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Keith C. Culver is Professor of Management at the University of British Columbia, Okanagan Campus. **Michael Giudice** is Associate Professor of Philosophy at York University.

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THIRD EDITION

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Preface

Why use this textbook in philosophy of law?

Accessibility: This textbook is designed to be used by readers with no prior experience of philosophy of law. Brief, easily understood introductions explain the context and key features of the readings, giving readers enough background to enable them to take on the real work of developing their own views regarding the arguments contained in each reading. The introductions are supplemented by a clearly written glossary, study questions and further readings, providing readers with tools for evaluating their own understanding, and a path toward more readings and perspectives on issues introduced in this textbook.

A real debate: Philosophy of law is a living discipline, inhabited by real people thinking about ideas and practices with real consequences for our everyday lives. These ideas have histories, and there are many points of view regarding those histories, so it is sometimes difficult to see the contemporary relevance of philosophy of law when it seems to be preoccupied with its history and diversity. This textbook takes seriously the importance of understanding the interaction between arguments which are in direct conflict, or offer incompatible points of view. Each part of this book is organized to present arguments which clearly compete and conflict with each other in trying to provide the best answer to shared questions and issues. It is up to you, the reader, to decide which arguments are the winners, or whether there is no winner and further investigation is needed.

Understanding what authors themselves said: A sound understanding of the issues and arguments of philosophy of law requires first-hand experience of philosophy of law. This textbook recognizes the importance of each reader coming to his or her own conclusions about what authors in philosophy of law have actually said. There is no substitute for the original text when trying to reach a fair understanding of the best available arguments regarding issues in philosophy of law. The readings contained in this textbook have been edited very lightly, and authors' original references have been left intact wherever possible, to allow this book to serve as a useful resource for further exploration of these arguments.

We look forward to your reaction to this third edition, and hope you find in philosophy of law a rich trove of arguments and insights to contribute to your life as a student, citizen, and perhaps Prime Minister or President.

Keith C. Culver
Michael Giudice

Introduction

Why read this introduction? After all, as any experienced college or university student knows, many textbook introductions are much like sports highlights shows. Readers are expected to ooh and ahh at the great strengths and insights of some area of study, and after the oohing and ahhing is done, it seems to be expected that the reader is captured for life by the area of study. This textbook and introduction are not like that. We will assume that you have your own reasons for choosing a course in philosophy of law—an interesting course description, a good instructor, or a promise to your Mom that you would try something different while at college or university. You likely do not need more convincing to have a look at what philosophy of law is about, and you will choose for yourself whether one course is enough, or whether you want to go further in philosophy of law. What you probably need now is a sense of what it is like to study and do philosophy of law using this textbook. This introduction is intended to be something like a road map or travel guide for your use of this textbook.

Just like a travel guide, this introduction will give you an overview of the kind of place you are going: the group of questions, methods, and arguments which make up philosophy of law. By reading this introduction before you complete the readings your instructor assigns, you will have an idea of what to expect as you approach each reading, and you will have a sense of how each topic and author in the book is related to other topics and authors. Just like a travel guide, the introduction will give you a sense of what to look for in specific readings, and what not to miss.

There is one last, important way this introduction is like a travel guide: introductions and travel guides are never a substitute for the real experience of the journey. If you are to really understand the questions and arguments of philosophy of law you must go right to its heart, in your own reading, working with your instructor, and in thinking and writing about the issues you see in your readings and discuss in class. As you reach beyond the travel guides offered by the introductions, it is also worth remembering that textbooks and travel guides are never entirely up to date. You need to keep your head up, looking at the news and recent developments to see how the changing world of life under law might cause us to look differently at the theories and arguments we use to understand it.

1. What Is "Philosophy of Law"?

Philosophy of law is concerned with the nature and conceptual foundations of law as a distinctive mode of social organization. Philosophy of law asks a wide and widening range of questions about law and legal practices. Some of these questions continue an ancient debate, asking "What is law?" and "What is legal obligation?" Other questions probe the links between law, authority, and morality, asking "What is legitimate authority?" and "Are immoral laws really laws?" Still other questions explore responsibility,

restitution, crime, punishment, race, and the border between literary, economic, and political understandings of law. Answers to these questions come from lawyers, philosophers, and others concerned with law and social life. These questions and answers are variously called philosophy of law, legal theory, legal philosophy, or jurisprudence (following the Latin *juris*, meaning law, and *prudentia*, meaning knowledge). We will use these terms interchangeably since they all refer to the same range of questions.

2. How Are These Questions Answered?

Traditionally, philosophy of law has been divided into "analytical" and "normative" areas of inquiry. Analytical jurisprudence has been concerned with *analysis* and *explanation* of legal concepts, asking such general questions as "What is law?" and "What is legal obligation?" Normative jurisprudence has been concerned with *evaluation* and *justification* of law and legal practices, asking such questions as "What is the nature of legitimate legal authority?" and "What justifies legal punishment?" This traditional distinction has recently come under extensive criticism from several directions, some of which are represented in this book. Some writers charge that the traditional distinction ought to be abandoned as invalid or, at best, seriously misleading. Influential writers such as Ronald Dworkin suppose that meaningful legal analysis and evaluation must be carried out simultaneously and focussed on interpretation of a particular legal culture—American, or Canadian, or British, and so forth. Writers from feminist, Critical Legal Studies, Critical Race Theory, and other perspectives are skeptical of the traditional distinction between analytical and normative investigations and argue that it promotes a dangerously distorted understanding of law and legal practices in which important social forces such as gender, race, and class are not properly accounted for. Law is fundamentally political and fundamentally attached to particular societies, according to these writers, so broad and general analytical and normative investigations are pointless and misleading. Yet those who are skeptical of the traditional distinction have not succeeded in persuading all legal theorists that the division between analytical and normative investigations ought to be given up as an unfortunate mistake. Many writers continue to defend the value of distinguishing analytical and normative philosophy of law.

As you consider analytical, normative, and other approaches to philosophy of law, it is also important to think about what each approach tries to accomplish. Some are contributions to understanding of what it is to be a human living in a society. Others ask us to take immediate, practical action to fix problems in our legal systems. There is probably a place for a range of approaches to philosophy of law, but they will sometimes conflict and it will not always be an option to try to find a compromise or common ground. Philosophy of law is open to alternative views and new approaches, yet it is not simply a collection of all that has been said about the core questions of philosophy of law. Philosophy of law is above all an attempt to work toward better understanding of life under law, even when that means rejecting particular arguments or entire approaches to law. This book tries to give a concise picture of some of the main contenders in the debate over what philosophy of law is and what it should try to accomplish, and a picture of the results of different theorists' philosophical investigations into law. This book also tries to give you the resources to decide for yourself which perspectives are likely to give the most helpful answers to questions of philosophy of law. You may not arrive at final answers to these questions, but at least you will have some of the tools needed to work toward answers.

3. What Am I Going to Get from Philosophy of Law?

Law pervades our daily lives whether we like it or not, so we all share an immediate practical interest in understanding law. In the longer run, law shapes

the general structure of our societies, so we also have a longer-term stake in understanding law. A course in philosophy of law will acquaint you with some of the best answers to date regarding immediate, practical questions with philosophical dimensions, such as the way we ought to understand the wrongdoing involved in an unsuccessful attempt to commit a crime. You will also have an opportunity to examine more abstract, yet equally important philosophical issues regarding the relation between law and justice—issues which may become especially important as you choose how to vote, where you will volunteer your skills in your community, or where you will lend your voice to a protest. As you study some of the arguments philosophers of law have offered in response to questions of philosophy of law, your instructor will show you how to demonstrate understanding of those arguments by explaining them, criticizing them, finding further support for their key claims, and assessing their strength relative to other arguments. Skills in critical analysis and evaluation of arguments in philosophy of law can be an excellent part of preparation for study of law, public service, journalism, business, and life as a private citizen.

4. Am I Ready for This Unfamiliar Discipline?

A new area of study can seem more challenging than it really is. To understand this book you do not need any background in either philosophy or law. In philosophy of law, as in many other areas of study, the main requirement for success at the introductory level and beyond is a willingness to encounter new ideas. It is also important to be prepared to learn about philosophers' and lawyers' special use of certain terms and concepts, and to be ready to read critically and thoroughly. Sometimes this means reading an argument more than once, but this is an ordinary and expected part of reading arguments which have been very carefully and precisely assembled. You may find it helpful to read an assigned reading before a lecture, then again soon after the lecture, taking notes at each stage. As you make notes you should try to identify not only the thesis or central organizing idea, but also the structure and organization of the argument. Make special note of areas you find unclear. If further attention to difficult areas still leaves you uncertain whether you understand an argument, a visit to your instructor or teaching assistant is your next step. Contrary to popular rumour, instructors do not actually eat students for breakfast, and are quite happy to help. Some instructors have a "drop in any time" policy, while others need to schedule specific office hours. Office hours are usually listed on the course outline, on the instructor's office door, or at the main office of your instructor's department.

5. The Structure of This Book: What to Expect

This book focuses on questions which have concerned legal theorists in the "common law societies" that inherited the structure of the English legal system, as well as in the emerging world of international law. These questions include but are not limited to: "What is law?"; "What limits may justifiably be imposed by law on individual liberty?"; "How can law justifiably determine what it is to be responsible for legal wrongdoing?"; and "What is international law?"

For each chapter there are four tools to help you. *Introductions* aimed at first-time readers of legal philosophy discuss some of the main ideas of the chapter. Each chapter concludes with recommendations for *further reading*, and *study questions* to help you refine your understanding of the arguments you have read. Both the further readings and the study questions will make it possible to find more perspectives on the arguments you read, and provide new ways into the debates we examine. Finally, a *glossary* of legal and philosophical terms forms the last part of the book. This glossary is intended to help you to move between philosophy and law, and to account for the different contexts in which different writers make their arguments.

6. The Content of This Book: An Overview

In the remainder of this general introduction, we will explore very briefly the main ideas of the book. We will do this so that you can begin reading already knowing how the book hangs together as a whole, and how the questions and arguments contained in the book represent an extended exchange of arguments and replies.

6.1 Chapter 1

The first chapter begins with natural law theory, a *normative* approach to law. Natural lawyers have traditionally argued that laws must meet certain moral standards if they are to generate genuine obligations. So-called laws which do not meet these standards cannot justifiably demand obedience. Our selections present both a classical natural law theory and a modified, contemporary natural law theory which claims that genuine laws which ought to be obeyed must at least *aim* at morally good goals. We will encounter in this contemporary view the very interesting claim that even immoral laws must sometimes be obeyed if they are only a small part of a system of laws which generally pursues morally justified goals. Since natural law is traditionally thought to set moral standards which laws must meet in order to be real laws, it is perhaps surprising to see a natural law theorist making a purely *analytical* claim that what is treated as a law is in fact a law, even if it does not pursue a morally acceptable goal. Can a natural law theory make this claim and still maintain natural lawyers' ability to distinguish genuine, binding laws from defective laws which ought to be disobeyed? This will be for you to decide.

6.2 Chapter 2

In the second chapter we turn to what has long been regarded as the view most plainly opposed to natural law theory. Legal positivism traditionally argues that while laws often are morally justified, it is *not necessary* for the existence of law that it have moral merit or even aim at morally justified goals. Legal positivists have instead explained laws as social conventions such as "commands," "social rules," or other norms which are not necessarily moral norms. This *analytical* theory of law allows legal positivists to explain easily how legal systems which pursue different goals in different ways at different times—even systems of morally bad law, such as the law of Nazi-era Germany—are all systems of law. Yet legal positivism has been criticized on several grounds. How, some critics ask, can an entire system of laws pursue morally bad aims and still provide any reason for judges to apply law or for citizens to obey it? Some critics suppose that legal positivists' insistence that laws need not aim at morally good goals is a terrible distortion of what distinguishes life under law from tyranny or a war of all against all. Other critics have objected in a variety of ways to the broad and general scope of legal positivism's picture of law, arguing that this sort of picture has very little value. We meet one of legal positivism's strongest critics in the next chapter.

6.3 Chapter 3

Chapter 3 contains some of Ronald Dworkin's criticisms of legal positivism and sets out Dworkin's influential replacement view, called "law as integrity." Dworkin answers the question "What is law?" in the context of American legal practices, and argues that law is composed of more than just rules: law also involves an underlying web of moral "principles." Dworkin uses the American case *Riggs v. Palmer* to show that when judges determine what the law is with respect to a given case, they sometimes need to interpret the particular law in light of the larger legal system and the moral principles which underwrite it. To the extent that Dworkin supposes interpretation of law sometimes requires reference to moral principles which in fact undergird the law, Dworkin's understanding of law is similar to natural law theory. Yet Dworkin does not suppose that the existence of a law is conditional on its passing some test of moral adequacy, so he does not accept what is traditionally regarded as the central idea of natural law theory. Dworkin's answer to the question "What is law?" rejects legal positivists' and natural lawyers' broad and

general concerns about the nature of law in favour of an account closely linked to the fact that judges in the common law world sometimes determine the meaning of law through appeal to moral principles which Dworkin sees in the law. It will be for you to evaluate whether Dworkin's insistence on understanding law in the context of a particular legal culture limits the general relevance of his theory, or whether Dworkin's focus on a particular legal culture really is the only way to develop a meaningful theory of law.

6.4 Chapter 4

In Chapter 4 we encounter a theory of law quite different from the three preceding ideas about law. "Legal realist" writers of the first half of the twentieth century tried to break free of earlier attempts to develop a "scientific" understanding of law as a set of rationally ordered rules whose meaning and proper application could be determined with scientific certainty. Legal realists recognized that there is much more to law than written rules stored in law libraries, and argued that a realistic understanding of law must use a wider array of analytical techniques and take account of what courts in fact do with laws. The legal realists' emphasis on the activities of courts reminded legal theorists that law is a living thing which exists in practice as well as in statutes, codes, and other written documents. This hard-headed realism about the real nature and operation of law goes only so far, however, in an answer to the question "What is law?" Many critics have suggested that legal realists have placed excessive emphasis on explanation of what courts do with law, at the expense of a balanced account of the nature of law both in and out of the courts. Yet legal realists' focus on actual practice has been an important challenge to broad and general theories of law, and the face of jurisprudence has certainly changed as theorists in both analytical and normative camps have attempted to take into account the legal realists' complaint that much legal theory proceeds on misleading versions of the facts about life under law.

6.5 Chapter 5

In the fifth chapter we consider some influential contemporary criticisms of the dominant analytical and normative theories of law. Feminist, Critical Race, and legal pluralist theorists argue from insights similar to those of legal realists that much orthodox legal theory proceeds on assumptions which must be challenged. These assumptions range from one we noted above—that jurisprudence is either analytical or normative—to assumptions about human nature and the shared experiences, values, and goals of persons living together under law. Many of the critics from these movements are concerned that legal theory's abstract worries about the nature of law have taken attention away from important practical questions of the actual effect of law on social life, and of the strategies required for reform of unjust laws and legal systems. Many feminist legal theorists, for example, have focused on normative evaluation of the way women are and have been treated in law, and analysis of the ways law and theories of law bear a masculine bias. Critical Race Theory writers, departing from some insights of the Critical Legal Studies movement, are concerned about the practical effects of law for members of ethnic groups historically distinguished from elites on the basis of the slippery idea of "race." In a similar fashion, legal pluralists argue that too much legal theory has proceeded on the assumption that the only law that exists in some social situation is the official, formal law of the state, which ignores the many ways in which non-state legal orders exist and operate. All three approaches included in this chapter examine the promise and appearance of law, and ask us to look more deeply and critically at its real nature beyond mere appearance.

