality or ethics of conduct, identifying kinds of choice, disposition and action as good or bad, right, acceptable or wrong by virtue of their reasonableness or unreasonableness in that open horizon.

Fourth domain: the kind of pattern one can impose upon matter (stuff, materials, including one’s bodily parts and operations) with the kind of means-end practical rationality that concerns making (and working with) artefacts in the widest sense, including arts, crafts and technologies or techniques including, as just noted, language and its use.

Each of the terms ‘nature’ (‘of this nature’), ‘essence’ (essentially…), ‘kind’ (‘of a different kind’), ‘identity’ (‘identical’, ‘similar’…), and so forth, is correctly usable in each of the four domains. But the precise meaning of each shifts, more or less systematically, as its use shifts between domains: they are analogical terms, neither univocal nor merely equivocal.

Law (as in this Companion’s title, and matching ‘legal/legally’) belongs within each of the four domains. Thought about its nature must attend to this complexity, and avoid describing and explaining law reductively, as if it pertained essentially to only one (or two, or three) of these domains. The properties necessary – needed – to constitute law and fully instantiate its nature include properties in each of the four domains. Deficiencies in a property in (say) one domain but not the others need not entail that the law or legal order is so deficient that it is simply not law: loss of limbs does not leave one non-human; enthymematic argument is argument (albeit weak and problematic); cowardice need not eliminate all practical reasonableness and virtue; a vessel unable to tack is still a sailing ship; citizenship conferring rights to vote but not to be elected is citizenship, but (as with the other examples) is not a central case of that reality nor the focal meaning of that term. Deficient, mutant, borderline instances leave intact the theses that law has a nature, which theories of law describe and explain, correctly or deficiently and more or less erroneously. Theories should focus on the central (kinds of) cases of law, which embody its nature most fully or adequately, and should locate non-central cases in the subject-matter’s analogical structure, a location settled not by statistical ‘typicality’, but by each relevant domain’s criteria of good (true) explanation.

This chapter considers law as involved essentially with each of the four domains. What best explains the features law has, taking all four together, proves to be its (third-domain) character as a response to human communities’ morally significant need for the kind of access to justice that only law systematically provides.

I

Law, nature and history

Laws of nature share some kinds of property with legal philosophy’s subject-matter: they are articulable in general (‘universal’) propositions about patterns of activity of a kind of physical-biological entity that are to be expected in specifiable kinds of circumstance. Lacking properties of a legal system that pertain to the other three domains of reality and explanation, however, they are only weakly analogous to the law in this volume’s title.

But before leaving this first domain, we should note that Aquinas’s account again needs amendment, to accommodate historical or sociological knowledge: of facts that are what they are independently of whether and how we think about them, but not with the natural necessity of laws of nature or the replicability of instances of natural kinds, but with the different necessity which everything that was so in the past has – that it cannot now be the case that it did not happen; and so it just awaits discovery, description and explanation. And any account of law’s nature must attend to this aspect of the first domain. Why?

For one thing, laws must belong to some legal system that exists, in the sense that it is by and large ‘efficacious’, that is, acknowledged and applied in practice among very many of those to whom its laws are addressed. The present tense ‘is’ here implies a reference to the past – the recent past, at least, and in many cases the past of the decades or centuries of a stable legal system’s continuous existence as the legal order of a more or less stably self-constituted people distinct from other peoples. Though the Roman law promulgated by Justinian in 529-34, and the legal system of Tsarist Russia, are instances of law, richly illustrative of its nature -- are discussed today as containing solutions to articulable legal problems just as if they were efficacious today -- they no longer have the nature of law, in one decisive respect: they no longer are available to secure justice for anyone.

For another thing, a legal system needs to include many rules and institutions that belong to it only because they were instituted by some law-making event or process in the past.

Both these properties of law are necessary (needed), in senses and ways involving the other three domains.

---

4 Here ‘to be expected’ is predictive, not optative or normative (action-guiding).
II

Law and the logic of its propositions

Law is by its nature the law of a group (community) ruled more or less by law. The law of a group can be called the community's legal system or legal order. In a primary respect, such a system or order is a set of laws, each a universal proposition. The law, in this respect, is a set of propositions of law, each stating what legally, according to the group’s law, may not be done (is prohibited, a duty not to...), or may be done (is permitted), or must be done (is mandatory, required, a duty to...); or what, according to law, certain or all persons have power (authority, faculty) to do in order to affect the way the law’s propositions apply to or bear upon what those persons or others may or may not or must do, or have power to do. Propositions of law are universal in that they apply to all persons and acts in the class of persons and class of acts specified by the proposition, however wide or narrow the classes. A valid legal proposition that picks out, not classes of person (such as 'the President'), but a particular person (William K. Brown born 16 September 1943) and particular acts of that person (his will made 26 June 2011 and codicil made 27 April 2013), is not a central case of 'a law'.

