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# What is the Philosophy of Law?

John Finnis<sup>1</sup>

**Abstract:** The philosophy of law is not separate from ethics and political philosophy, but dependent upon them. It extends them by that special attention to the past (of sources, constitutions, contracts, acquired rights, etc.) which—for reasons articulated by the philosophy of law—is characteristic of juridical thought. Positivism is coherently sustainable only as a thesis of or topic within natural law theory, which adequately incorporates it but remains engaged with ethical and political issues and challenges, both perennial and peculiar to this age. The article concludes by proposing a task for legal philosophy in coming years, in light of the fact that legal systems are not simply sets of norms.

**Keywords:** General Jurisprudence, Positivism, Natural Law

## I. Legal, Political and Moral Philosophy

Like ethics and political philosophy, the parts of philosophy on which it is directly dependent, the philosophy of law belongs to the philosophy of practical reason. Practical reason, and thus the philosophy of practical reason (philosophical because considering the problems of practical reason in their full universality), seeks to make reasonable the deliberations and choices by which human persons shape their freely chosen actions and thus shape also themselves and their communities. Ethics considers those problems in the form in which they confront each individual without exception, in the predicament of choice of significant conduct (action or inaction), choice which, shaping the world, will also shape his or her own character. Political philosophy (subsuming without absorbing the philosophy of the household and family) considers the problems confronting each of us precisely insofar as we need to act in concert with other members of our communities, as members or leaders whose choices are choices for the community to

<sup>1</sup> Biolchini Family Professor of Law, University of Notre Dame; Professor of Law and Legal Philosophy Emeritus, University of Oxford. Email: john.finnis@law.ox.ac.uk. This article was originally written for the first issue of the Italian Association of Legal Philosophy's new *Rivista di Filosofia del Diritto* in 2012. Contributors were invited to address first the general question What is Philosophy of Law? and then three specified sub-issues: Is there a difference between Jurisprudence and Philosophy of Law? Natural Law or Positivism? Is legal normativity distinct from moral normativity? Hence the article's structure. Opportunity has been taken to make some emendations and amplifications, mainly in the footnotes.

whose actions we intend our own actions to contribute. The philosophy of law (legal philosophy) extends and specifies political philosophy by considering precisely how far choices made today for one's political community's future should be determined or shaped by choices made and acts made *in the past*, in the form of contracts, wills, constitutions, legislative enactments, customs, judicial decisions, and the like.

That question is itself the topic of a number of "general principles of law recognized by civilized nations,"<sup>2</sup> fundamental principles which enter directly into the needed determinations. The philosophy of law identifies the grounds for accepting those principles as appropriate (just) and authoritative, along with the grounds for judging appropriate and authoritative the different kinds of private and public law-making and rights-affecting acts (juridical acts) mentioned above. Just as ethics looks to fulfillment in all the basic forms of human good, so far as choices and actions can bear on or be opposed to that fulfillment, and just as political philosophy looks to the bearing of choices and actions on the common good of a political community—on the fulfillment and human rights of all its members—so the philosophy of law finds the grounds for accepting the justice of fundamental principles of law and the authoritativeness of private and public juridical acts in the specific bearing of those principles and acts on the common good. That common good extends with meaningful continuity from the past in which members of the community chose those acts (as against alternatives, reasonable and unreasonable) into the present which those acts intended to determine beneficially, and in which today's members can similarly determine (in due measure) the future fulfillment of the same historically extended community and its members.

<sup>2</sup> Statute of the International Court of Justice, art. 38(1)(d). In *Natural Law and Natural Rights*, 2d ed. (Oxford: Oxford University Press, 2011) [NLNR], 288, I offer a brief list:

Starting with . . . second-order maxims favouring continuity in human affairs—i.e. favouring the good of diachronic order, as distinct from the good of a future end-state—we can trace a series of related second-order principles which include the principle of stability but more and more go beyond it to incorporate new principles or values. In each case these are available in first-order form to guide a legislator. Prose-form requires a linear exposition here which oversimplifies and disguises their interrelations: (i) compulsory acquisition of property rights to be compensated, in respect of *damnum emergens* (actual losses) if not of *lucrum cessans* (loss of expected profits); (ii) no liability for unintentional injury, without fault; (iii) no criminal liability without *mens rea*; (iv) estoppel (*nemo contra factum proprium venire potest*); (v) no judicial aid to one who pleads his own wrong (he who seeks equity must do equity); (vi) no aid to abuse of rights; (vii) fraud unravels everything; (viii) profits received without justification and at the expense of another must be restored; (ix) *pacta sunt servanda* (contracts are to be performed); (x) relative freedom to change existing patterns of legal relationships by agreement; (xi) in assessments of the legal effects of purported acts-in-the-law, the weak to be protected against their weaknesses; (xii) disputes not to be resolved without giving both sides an opportunity to be heard; (xiii) no one to be allowed to judge his or her own cause.

These "general principles of law" are indeed principles. That is to say, they justify, rather than require, particular rules and determinations, and are qualified in their application to particular circumstances by other like principles. Moreover, any of them may on occasion be outweighed and overridden (which is not the same as violated, amended, or repealed) by other important components of the common good, other principles of justice. Nor is it to be forgotten that there are norms of justice that may never be overridden or outweighed, corresponding to the absolute human rights.

The reach of the philosophy of law is thus the reach of Aristotle's *nomothetikē*<sup>3</sup> and Aquinas's *legis positio*,<sup>4</sup> which he understood as extending beyond the philosophy—the “practical science”—whose philosophical truth fits one to participate in constitution-making and legislation, and as including also (subordinate to the constituent and legislative as such) the art and wisdom needed by the judge, not to mention the civic understanding, law-abidingness, and critical allegiance of the good citizen.<sup>5</sup>

To inform its understanding of the goods common to all human persons, including all that can be philosophically envisaged about human fulfillment, the philosophy of law (and of laws) draws directly upon ethics. That understanding takes the form of practical reason's very first principles, directing each of us to all the basic human goods (each an irreducible aspect of human flourishing), and of the specifically moral principles that direct us to choose and act reasonably, faced as we are with not one good but many, not one way of realizing each good but many, and not one person in whom these goods can be realized, respected or disrespected but many. For its understanding of the common good of families, of other associations of civil society, and of the state, the philosophy of laws draws directly upon political philosophy. That understanding includes what can be said in general, on the basis of wide human experience, about the factual conditions of co-existence and cooperation in political life and collective action, conditions which statecraft and law-making need to take fully into account and which therefore are part of the matter of political and legal philosophy. An elementary example of such conditions is the fact that unanimity about specific forms of communal life and action is not practically attainable or available as a source of cooperation in the life of a political community. This practically necessitates and justifies the concept and institutions of *authority*, taken as justifying, albeit presumptively and defeasibly, the *obligation* of compliance with authoritative directives (legislative, judicial or executive, etc.).<sup>6</sup> Or again, elementary facts about the

<sup>3</sup> *Nicomachean Ethics* [NE] X.14: 1181b20.

<sup>4</sup> Aquinas, *In Eth.* X.16 nn. 11-17; III *Sent.* d. 33 q. 3 a. 1 sol. 4c.

<sup>5</sup> Aquinas, III *Sent.* d. 33 q. 3 a. 4 sol. 6c: “justice is in the judge as in a regulator, and is in others as in the regulated. Still, there are two aspects to judging: (i) bringing about equalities in other persons, which involves the making of law, and (ii) punishing those who bring about inequality, which is a matter of retributive justice” [iustitia . . . est in iudice sicut in regulante, et est in aliis sicut in regulatis. Ad iudicem autem duo pertinent: unum est quod aequalitates in aliis faciat, et ad hoc est *legis positiva*; aliud est ut inaequalitatem facientes puniat, et ad hoc est *vindicativa*].

<sup>6</sup> See “Positivism and ‘Authority,’” essay 4 in *The Collected Essays of John Finnis* (Oxford: Oxford University Press 2011), vol. IV [CEJFIV]; NLNR ch. IX. For a more ample and dialectical discussion of the grounds of authority (with its correlative obligation), see now Finnis, “Freedom, Benefit and Understanding: Reflections on Laurence Claus's Critique of Authority,” *San Diego Law Review* (2014) 51 (forthcoming). An excerpt:

To have authority is to be in a position to bring it about that others are under a duty that, precisely as such, they would not be under but for that exercise of authority. This duty, as I have said, should not be conceived as having as its proper correlative a right to be obeyed. Rather, the duty, if owed to anyone, is owed to those persons for the sake of whom (and of whose wellbeing) the authority was conferred or is (and is to be) acknowledged. This is why it is a severe degeneration of thought, and of communal life, for politicians to conceive themselves as, or be automatically assumed by journalists to be, seeking or wielding *power*.