The first five chapters offer five different kinds of answers to the question "What is law?", and are sometimes clearly at odds with one another, as analytical, normative, and skeptical approaches appear to pursue entirely different goals. At other points, it seems possible to borrow the insights of

at least parts of analytical and normative theories, while abandoning their weaknesses, to arrive at an acceptable single, comprehensive theory. There are difficulties in either an "all-star" theory made up of analytical and normative insights, or a defence of one particular analytical or normative answer to the question of the nature of law. There are also difficulties with skeptical approaches which deny the traditional distinction between analytical and normative approaches, yet do not offer a better, comprehensive replacement for understanding what law is or what law should become. The ideas provided here and in the suggested further readings can provide a great deal of insight into what the best understanding of law might look like. There is, of course, much more to be said about the nature of law, so it is well worth pursuing answers to the question "What is law?" in the large and rich literature beyond this book.

6.6 Chapter 6

The sixth chapter takes up a range of issues likely familiar to you from your experience of legal systems with constitutions giving special protection to fundamental rights such as a right to freedom of expression. The issues range from whether it is possible to identify, with the right degree of precision, which legal rights should be given special protection, to questions about how such rights ought to be applied in practice. These issues are closely associated with questions about whether courts ought to be permitted or required to declare laws invalid if they are found to be in violation of specially protected rights, even when those laws have been enacted by a democratically-elected legislature. As you will see from the competing arguments offered by the authors in this chapter, there are deep disagreements regarding the legitimacy of specially protected rights entrenched in constitutions, the nature of democracy and its relation to law, and the proper power and role of courts in democratic societies with bills of rights and other kinds of specially-protected rights.

6.7 Chapter 7

The seventh chapter of the book turns to one important aspect of life under law: personal freedom and its limits. When you think of law, what images immediately come to mind? Courts, police, and bad guys probably appear in the first few thoughts. This is not surprising, given that our lives are filled with fictional TV cops, judges, bad guys, and "reality TV" which shows real car-chases, hold-ups, hostage-taking, and so forth. We are fascinated by the interaction between these groups, and often shocked by what the bad guys have done: in acting "against the law" or "breaking the law" they have used their personal freedom in ways prohibited by law. Here we find an important issue in philosophy of law. In constitutional documents, declarations, and human rights legislation, common law societies are committed to the preservation of the widest possible range of human freedom. Yet we all recognize that freedom needs limits. What should those limits be?

We begin with John Stuart Mill's expression of the classical liberal view that the good of individuals and the good of societies require that laws leave as wide as possible a range of freedoms to individual persons. On this view, society is justified in legislating against only that conduct which harms others. Private conduct which is harmless to others cannot justifiably be limited by law. This view can explain and justify many laws, especially much of the criminal law, yet Mill's arguments have encountered criticism nonetheless. Some of these criticisms appear in the three subsequent articles included here.

In the next two articles excerpted in this chapter we will examine a famous debate over the amount and type of liberty a society can tolerate. In the Hart-Devlin debate presented here, the English judge Lord Devlin argued against legalization of homosexual conduct in private between consenting adults, on grounds including the need for a society to have a shared set of values in order to exist. Hart responded with a modified version of Mill's liberal understanding of freedom, and argued in favour of legalization

of private homosexual conduct. In this debate some crucial issues of public policy are intertwined with philosophy, and philosophy can be seen as a useful practical tool for resolving some of these issues.

In the final article, Ronald Dworkin explores some of the issues governments face as they use law to address terrorism. Dworkin explains that several core features of new anti-terrorism legislation represent direct limitations of basic civil liberties, but public enthusiasm for action against terrorism runs the risk of blinding us to the true character and severity of these limitations. Dworkin leaves it as an open question whether liberty might in fact need to be restricted to a greater degree in what might be called times of emergency, but he insists that we ought to debate such restrictions candidly and clearly.

6.8 Chapter 8

From our consideration of liberty and its limits, we move to the idea of responsibility. We sometimes say "with freedom comes responsibility," meaning that our freely chosen actions are ours and ours alone, and we must bear the brunt of criticism or praise for those actions because they are ours—sometimes in the form of suffering significant liberty-limiting punishments. Philosophically interesting questions arrive when we have to say precisely and unambiguously *how* actions are "our own responsibility" in a way worth punishing. This chapter explores the idea of responsibility, first in a general way, and then specifically in the context of the criminal law.

In the first article we will explore the idea of being responsible for some state of affairs. What sort of connection must a person's intentions and actions have to some terrible event if we are to be justified in punishing that person? Is responsibility for causing the event enough? Or is the supervisor responsible for the employee who threw the fatal switch? The analysis developed in the first article of this section will help us thread our way through the different senses of responsibility to state clearly what sort of responsibility is required to justify an assessment of wrongdoing—especially voluntary, intentional *criminal* wrongdoing, the type of responsibility with the most serious consequences for the sort of personal liberty explored in Chapter 7. The second article of this chapter examines the role of *intention* and *action* in criminal wrongdoing, in an attempt to determine how to characterize the wrongdoing committed in crimes people "meant to do." The difficulty and importance of arriving at a clear and unambiguous understanding of criminal wrongdoing is illustrated at the end of this chapter with close consideration of responsibility for hate crimes.

6.9 Chapter 9

In Chapter 9 we turn to international law. Most of us have a sense of what international law does. It governs such matters as basic human rights which exist in all countries, international borders, and rules of international trade. But does this add up to a *law* of nations, something more than a series of agreements? What are we to make of the fact that international human rights law is frequently ignored, typically with little repercussion against those who ignore it? Does international law really provide binding obligations in the same way the law of individual countries is binding within those countries? The resemblance between these questions and the questions we encountered in the first five chapters is more than skin-deep. Here we ask "What is international law?" and rejoin the debate over the value of analytical and normative approaches to questions in philosophy of law. Our selections include works from analytical and normative perspectives, and an argument from an author who is skeptical both about the existence of international law and about the value of analytical and normative perspectives on international law.

Our selections begin with Hugo Grotius's natural law theory which argues that certain standards of conduct hold universally among all people and all countries. This view captures the widespread sense that there are shared standards which all decent, civilized societies ought to recognize as the basis of

international legal order. The second article presents H.L.A. Hart's legal positivist argument that an international legal system remains a possibility which does not yet exist. Hart's argument points to the absence of a settled way to test the validity of what are claimed to be international laws and reminds us that there is an important difference between our aspirations for international law as a way to guide international life and the actual fact of the matter.

The third article of this chapter, by Martti Koskenniemi, rejects both normative and analytical approaches to understanding international law, arguing that both approaches lack sensitivity to the actual political context of international relations. According to this skeptical argument, there are strong political reasons against the existence of international law in the form theorists have traditionally expected it to take. This skeptical argument claims that purely normative theories of international law lack realism about international relations, and purely analytical theories of law attempt awkwardly to understand international law within the inadequate concepts of domestic law. Koskenniemi's approach goes beyond analytical and normative approaches to law in order to understand law in a broader social and political context, much as the Feminist and Critical Race Theory approaches examined in Chapter 5 attempt to go beyond the traditional conception of jurisprudence.

In the final article of this chapter we explore a set of arguments designed to show the limits of thinking that only states, or organizations of states, make law at regional or global levels. Roger Cotterrell argues that we ought to adopt a legal pluralist framework for viewing law beyond states, so as not to miss the distinctive character of overlapping and competing legal orders created and maintained by transnational communities of non-state actors. While such transnational law is not meant to replace international law, transnational law forces us to reflect on whether an understanding of law built up from experience of state law is sufficiently sensitive to detect and explain the various forms which law can take. In many ways this final article brings us full circle to the issues and questions raised in earlier chapters of the book about what law is, and whether analytical or normative approaches, or perhaps something else entirely new, might be needed as life under law changes as our societies change.

Further Readings

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Some Academic Journals

Canadian Journal of Law and Jurisprudence
Criminal Law and Philosophy
Jurisprudence
Law and Philosophy
Legal Theory
Oxford Journal of Legal Studies
Ratio Juris
Res Publica

CHAPTER ONE

Natural Law Theory

Introduction

This chapter explores the idea of natural law. The range of ideas associated with natural law theory is so wide that it is nearly impossible to avoid excluding one important understanding of natural law while trying to explain another. Here we will explore a general description of natural law theories before discussing the work of two authors whose ideas have been particularly influential.

It is reasonably safe to say that all natural law theorists suppose that certain facts about humans and their world provide the *right* basis for laws with which to guide human conduct. Natural law theorists differ significantly, however, in their understanding of exactly which facts about the world must be taken as guides to law. Some theorists depend on the existence of God and religious texts, inspiration, or divine revelation as the basis for laws. Others rely on an understanding of human nature, human capacity to reason, or human social or biological needs. Yet no matter which facts a particular natural law theorist thinks especially relevant to the basis of law, all natural law theorists argue that their particular set of facts shows that laws cannot have just any content. What we might call "real" laws are those laws which meet certain standards—usually *moral* standards. Those standards are found by looking at the right facts, and using practical reasoning to determine how those facts ought to guide human conduct.

This chapter presents readings from two influential natural law theorists. The first, St. Thomas Aquinas, is the best-known writer of the Roman Catholic natural law tradition. The second, Professor John Finnis, is the best-known contemporary defender of natural law theory. It might seem at first glance that there can be little in common between a Catholic theologian who studied and wrote in various European centres of learning in the thirteenth century, and a professor of jurisprudence teaching at Oxford University in England in the late twentieth century. In fact, the two share several views, and Finnis makes clear his debt to Aquinas. It is a mark of the persuasiveness of natural law theory that many of its central ideas have survived substantially unchanged from the thirteenth to the twenty-first centuries and still appear relevant and compelling. Here we will examine just three of the many areas of agreement between Aquinas and Finnis before turning, in the remainder of this introduction, to the specific features of each author's argument.

1. The Purpose of Law and Legal Theory

Aquinas and Finnis (and many other natural law theorists) agree on the answer to the question "What is the purpose of philosophical investigation of law?" Both authors suppose that the philosophy of law ought to determine how best to order social interaction for the common good—the good of all. Aquinas does not leap out and say explicitly that this

is the purpose of the philosophy of law, but we will not have to dig very deeply into his work to find this view. Finnis takes time at the beginning of his book *Natural Law and Natural Rights* (from which our selection is taken) to make clear why he thinks a philosophical investigation of law must do more than simply describe certain features of law. Aquinas and Finnis agree that description is not enough: an adequate philosophy of law must contain the means to distinguish between real laws which impose genuine obligations, and laws which do not impose genuine obligations and are best regarded as defective or degenerate. As Professor Neil MacCormick describes the natural law view, it supposes that "…laws, like other social institutions, are fully intelligible only by reference to the ends or values they ought to realise, and thus by reference to the intentions that those who participate in making them or implementing them must at least purport to have. This does not entail any acceptance of substantive moral criteria as criteria of legal validity, but it does involve acknowledging the moral quality of the relevant ends and values, namely justice and the public good."[1]

2. The Self-Evidence of Basic Goods

Aquinas and Finnis share a further understanding of the way in which we can determine which facts about the world are appropriate guides to the formation of laws. Both writers argue that certain goods (values) are self-evident. Aquinas, writing from a Christian perspective, supposes that certain Christian values are self-evidently good and valuable. Finnis does not appeal to Christian theology. Rather, he argues that careful attention to the requirements of social life and individual fulfilment show that at least some values are good in and of themselves. Laws must advance these values, to best serve the goal of human flourishing. Despite their slightly different starting points, both writers are sympathetic to the famous ancient Greek philosopher Aristotle's view of human flourishing as involving happiness. This sort of happiness is rather more than a warm and fuzzy feeling of contentment. It involves a deeper sense of fulfilment in several areas of life such as self-development and treating others fairly. Happiness of this sort is self-evidently good, according to Aquinas and Finnis, and laws ought to contribute to this happiness.

3. Practical Reasoning

Aquinas and Finnis both recognize that laws do not make or interpret themselves. Even if it is possible to arrive at a set of general principles which all persons will recognize as the correct basis for laws of human conduct, these general principles must be interpreted and applied by humans to provide specific guidance in specific situations. Consider, for example, the principle that one ought not to harm others. This principle does not contain in itself any guidance regarding its application. Are police officers to be exempt from this principle? If so, under what conditions? To determine how to put this principle into practice in a particular situation, we must use skills of *practical reasoning* to arrive at a law which will guide human conduct in the best possible way.

4. St. Thomas Aquinas

St. Thomas Aquinas (1224–74) is one of the great thinkers of Western philosophy, and a central figure of Catholic philosophy and theology. Aquinas was born near Naples, Italy, and spent his adult life in several cities in Europe. The source of the selection included in this book is Aquinas's *Summa Theologica*. His *Summa*, as it is called, is a sort of systematic working out of a *theological* view of the world. A theological view of the world accepts the existence of God, and asks what sort of world God has created. Aquinas's concern with the nature of law is understandably influenced by the fact that he views the discussion of law as only part of his larger discussion of the nature of a God-created world. It is

1 D. Neil MacCormick, "The Separation of Law and Morals," in R.P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon P, 1992), p. 113.

worth noting, however, that Aquinas's theory of law is persuasive to many non-Christians as well: much of his argument can be accepted on rational grounds alone without reference to faith.

Much of the rational, non-religious appeal of Aquinas's arguments can be traced to his philosophical debt to Aristotle. Although Aquinas was certainly a powerful and important original thinker in his own right, his understanding of metaphysics, physics, politics, and ethics is thoroughly Aristotelian. In the thirteenth century, when Aquinas wrote, Aristotle was taken so seriously that he was referred to simply as "The Philosopher." Authors commonly wrote "The Philosopher says…" in support of their arguments. This was done not simply on the blind assumption that what Aristotle said was true, but on the reasoned, sincerely held belief that Aristotle's views were the most sophisticated, best available views, regardless of the fact that he was not a Christian. To the extent that Aquinas examined law using Aristotle's map of the basic foundations of logical thought, Aquinas's views appeal to both Christians and non-Christians.

In a moment we shall discuss some of Aquinas's main arguments, but first we must examine their packaging. If you have never read the work of a medieval philosopher, Aquinas's style of organization may seem quite odd. Aquinas's discussion of law is given in a form called a "disputatio"—an imitation of a verbal dispute. His work looks a bit like a screenplay with too few indications as to which character should say which line. Yet once the structure of his writing is exposed, we will be able to see that it is actually very carefully and logically organized. The framework is as follows:

1. Aquinas begins by asking a question or series of questions whose answers are a matter of dispute. He encounters each question in turn, each in a unit he calls an "Article."
2. At the beginning of each Article, Aquinas lists a series of objections or possible arguments *against* the view he intends to defend, sometimes mentioning the name of the person known for offering this objection, and sometimes not. Sometimes he does not bother to identify an author of an objection because the view contained in the objection is very well known, or the view is so widely held that there is no need to point to specific persons.
3. After the question and the objections, Aquinas often quotes an authority whose argument disputes the claims of the objections and generally supports Aquinas's own view. He begins this section by saying "on the contrary," to mark the fact that the authority's argument runs contrary to the objection Aquinas has noted. It is worth mentioning again that authorities such as Aristotle are often cited not simply in the blind belief that if an authority said it then it must be true, but in the same way that we rely today on a scientist's expert testimony in court or a physician's expert advice about how to remain healthy.
4. Following his citation of an expert opinion in support of his view, Aquinas offers his own argument. He begins the body or "corpus" of his own argument with the words, "I answer that…"
5. Aquinas completes consideration of the question by returning to the objections with which he began. He replies to them one by one, restating and expanding parts of the main body of his argument.

It may be tempting to rush past the objections in order to get at the meat of Aquinas's own views. If you do so, you risk misunderstanding precisely why he offers the arguments he does. Aquinas's methodical examination of a question offers in an admittedly artificial format the give-and-take which actually occurs when we attempt to defend a view. Only very rarely will an audience collapse in stunned silence

at a speaker's feet, in awe of the speaker's shining intelligence and awesome reasoning. Usually even the most persuasive arguments are met with reasonable objections which must be answered. A full understanding of a speaker's view includes both the body of the speaker's argument and the speaker's responses to objections.