In a secondary respect, a legal system is a set of persons, institutions, and practices. Though a legal system as set of propositions can hardly be said to be (say) flourishing or corrupt, legal systems in this secondary respect do have such temporal and morally relevant historical properties.

A proposition of law specifying that persons of class Y have a duty not to do acts of class/type A – or a duty to do acts of class/type B -- and either making this specification for the benefit of each person of class/type X, or specifying that each person of class X (or representatives of those persons) has power to enforce or waive that duty, entails that each X has (by virtue of that same proposition of law) a right correlative to the relevant duty – the right that each Y so act/refrain from acting. This exemplifies the correlativity that, in one kind or another, is entailed by each duty or power specified by a proposition of law valid in a given legal system. But besides the rights (of X) correlative to duties (of Y). there are other rights that members of class X might have (by virtue of some other proposition(s) of law): rights to, or over, things – rights of property and possession. Of course, such rights to/over things go along with (not by entailment but by virtue of legal rules) powers (of X) to transfer those rights to Z, to impose or waive duties (of Y) to refrain from use of the things, and so forth. And, somewhat similarly, there are rights of members of class X that are neither correlatives nor negations of any duty, but are ‘to life’ or ‘to private life’ or ‘to free assembly’ and so on. Such ‘two-term’ rights are linked to duties not by logic but by rules and decisions of this legal system’s law.

The technical, artefactual, fourth-domain postulate that a legal system is complete and gapless in containing a legally correct answer to every question of conduct within its jurisdiction makes plausible the thought that every two-term right can be exhaustively stated in the (vast) set of three-term rights it legally entails (such as A’s right that B, C, D,... not intercept his telephone conversations; A’s liberty to make telephone calls and B’s, C’s... lack of right that he not make them; A’s power to grant B a contractual liberty to listen to A’s phone conversations; A’s immunity from B’s acquiring that liberty by any other source of power...; etc., etc.).

One specific kind of two-term right is the public power/authority to make law, primarily to make rules of law, secondarily to make particular legal rights and duties by issuing a judicial or similar order; comparably, there are private powers to create rights and duties by contract or other private-law assumptions of obligation. The idea of validity implicit in statements about the validity of propositions of law draws upon the idea of logical validity (of argumentation or proof in logic, geometry, etc.). But its legal sense adds the idea that a proposition has been made true by the exercise of a public power/authority of law making, or by the exercise of a private power of contracting, appointment (of agents), creation (of a trust), and so forth. This legal sense of validity extends further to include other valid ways of introducing new laws and/or propositions of law into the legal system by processes of custom formation, estoppel, prescription and so forth – authoritative processes which do not depend upon or include any person’s exercise of authority or power to introduce them.
When propositions of law are made true by such acts or processes, the validating operation of power-conferring or other rules of recognition bears, in the first instance, not on the proposition as such but on the statements uttered in legislative texts authoritatively settled and adopted. The distinction between a statement, its utterance in a speech or text, and the proposition that it conveys (or in some other way makes true), is not peculiar to legal texts, but is a general feature of the second domain and of its relationship to the fourth (to which belong languages, as modes of expression, and other conventional forms, like other artefacts as such). In legal systems, however, the distinctions, and the problems of interpretation to which they give rise, are of special importance. For legal systems seek indirectly and directly – by making true certain very generic propositions of law about how to interpret legal texts -- to regulate both the processes by which (say) legislative texts become authoritative and the processes and techniques whereby they thereafter are lawfully interpreted and the resulting propositions of law are applied. Law by its nature is reflexive – seeks to regulate its own creation and interpretation.\(^5\)

Why that is so, and why the other second-domain features of law above-mentioned are characteristic of law, becomes clearer when we examine its third-domain characteristics. But the ineliminable gap between textual statement and proposition of law is a resultant of the first-domain fact that human persons cannot communicate with each other by thought alone (‘mind-reading’ of a non-metaphorical kind), but must share their thoughts, so far as these can be shared, by more or less bodily acts of communication. And those acts deploy, and depend almost entirely, upon the artefacts we call language and its utterance in the further artefacts and artifices of speech and text. Law by its nature needs to be published (‘promulgated’), and its publication can always be incomplete or in some other way incompletely successful in communicating what was intended and meant.

III

Law and pursuing human good(s) reasonably

As actual, law can be understood by asking why existing specimens or instantiations of it have the kinds of stuff and shape they do. As achievable kind of reality, law can be understood by considering the features of the human predicament that make evidently reasonable a kind of response-to-predicament that has that sort of stuff and shape. Both these methods of inquiry converge upon a common result: it is law’s third-domain features or elements that most explain the other-domain features and elements characteristic of it.

For the flourishing of individuals and groups is weakened, damaged or destroyed by various kinds of danger, threats (perils) that might be alleviated or overcome by positive or negative coordination to avert them, by coordination and cooperation which can also make available various kinds of elements in human flourishing that are otherwise unavailable. Plans for and modalities of cooperation can be brought into operation and made effective by rules and institutions of law which make them authoritative and compulsory. Defections from the authoritatively required modes of cooperation can be ascertained, assessed and rectified by legal rules for compensation or punishment, rules applied after trial according to law. Trial according to law is itself a form of cooperation oriented towards averting the menace and harm that consists in unjust deprivation of liberty, property or opportunity, whether by simple lawless private force and oppression, or by public orders predicated not on true facts of guilt or liability but on false claims and/or false public adjudications induced by fear, bribery or other favour.

Recognising with clarity that law’s nature must be described/explained as a system of institutions and rules for meeting human needs, the central chapters of Hart’s The Concept of Law (1961) strove nonetheless to present as non-moral the evaluations implicit in identifying a ‘need’ (or ‘remedying a defect’). (Hart doubted whether moral propositions can be true.\(^6\)) So he presented rules and institutions of adjudication as needed for ‘efficiency’ in resolution of disputes; and law-making institutions and rules of change as needed for efficiency in responding

\(^5\) This was fundamental to Kelsen, General Theory of Law and State, 124, 126, 132, 198, 354.

\(^6\) See Collected Essays of John Finnis [CEJF] IV, 254; Raz, Between Authority and Interpretation, 52.
to change of circumstances and/or of ideas about ends and/or means. And in another phase of his explanation of law, he argued that the only basic need (or value or ultimate end) that such an explanation should postulate is survival (whether of me or our group he left in shadow). Although these needs were presented as the *de facto* content of an attitude or viewpoint observable among those whose possession of this ‘internal attitude/viewpoint’ makes a set of rules exist, and exist as law, Hart nonetheless plainly expected readers to share the viewpoint, in relation to whatever legal system they happened to be, or could realistically imagine being, subjects or officials of. That the philosopher’s account ‘reproduces’ this internal attitude (as an attitude of acceptance of rules in the combination of them distinctive of legal systems) was thus, for Hart, a primary criterion of sound legal-philosophical/theoretical description and explanation. And this was indeed progress in the theory of law (Jurisprudence). For it located law explicitly in the life of practical reason, understanding legal rules as a distinctive kind of *reason for action*.

And reasons for action are the matter of the third and fourth domains – but more fundamentally of the third, since the reasons for being concerned with that sort of arrangement of means to an end that constitutes a fourth-domain artefact (technique/technology) are always, in the last analysis, third-order reasons – reasons to deploy that technique or use that artefact in some conduct chosen for its contribution to one’s (or one’s group’s) open-ended life as a whole: that is, morally significant reasons for action. So Hart’s methodology systematically opened up the enquiry about the nature of law to that philosophy of practical reasonableness which we call ethics or moral philosophy or rational morality.

No one is rationally obliged to accept Hart’s implicit proposal to limit the explanation of adjudication to considerations of efficiency in ‘dispute-resolution’, as distinct from concern to require impartial (‘judicial’) attention to finding the truth about what wrongs were or were not done, and fidelity-in-application of the law(s) defining the obligations and rights of the parties at the time of the cause of action (tort or crime or breach of trust…) arose. Such values as truth, honesty and fidelity to past commitments and expectations cannot be fully explained in terms of promoting survival, but instead need to be reported as aspects of a concern for practical reasonableness for its own sake, as an intrinsic human good just as intrinsic or ‘basic’ as survival in life and health, knowledge for its own sake, friendship and inter-personal harmony, and the handing on of life and education in maritally committed procreation and parental nurture. *The Concept of Law* has a chapter on Justice as willingness to treat like cases alike and different cases differently, and this justice is obviously a central aspect or implication of the good of being practically reasonable, and the good of inter-personal harmony, and the truth about all basic human goods: that they are *as intelligibly good* in the lives of other persons as in my own. Morality is just another name for a fully reasonable concern for human flourishing in all its basic aspects, integrally considered (without arbitrary cutting back in attention to basic goods, or to the persons in whose lives they might be instantiated). So, though Hart’s own study of law’s nature remained, by restriction, amoral or incompletely moral, his method invited the unrestricted exploration of the bearing of reasons for action, as a set, on the making and maintaining of laws, law, and legal system. That is, his method invited a thorough exploration of law as a reality or potential reality in the third domain.  