The selections presented here from Aquinas's *Summa Theologica* have been limited to the Questions and Articles most useful to a new reader of Aquinas's philosophy of law. However, in order to leave the door open for your further reading, where Articles have been omitted, their titles have been included for your reference. The selections explore four particular aspects of Aquinas's natural law theory. In this introduction we will begin with (1) his definition of law, and (2) his explanation of what natural law is. We will conclude our discussion of Aquinas with (3) his explanation of the difference between real laws and defective laws, and (4) his explanation of how laws bind their subjects.

4.1 AQUINAS'S DEFINITION OF LAW

Aquinas's definition of law states the essence, or fundamental nature, of laws. It is important to recognize that Aquinas was concerned mainly with defining the nature of *laws* rather than the nature of a *legal system*, unlike writers such as Finnis who are concerned as much with the way laws operate in a system as with the nature of *law* more generally. (As you will see in other introductions and readings in this book, there are important differences between explanations of law and of legal systems made up of many laws, much as there are important differences between explanations of a person and of a society, composed of many persons.) Aquinas's definition of law may seem immediately familiar, and that is perhaps a good indication of how thoroughly it has penetrated thought in the Western world. In the body or "corpus" of Question 90, Article 4, Aquinas summarizes the investigation of the question. He writes, "Thus from the four preceding articles, the definition of law may be gathered; and it is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated." A law, according to Aquinas, is a result of reasoning about how to reach the common good (the good for everyone). A law is made by a person in authority, and made public or "promulgated" so the law's requirements can be known.

4.2 NATURAL LAW

Armed with an understanding of what Aquinas supposes a law is, we can now ask what makes such a law part of natural law? To understand the answer to this question we must first examine Aquinas's understanding of humans. Aquinas accepts that humans were created by God in God's own image, and that God gave humans certain characteristics. The defining characteristic of humans, according to Aquinas, is our possession of *reason*, or *rationality*. We tend naturally to attempt to do good things, mirroring in a limited way God's characteristics as a supremely rational, wholly good being who has created a rationally ordered universe. When we use our God-given powers of reasoning we can see that certain things are self-evidently good, and worth pursuing. Consider, for example, the claim that what is good is to be pursued, and what is bad is to be avoided. Aquinas supposes that this claim is self-evidently true: as rational humans we can see that it is true simply by looking at it. When we use our reasoning correctly as we pursue self-evidently good things and attempt to make laws to achieve the common good, we are said to be using "right reason" and participating or sharing in God's reasoning and rational ordering of the world. So the natural law is in each person and is discovered by applying reason to general principles whose truth is self-evidently clear. This process results in practical rules for living that best fit our nature as rational persons who are generally good. As Aquinas explains the natural law in the body of Article 2, Question 91, "Wherefore it [the rational creature] has a share of the Eternal Reason, whereby

it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law."

4.3 REAL AND DEFECTIVE LAWS

It might seem from this sketch of natural law that there can only be one right way to make a law: either a man-made or "positive" law discovers correctly the reasonable way to achieve the common good, or it doesn't. This is not Aquinas's view. His understanding of natural law is much more subtle and complex. Aquinas recognizes that there may be more than one way to solve a particular social problem and he can accept that different cultures may choose to place different limits on behaviour, as required by different social situations. What is important is that any particular solution meets the general requirements set by the principles which all rational persons must accept. Aquinas divides man-made or positive law into two types: "real" law and "defective" law. (These are not the precise words of Aquinas or his translators, but they represent ideas recognizable in any translation.) Real laws meet the requirements of right reason: they are reasonable standards of conduct which aim at serving the common good. Real laws are "just," because they meet the requirements of justice. Aquinas recognizes, however, that some so-called laws fail in some way to meet the requirements of natural law—they may be unjust, or perhaps they are not promulgated properly. What are we to make of these so-called laws? According to Aquinas, while these failed attempts at laws may in fact be accepted and followed in some particular situation, "such laws do not bind in conscience." These defective laws are justifiably disobeyed. It is arguable, for example, that acts of civil disobedience committed by persons such as Dr. Martin Luther King were justified because the laws Dr. King disobeyed were not binding in conscience, and therefore were not real laws genuinely deserving of obedience.

4.4 HOW LAWS BIND THEIR SUBJECTS

We may now face the last of our four topics in consideration of the ideas of Aquinas. In his discussion of legal obligations, Aquinas notes that the Latin word for law (*lex*) comes from a word which means "to bind." Many of us in the modern world may feel that this is exactly what our huge and complex bodies of law do to us—laws leave us tightly tied and restrict our options, sometimes for good reasons, and at other times for bad reasons or for reasons which are no longer relevant. Often we continue to obey some law only to avoid being arrested or sued if we ignore that law. For Aquinas, however, police action or other sanctions against disobedience are a last resort and the least important reason to obey the law. According to Aquinas, if a law is real and meets the requirements of natural law, it is *morally* binding. If you are subject to that law, you ought to obey it because the law is for the common good. As a rational person you ought to realize that the common good is a worthwhile goal and you ought to respect law as a reasonable way of achieving that worthwhile goal. You ought also to obey the law because the law is part of God's will, and you are a subject of God. With these weighty considerations supporting the law, police action is left as a tool of last resort. Police action is to be applied to those few persons who for whatever reason fail to realize what they are reasonably required to do or withhold from doing.

You may, after reading all of this, find yourself impressed by the organization of Aquinas's argument and yet still suppose it is not relevant to you. You might, for example, reject the existence of God. Or you might suppose that Aquinas's understanding of God is somehow defective. It may seem that if Aquinas's idea of God is rejected, Aquinas's theory of natural law must be rejected also. It is worth considering, however, whether at least some of the elements of Aquinas's theory can be used in a more modern theory of natural law that does not rely on the existence of God as part of its justification.

5. Professor Finnis and Natural Law as Practical Reasonableness

The selections included here from Finnis's book *Natural Law and Natural Rights* are limited to four important topics. We begin with some of Finnis's remarks from his introductory discussion of the purposes of theorizing about law. We will then jump to Finnis's discussion of how we know what is good for humans. In the third part of our selection Finnis discusses "practical reasonableness." The fourth and final part of our excerpt contains Finnis's response to the question of whether an immoral law ought to be obeyed. Throughout these selections, you will find strong similarities between the views of Aquinas and Finnis. Is this evidence that Finnis is not an original thinker? It is likely better to see Finnis as an active participant and developer of an idea and argument which has been refined gradually over several centuries. Far from lacking originality as a philosopher, Finnis is faced with the difficult task of improving arguments which have already benefited from the close attention of some of the best philosophers.

In an earlier section of this introduction, we noted that Aquinas and Finnis agree on the purpose of philosophizing about law. A complete philosophy of law, both agree, is one which helps humans to guide their conduct in a way which promotes the common good. Finnis, with the benefit of several centuries of hindsight, goes further. To simply describe what happens when people make or use laws is not useful at all, according to Finnis. A theory of law which consists merely of a series of descriptions is seriously incomplete. A theorist who lacks an understanding of the *purpose* of law will not know which phenomena to observe or which observations to include in the theory. For Finnis, the key to understanding law is to see law as a *purposeful* activity conducted by generally reasonable humans. To reach this understanding, the theorist must stand inside the law, and understand and participate in achieving the purposes of law. As Finnis puts it, "…A theorist cannot give a theoretical description and analysis of social facts unless he also participates in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness."

In our discussion of Aquinas, we noted that theology supplied him with a picture of what is really good for humans. Finnis does not appeal to theology. Instead, Finnis supposes that there are certain basic goods for humans, and that these goods are self-evident upon rational consideration of them. (While Aquinas supposes we are rational and able to perceive goods because God made us rational, Finnis leaves the origin of our rationality largely untreated. What is important for Finnis's theory is that we *are* rational, not whether we are rational because we evolved to be this way or because God made us so.) According to Finnis, there are seven basic forms of good: life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and "religion," or a desire for a larger explanation of our nature and origin.

Finnis's list of basic goods answers the question "What is really good for humans?" The list does not, however, explain what moral or legal rules must be enacted to help us to achieve these goods. *How* we are to achieve the good for humans is a question of practical reasoning, and Finnis suggests that practical reasoning cannot proceed in just any way. This is the crucial second part of his argument. According to Finnis, proposed moral or legal rules must meet standards of "practical reasonableness" (which is itself a basic human good). Practical reasonableness can be seen as a sort of blend of pure rationality and perception of basic goods. Practical reasonableness is not simply rationality, because what is rationally possible may sometimes be prohibited as unreasonable. Nor is practical reasonableness simply a composite of the six other basic goods. Practical reasonableness is about rationally balancing our pursuit of different goods, while respecting the basic value of each of those goods as necessary ingredients in a good individual and a good society. We shall discuss here

just two aspects of practical reasonableness, to give a sense of the sort of procedural standards Finnis thinks are self-evidently good.

Practical reasonableness requires that our attempts to achieve human goods proceed fairly. For example, when we treat persons differently, we must do so for good reasons, and not arbitrarily. Practical reasonableness also requires a certain degree of foresight: we cannot sacrifice certain basic goods simply to achieve consequences which promote some other basic good. So, for example, the basic good of play is not worth having at the cost of life and friendship, as might happen if we ask our friends to stand with apples on their heads as we practice archery. It is important to recognize that the sort of balanced pursuit of human goods which emerges from the requirements of practical reasonableness is simply a weighing of consequences in which achievement of two basic goods outweighs the loss of failing to achieve one basic good. Rather, basic goods are *fundamental* in our thinking about how we ought to conduct ourselves, and we are never justified in sacrificing these goods entirely.

Finnis argues that morality and law are the result of applying the standards of practical reasonableness to questions of how we ought to conduct ourselves, keeping in mind always what is really good for humans—the seven basic goods. Notice that we have said that *both* morality and law are the result of this process of practical reasoning. For Finnis, and for Aquinas and many other natural law theorists, law just *is* a special sort of morality. It is part of the nature of a law that it is morally justified. If a law does not aim at the common good, or fails to meet the requirements of practical reasonableness, that law must be rejected.

Finnis is careful to note that he does not suppose individual citizens are always right to disobey laws which lack moral justification. He observes that there is considerable value in the stability of the rule of law, and allows that there may be an obligation in a larger sense to obey an immoral law for the sake of the rule of law. There is no quick and simple answer to the question "Should I obey this law?"

Is this natural law theory powerful enough to distinguish genuine law from defective law in a practically useful way? Does this natural law theory provide a useful addition to our understanding of life under law? These questions can only be answered after careful consideration of these readings, and comparison of the merits of natural law theory with theories presented in other chapters of the book.

St. Thomas Aquinas

"Treatise on Law," from *Summa Theologica*

Question 90: Of the Essence of Law (In Four Articles)

. . . [T]here are four points of inquiry (1) Whether law is something pertaining to reason? (2) Concerning the end of law, (3) Its cause; (4) The promulgation of law.

FIRST ARTICLE: WHETHER LAW IS SOMETHING PERTAINING TO REASON?

We proceed thus to the First Article:—

Objection 1. It would seem that law is not something pertaining to reason. For the Apostle says (Rom. vii. 23): *I see another law in my members*, etc. But nothing pertaining to reason is in the members; since the reason does not make use of a bodily organ. Therefore law is not something pertaining to reason.

Obj. 2. Further, in the reason there is nothing else but power, habit, and act. But law is not the power itself of reason. In like manner, neither is it a habit of reason: because the habits of reason are the intellectual virtues of which we have spoken above (Q. 57). Nor again is it an act of reason: because then law would cease, when the act of reason ceases, for instance, while we are asleep. Therefore law is nothing pertaining to reason.

Obj. 3. Further, the law moves those who are subject to it to act aright. But it belongs properly to the will to move to act, as is evident from what has been said above (Q. 9, A. 1).Therefore law pertains, not to the reason, but to the will; according to the words of the Jurist (*Lib.* i. *ff., De Const. Prin.* leg. i): *Whatsoever pleaseth the sovereign, has force of law.*

On the contrary, It belongs to the law to command and to forbid. But it belongs to reason to command, as stated above (Q. 17, A.1). Therefore law is something pertaining to reason.

I answer that, Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting: for *lex* (law) is derived from *ligare* (to bind), because it binds one to act. Now the rule and measure of human acts is the reason, which is the first principle of human acts, as is evident from what has been stated above (Q. 1, A. 1 *ad* 3); since it belongs to the reason to direct to the end, which is the first principle in all matters of action, according to the Philosopher (*Phys.* ii). Now that which is the principle in any genus, is the rule and measure of that genus: for instance, unity in the genus of numbers, and the first movement in the genus of movements. Consequently it follows that law is something pertaining to reason.

Reply Obj. 1. Since law is a kind of rule and measure, it may be in something in two ways. First, as in that which measures and rules: and since this is proper to reason, it follows that, in this way, law is in the reason alone.—Secondly, as in that which is measured and ruled. In this way, law is in all those things that are inclined to something by reason of some law: so that any inclination arising from a law, may be called a law, not essentially but by participation as it were. And thus the inclination of the members to concupiscence is called the *law of the members*.

Reply Obj. 2. Just as, in external action, we may consider the work and the work done, for instance the work of building and the house built; so in the acts of reason, we may consider the act itself of reason, i.e., to understand and to reason, and something produced by this act. With regard to the speculative reason, this is first of all the definition; secondly, the proposition; thirdly, the syllogism or argument. And since also the practical reason makes use of a syllogism in respect of the work to be done, as stated above (Q. 13, A. 3; Q. 76, A. 1) and as the Philosopher teaches (*Ethic.* vii, 3); hence we find in the practical reason something that holds the same position in regard to operations, as, in the speculative intellect, the proposition holds in regard to conclusions. Such like universal propositions of the practical intellect that are directed to actions have the nature of law. And these propositions are sometimes under our actual consideration, while sometimes they are retained in the reason by means of a habit.

Reply Obj. 3. Reason has its power of moving from the will, as stated above (Q. 17, A. 1): for it is due to the fact that one wills the end, that the reason issues its commands as regards things ordained to the end. But in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason. And in this sense is to be understood the saying that the will of the sovereign has the force of law; otherwise the sovereign's will would savor of lawlessness rather than of law.

SECOND ARTICLE: WHETHER THE LAW IS ALWAYS SOMETHING DIRECTED TO THE COMMON GOOD?

We proceed thus to the Second Article:—

Objection 1. It would seem that the law is not always directed to the common good as to its end. For it belongs to law to command and to forbid. But commands are directed to certain individual goods. Therefore the end of the law is not always the common good.

Obj. 2. Further, the law directs man in his actions. But human actions are concerned with particular matters. Therefore the law is directed to some particular good.

Obj. 3. Further, Isidore says (*Etym.* v. 3): *If the law is based on reason, whatever is based on reason will be*

a law. But reason is the foundation not only of what is ordained to the common good, but also of that which is directed to private good. Therefore the law is not only directed to the good of all; but also to the private good of an individual.

On the contrary, Isidore says (Etym. v. 21) that *laws are enacted for no private profit, but for the common benefit of the citizens.*

I answer that, As stated above (A. 1), the law belongs to that which is a principle of human acts, because it is their rule and measure. Now as reason is a principle of human acts, so in reason itself there is something which is the principle in respect of all the rest: wherefore to this principle chiefly and mainly law must needs be referred.—Now the first principle in practical matters, which are the object of the practical reason, is the last end: and the last end of human life is bliss or happiness, as stated above (Q. 2, A. 7; Q. 3, A. 1). Consequently the law must needs regard principally the relationship to happiness. Moreover, since every part is ordained to the whole, as imperfect to perfect; and since one man is a part of the perfect community, the law must needs regard properly the relationship to universal happiness. Wherefore, the Philosopher, in the above definition of legal matters mentions both happiness and the body politic: for he says (*Ethic.* v.1) that we call those legal matters *just, which are adapted to produce and preserve happiness and its parts for the body politic*: since the state is a perfect community, as he says in *Polit.* i. 1.

Now in every genus, that which belongs to it chiefly is the principle of the others, and the others belong to that genus in subordination to that thing: thus fire, which is chief among hot things, is the cause of heat in mixed bodies, and these are said to be hot in so far as they have a share of fire. Consequently, since the law is chiefly ordained to the common good, any other precept in regard to some individual work, must needs be devoid of the nature of a law, save in so far as it regards the common good. Therefore every law is ordained to the common good.

Reply Obj. 1. A command denotes an application of a law to matters regulated by the law. Now the order to the common good, at which the law aims, is applicable to particular ends. And in this way commands are given even concerning particular matters.

Reply Obj. 2. Actions are indeed concerned with particular matters: but those particular matters are referable to the common good, not as to a common genus or species, but as to a common final cause, according as the common good is said to be the common end.

Reply Obj. 3. Just as nothing stands firm with regard to the speculative reason except that which is traced back to the first indemonstrable principles, so nothing stands firm with regard to the practical reason, unless it be directed to the last end which is the common good: and whatever stands to reason in this sense, has the nature of a law.

THIRD ARTICLE: WHETHER THE REASON OF ANY MAN IS COMPETENT TO MAKE LAWS?

We proceed thus to the Third Article:—

Objection 1. It would seem that the reason of any man is competent to make laws. For the Apostle says (Rom. ii. 14) that *when the Gentiles, who have not the law, do by nature those things that are of the law,... they are a law to themselves.* Now he says this of all in general. Therefore anyone can make a law for himself.

Obj. 2. Further, as the Philosopher says (*Ethic.* ii. 1), *the intention of the lawgiver is to lead men to virtue.* But every man can lead another to virtue. Therefore the reason of any man is competent to make laws.

Obj. 3. Further, just as the sovereign of a state governs the state, so every father of a family governs his household. But the sovereign of a state can make laws for the state. Therefore every father of a family can make laws for his household.

On the contrary, Isidore says (*Etym.* v.10): *A law is an ordinance of the people, whereby something is sanctioned by the Elders together with the Commonalty.*

I answer that, A law, properly speaking, regards first and foremost the order to the common good. Now to order anything to the common good, belongs either to the whole people, or to someone who is the viceregent of the whole people. And therefore the making of a law belongs either to the whole people or to a public personage who has care of the whole people: since in all other matters the directing of anything to the end concerns him to whom the end belongs.

Reply Obj. 1. As stated above (A.1 *ad* 1), a law is in a person not only as in one that rules, but also by participation as in one that is ruled. In the latter way each one is a law to himself, in so far as he shares the direction that he receives from one who rules him. Hence the same text goes on: *Who show the work of the law written in their hearts.*

Reply Obj. 2. A private person cannot lead another to virtue efficaciously: for he can only advise, and if his advice be not taken, it has no coercive power, such as the law should have, in order to prove an efficacious inducement to virtue, as the Philosopher says (*Ethic.* x. 9). But this coercive power is vested in the whole people or in some public personage, to whom it belongs to inflict penalties, as we shall state further on (Q. 92, A. 2 *ad* 3; II–II, Q. 64, A. 3). Wherefore the framing of laws belongs to him alone.

Reply Obj. 3. As one man is a part of the household, so a household is a part of the state: and the state is a perfect community, according to *Polit.* i. 1. And therefore, as the good of one man is not the last end, but is ordained to the common good; so too the good of one household is ordained to the good of a single state, which is a perfect community. Consequently he that governs a family, can indeed make certain commands or ordinances, but not such as to have properly the force of law.

FOURTH ARTICLE: WHETHER PROMULGATION IS ESSENTIAL TO A LAW?

We proceed thus to the Fourth Article:—

Objection 1. It would seem that promulgation is not essential to a law. For the natural law above all has the character of law. But the natural law needs no promulgation. Therefore it is not essential to a law that it be promulgated.

Obj. 2. Further, it belongs properly to a law to bind one to do or not to do something. But the obligation of fulfilling a law touches not only those in whose presence it is promulgated, but also others. Therefore promulgation is not essential to a law.

Obj. 3. Further, the binding force of a law extends even to the future, since *laws are binding in matters of the future*, as the jurists say (*Cod.* 1., tit. *De lege et constit.* leg. vii). But promulgation concerns those who are present. Therefore it is not essential to a law.

On the contrary, It is laid down in the *Decretals*, dist. 4, *that laws are established when they are promulgated.*

I answer that, As stated above (A. 1), a law is imposed on others by way of a rule and measure. Now a rule or measure is imposed by being applied to those who are to be ruled and measured by it. Wherefore, in order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Wherefore promulgation is necessary for the law to obtain its force.

Thus from the four preceding articles, the definition of law may be gathered; and it is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.

Reply Obj. 1. The natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally.

Reply Obj. 2. Those who are not present when a law is promulgated, are bound to observe the law, in so far as it is notified or can be notified to them by others, after it has been promulgated.

Reply Obj. 3. The promulgation that takes place now, extends to future time by reason of the durability of written characters, by which means it is continually promulgated. Hence Isidore says (*Etym.* v.3;

ii. 10) that *lex* (law) *is derived from legere* (to read) *because it is written*.

Question 91: Of the Various Kinds of Law (In Six Articles)

We must now consider the various kinds of law: under which head there are six points of inquiry: (1) Whether there is an eternal law? (2) Whether there is a natural law? (3) Whether there is a human law? (4) Whether there is a Divine law? (5) Whether there is one Divine law, or several? (6) Whether there is a law of sin? [*Ed. note*: articles 4–6 are omitted here.]

FIRST ARTICLE: WHETHER THERE IS AN ETERNAL LAW?

We proceed thus to the First Article:—

Objection 1. It would seem that there is no eternal law. Because every law is imposed on someone. But there was not someone from eternity on whom a law could be imposed: since God alone was from eternity. Therefore no law is eternal.

Obj. 2. Further, promulgation is essential to law. But promulgation could not be from eternity: because there was no one to whom it could be promulgated from eternity. Therefore no law can be eternal.

Obj. 3. Further, a law implies order to an end. But nothing ordained to an end is eternal: for the last end alone is eternal. Therefore no law is eternal.

On the contrary, Augustine says (*De Lib. Arb.* i. 6): *That Law which is the Supreme Reason cannot be understood to be otherwise than unchangeable and eternal.*

I answer that, As stated above (Q. 90, A. 1 *ad* 2; AA. 3, 4), a law is nothing else but a dictate of practical reason emanating from the ruler who governs a perfect community. Now it is evident, granted that the world is ruled by Divine Providence, as was stated in the First Part (Q. 22, AA. 1, 2), that the whole community of the universe is governed by Divine Reason. Wherefore the very Idea of the government of things in God the Ruler of the universe, has the nature of a law. And since the Divine Reason's conception of things is not subject to time but is eternal, according to Prov. viii. 23, therefore it is that this kind of law must be called eternal.

Reply Obj. 1. Those things that are not in themselves, exist with God, inasmuch as they are foreknown and preordained by Him, according to Rom. iv. 17: *Who calls those things that are not, as those that are.* Accordingly the eternal concept of the Divine law bears the character of an eternal law, in so far as it is ordained by God to the government of things foreknown by Him.

Reply Obj. 2. Promulgation is made by word of mouth or in writing; and in both ways the eternal law is promulgated: because both the Divine Word and the writing of the Book of Life are eternal. But the promulgation cannot be from eternity on the part of the creature that hears or reads.

Reply Obj. 3. The law implies order to the end actively, in so far as it directs certain things to the end; but not passively,—that is to say, the law itself is not ordained to the end,—except accidentally, in a governor whose end is extrinsic to him, and to which end his law must needs be ordained. But the end of the Divine government is God Himself, and His law is not distinct from Himself. Wherefore the eternal law is not ordained to another end.

SECOND ARTICLE: WHETHER THERE IS IN US A NATURAL LAW?

We proceed thus to the Second Article:—

Objection 1. It would seem that there is no natural law in us. Because man is governed sufficiently by the eternal law: for Augustine says (*De Lib. Arb.* i) that *the eternal law is that by which it is right that all things should be most orderly.* But nature does not abound in superfluities as neither does she fail in necessaries. Therefore no law is natural to man.

Obj. 2. Further, by the law man is directed, in his acts, to the end, as stated above (Q. 90, A. 2). But the directing of human acts to their end is not a function of nature, as is the case in irrational creatures, which act for an end solely by their natural appetite;

whereas man acts for an end by his reason and will. Therefore no law is natural to man.

Obj. 3. Further, the more a man is free, the less is he under the law. But man is freer than all the animals, on account of his free-will, with which he is endowed above all other animals. Since therefore other animals are not subject to a natural law, neither is man subject to a natural law.

On the contrary, A gloss on Rom. ii. 14: *When the Gentiles, who have not the law, do by nature those things that are of the law, comments as follows: Although they have no written law, yet they have the natural law, whereby each one knows, and is conscious of, what is good and what is evil.*

I answer that, As stated above (Q. 90, A. 1 *ad* 1), law, being a rule and measure, can be in a person in two ways: in one way, as in him that rules and measures; in another way, as in that which is ruled and measured, since a thing is ruled and measured, in so far as it partakes of the rule or measure. Wherefore, since all things subject to Divine providence are ruled and measured by the eternal law, as was stated above (A. 1); it is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law. Hence the Psalmist after saying (Ps. iv. 6): *Offer up the sacrifice of justice*, as though someone asked what the works of justice are, adds: *Many say, Who showeth us good things?* in answer to which question he says: *The light of Thy countenance, O Lord, is signed upon us*: thus implying that the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of Divine light. It is therefore evident that the natural law is nothing else than the rational creature's participation of the eternal law.

Reply Obj. 1. This argument would hold, if the natural law were something different from the eternal law: whereas it is nothing but a participation thereof, as stated above.

Reply Obj. 2. Every act of reason and will in us is based on that which is according to nature, as stated above (Q. 10, A. 1): for every act of reasoning is based on principles that are known naturally, and every act of appetite in respect of the means is derived from the natural appetite in respect of the last end. Accordingly the first direction of our acts to their end must needs be in virtue of the natural law.

Reply Obj. 3. Even irrational animals partake in their own way of the Eternal Reason, just as the rational creature does. But because the rational creature partakes thereof in an intellectual and rational manner, therefore the participation of the eternal law in the rational creature is properly called a law, since a law is something pertaining to reason, as stated above (Q. 90, A. 1). Irrational creatures, however, do not partake thereof in a rational manner, wherefore there is no participation of the eternal law in them, except by way of similitude.

THIRD ARTICLE: WHETHER THERE IS A HUMAN LAW?

We proceed thus to the Third Article:—

Objection 1. It would seem that there is not a human law. For the natural law is a participation of the eternal law, as stated above (A. 2). Now through the eternal law *all things are most orderly*, as Augustine states (*De Lib. Arb.* i. 6). Therefore the natural law suffices for the ordering of all human affairs. Consequently there is no need for a human law.

Obj. 2. Further, a law bears the character of a measure, as stated above (Q. 90, A. 1). But human reason is not a measure of things, but vice versa, as stated in *Metaph.* x, text. 5. Therefore no law can emanate from human reason.

Obj. 3. Further, a measure should be most certain, as stated in *Metaph.* x, text. 3. But the dictates of human reason in matters of conduct are uncertain, according to Wis. ix. 14: *The thoughts of mortal men are fearful, and our counsels uncertain.* Therefore no law can emanate from human reason.

On the contrary, Augustine (*De Lib. Arb.* 1.6) distinguishes two kinds of law, the one eternal, the other temporal, which he calls human.

I answer that, As stated above (Q. 90, A. 1 *ad* 2), a law is a dictate of the practical reason. Now it is to be observed that the same procedure takes place in the practical and in the speculative reason: for each proceeds from principles to conclusions, as stated above (*ibid.*). Accordingly we conclude that just as, in the speculative reason, from naturally known indemonstrable principles, we draw the conclusions of the various sciences, the knowledge of which is not imparted to us by nature, but acquired by the efforts of reason, so too it is from the precepts of the natural law, as from general and indemonstrable principles, that the human reason needs to proceed to the more particular determination of certain matters. These particular determinations, devised by human reason, are called human laws, provided the other essential conditions of law be observed, as stated above (Q. 90, AA. 2, 3, 4). Wherefore Tully says in his *Rhetoric* (*De Invent. Rhet.* ii) *that justice has its source in nature; thence certain things came into custom by reason of their utility; afterwards these things which emanated from nature and were approved by custom, were sanctioned by fear and reverence for the law.*

Reply Obj. 1. The human reason cannot have a full participation of the dictate of the Divine Reason, but according to its own mode, and imperfectly. Consequently, as on the part of the speculative reason, by a natural participation of Divine Wisdom, there is in us the knowledge of certain general principles, but not proper knowledge of each single truth, such as that contained in the Divine Wisdom; so too, on the part of the practical reason, man has a natural participation of the eternal law, according to certain general principles, but not as regards the particular determinations of individual cases, which are, however, contained in the eternal law. Hence the need for human reason to proceed further to sanction them by law.

Reply Obj. 2. Human reason is not, of itself, the rule of things: but the principles impressed on it by nature, are general rules and measures of all things relating to human conduct, whereof the natural reason is the rule and measure, although it is not the measure of things that are from nature.

Reply Obj. 3. The practical reason is concerned with practical matters, which are singular and contingent: but not with necessary things, with which the speculative reason is concerned. Wherefore human laws cannot have that inerrancy that belongs to the demonstrated conclusions of sciences. Nor is it necessary for every measure to be altogether unerring and certain, but according as it is possible in its own particular genus.

...

Question 94: Of the Natural Law (In Six Articles)

We must now consider the natural law; concerning which there are six points of inquiry: (1) What is the natural law? (2) What are the precepts of the natural law? (3) Whether all acts of virtue are prescribed by the natural law? (4) Whether the natural law is the same in all? (5) Whether it is changeable? (6) Whether it can be abolished from the heart of man? [*Ed. note*: article 3 is omitted here.]

FIRST ARTICLE: WHETHER THE NATURAL LAW IS A HABIT?

We proceed thus, to the First Article:—

Objection 1. It would seem that the natural law is a habit. Because, as the Philosopher says (*Ethic.* ii. 5), *there are three things in the soul, power, habit, and passion.* But the natural law is not one of the soul's powers: nor is it one of the passions; as we may see by going through them one by one. Therefore the natural law is a habit.

Obj. 2. Further, Basil says that the conscience or *synderesis is the law of our mind*; which can only apply to the natural law. But the *synderesis* is a habit, as was shown in the First Part (Q. 79, A. 12). Therefore the natural law is a habit.

Obj. 3. Further, the natural law abides in man always, as will be shown further on (A. 6). But man's reason, which the law regards, does not always think about the natural law. Therefore the natural law is not an act, but a habit.

On the contrary, Augustine says (*De Bono Conjug.* xxi) that *a habit is that whereby something is done when necessary*. But such is not the natural law: since it is in infants and in the damned who cannot act by it. Therefore the natural law is not a habit.

I answer that, A thing may be called a habit in two ways. First, properly and essentially: and thus the natural law is not a habit. For it has been stated above (Q. 90, A. 1 *ad* 2) that the natural law is something appointed by reason, just as a proposition is a work of reason. Now that which a man does is not the same as that whereby he does it: for he makes a becoming speech by the habit of grammar. Since then a habit is that by which we act, a law cannot be a habit properly and essentially.

Secondly, the term habit may be applied to that which we hold by a habit: thus faith may mean that which we hold by faith. And accordingly, since the precepts of the natural law are sometimes considered by reason actually, while sometimes they are in the reason only habitually, in this way the natural law may be called a habit. Thus, in speculative matters, the indemonstrable principles are not the habit itself whereby we hold these principles, but are the principles the habit of which we possess.