And those third-domain reasons which give law its characteristic shape and nature are reasons for making it have the character it has as participating in the first, second and fourth domains of explanation, as a natural reality governing natural realities (human persons), as a logical-propositional realm of validity and correlativities of duty, power and right, and as a complex artefact and technique of signs, institutions, and activities – a *positing* yielding *positive* law.

Central to law’s nature is that law links – because a society needs, in justice, to link -- present decisions not simply to achieving future benefits (as any rational plan does) but also to

---

7 Hart, *Concept of Law*, 90.
8 On these issues in Hart, see Finnis, ‘How Persistent are Hart’s “Persistent Questions”?’ (2011); *CEJF* IV, essays 10 and 11.
doing so by honouring past commitments both public and private. Legislation is a form of public commitment: to deal with certain matters henceforth in the way that was specified in the law-making act (constitution, statute etc.). Adjudication by application of law is a complex, thorough public acknowledgement (and following through) of those and comparable (customary, precedentual) commitments. Private acts of undertaking obligations are commitments to act in the ambulatory present with fidelity to those past acts even when one’s future wellbeing might in other respects be enhanced by neglecting those commitments.

So law and the Rule of Law cannot be reduced to the model of planning.\(^9\) For that model includes, perhaps paradigmatically, the activities of soldiers, architects and engineers, whose sole concern quite reasonably is future wellbeing as it may be enhanced or protected starting from now with what now lies to hand. Law is planning in (reformable) fidelity to past enactments and other historical ('social-fact') sources of law and obligation or entitlement (acquired rights); the plan was adopted then, and is (presumptively) to be applied now not so much for its promise of benefit as for its validity as positive (posed) law (and therefore as political commitment of the community). The fully reasonable premise for acknowledging positive law as a reason for action now (as judge, administrator or other subject) is a moral premise: justice as a fundamental aspect of promoting the common good of my political community presumptively requires me, in reason, to respect the commitments articulated in the rules, and by the institutions, of our law.

The principles directing this needed willingness (or summons) to act justly are traditionally called natural law (synonymously, ‘natural right’). Principles of natural law -- that is, of practical reasonableness uncorrupted by sub-rational bias or inattention -- direct us not only to make all our choices consistent with various specific principles and norms of justice, but also to promote and protect these by establishing positive laws and law, and then by recognising, maintaining and applying the rules of this positive law according to their tenor – that is, in the meaning established by their own content and by the content of rules of validity and principles of interpretation and requirements of coherence with other positive rules of the system considered as a whole that ought (according to the same foundational, natural-law principles of justice) to be coherent, capable of application and compliance (and so not retroactive), relatively stable, intelligible to those whom they concern, and actually adhered to by those whom this legal system designates as its officers. Where a legal system’s rules, institutions and practices conform sufficiently to these morally desirable structural/procedural features, the political community\(^10\) they govern can be said (in the wake of Aristotle’s debate about the matter) to instantiate the Rule of Law,\(^11\) the primauté de droit.

What about the content of these legally structured rules? The specific norms of justice which, just as a sound ethics identifies them, need to be included in any legal system are now often called jus cogens. These rules (jus), peremptory (cogens) by virtue of their content – their inherent reasonableness – rather than merely by virtue of their enactment or their adoption in custom and/or judicial precedent, forbid choices, private or public, to kill or harm with intent precisely to terminate life or damage bodily integrity; or to rape; or to deceive by asserting a proposition believed by the asserter to be false. As well as such exceptionless negative norms, natural law’s foundational substantive principles include affirmative directions whose application is dependent on appropriate circumstances (including the reasonable content of other parts of the particular legal system). Given what a sound ethics and a sound political philosophy establish, and the experience of lawyers and comparativists across many centuries confirms, about these ‘appropriate circumstances’, the main affirmative principles mandate, and

---

\(^9\) Cf Shapiro, Legality, 194: ‘the law is simply a sophisticated apparatus for planning in very complex, contentious, and arbitrary communal settings.’

\(^10\) A non-state community can have a legal system in a near focal sense. So Pope Paul III’s commission of inquiry into the Reformation’s causes reported that some popes (mis-advised by ecclesiastical lawyers) ruled like private owners over their property, setting aside the Rule of Law commended in Aristotle’s Politics, and governing the Church just as they pleased; whence (as from a Trojan horse) the desperate illnesses infecting the Church of 1537: Consilium de Emendanda Ecclesia (Rome, Anthony Bladius, 1538), Aii-iv.