Reply Obj. 1. The Philosopher proposes there to discover the genus of virtue; and since it is evident that virtue is a principle of action, he mentions only those things which are principles of human acts, viz., powers, habits and passions. But there are other things in the soul besides these three: there are acts; thus to will is in the one that wills; again, things known are in the knower; moreover its own natural properties are in the soul, such as immortality and the like.

Reply Obj. 2. *Synderesis* is said to be the law of our mind, because it is a habit containing the precepts of the natural law, which are the first principles of human actions.

Reply Obj. 3. This argument proves that the natural law is held habitually; and this is granted.

To the argument advanced in the contrary sense we reply that sometimes a man is unable to make use of that which is in him habitually, on account of some impediment: thus, on account of sleep, a man is unable to use the habit of science. In like manner, through the deficiency of his age, a child cannot use the habit of understanding of principles, or the natural law, which is in him habitually.

SECOND ARTICLE: WHETHER THE NATURAL LAW CONTAINS SEVERAL PRECEPTS, OR ONE ONLY?

We proceed thus to the Second Article:—

Objection 1. It would seem that the natural law contains, not several precepts, but one only. For law is a kind of precept, as stated above (Q. 92, A. 2). If therefore there were many precepts of the natural law, it would follow that there are also many natural laws.

Obj. 2. Further, the natural law is consequent to human nature. But human nature, as a whole, is one; though, as to its parts, it is manifold. Therefore, either there is but one precept of the law of nature, on account of the unity of nature as a whole; or there are many, by reason of the number of parts of human nature. The result would be that even things relating to the inclination of the concupiscible faculty belong to the natural law.

Obj. 3. Further, law is something pertaining to reason, as stated above (Q. 90, A. 1). Now reason is but one in man. Therefore there is only one precept of the natural law.

On the contrary, The precepts of the natural law in man stand in relation to practical matters, as the first

principles to matters of demonstration. But there are several first indemonstrable principles. Therefore there are also several precepts of the natural law.

I answer that, As stated above (Q. 91, A. 3), the precepts of the natural law are to the practical reason, what the first principles of demonstrations are to the speculative reason; because both are self-evident principles. Now a thing is said to be self-evident in two ways: first, in itself; secondly, in relation to us. Any proposition is said to be self-evident in itself, if its predicate is contained in the notion of the subject: although, to one who knows not the definition of the subject, it happens that such a proposition is not self-evident. For instance, this proposition, *Man is a rational being*, is, in its very nature, self-evident, since who says *man*, says a *rational being*: and yet to one who knows not what a man is, this proposition is not self-evident. Hence it is that, as Boethius says (*De Hebdom.*), certain axioms or propositions are universally self-evident to all; and such are those propositions whose terms are known to all, as, *Every whole is greater than its part, and, Things equal to one and the same are equal to one another.* But some propositions are self-evident only to the wise, who understand the meaning of the terms of such propositions: thus to one who understands that an angel is not a body, it is self-evident that an angel is not circumscriptively in a place: but this is not evident to the unlearned, for they cannot grasp it.

Now a certain order is to be found in those things that are apprehended universally. For that which, before aught else, falls under apprehension, is *being*, the notion of which included in all things whatsoever a man apprehends. Wherefore the first indemonstrable principle is that the *same thing cannot be affirmed and denied at the same time*, which is based on the notion of *being* and *not-being*: and on this principle all others are based, as is stated in *Metaph.* iv, text 9. Now as *being* is the first thing that falls under the apprehension simply, so *good* is the first thing that falls under the apprehension of the practical reason, which is directed to action: since every agent acts for an end under the aspect of good. Consequently the first principle in the practical reason is one founded on the notion of good, viz., *that good is that which all things seek after.* Hence this is the first precept of law, that good is to be done and pursued, and evil is to be avoided. All other precepts of the natural law are based upon this: so that whatever the practical reason naturally apprehends as man's good, (or evil) belongs to the precepts of the natural law as something to be done or avoided.

Since, however, good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance. Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law. Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever a means of preserving human life, and warding off its obstacles, belongs to the natural law. Secondly, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law, *which nature has taught to all animals*, such as sexual intercourse, education of offspring and so forth. Thirdly, there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law; for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination.

Reply Obj. 1. All these precepts of the law of nature have the character of one natural law, inasmuch as they flow from one first precept.

Reply Obj. 2. All the inclinations of any parts whatsoever of human nature, e.g., of the concupiscible and irascible parts, in so far as they are ruled by reason, belong to the natural law, and are reduced to one first precept, as stated above: so that the precepts of the natural law are many in themselves, but are based on one common foundation.

Reply Obj. 3. Although reason is one in itself, yet it directs all things regarding man; so that whatever can be ruled by reason, is contained under the law of reason.

. . .

FOURTH ARTICLE: WHETHER THE NATURAL LAW IS THE SAME IN ALL MEN?

We proceed thus to the Fourth Article:—

Objection 1. It would seem that the natural law is not the same in all. For it is stated in the Decretals (*Dist.* i) that *the natural law is that which is contained in the Law and the Gospel*. But this is not common to all men; because, as it is written (Rom. x. 16), *all do not obey the gospel*. Therefore the natural law is not the same in all men.

Obj. 2. Further, *Things which are according to the law are said to be just*, as stated in *Ethic.* v. But it is stated in the same book that nothing is so universally just as not to be subject to change in regard to some men. Therefore even the natural law is not the same in all men.

Obj. 3. Further, as stated above (AA. 2, 3), to the natural law belongs everything to which a man is inclined according to his nature. Now different men are naturally inclined to different things; some to the desire of pleasures, others to the desire of honors, and other men to other things. Therefore there is not one natural law for all.

On the contrary, Isidore says (*Etym.* v.4): *The natural law is common to all nations.*

I answer that, As stated above (AA. 2, 3), to the natural law belongs those things to which a man is inclined naturally: and among these it is proper to man to be inclined to act according to reason. Now the process of reason is from the common to the proper, as stated in *Phys.* i. The speculative reason, however, is differently situated in this matter, from the practical reason. For, since the speculative reason is busied chiefly with necessary things, which cannot be otherwise than they are, its proper conclusions, like the universal principles, contain the truth without fail. The practical reason, on the other hand, is busied with contingent matters, about which human actions are concerned: and consequently, although there is necessity in the general principles, the more we descend to matters of detail, the more frequently we encounter defects. Accordingly then in speculative matters truth is the same in all men, both as to principles and as to conclusions: although the truth is not known to all as regards the conclusions, but only as regards the principles which are called common notions. But in matters of action, truth or practical rectitude is not the same for all, as to matters of detail, but only as to the general principles: and where there is the same rectitude in matters of detail, it is not equally known to all.

It is therefore evident that, as regards the general principles whether of speculative or of practical reason, truth or rectitude is the same for all, and is equally known by all. As to the proper conclusions of the speculative reason, the truth is the same for all, but is not equally known to all: thus it is true for all that the three angles of a triangle are together equal to two right angles, although it is not known to all. But as to the proper conclusions of the practical reason, neither is the truth or rectitude the same for all, nor, where it is the same, is it equally known by all. Thus it is right and true for all to act according to reason: and from this principle it follows as a proper conclusion, that goods entrusted to another should be restored to their owner. Now this is true for the majority of cases: but it may happen in a particular case that it would be injurious, and therefore unreasonable, to restore goods held in trust; for instance if they are claimed for the purpose of fighting against one's country. And this principle will be found to

fail the more, according as we descend further into detail, e.g., if one were to say that goods held in trust should be restored with such and such a guarantee, or in such and such a way; because the greater the number of conditions added, the greater the number of ways in which the principle may fail, so that it be not right to restore or not to restore.

Consequently we must say that the natural law, as to general principles, is the same for all, both as to rectitude and as to knowledge. But as to certain matters of detail, which are conclusions, as it were, of those general principles, it is the same for all in the majority of cases, both as to rectitude and as to knowledge; and yet in some few cases it may fail, both as to rectitude, by reason of certain obstacles (just as natures subject to generation and corruption fail in some few cases on account of some obstacle), and as to knowledge, since in some the reason is perverted by passion, or evil habit, or an evil disposition of nature; thus formerly, theft, although expressly contrary to the natural law, was not considered wrong among the Germans, as Julius Cæsar relates (*De Bello Gall.*vi).

Reply Obj. 1. The meaning of the sentence quoted is not that whatever is contained in the Law and the Gospel belongs to the natural law, since they contain many things that are above nature; but that whatever belongs to the natural law is fully contained in them. Wherefore Gratian, after saying that *the natural law is what is contained in the Law and the Gospel*, adds at once, by way of example, *by which everyone is commanded to do: to others as he would be done by.*

Reply Obj. 2. The saying of the Philosopher is to be understood of things that are naturally just, not as general principles, but as conclusions drawn from them, having rectitude in the majority of cases, but failing in a few.

Reply Obj. 3. As, in man, reason rules and commands the other powers, so all the natural inclinations belonging to the other powers must needs be directed according to reason. Wherefore it is universally right for all men, that all their inclinations should be directed according to reason.

FIFTH ARTICLE: WHETHER THE NATURAL LAW CAN BE CHANGED?

We proceed thus to the Fifth Article:—

Objection 1. It would seem that the natural law can be changed. Because on Ecclus, xvii. 9, *He gave them instructions, and the law of life*, the gloss says: *He wished the law of the letter to be written, in order to correct the law of nature.* But that which is corrected is changed. Therefore the natural law can be changed.

Obj. 2. Further, the slaying of the innocent, adultery, and theft are against the natural law. But we find these things changed by God: as when God commanded Abraham to slay his innocent son (Gen. xxii. 2); and when he ordered the Jews to borrow and purloin the vessels of the Egyptians (Exod. xii. 35); and when He commanded Osee to take to himself a *wife of fornications* (Osee i. 2). Therefore the natural law can be changed.

Obj. 3. Further, Isidore says (*Etym.* v.4) that *the possession of all things in common, and universal freedom, are matters of natural law.* But these things are seen to be changed by human laws. Therefore it seems that the natural law is subject to change.

On the contrary, It is said in the Decretals (*Dist.*v): *The natural law dates from the creation of the rational creature. It does not vary according to time, but remains unchangeable.*

I answer that, A change in the natural law may be understood in two ways. First, by way of addition. In this sense nothing hinders the natural law from being changed: since many things for the benefit of human life have been added over and above the natural law both by the Divine law and by human laws.

Secondly, a change in the natural law may be understood by way of subtraction, so that what previously was according to the natural law ceases to be so. In this sense, the natural law is altogether unchangeable in its first principles but in its secondary principles, which as we have said (A. 4), are certain detailed proximate conclusions drawn from the first principles, the natural law is not changed so that what it prescribes be not right in most cases.

But it may be changed in some particular cases of rare occurrence, through some special causes hindering the observance of such precepts, as stated above (A. 4).

Reply Obj. 1. The written law is said to be given for the correction of the natural law, either because it supplies what was wanting to the natural law; or because the natural law was perverted in the hearts of some men, as to certain matters, so that they esteemed those things good which are naturally evil; which perversion stood in need of correction.

Reply Obj. 2. All men alike, both guilty and innocent, die the death of nature which is inflicted by the power of God on account of original sin, according to 1 Kings ii. 6: *The Lord killeth and maketh alive*. Consequently by the command of God, death can be inflicted on any man, guilty or innocent, without any injustice whatever.—In like manner adultery is intercourse with another's wife; who is allotted to him by the law emanating from God. Consequently intercourse with any woman, by the command of God, is neither adultery nor fornication.—The same applies to theft, which is the taking of another's property. For whatever is taken by the command of God, to Whom all things belong, is not taken against the will of its owner, whereas it is in this that theft consists.—Nor is it only in human things, that whatever is commanded by God is right; but also in natural things, whatever is done by God, is, in some way, natural, as stated in the First Part (Q. 105, A. 6 *ad* 1).

Reply Obj. 3. A thing is said to belong to the natural law in two ways. First, because nature inclines thereto: e.g., that one should not do harm to another. Secondly, because nature did not bring in the contrary: thus we might say that for man to be naked is of the natural law, because nature did not give him clothes, but art invented them. In this sense; *the possession of all things in common and universal freedom* are said to be of the natural law, because, to wit, the distinction of possessions and slavery were not brought in by nature, but devised by human reason for the benefit of human life. Accordingly the law of nature was not changed in this respect, except by addition.

SIXTH ARTICLE: WHETHER THE LAW OF NATURE CAN BE ABOLISHED FROM THE HEART OF MAN?

We proceed thus to the Sixth Article:—

Objection 1. It would seem that the natural law can be abolished from the heart of man. Because on Rom. ii. 14, *When the Gentiles who have not the law*, etc., a gloss says that *the law of righteousness, which sin had blotted out, is graven on the heart of man when he is restored by grace.* But the law of righteousness is the law of nature. Therefore the law of nature can be blotted out.

Obj. 2. Further, the law of grace is more efficacious than the law of nature. But the law of grace is blotted out by sin. Much more therefore can the law of nature be blotted out.

Obj. 3. Further, that which is established by law is made just. But many things are enacted by men, which are contrary to the law of nature. Therefore the law of nature can be abolished from the heart of man.

On the contrary, Augustine says (*Conf.* ii): *Thy law is written in the hearts of men, which iniquity itself effaces not*. But the law which is written in men's hearts is the natural law. Therefore the natural law cannot be blotted out.

I answer that, As stated above (AA. 4, 5), there belong to the natural law, first, certain most general precepts, that are known to all; and secondly, certain secondary and more detailed precepts; which are, as it were, conclusions following closely from first principles. As to those general principles, the natural law, in the abstract, can nowise be blotted out from men's hearts. But it is blotted out in the case of a particular action, in so far as reason is hindered from applying the general principle to a particular point of practice, on account of concupiscence or some other passion, as stated above (Q. 77, A. 2).—But as to the other, i.e., the secondary precepts, the natural law can be blotted out from the human heart, either by evil persuasions, just as in speculative matters errors occur in respect of necessary conclusions; or by vicious customs and corrupt habits, as among

some men, theft, and even unnatural vices, as the Apostle states (Rom. i), were not esteemed sinful.

Reply Obj. 1. Sin blots out the law of nature in particular cases, not universally, except perchance in regard to the secondary precepts of the natural law, in the way stated above.

Reply Obj. 2. Although grace is more efficacious than nature, yet nature is more essential to man, and therefore more enduring.

Reply Obj. 3. This argument is true of the secondary precepts of the natural law, against which some legislators have framed certain enactments which are unjust.

Question 95: Of Human Law (In Four Articles)

We must now consider human law; and (1) this law considered in itself; (2) its power; (3) its mutability. Under the first head there are four points of inquiry: (1) Its utility. (2) Its origin. (3) Its quality. (4) Its division. [*Ed. note*: only Article 2 is included here.]

SECOND ARTICLE: WHETHER EVERY HUMAN LAW IS DERIVED FROM THE NATURAL LAW?

We proceed thus to the Second Article:—

Objection 1. It would seem that not every human law is derived from the natural law. For the Philosopher says (*Ethic.* v. 7) *that the legal just is that which originally was a matter of indifference*. But those things which arise from the natural law are not matters of indifference. Therefore the enactments of human laws are not all derived from the natural law.

Obj. 2. Further, positive law is contrasted with natural law, as stated by Isidore (*Etym.* v. 4) and the Philosopher (*Ethic.* v, *loc. cit.*). But those things which flow as conclusions from the general principles of the natural law belong to the natural law, as stated above (Q. 94, A. 4). Therefore that which is established by human law does not belong to the natural law.

Obj. 3. Further, the law of nature is the same for all; since the Philosopher says (*Ethic.* v. 7) that *the natural just is that which is equally valid everywhere*. If therefore human laws were derived from the natural law, it would follow that they too are the same for all: which is clearly false.