\(^11\) See Simmonds, Law as a Moral Idea, s.v. ‘rule of law’; Finnis, ‘Law as Idea, Ideal, and Duty...’
give broad guidance in establishing, not only (i) constitutional and other institutions of legislation and adjudication but also (ii) rights of property (whether ownership or lesser possessory or beneficiary rights) in portions of the world’s resources (excluding human persons), with appurtenant powers such as sale and rights such as inheritance, all subject to responsibilities of distribution of holdings in excess of the owner’s reasonable needs; and (iii) rights to make and enforce contractual and other voluntarily assumed obligations, such as the marriage of two persons who together can be the father and mother of these spouses’ own children, a relationship important to law for the sake of justice to the child(ren) and of sustaining the people itself whose law this all is; and (iv) entitlements to compensation for losses imposed by another’s fault; and (v) liabilities to punishment for defined offences against the law; and (vi) conditional entitlements to sustenance in circumstances of extreme or undeserving indigence; and so forth. Such natural-law principles, precepts (negative or affirmative) and institutions, adopted concretely into all or many legal systems, have traditionally been called the *jus gentium, the law of peoples.*

The generic, under-determined character of these wide-ranging responsibilities of lawmakers and other persons responsible for the well-being of their community and all its members – that is, for its common good – entails that there should be positive rules of law created to crystallize these principles as fully legal obligations, rights, powers, etc. Such crystallising or concretizing has been called determinatio (‘concretization’), to distinguish it from the more deductive process of acknowledging the moral truth of the principles (and precepts, especially the negative precepts) of natural moral law. But within a positive-law system, even these last-mentioned natural-law, *jus cogens* principles and precepts need some determinatio: the moral goods of fairness, like the technical goods of craftsmanship, in application of law call for stability, clarity and transparency, and predictability in their application -- Rule of Law -- so that their applicability's precise terms are made common, and coherent with the system’s vocabulary and institutions. So, for example, murder can be defined so as to distinguish it as a ‘degree’ of criminal homicide, and can be declared (say) a felony, susceptible to (say) whole-of-life imprisonment, a disqualification from office or vote, and so forth – but in all these details murder could reasonably have been defined somewhat differently with somewhat different legal incidents or consequences).

In short, a legal system adequate to human needs will be of complex nature: all positive, yet partly a matter of natural law (‘*jus gentium*’) and partly (indeed largely) a matter of ‘purely positive’ rules. Rules of this latter kind appropriately have a relation to their justifying principles that is too indefinite or disputable for the rules to be describable as declarations (or even applications) of the principles.

Everything said in the last four paragraphs could be accurately and sufficiently stated without speaking of ‘natural law’ or ‘natural right’ (or *jus gentium*). That traditional language has always been exposed to misunderstanding, and is perhaps particularly exposed today, when the history of philosophy is not widely known and the success of the natural sciences arouses or reinforces the thought that explanation and description, and the very idea of ‘the nature of X’, are all properly located in the first domain and its models of reality and explanation. But the principles of natural law relevant to the understanding and justification of authority and the laws of legally ordered societies are principles in the third domain (though presupposing certain truths in the first and second). Knowledge of them is the fruit of a search to bring order and reasonableness into one’s own and one’s groups’ choices and actions. They are moral (= ethical) principles, and those among them that are directly relevant to and properly directive of lawmaking and compliance with law are principles of justice – that is, of practical reasonableness’s

---

12 See *CEJF* IV at 182 n. 37, 183 nn. 40-41; *CEJF* II at 101-3. International law, as the law regulating relations between peoples, is quite a different matter (and see sec. V below), even though it too contains an important natural-law element which can therefore be called *jus gentium.*

13 As to what positive law adds in (say) *mala in se* offences, see *Natural Law and Natural Rights* 282-3.
requirements for those of one’s choices that directly or indirectly affect the good of other human beings.

Despite the doubts of Hart and countless others, there are indeed such principles and norms of practical right reason. Unfortunately, philosophical understanding and vindication of them has suffered many vicissitudes. Notable among these setbacks are the utilitarianism that Bentham laboured but failed to make coherent, let alone reasonable, and the alternative to it proposed by Kant to rescue morality from utilitarianism’s reduction of third-domain rationality to fourth-domain, technological reasoning. For Kant’s rescue effort made the analogous mistake of seeking moral rationality’s paradigm in the second domain (retaining from the third domain little save the idea of bringing order into one’s free choices – ‘autonomy’), and modelling all ethical argument on logic’s mission to eliminate contradiction. He failed to acknowledge any of the first principles of practical reason (each in truth directing us to a substantive human good such as life, knowledge, friendship, etc), save the good of practical reasonableness itself, a good which, since he had deprived it of subject-matter, he took to be the reasonableness of coherence. Dominated by these failed reductions of ethics to inappropriate domains, modern moral philosophy as actually expounded has been of little assistance to philosophers of law.¹⁴