Obj. 4. Further, it is possible to give a reason for things which are derived from the natural law. But *it is not possible to give the reason for all the legal enactments of the law-givers*, as the jurist says. Therefore not all human laws are derived from the natural law.

On the contrary, Tully says (*Rhetor.* ii): Things which emanated from nature and were approved by custom, were sanctioned by fear and reverence for the laws.

I answer that, As Augustine says (*De Lib. Arb.* i. 5), *that which is not just seems to be no law at all*: wherefore the force of a law depends on the extent of its justice. Now in human affairs a thing is said to be just, from being right, according to the rule of reason. But the first rule of reason is the law of nature, as is clear from what has been stated above (Q. 91, A. 2 *ad* 2). Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.

But it must be noted that something may be derived from the natural law in two ways: first, as a conclusion from premises, secondly, by way of determination of certain generalities. The first way is like to that by which, in sciences, demonstrated conclusions are drawn from the principles: while the second mode is likened to that whereby, in the arts, general forms are particularized as to details: thus the craftsman needs to determine the general form of a house to some particular shape. Some things are therefore derived from the general principles of the natural law, by way of conclusions; e.g., that *one must not kill* may be derived as a conclusion from the principle that *one should do harm to no man*: while some are derived therefrom by way of determination; e.g., the law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a determination of the law of nature.

Accordingly both modes of derivation are found in the human law. But those things which are derived in the first way, are contained in human law not as emanating therefrom exclusively, but have some force from the natural law also. But those things which are derived in the second way, have no other force than that of human law.

Reply Obj. 1. The Philosopher is speaking of those enactments which are by way of determination or specification of the precepts of the natural law.

Reply Obj. 2. This argument avails for those things that are derived from the natural law, by way of conclusions.

Reply Obj. 3. The general principles of the natural law cannot be applied to all men in the same way on account of the great variety of human affairs: and hence arises the diversity of positive laws among various people.

Reply Obj. 4. These words of the Jurist are to be understood as referring to decisions of rulers in determining particular points of the natural law: on which determinations the judgment of expert and prudent men is based as on its principles; in so far, to wit, as they see at once what is the best thing to decide.

Hence the Philosopher says (*Ethic.* vi. 11) that in such matters, *we ought to pay as much attention to the undemonstrated sayings and opinions of persons who surpass us in experience, age and prudence, as to their demonstrations.*

. . .

Question 96: Of the Power of Human Law (In Six Articles)

We must now consider the power of human law. Under this head there are six points of inquiry: (1) Whether human law should be framed for the community? (2) Whether human law should repress all vices? (3) Whether human law is competent to direct all acts of virtue? (4) Whether it binds man in conscience? (5) Whether all men are subject to human law? (6) Whether those who are under the law may act beside the letter of the law? [*Ed. note*: only Article 4 is included here.]

FOURTH ARTICLE: WHETHER HUMAN LAW BINDS A MAN IN CONSCIENCE?

We proceed thus to the Fourth Article:—

Objection 1. It would seem that human law does not bind a man in conscience. For an inferior power has no jurisdiction in a court of higher power. But the power of man, which frames human law, is beneath the Divine power. Therefore human law cannot impose its precept in a Divine court, such as is the court of conscience.

Obj. 2. Further, the judgment of conscience depends chiefly on the commandments of God. But sometimes God's commandments are made void by human laws, according to Matth. xv. 6: *You have made void the commandment of God for your tradition.* Therefore human law does not bind a man in conscience.

Obj. 3. Further, human laws often bring loss of character and injury on man, according to Isa. x. 1 *et seq.*: *Woe to them that make wicked laws, and when they write, write injustice; to oppress the poor in judgment, and do violence to the cause of the humble of My people.* But it is lawful for anyone to avoid oppression and violence. Therefore human laws do not bind man in conscience.

On the contrary, It is written (1 Pet. ii. 19): *This is thankworthy, if for conscience . . . a man endure sorrows, suffering wrongfully.*

I answer that, Laws framed by man are either just or unjust. If they be just, they have the power of binding in conscience, from the eternal law whence they are derived, according to Prov. viii. 15: *By Me kings reign; and lawgivers decree just things.* Now laws are said to be just, both from the end, when, to wit, they are ordained to the common good;—and from their author, that is to say, when the law that is made does not exceed the power of the lawgiver,—and from their form, when, to wit, burdens are laid on the subjects, according to an equality of proportion

and with a view to the common good. For, since one man is a part of the community, each man in all that he is and has, belongs to the community; just as a part, in all that it is, belongs to the whole; wherefore nature inflicts a loss on the part, in order to save the whole: so that on this account, such laws as these, which impose proportionate burdens, are just and binding in conscience, and are legal laws.

On the other hand laws may be unjust in two ways: first, by being contrary to human good, through being opposed to the things mentioned above:—either in respect of the end, as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory;—or in respect of the author, as when a man makes a law that goes beyond the power committed to him;—or in respect of the form, as when burdens are imposed unequally on the community, although with a view to the common good. The like are acts of violence rather than laws; because, as Augustine says (*De Lib. Arb.* i. 5), *a law that is not just, seems to be no law at all.* Wherefore such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance; for which cause a man should even yield his right, according to Matth. v. 40, 41: *If a man take away thy coat, let go thy cloak also unto him; and whosoever will force thee one mile, go with him another two.*

Secondly, laws may be unjust through being opposed to the Divine good: such are the laws of tyrants inducing to idolatry, or to anything else contrary to the Divine law: and laws of this kind must nowise be observed, because, as stated in Acts v. 29, *we ought to obey God rather than men.*

Reply Obj. 1. As the Apostle says (Rom. xiii, 1, 2), all human power is from God . . . *therefore he that resisteth the power*, in matters that are within its scope, *resisteth the ordinance of God*; so that he becomes guilty according to his conscience.

Reply Obj. 2. This argument is true of laws that are contrary to the commandments of God, which is beyond the scope of (human) power. Wherefore in such matters human law should not be obeyed.

Reply Obj. 3. This argument is true of a law that inflicts unjust hurt on its subjects. The power that man holds from God does not extend to this: wherefore neither in such matters is man bound to obey the law, provided he avoid giving scandal or inflicting a more grievous hurt.

John Finnis

from *Natural Law and Natural Rights*[1]

I. Evaluation and the Description of Law

I.1 THE FORMATION OF CONCEPTS FOR DESCRIPTIVE SOCIAL SCIENCE

There are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy. It is the object of this book to identify those goods, and those requirements of practical reasonableness, and thus to show how and on what conditions such institutions are justified and the ways in which they can be (and often are) defective.

It is often supposed that an evaluation of law as a type of social institution, if it is to be undertaken at all, must be preceded by a value-free description and analysis of that institution as it exists in fact. But the development of modern jurisprudence suggests, and reflection on the methodology of any social science confirms, that a theorist cannot give a theoretical description and analysis of social facts, unless he also participates in the work

1 *Ed. note*: In his argument Finnis frequently refers to parts of his book which are not included in this excerpt; however, these references have been left in the excerpted text in the interest of its completeness as a resource for further exploration of the full text of *Natural Law and Natural Rights*.

of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.

A social science, such as analytical or sociological jurisprudence, seeks to describe, analyse, and explain some object or subject-matter. This object is constituted by human actions, practices, habits, dispositions and by human discourse. The actions, practices, etc., are certainly influenced by the "natural" causes properly investigated by the methods of the natural sciences, including a part of the science of psychology. But the actions, practices, etc., can be fully understood only by understanding their point, that is to say their objective, their value, their significance or importance, as conceived by the people who performed them, engaged in them, etc. And these conceptions of point, value, significance, and importance will be reflected in the discourse of those same people, in the conceptual distinctions they draw and fail or refuse to draw. Moreover, these actions, practices, etc., and correspondingly these concepts, vary greatly from person to person, from one society to another, from one time and place to other times and places. *How, then, is there to be a general descriptive theory of these varying particulars?*

A theorist wishes to describe, say, law as a social institution. But the conceptions of law (and of *jus, lex, droit*, *nomos*,…) which people have entertained, and have used to shape their own conduct, are quite varied. The subject-matter of the theorist's description does not come neatly demarcated from other features of social life and practice. Moreover, this social life and practice bears labels in many languages. The languages can be learned by speakers of other languages, but the principles on which labels are adopted and applied—i.e., the practical concerns and the self-interpretations of the people whose conduct and dispositions go to make up the theorist's subject-matter—are not uniform. Can the theorist do more, then, than list these varying conceptions and practices and their corresponding labels? Even a list requires some principle of selection of items for inclusion in the list. And jurisprudence, like other social sciences, aspires to be more than a conjunction of lexicography with local history, or even than a juxtaposition of all lexicographies conjoined with all local histories.…

…

1.5 THE THEORY OF NATURAL LAW

Bentham, Austin, Kelsen, Weber, Hart, and Raz all published stern repudiations of what they understood to be the theory of natural law; and Fuller carefully dissociated himself from that theory in its classical forms. But the theoretical work of each of these writers was controlled by the adoption, on grounds left inexplicit and inadequately justified, of some practical viewpoint as the standard of relevance and significance in the construction of his descriptive analysis. A sound theory of natural law is one that explicitly, with full awareness of the methodological situation just described, undertakes a critique of practical viewpoints, in order to distinguish the practically unreasonable from the practically reasonable, and thus to differentiate the really important from that which is unimportant or is important only by its opposition to or unreasonable exploitation of the really important. A theory of natural law claims to be able to identify conditions and principles of practical right-mindedness, of good and proper order among men and in individual conduct. Unless some such claim is justified, analytical jurisprudence in particular and (at least the major part of) all the social sciences in general can have no critically justified criteria for the formation of general concepts, and must be content to be no more than manifestations of the various concepts peculiar to particular peoples and/or to the particular theorists who concern themselves with those people.

A theory of natural law need not be undertaken primarily for the purpose of thus providing a justified conceptual framework for descriptive social science. It may be undertaken, as this book is, pri-

marily to assist the practical reflections of those concerned to act, whether as judges or as statesmen or as citizens. But in either case, the undertaking cannot proceed securely without a knowledge of the whole range of human possibilities and opportunities, inclinations and capacities, a knowledge that requires the assistance of descriptive and analytical social science. There is thus a mutual though not quite symmetrical interdependence between the project of describing human affairs by way of theory and the project of evaluating human options with a view, at least remotely, to acting reasonably and well. The evaluations are in no way deduced from the descriptions (see II.4); but one whose knowledge of the facts of the human situation is very limited is unlikely to judge well in discerning the practical implications of the basic values. Equally, the descriptions are not deduced from the evaluations; but without the evaluations one cannot determine what descriptions are really illuminating and significant.

. . .

II. Images and Objections

II.1 NATURAL LAW AND THEORIES OF NATURAL LAW

What are *principles of natural law*? The sense that the phrase "natural law" has in this book can be indicated in the following rather bald assertions, formulations which will seem perhaps empty or question-begging until explicated in Part Two: There is (i) a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realized, and which are in one way or another used by everyone who considers what to do, however unsound his conclusions; and (ii) a set of basic methodological requirements of practical reasonableness (itself one of the basic forms of human flourishing) which distinguish sound from unsound practical thinking and which, when all brought to bear, provide the criteria for distinguishing between acts that (always or in particular circumstances) are reasonable-all-things-considered (and not merely relative-to-a-particular purpose) and acts that are unreasonable-all-things-considered, i.e., between ways of acting that are morally right or morally wrong thus enabling one to formulate (iii) a set of general moral standards.

To avoid misunderstandings about the scope of our subject-matter in this book, I should add here that the principles of natural law, thus understood, are traced out not only in moral philosophy or ethics and "individual" conduct, but also in political philosophy and jurisprudence, in political action, adjudication, and the life of the citizen. For those principles justify the exercise of authority in community. They require, too, that that authority be exercised, in most circumstances, according to the manner conveniently labelled the Rule of Law, and with due respect for the human rights which embody the requirements of justice, and for the purpose of promoting a common good in which such respect for rights is a component. More particularly, the principles of natural law explain the obligatory force (in the fullest sense of "obligation") of positive laws, even when those laws cannot be deduced from those principles. And attention to the principles, in the context of these explanations of law and legal obligation, justifies regarding certain positive laws as radically defective, *precisely as laws*, for want of conformity to those principles.

My present purpose, however, is not to anticipate later chapters, but to make some preliminary clarifications. A first essential distinction is that between a theory, doctrine, or account and the subject-matter of that theory, doctrine, or account. There can be a history of theories, doctrines, and accounts of matters that have no history. And principles of natural law, in the sense formulated in the two preceding paragraphs, have no history.

Since I have yet to show that there are indeed any principles of natural law, let me put the point conditionally. Principles of this sort would hold good, as principles, however extensively they were overlooked,

misapplied, or defied in practical thinking, and however little they were recognized by those who reflectively theorize about human thinking. That is to say, they would "hold good" just as the mathematical principles of accounting "hold good" even when, as in the medieval banking community, they are unknown or misunderstood. So there could be a history of the varying extent to which they have been used by people, explicitly or implicitly, to regulate their personal activities. And there could be a history of the varying extent to which reflective theorists have acknowledged the sets of principles as valid or "holding good." And there could be a history of the popularity of the various theories offered to explain the place of those principles in the whole scheme of things. But of natural law itself there could, strictly speaking, be no history.

Natural law could not rise, decline, be revived, or stage "eternal returns." It could not have historical achievements to its credit. It could not be held responsible for disasters of the human spirit or atrocities of human practice.

But there is a history of the opinions or set of opinions, theories, and doctrines which assert that there are principles of natural law, a history of origins, rises, declines and falls, revivals and achievements, and of historical responsibilities. Anyone who thinks there really are no such principles will consider that a book about natural law must be a book about mere opinions, and that the principal interest of those opinions is their historical causes and effects. But anyone who considers that there are principles of natural law, in the sense already outlined, ought to see the importance of maintaining a distinction between discourse about natural law and discourse about a doctrine or doctrines of natural law. Unhappily, people often fail to maintain the distinction.[1]

1 Notable examples of this failure include A.P. D'Entrèves, *Natural Law* (London: 1951, rev. ed. 1970), e.g., pp. 13, 18, 22, etc.; Julius Stone, *Human Law and Human Justice* (London: 1965), chs. 2 and 7.

This is a book about natural law. It expounds or sets out a theory of natural law, but is not *about* that theory. Nor is it about other theories. It refers to other theories only to illuminate the theory expounded here, or to explain why some truths about natural law have at various times and in various ways been overlooked or obscured. The book does not enter into discussions about whether natural law doctrines have exerted a conservative or radical influence on Western politics, or about the supposed psychological (infantile)[2] origins of such doctrines, or about the claim that some or all specific natural law doctrines are asserted hypocritically,[3] arrogantly,[4] or as a disguise or vehicle for expressions of ecclesiastical faith. For none of these discussions has any real bearing on the question whether there is a natural law and, if so, what its content is. Equally irrelevant to that question is the claim that disbelief in natural law yields bitter fruit. Nothing in this book is to be interpreted as either advancing or denying such claims; the book simply prescinds from all such matters.

II.2 LEGAL VALIDITY AND MORALITY

The preceding section treated theories of natural law as theories of the rational foundations for moral judgment, and this will be the primary focus of subsequent sections of this chapter. But in the present section I consider the more restricted and juristic understanding of "natural law" and "natural law doctrine(s)."