A sound moral philosophy, developing Plato’s, Aristotle’s and Aquinas’s, can be articulated not as ‘natural’ or ‘law’, but as principles and norms (precepts, rules) of reason(ability) that direct us to understand and pursue, coherently, the flourishing of all human persons and communities with reasonable prioritizing and essential respect for persons in each basic aspect of their flourishing – each basic human good. Still, by understanding human flourishing in the only way it can be adequately understood (namely, from within practical understanding and reasoning), we also understand human nature adequately. For the nature of any dynamic reality can only be understood by understanding that kind of thing’s capacities (potentials), and these we can only understand by understanding the activities that make them manifest, and activities cannot be well understood except by understanding what they are heading for – their ‘objects’. And the objects of human acts are first the basic goods (needs; ends; elements of human flourishing) and then the means (kinds of action) that, considered integrally, they call for.

Adequate third-domain understanding of law’s nature thus relates law in all its features to human needs, both as intrinsic ends (basic human goods, intrinsic elements or aspects of human flourishing) and as empirically effective and morally respectful means of realizing those intrinsic ends/goods/basic elements of wellbeing. We need common good and justice, and for that we need the moral judgments and legal institutions needed to make those very complex ends (and the principles directing us about and to them) actual in the life of an ongoing community that is in (or can be got into) shape for political existence and action.

But what about laws that, in manner of positing or in content, are made without concern, or (knowingly or not) without respect, for common good and/or for justice? Well, they lack an essential pre-condition for the claim to authoritativeness that is part of law’s nature, an authoritativeness (more simply, authority) that from the side of the law’s subjects entails an obligatoriness that is both strictly and purely legal (like the predicate ‘legally valid’) and, presumptively but defeasibly, also moral obligatoriness. (The obligation is owed not to the bearers of law-making or executive authority, but to other subjects of the law.) It may still be morally wrong to do what they purport to (and as a matter of legal validity do) prohibit; for such behaviour may as a side-effect have effects that it is unfair to impose on one’s fellow subjects. But from a moral point of view which includes but is not limited to the legal system’s own criteria of validity and interpretation, these are laws that are (each in itself) unsupported by law’s most basic organising point (rationale, purpose). So it is an implication of law’s positivity, adequately understood in terms of its justifying purposes, that a seriously unjust positive law is so radically defective that, just as a persuasive but logically fallacious argument is ‘no argument’

¹⁴Dworkin’s philosophy of law (e.g. in his Law’s Empire) is essentially Kantian in its reduction of the goods for which law is needed to equality and autonomy, and consequent focus on coercion and adjudication (rather than on the substantive just common good that is the primary concern of law makers)
and an old friend who turns out to be one’s betrayer is ‘no friend’, so too ‘an unjust law is not a law’. Or, as Aquinas always preferred to say, ‘is not a central case of law’, or ‘is not without qualification a law’ (but rather a kind of corruption of law – deficient as law). The idioms are various, but the propositions at stake should not be controversial. They involve no denial of or inattention to the sad facts of human immorality and wicked law. Rather, they draw attention to such immorality’s (injustice’s) significance as depriving an act of human governance of all just title to be regarded as changing the moral obligations of its subjects in the way law – by its nature – is to be regarded as changing them, namely, in just the way and (presumptively, defeasibly) to just the extent it changes those subjects’ legal obligations.  

Some recent work in legal philosophy contends that that, while ‘unjust law is not law’ is false, ‘law not claiming moral legitimacy is not law’ is true: the very ‘concept of law’ entails, ‘conceptually’, that all laws claim (often falsely) to be morally legitimate/obligatory. Philosophy of law, we should reply, is a study not primarily of concepts and ‘conceptual necessities’, but of what law needs to be in each of the four domains in which it can be understood, acknowledged, and posited; and it is the understanding of these natural preconditions, logical necessities, morally significant needs, and need (as we shall see) for kinds of technique and artefactual institutions etc., that yields concepts – in the first instance, (i) the concepts excogitated and used by the persons and societies that have more or less unphilosophically (or with common sense’s philosophy) understood those needs and responded to that understanding by creating and maintaining legal systems (whether under the terminology of ‘law’ and its foreign language cognates or not); and then, secondarily, (ii) the would-be more adequate and coherent and explanatory concepts of a philosophy of law, usually but not exclusively framed in terminology borrowed from the practical life of law-makers, judges, legal advisers and citizens. So we should understand both ‘unjust laws are not law’ and ‘laws not claiming to be just are not law’ as items in a philosophical reflection on what law needs to be. Morally (that is, integrally reasonably), law ought to aspire to be just (morally legitimate, etc.), ought to claim to be just (morally obligatory, etc.), and ought, most importantly, to be just. Laws that are defective in aspiration, form or content are so seriously defective that, in a decisive respect, they fail to be law(s). But of course, they remain law(s) insofar as they are being promulgated and enforced and historically efficacious in a given time and place, as artefacts available, like other tools, for abuse as well as appropriate use.