Here we have to deal with the image of natural law entertained by jurists such as Kelsen, Hart, and Raz. This image should be reproduced in their own words, since they themselves scarcely identify, let alone quote from, any particular theorist as defend-

2 See Alf Ross, *On Law and Justice* (London: 1958), pp. 258, 262–63.

3 See Wolfgang Friedmann, letter (1953) 31 *Canadian Bar Rev.* 1074 at 1075.

4 See Wolfgang Friedmann, review (1958) 3 *Nat. L.F.* 208 at 210; also Hans Kelsen, *Allgemeine Staatslehre* (Berlin: 1925), p. 335, on "natural law naivety or arrogance" (in the passage, omitted from the 1945 English translation (*General Theory*, cf. p. 300), about the fully legal character of despotism).

ing the view that they describe as the view of natural law doctrine. Joseph Raz usefully summarizes and adopts Kelsen's version of this image:

> Kelsen correctly points out that according to natural law theories there is no specific notion of legal validity. The only concept of validity is validity according to natural law, i.e., moral validity. Natural lawyers can only judge a law as morally valid, that is, just or morally invalid, i.e., wrong. They cannot say of a law that it is legally valid but morally wrong. If it is wrong and unjust, it is also invalid in the only sense of validity they recognise.[1]

In his own terms, Raz later defines "Natural Law theorists" as "those philosophers who think it a criterion of adequacy for theories of law that they show . . . that it is a necessary truth that every law has moral worth."[2]

For my part, I know of no philosopher who fits, or fitted, such a description, or who would be committed to trying to defend that sort of theoretical or meta-theoretical proposal.

. . .

[*Ed. note*: Having rejected Raz's characterization of natural law theory, Finnis explains his understanding of natural law. The next excerpt demonstrates the style of his reasoning about the basic good of "knowledge." What is important here is that Finnis supposes "knowledge" is *self-evidently* good and so is a "given" in deliberations about conduct. We will not examine Finnis's full discussion of the seven basic forms of the human good: life, knowledge, play, aesthetic experience, friendship, practical reasonableness, and "religion." We will turn instead to Finnis's discussion of what "practical reasonableness" requires us to do as we pursue these basic goods.]

III. A Basic Form of Good: Knowledge

III.1 AN EXAMPLE

Neither this chapter nor the next makes or presupposes any moral judgments. Rather, these two chapters concern the evaluative substratum of all moral judgments. That is to say, they concern the acts of practical understanding in which we grasp the basic values of human existence and thus, too, the basic principles of all practical reasoning.

The purpose of this chapter, in particular, is to illustrate (i) what I mean by "basic value" and "basic practical principle," (ii) how such values and principles enter into any consideration of good reasons for action and any full description of human conduct, and (iii) the sense in which such basic values are obvious ("self-evident"), and even unquestionable. For this purpose, I discuss only one basic value, leaving to the next chapter the identification of the other forms of human good that, so far as I can see, are likewise irreducibly basic.

The example of a basic value to be examined now is: knowledge. Perhaps it would be more accurate to call it "speculative knowledge," using the term "speculative" here, not to make the Aristotelian distinction between the *theoretike* and the *praktike*, but to distinguish knowledge as sought for its own sake from knowledge as sought only instrumentally, i.e., as useful in the pursuit of some other objective, such as survival, power, popularity, or a money-saving cup of coffee. Now "knowledge," unlike "belief," is an achievement-word; there are true beliefs and false beliefs, but knowledge is of truth. So one could

1 Raz, "Kelsen's Theory of the Basic Norm" (1974)19 *Am. J. Juris.* 94 at p. 100.

2 *Practical Reason*, p. 162. This formulation corresponds to the contradictory of the characterization of "Legal Positivism" constructed by Hart in order to define "the issue between Natural Law and Legal Positivism": *Concept of Law*, p. 181. See also *Practical Reason*, pp. 155, 162; all these formulations seem to be intended by Raz to apply equally to "definitional" and "derivative" approach theories of natural law. (Since no one uses the "definitional" approach, there is no need to inquire into the value of the supposed distribution between "definitional" and "derivative" approaches.)

speak of truth as the basic good with which we are here concerned, for one can just as easily speak of "truth for its own sake" as of "knowledge for its own sake." In any event, truth is not a mysterious abstract entity; we want the truth when we want the judgments in which we affirm or deny propositions to be true judgments, or (what comes to the same) want the propositions affirmed or denied, or to be affirmed or denied, to be true propositions. So, to complete the explanation of what is meant by the knowledge under discussion here, as distinct from instrumental knowledge, I can add that the distinction I am drawing is not between one set of propositions and another. It is not a distinction between fields of knowledge. Any proposition, whatever its subject-matter, can be inquired into (with a view to affirming or denying it) in either of the two distinct ways, (i) instrumentally or (ii) out of curiosity, the pure desire to know, to find out the truth about it simply out of an interest in or concern for truth and a desire to avoid ignorance or error as such.

This chapter, then, is an invitation to reflect on one form of human activity, the activity of trying to find out, to understand, and to judge matters correctly. This is not, perhaps, the easiest activity to understand; but it has the advantage of being the activity which the reader himself is actually engaged in. But if it seems too abstruse and tricky to try to understand this form of activity reflectively (i.e., by reflecting on one's attempt to understand and assess the truth of this chapter itself), one can reflect on any other exercise of curiosity. One could consider, for example, the wide-ranging effort of historical inquiry involved in discovering the actual intentions of the principal authors of the Statute of Uses (1536) or of the Fourteenth Amendment of the US Constitution (1866). Or something more humble (like weighing the truth of some gossipy rumour), or more "scientific"—it makes no difference, for present purposes.

…

V. The Basic Requirements of Practical Reasonableness

V.1 THE GOOD OF PRACTICAL REASONABLENESS STRUCTURES OUR PURSUIT OF GOODS

There is no reason to doubt that each of the basic aspects of human well-being is worth seeking to realize. But there are many such basic forms of human good; I identified seven. And each of them can be participated in, and promoted, in an inexhaustible variety of ways and with an inexhaustible variety of combinations of emphasis, concentration, and specialization. To participate thoroughly in any basic value calls for skill, or at least a thoroughgoing commitment. But our life is short.

By disclosing a horizon of attractive possibilities for us, our grasp of the basic values thus creates, not answers, the problem for intelligent decision: What is to be done? What may be left undone? What is not to be done? We have, in the abstract, no reason to leave any of the basic goods out of account. But we do have good reason to choose commitments, projects, and actions, knowing that choice effectively rules out many alternative reasonable or possible commitment(s), project(s), and action(s).

To have this choice between commitment to concentration upon one value (say, speculative truth) and commitment to others, and between one intelligent and reasonable project (say, understanding this book) and other eligible projects for giving definite shape to one's participation in one's selected value, and between one way of carrying out that project and other appropriate ways, is the primary respect in which we can call ourselves both free and responsible.

For amongst the basic forms of good that we have no good reason to leave out of account is the good of practical reasonableness, which is participated in precisely by shaping one's participation in the other basic goods, by guiding one's commitments, one's selection of projects, and what one does in carrying them out.

The principles that express the general ends of human life do not acquire what would nowadays be called a "moral" force until they are brought to bear upon definite ranges of project, disposition, or action, or upon particular projects, dispositions, or actions. How they are thus to be brought to bear is the problem for practical reasonableness. "Ethics," as classically conceived, is simply a recollectively and/or prospectively reflective expression of this problem and of the general lines of solutions which have been thought reasonable.

How does one tell that a decision is practically reasonable? This question is the subject-matter of the present chapter. The classical exponents of ethics (and of theories of natural law) were well aware of this problem of criteria and standards of judgment. They emphasize that an adequate response to that problem can be made only by one who has experience (both of human wants and passions and of the conditions of human life) and intelligence and a desire for reasonableness stronger than the desires that might overwhelm it. Even when, later, Thomas Aquinas clearly distinguished a class of practical principles which he considered self-evident to anyone with enough experience and intelligence to understand the words by which they are formulated, he emphasized that moral principles such as those in the Ten Commandments are *conclusions from* the primary self-evident principles, that reasoning to such conclusions requires good judgment, and that there are many other more complex and particular moral norms to be followed and moral judgments and decisions to be made, all requiring a degree of practical wisdom which (he says) few men in fact possess: II.3, above.

Now, you may say, it is all very well for Aristotle to assert that ethics can be satisfactorily expounded only by and to those who are experienced and wise and indeed of good habits,[1] and that these characteristics are only likely to be found in societies that already have sufficiently sound standards of conduct,[2] and that the popular morality of such societies (as crystallized and detectable in their language of praise and blame, and their lore) is a generally sound pointer in the elaboration of ethics.[3] He may assert that what is right and morally good is simply *seen* by the man (the *phronimos*, or again the *spoudaios*) who is right minded and morally good,[4] and that what such a man thinks and does *is* the criterion of sound terminology and correct conclusions in ethics (and politics).[5] Such assertions can scarcely be denied. But they are scarcely helpful to those who are wondering whether their own view of what is to be done is a reasonable view *or not*. The notion of "the mean," for which Aristotle is perhaps too well known, seems likewise to be accurate but not very helpful (though its classification of value-words doubtless serves as a reminder of the dimensions of the moral problem). For what is "the mean and best, that is characteristic of virtue"? It is "to feel [anger, pity, appetite, etc.] when one ought to, and in relation to the objects and persons that one ought to, and with the motives and in the manner that one ought to. . . ."[6] Have we no more determinate guide than this?

In the two millennia since Plato and Aristotle initiated formal inquiry into the content of practical reasonableness, philosophical reflection has identified a considerable number of requirements of *method* in practical reasoning. Each of these requirements has, indeed, been treated by some philosopher with exaggerated respect, as if it were the exclusive controlling and shaping requirement. For, as with each of the basic forms of good, each of these requirements is fundamental, underived,

1 *Nic. Eth.* I, 3: 1095a7–11; 4: 1095b5–13; X, 9: 1179b27–30.

2 *Nic. Eth.* X, 9: 1179b27–1180a5.

3 See *Nic. Eth.* VI, 5: 1140a24–25; II, 5: 1105b30–31; III, 6: 1115a20; III, 10:1117b32; cf. X, 2: 1173a1.

4 *Nic. Eth.* VI, 11: 1143a35–1143b17.

5 *Nic. Eth.* X, 10: 1176a17–18; cf. III, 6: 1113a33; IX, 4: 1166a12–13: see also I.4, above.

6 *Nic. Eth.* II, 6: 1106b21–24.

irreducible, and hence is capable when focused upon of seeming the most important.

Each of these requirements concerns what one *must* do, or think, or be if one is to participate in the basic value of practical reasonableness. Someone who lives up to these requirements is thus Aristotle's *phronimos*; he has Aquinas's *prudentia*; they are requirements of reasonableness or practical wisdom, and to fail to live up to them is irrational. But, secondly, reasonableness both *is* a basic aspect of human well-being and *concerns* one's participation in all the (other) basic aspects of human well-being. Hence its requirements concern fullness of well-being (in the measure in which any one person can enjoy such fullness of well-being in the circumstances of his lifetime). So someone who lives up to these requirements is also Aristotle's *spoudaios* (mature man), his life is *eu zen* (well-living) and, unless circumstances are quite against him, we can say that he has Aristotle's *eudaimonia* (the inclusive all-round flourishing or well-being—not safely translated as "happiness"). But, thirdly, the basic forms of good are opportunities of *being*; the more fully a man participates in them the more he is what he can be. And for this state of being fully what one can be, Aristotle appropriated the word *physis*, which was translated into Latin as *natura* (cf. XIII.l, below). So Aquinas will say that these requirements are requirements not only of reason, and of goodness, but also (by entailment) of (human) nature: II.4, above.

Thus, speaking very summarily, we could say that the requirements to which we now turn express the "natural law method" of working out the (moral) "natural law" from the first (pre-moral) "principles of natural law." Using only the modern terminology (itself of uncertain import) of "morality," we can say that the following sections of this chapter concern the sorts of reasons why (and thus the ways in which) there are things that morally ought (not) to be done.

V.2 A COHERENT PLAN OF LIFE

First, then, we should recall that, though they correspond to urges and inclinations which can make themselves felt prior to any intelligent consideration of what is worth pursuing, the basic aspects of human well-being are discernible only to one who thinks about his opportunities, and thus are realizable only by one who intelligently directs, focuses, and controls his urges, inclinations, and impulses. In its fullest form, therefore, the first requirement of practical reasonableness is what John Rawls calls a rational plan of life.[1] Implicitly or explicitly one must have a harmonious set of purposes and orientations, not as the "plans" or "blueprints" of a pipe-dream, but as effective commitments. (Do not confuse the adoption of a set of basic personal or social commitments with the process, imagined by some contemporary philosophers, of "choosing basic values"!) It is unreasonable to live merely from moment to moment, following immediate cravings, or just drifting. It is also irrational to devote one's attention exclusively to specific projects which can be carried out completely by simply deploying defined means to defined objectives. Commitment to the practice of medicine (for the sake of human life), or to scholarship (for the sake of truth), or to any profession, or to a marriage (for the sake of friendship and children) . . . all require both direction and control of impulses, and the undertaking of specific projects; but they also require the redirection of inclinations, the reformation of habits, the abandonment of old and adoption of new projects, as circumstances require, and, overall, the harmonization of all one's deep commitments for which there is no recipe or blueprint, since basic aspects of human good are not like the definite objectives of particular projects, but are *participated in* (see III.3, above).

As Rawls says, this first requirement is that we should "see our life as one whole, the activities of one

1 *Theory of Justice*, pp. 408–23, adopting the terminology of W.F.R. Hardie, "The Final Good in Aristotle's Ethics" (1965) 60 *Philosophy* 277.

rational subject spread out in time. Mere temporal position, or distance from the present, is not a reason for favouring one moment over another."[1] But since human life is in fact subject to all manner of unforeseeable contingencies, this effort to "see" our life as one whole is a rational effort only if it remains on the level of general commitments, and the harmonizing of them. Still, generality is not emptiness (as one can confirm for oneself by contrasting any of the basic forms of good, which as formulated in the "substantive" practical principles are quite general, with their opposites). So, in every age, wise men have counselled "in whatever you do remember your last days" (Ecclesiasticus 7:36), not so much to emphasize the importance of the hour of death in relation to a life hereafter, but rather to establish the proper perspective for choosing how to live one's present life. For, from the imagined and heuristically postulated standpoint of the still unknown time of one's death, one can see that many sorts of choices would be irrational, a waste of opportunities, meaningless, a failure, a shame. So the Christian parable of the man who devoted all his energies to gathering riches, with a view to nothing more than drinking and eating them up, makes its "moral" point by appealing to the intelligence by which we discern folly: "*You fool!* This night your life shall be required of you. Then whose shall that wealth be which you have heaped together?" (Luke 12:20).

The content and significance of this first requirement will be better understood in the light of the other requirements. For indeed, all the requirements are interrelated and capable of being regarded as aspects one of another.

V.3 NO ARBITRARY PREFERENCES AMONGST VALUES

Next, there must be no leaving out of account, or arbitrary discounting or exaggeration, of any of the basic human values. Any commitment to a coherent plan of life is going to involve some degree of concentration on one or some of the basic forms of good, at the expense, temporarily or permanently, of other forms of good: IV.4. But the commitment will be rational only if it is on the basis of one's assessment of one's capacities, circumstances, and even of one's tastes. It will be unreasonable if it is on the basis of a devaluation of any of the basic forms of human excellence, or if it is on the basis of an overevaluation of such merely derivative and supporting or instrumental goods as wealth or "opportunity" or of such merely; secondary and conditionally valuable goods as reputation or (in a different sense of secondariness) pleasure.

A certain scholar may have little taste or capacity for friendship, and may feel that life for him would have no savour if he were prevented from pursuing his commitment to knowledge. None the less, it would be unreasonable for him to deny that, objectively, human life (quite apart from truthseeking and knowledge) and friendship are good in themselves. It is one thing to have little capacity and even no "taste" for scholarship, or friendship, or physical heroism, or sanctity; it is quite another thing, and stupid or arbitrary, to think or speak or act as if these were not real forms of good.