In these respects, law is no different from many other realities and concepts with which social (political, legal, etc.) philosophy must come to terms, and on which it should seek to shed the light of nuanced, supple, undogmatic explanation.

IV

Law as an artefact of artefacts

In order to be a just and effective form, and source for forms and instances, of social coordination effective in promoting human flourishing within a framework of respect for natural (=human) rights, law needs to have the stability of a publicly accessible craft working within (and as) the framework of institutions for law-making, -administering and – adjudicating/enforcing. The idea of validity characteristic of positive law (and as such distinct from logical/argumentative validity as such) is a primary manifestation and instrument of law’s operations and nature as a fourth-domain, artefactual kind of reality and aspiration responsive to that need.

Institutions as various as a constitution, a legislature, a judicature and judiciary, a common law, a law of property and within it a law of real property and a law of entails, or a law of contract and within it a law of mistake in formation, and a doctrine of interpretation... are all artefactual instruments of a legal logic (see sec. II) and of a historically effective (sec. I) legally

15 See Finnis, ‘Law as Fact and as Reason for Action…’, 100-09.
16 Raz, Between Authority and Interpretation, 180; Alexy, The Argument from Injustice, 36; Gardner, Law as a Leap of Faith, ch. 5; Gardner, Law as a Leap of Faith, 125-45; contrast CEJFIV, 8 n.18; Finnis, ‘Reflections and Responses’, 538, 553-6; ‘Law as Fact and as Reason for Action…’, 91-3.
ordered moral enterprise (sec. III). Many of these have been mentioned in section III’s sketch of moral needs justifying and demanding legal rules and institutions. As was also mentioned, they are like other artefacts, in having significant intelligibility and reality simply as artefacts, or techniques, or plans, which can also be deployed, even successfully (and therefore also unsuccessfully), for more or less amoral objectives or immoral purposes.

That is, they can be studied precisely as techniques, detached from their (or any) moral rationale. They can be imitated more or less closely for non-moral rationales, such as the wealth or power of their inventors, designers, or master (or more lowly) users. This gives an opening for philosophies of ‘(legal) positivism’, claiming that law’s nature had best be defined amorally, before any investigation of the moral purposes to which it may be put or the moral criteria by which particular laws may be assessed, or by which, if positive laws happen so to provide, rules may be granted validity by reason of their moral soundness. But there is no reason to try to define law (other than stipulatively, or lexicographically) before understanding the reasons for having law at all, and some of those reasons are third-domain reasons – reasons that when fully teased out as reasons are of the kind we call moral: attentive to intrinsic human goods, and to the fundamental equality of human beings, all of us benefitted by the instantiation of those goods, and none of us a priori entitled to identity-based, as distinct from reasons- and responsibilities-based, priority in the private or public distribution of those goods. Vocabulary (lexicographical definition) assists us to see that we are discoursing about broadly the same sort of subject-matter, but any explanatory definition should express the results of reflection on that subject-matter’s nature, a nature understood as what is articulated in a sufficient answer to ‘What is…?’ questions arising in all the four domains in which human life (as distinct from sub-rational forms of life and existence) is lived.

So: self-styled ‘positivist’ definitions of law are more or less arbitrary to the extent that they genuinely precede a moral assessment of the need for law and legal institutions, and try to describe law’s nature and characteristic institutions without the benefit of understanding that set of needs – that set of reasons foundational for the articulated reasons (propositions) about action that we reasonably call laws. Nothing philosophically sufficient or explanatorily

17 Most recently, Gardner, Law as a Leap of Faith, 275-7 (in the idiom of ‘classification’ rather than ‘definition’); contrast ibid., 175: ‘the study of the nature of law can and must begin, in a certain sense, with the central case of law as morally successful law’.
18 See for example, the first sentence of the penultimate paragraph of the introductory section above.
19 That is, ‘real definition’ (definition that sums up an explanation of the thing [res] in question, rather than reporting or stipulating usage of the word): Robinson, Definition (1952); Hart, Concept of Law, 279. An example: Aquinas proposes and argues for a definition of law: an ordinance of reason for the common good of a [complete] community, promulgated by the person or body responsible for looking after that community [Summa Theologiae 1-II, q. 90 a. 4c]. But in supplementing and explicating that definition, Aquinas immediately stresses that law—a law—is simply a sort of prescription (dictamen) of practical reason in the ruler governing a complete community, and that ‘prescriptions’ are simply universal propositions of practical reason which prescribe and direct to action.

Finnis, Aquinas, 255-6. For an expansion of that definition (and commentary on definition) in light of subsequent work in the philosophy of law, see Finnis, Natural Law and Natural Rights, 276-9, 472.
20 Raz rightly deprecates labeling legal theories ‘positivist’ or non-‘positivist’; his theory of law’s nature is in this and some other respects not a self-styled ‘positivist’ theory. But in ‘The Problem about the Nature of Law’ (1983) he applies the term ‘positivist’ to any source-based standard; he defines as positivist any standard or consideration the existence of which can be ascertained without resort to moral [or any other evaluative] argument–standards which the present essay, like most theorists, calls positive or posited law. And he holds (in that essay and in ‘Authority, Law, and Morality’ (1985)) that, while a ‘doctrine of the nature of law’ must be evaluative (‘of the relative importance of various features of social organizations’), its point and upshot is not to show that (or to what extent) law is morally needed or appropriate, but rather to ‘elaborate and explain’ the concept of law as ‘part of our culture’, by ‘pick[ing] on those [ideas] which are central and significant to the way the concept plays its role in people’s understanding of society’. Ethics in the Public Domain 205-9, 211-2, 237; his 1994/6 essay on the nature of law (n. 2 above) does not depart from this position. So (though his 2003 essay (n. 2 above) makes some movement towards accepting a ‘Thomist’ moral case for having legal authorities (Between Authority and Interpretation, 173), his ‘doctrine of the nature of law’, unlike other parts of his philosophy of law (including parts as proximate to that doctrine as his ‘service conception of authority’), has deliberately proceeded without incorporating or presupposing a systematic moral assessment of the need for law and legal institutions; his account of the evaluations involved in the
satisfying can be said about law without understanding it as -- by its nature, though not in its many defective forms and instances – responsive to morally weighty purposes of fair dealing between the members of a community across time. And the truths, welcome or unwelcome, about law in its defective forms and evil instances, truths which legal positivists rightly resolve to face and explore, are all just as well, or better, disclosed (and are unconfusedly describable and explicable) within the framework of moral inquiry that historically generated the philosophical idea of ‘positive law’, a framework continuous with the third-domain practical thinking of those who have constructed the systems of normative coordination and direction called by them, and then by us all, legal.

V

Law and the nature of persons and groups

Law has the nature it has because human persons have the nature they have, and beings of that nature need for their nature’s full or even adequate instantiation the assistance of many, the respect of all, and the love, in varying measure, of some. Law has its existence primarily in the mind (conceptions and assent) of the person or persons who accept responsibility for serving the common good of a community capable in principle of meeting all the kinds of this-worldly needs. It has its existence secondarily but most importantly in the minds of all who understand and assent to what propositions of law the law maker(s) intended to introduce into the set of propositions constituting that community’s law (its legal system). Many of those may regret and even resent one or more laws, yet comply with them for the sake of upholding the legal ordering of their community, an ordering which depends for its fairness, and even its existence, on excluding all picking-and-choosing save that which a serious, authentic competing moral responsibility mandates. Some members of any community, and some (perhaps many) persons in other communities, or in stateless piracy/brigandage, will willingly defy the law’s requirements. So the responsibility of the law makers includes a very serious duty to provide for the forceful application of the law to such people, and for their punishment, and the deterrence and suppression of future offences. Entrusting to rulers this power of applying force is reasonable, though also very risky.

Within a well ordered political community substantially united by common history, memory, culture and reciprocal trust, the constitutionally stipulated Rule of Law can often ensure that abuse of legal and de facto power by rulers is kept to tolerable levels. But as between states, which must share the Earth with each other and respect the common good of mankind, many of those preconditions do not obtain. So it is reasonable to judge that public international law, though obviously needed (as a matter of moral responsibility), does not fully participate, and for the foreseeable future should not be conceived as fully participating, in the nature of law as one of law’s central forms. International law, as morally needed, is positive law, but made directly or indirectly by agreements rather than by rulers entrusted with the power to compel obedience to law and punish disobedience. Here as elsewhere in these reflections, sound judgment about the nature of the subject-matter has as one of its necessary conditions sound evaluations and judgments about moral responsibilities and entitlements: a sound, historically informed ethics and political philosophy.

REFERENCES


‘doctrine’ truncates the nature of third-domain investigations of practical reason, and remains too limited to describing culture qua first-domain fact of a ‘historical or sociological’ kind.


--- --- *Between Authority and Interpretation* (Oxford University Press, 2009)

Robinson, Richard, *Definition* (Oxford University Press, 1952)


Simmonds, Nigel, *Law as a Moral Idea* (Oxford University Press, 2007)

Waluchow, Wilfrid and Sciaraffa, Stefan (eds.), *Philosophical Foundations of the Nature of Law* (Oxford University Press, 2013)