So, in committing oneself to a rational plan of life, and in interacting with other people (with their own plans of life), one must not use Rawls's "thin theory of the good." For the sake of a "democratic"[2] impartiality between differing conceptions of human good, Rawls insists that, in selecting principles of justice, one must treat as primary goods only liberty, opportunity, wealth, and self-respect, and that one must not attribute intrinsic value to such basic forms of good as truth, or play, or art, or friendship. Rawls gives no satisfactory reason for this radical emaciation of human good, and no satisfactory reason is available: the "thin theory" is arbitrary. It is quite reasonable for many men to

1 *Theory of Justice*, p. 420.

2 Cf. *Theory of Justice*, p. 527.

choose not to commit themselves to any real pursuit of knowledge, and it is quite unreasonable for a scholar-statesman or scholar-father to demand that all his subjects or children should conform themselves willy-nilly to the modes and standards of excellence that he chooses and sets for himself. But it is even more unreasonable for anyone to deny that knowledge *is* (and is to be treated as) a form of excellence, and that error, illusion, muddle, superstition, and ignorance are evils that no one should wish for, or plan for, or encourage in himself or in others. If a statesman (VIII.5) or father or any self-directing individual treats truth or friendship or play or any of the other basic forms of good as of no account, and never asks himself whether his life-plan(s) makes reasonable allowance for participation in those intrinsic human values (and for avoidance of their opposites), then he can be properly accused both of irrationality and of stunting or mutilating himself and those in his care.

V.4 NO ARBITRARY PREFERENCES AMONGST PERSONS

Next, the basic goods are human goods, and can in principle be pursued, realized, and participated in by any human being. Another person's survival, his coming to know, his creativity, his all-round flourishing, may not interest me, may not concern me, may in any event be beyond my power to affect. But have I any *reason* to deny that they are really good, or that they are fit matters of interest, concern, and favour by that man and by all those who have to do with him? The questions of friendship, collaboration, mutual assistance, and justice are the subject of the next chapters. Here we need not ask just who is responsible for whose well-being: see VII.4. But we can add, to the second requirement of fundamental impartiality of recognition of each of the basic forms of good, a third requirement: of fundamental impartiality among the human subjects who are or may be partakers of those goods.

My own well-being (which, as we shall see, includes a concern for the well-being of others, my friends: VI.4; but ignore this for the moment) is reasonably the first claim on my interest, concern, and effort. Why can I so regard it? Not because it is of more value than the well-being of others, simply because it is mine: intelligence and reasonableness can find no basis in the mere fact that A is A and is not B (that I am I and am not you) for evaluating his (our) well-being differentially. No: the only *reason* for me to prefer my well-being is that it is through *my* self-determined and self-realizing participation in the basic goods that I can do what reasonableness suggests and requires, viz. favour and realize the forms of human good indicated in the first principles of practical reason.

There is, therefore, reasonable scope for self-preference. But when all allowance is made for that, this third requirement remains, a pungent critique of selfishness, special pleading, double standards, hypocrisy, indifference to the good of others whom one could easily help ("passing by on the other side"), and all the other manifold forms of egoistic and group bias. So much so that many have sought to found ethics virtually entirely on this principle of impartiality between persons. In the modern philosophical discussion, the principle regularly is expressed as a requirement that one's moral judgments and preferences be *universalizable*.

The classical non-philosophical expression of the requirement is, of course, the so-called Golden Rule formulated not only in the Christian gospel but also in the sacred books of the Jews, and not only in didactic formulae but also in the moral appeal of sacred history and parable. It needed no drawing of the moral, no special traditions of moral education, for King David (and every reader of the story of his confrontation with Nathan the prophet) to feel the rational conclusiveness of Nathan's analogy between the rich man's appropriation of the poor man's ewe and the King's appropriation of Uriah the Hittite's wife, and thus the rational necessity for the King to extend his condemnation of the rich man to himself. "You are the man" (2 Samuel 12:7).

"Do to (or for) others what you would have them do to (or for) you." Put yourself in your neighbour's shoes. Do not condemn others for what you are willing to do yourself. Do not (without special reason) prevent others getting for themselves what you are trying to get for yourself. These are requirements of reason, because to ignore them is to be arbitrary as between individuals.

But what are the bounds of reasonable self-preference, of reasonable discrimination in favour of myself, my family, my group(s)? In the Greek, Roman, and Christian traditions of reflection, this question was approached via the heuristic device of adopting the viewpoint, the standards, the principles of justice, of one who sees the whole arena of human affairs and who has the interests of each participant in those affairs equally at heart and equally in mind—the "ideal observer." Such an impartially benevolent "spectator" would condemn some but not all forms of self-preference, and some but not all forms of competition: VII.3–4, below. The heuristic device helps one to attain impartiality as between the possible subjects of human well-being (persons) and to exclude mere bias in one's practical reasoning. It permits one to be impartial, too, among inexhaustibly many of the life-plans that differing individuals may choose. But, of course, it does not suggest "impartiality" about the basic aspects of human good. It does not authorize one to set aside the second requirement of practical reason by indifference to death and disease, by preferring trash to art, by favouring the comforts of ignorance and illusion, by repressing all play as unworthy of man, by praising the ideal of self-aggrandizement and contemning the ideal of friendship, or by treating the search for the ultimate source and destiny of things as of no account or as an instrument of statecraft or a plaything reserved for leisured folk…

Therein lies the contrast between the classical heuristic device of the benevolently divine viewpoint and the equivalent modern devices for eliminating mere bias, notably the heuristic concept of the social contract. Consider Rawls's elaboration of the social contract strategy, an elaboration which most readily discloses the purpose of that strategy as a measure and instrument of practical reason's requirement of interpersonal impartiality. Every feature of Rawls's construction is designed to guarantee that if a supposed principle of justice is one that would be unanimously agreed on, behind the "veil of ignorance," in the "Original Position," then it must be a principle that is fair and unbiased as between persons. Rawls's heuristic device is thus of some use to anyone who is concerned for the third requirement of practical reasonableness, and in testing its implications. Unfortunately, Rawls disregards the second requirement of practical reasonableness, viz. that each basic or intrinsic human good be treated as a basic and intrinsic good. The conditions of the Original Position are designed by Rawls to guarantee that no principle of justice will systematically favour any life-plan simply because that life-plan participates more fully in human well-being in any or all of its basic aspects (e.g., by favouring knowledge over ignorance and illusion, art over trash, etc.).

And it simply does not follow, from the fact that a principle chosen in the Original Position would be unbiased and fair as between individuals, that a principle which would *not* be chosen in the Original Position must be unfair or not a proper principle of justice in the real world. For in the real world, as Rawls himself admits, intelligence can discern intrinsic basic values and their contraries.[1] Provided we make the distinctions mentioned in the previous section, between basic practical principles and mere matters of taste, inclination, ability, etc., we are able (and are required in reason) to favour the basic forms of good and to avoid and discourage their contraries. In doing so we are showing no improper favour to individuals as such, no unreasonable "respect of persons," no egoistic or group bias, no partiality opposed to the Golden Rule or to

1 *Theory of Justice*, p. 328.

any other aspect of this third requirement of practical reason: see VIII.5–6, below.

V.5 DETACHMENT AND COMMITMENT

The fourth and fifth requirements of practical reasonableness are closely complementary both to each other and to the first requirement of adopting a coherent plan of life, order of priorities, set of basic commitments.

In order to be sufficiently open to all the basic forms of good in all the changing circumstances of a lifetime, and in all one's relations, often unforeseeable, with other persons, and in all one's opportunities of effecting their well-being or relieving hardship, one must have a certain detachment from all the specific and limited projects which one undertakes. There is no good reason to take up an attitude to any of one's particular objectives, such that if one's project failed and one's objective eluded one, one would consider one's life drained of meaning. Such an attitude irrationally devalues and treats as meaningless the basic human good of authentic and reasonable self-determination, a good in which one meaningfully participates simply by trying to do something sensible and worthwhile, whether or not that sensible and worthwhile project comes to nothing. Moreover, there are often straightforward and evil consequences of succumbing to the temptation to give one's particular project the overriding and unconditional significance which only a basic value and a general commitment can claim: they are the evil consequences that we call to mind when we think of fanaticism. So the fourth requirement of practical reasonableness can be called detachment.

The fifth requirement establishes the balance between fanaticism and dropping out, apathy, unreasonable failure or refusal to "get involved" with anything. It is simply the requirement that having made one's general commitments one must not abandon them lightly (for to do so would mean, in the extreme case, that one would fail ever to really participate in any of the basic values). And this requirement of fidelity has a positive aspect. One should be looking creatively for new and better ways of carrying out one's commitments, rather than restricting one's horizon and one's effort to the projects, methods, and routines with which one is familiar. Such creativity and development shows that a person, or a society, is really living on the level of practical *principle*, not merely on the level of conventional rules of conduct, rules of thumb, rules of method, etc., whose real appeal is not to reason (which would show up their inadequacies) but to the sub-rational complacency of habit, mere urge to conformity, etc.

V.6 THE (LIMITED) RELEVANCE OF CONSEQUENCES: EFFICIENCY, WITHIN REASON

The sixth requirement has obvious connections with the fifth, but introduces a new range of problems for practical reason, problems which go to the heart of morality. For this is the requirement that one bring about good in the world (in one's own life and the lives of others) by actions that are efficient for their (reasonable) purpose(s). One must not waste one's opportunities by using inefficient methods. One's actions should be judged by their effectiveness, by their fitness for their purpose, by their utility, their consequences…

There is a wide range of contexts in which it is possible and only reasonable to calculate, measure, compare, weigh, and assess the consequences of alternative decisions. Where a choice must be made it is reasonable to prefer human good to the good of animals. Where a choice must be made it is reasonable to prefer basic human goods (such as life) to merely instrumental goods (such as property). Where damage is inevitable, it is reasonable to prefer stunning to wounding, wounding to maiming, maiming to death: i.e., lesser rather than greater damage to one-and-the-same basic good in one-and-the-same instantiation. Where one way of participating in a human good includes *both* all the good aspects and effects of its alternative,

and more, it is reasonable to prefer that way: a remedy that both relieves pain and heals is to be preferred to the one that merely relieves pain. Where a person or a society has created a personal or social hierarchy of practical norms and orientations, through reasonable choice of commitments, one can in many cases reasonably measure the benefits and disadvantages of alternatives. (Consider a man who has decided to become a scholar, or a society that has decided to go to war.) Where one is considering objects or activities in which there is reasonably a market, the market provides a common denominator (currency) and enables a comparison to be made of prices, costs, and profits. Where there are alternative techniques or facilities for achieving definite objectives, cost-benefit analysis will make possible a certain range of reasonable comparisons between techniques or facilities. Over a wide range of preferences and wants, it is reasonable for an individual or society to seek to maximize the satisfaction of those preferences or wants.

But this sixth requirement is only one requirement among a number. The first, second, and third requirements require that in seeking to maximize the satisfaction of preferences one should discount the preferences of, for example, sadists (who follow the impulses of the moment, and/or do not respect the value of life, and/or do not universalize their principles of action with impartiality). The first, third, and (as we shall see) seventh and eighth requirements require that cost-benefit analysis be contained within a framework that excludes any project involving certain intentional killings, frauds, manipulations of personality, etc. And the second requirement requires that one recognize that each of the basic aspects of human well-being is equally basic, that none is objectively more important than any of the others, and thus that none can provide a common denominator or single yardstick for assessing the utility of all projects: they are incommensurable, and any calculus of consequences that pretends to commensurate them is irrational.

. . .

V.7 RESPECT FOR EVERY BASIC VALUE IN EVERY ACT

The seventh requirement of practical reasonableness can be formulated in several ways. A first formulation is that one should not choose to do any act which *of itself does nothing but* damage or impede a realization or participation of any one or more of the basic forms of human good. For the only "reason" for doing such an act, other than the non-reason of some impelling desire, could be that the good *consequences* of the act *outweigh* the damage done in and through the act itself. But, outside merely technical contexts, consequentialist "weighing" is always and necessarily arbitrary and delusive for the reasons indicated in the preceding section. [*Ed. note*: This argument has been omitted.]

Now an act of the sort we are considering will always be done (if it is done intelligently at all) as a means of promoting or protecting, directly or indirectly, one or more of the basic goods, in one or more of their aspects. For anyone who rises above the level of impulse and acts deliberately must be seeking to promote some form of good (even if only the good of authentically powerful self-expression and self-integration which he seeks through sadistic assaults or through malicious treachery or deception, with "no ulterior motives"). Hence, if consequentialist reasoning were reasonable, acts which themselves do nothing but damage or impede a human good could often be justified as parts of, or steps on the way to carrying out, some project for the promotion or protection of some form(s) of good. For example, if consequentialist reasoning were reasonable, one might sometimes reasonably kill some innocent person to save the lives of some hostages. But consequentialist reasoning is arbitrary and senseless, not just in one respect but in many. So we are left with the fact that such a killing is an act which of itself does nothing but damage the basic value of life. The goods that are expected to be secured in and through the consequential release of the hostages (if it takes place) would be secured not in or as an aspect of the

killing of the innocent man but in or as an aspect of a distinct, subsequent act, an act which would be one "consequence" amongst the innumerable multitude of incommensurable consequences of the act of killing. Once we have excluded consequentialist reasoning, with its humanly understandable but in truth naively arbitrary limitation of focus to the purported calculus "one life versus many," the seventh requirement is self-evident.

V.8 THE REQUIREMENTS OF THE COMMON GOOD

Very many, perhaps even most, of our concrete moral responsibilities, obligations, and duties have their basis in the eighth requirement. We can label this the requirement of favouring and fostering the common good of one's communities. The sense and implications of this requirement are complex and manifold: see especially VI.8, VII.2–5, IX.l, XI.2, XII.2–3.

V.9 FOLLOWING ONE'S CONSCIENCE

The ninth requirement might be regarded as a particular aspect of the seventh (that no basic good may be directly attacked in any act), or even as a summary of all the requirements. But it is quite distinctive. It is the requirement that one should not do what one judges or thinks or "feels"-all-in-all should not be done. That is to say one must act "in accordance with one's conscience."

This chapter has been in effect a reflection on the workings of conscience. If one were by inclination generous, open, fair, and steady in one's love of human good, or if one's milieu happened to have settled on reasonable *mores*, then one would be able, without solemnity, rigmarole, abstract reasoning, or casuistry, to make the particular practical judgments (i.e., judgments of conscience) that reason requires. If one is not so fortunate in one's inclinations or upbringing, then one's conscience will mislead one, unless one strives to be reasonable and is blessed with a pertinacious intelligence alert to the forms of human good yet undeflected by the sophistries which intelligence so readily generates to rationalize indulgence, time-serving, and self-love. (The stringency of these conditions is the permanent ground for the possibility of authority in morals, i.e., of authoritative guidance, by one who meets those conditions, acknowledged willingly by persons of conscience.)

The first theorist to formulate this ninth requirement in all its unconditional strictness seems to have been Thomas Aquinas: if one chooses to do what one judges to be in the last analysis unreasonable, or if one chooses not to do what one judges to be in the last analysis required by reason, then one's choice is unreasonable (wrongful), however erroneous one's judgments of conscience may happen to be. (A *logically* necessary feature of such a situation is, of course, that one is ignorant of one's mistake.)

This dignity of even the mistaken conscience is what is expressed in the ninth requirement. It flows from the fact that practical reasonableness is not simply a mechanism for producing correct judgments, but an aspect of personal full-being, to be respected (like all the other aspects) in every act as well as "over-all"—whatever the consequences.

V.10 THE PRODUCT OF THESE REQUIREMENTS: MORALITY

Now we can see why some philosophers have located the essence of "morality" in the reduction of harm, others in the increase of well-being, some in social harmony, some in universalizability of practical judgment, some in the all-round flourishing of the individual, others in the preservation of freedom and personal authenticity. Each of these has a place in rational choice of commitments, projects, and particular actions. Each, moreover, contributes to the sense, significance, and force of terms such as "moral," "[morally] ought," and "right"; not every one of the nine requirements has a direct role in every moral judgment, but some moral judgments do sum up the bearing of each and all of the nine on the questions in hand, and every moral judg-