To confer authority on someone—or to accept and exercise it—for reasons other than *for the sake of the common good* is, presumptively, unjust and contemptible. (The common good in

limitations of human foresight justify the institution or practice we call *equity* (departure from the letter of the established law in the interests of its underlying purposes and justice).

On these bases, philosophy of law extends ethics and political philosophy into the domain of the specifically legal. That domain, as I said above, is characterized by its rooting of grounds for present decisions about the future in facts about the past. Those facts are the positive sources of law, whether in express legislation, or in the practice and customs of the judiciary or others, or in publicly available doctrine of scholarly jurists. The sources are interpreted as yielding a set of normative propositions (about powers as well as obligations) which in turn are interpreted so as to be coherent in a sense richer and more demanding than mere avoidance of direct contradiction at the point of their full specification as norms of choice and action. Each such set of propositions—"the legal system," "the law of the land," "our law," etc.—is taken to be applicable, in principle in its entirety, to every person and fact within its jurisdiction. And the validity of each proposition of law in the legal system is taken to be controlled by other propositions within the set, and to be a precondition for its applicability to particular persons and facts.

Concepts such as jurisdiction and validity are not, in their substance, unknown to political philosophy; they are already implicit in Aristotle's discussion of the desirability of a Rule of Law (*Rechtsstaat*).<sup>7</sup> But they remain rather implicit and unarticulated until the philosophy of law takes them up out of legal discourse. It does so precisely to explain why each legal system appropriately develops these (and other) concepts as technical devices for ensuring that the rules and institutions of a legal system can relatively often do what philosophical reasoning and political deliberation as such often cannot do, viz., deliver an unequivocal answer to some relatively specific question about what will be the right choice and conduct in a specific,

question may be that of a family or other restricted private grouping, as with the authority of the executor of a will; or it may be of a university—or department—or other corporation; or of a military unit; or of the sorts of political community we call states; or of bodies established to look to even wider aspects of the human race's wellbeing.) Of course, any exercise of authority will be futile unless those whose duties and powers it purports to change do in fact, by and large, act or dispose themselves to act accordingly. . . . [A]uthority is empty unless its exercise can be *predicted* to change behavior (and dispositions) in line with the propositional content of its exercise—of the rule enacted or court-order made, et cetera. But this does not entail that that propositional content is itself predictive, or would be more (or even *as*) beneficial if it were. Even to *translate* it into a prediction is to replace its *point and substance* with a mere (indispensable) precondition of (one means among others to), and/or mere (albeit inevitable) side effect of, its efficacy.

The point of law is to change things for the better in the community whose law it is. Its substance is the prescribing of patterns of conduct as *to be chosen* by those subject to the law. (That "to be" is the idiom not of prediction but of prescription—as with the doctor's prescription to the pharmacist.) Law is a modality of coordinating for the sake of common benefit. Beyond a minimal level of complexity (roughly two persons with a simple objective), the coordination indispensable for common benefit cannot be achieved without some exercise and acknowledgement of authority—both exercise and acknowledgment being in good faith *for that common benefit*. Legal authority, and thus law, is authority deployed according to rules for its deployment, with rules about the making and applying of the rules, and about the consequences of non-compliance with them. Predictable efficacy (at least, a relatively low level of non-compliance) is a precondition and in that sense a necessary *means*. But an even more inherently necessary means is this: the law and its rules being understood and accepted *as prescriptive* (even when the formulation of the rule is indicative in its grammar) in a relatively strong sense, such that the prescription is taken by its addressee(s) as presumptively excluding some otherwise attractive option or options.

<sup>7</sup> See especially *Politics* 3. 16.1287a.

indeed (in eventual applications) particular situation. The capacity of positive law—the set of propositions of law of our legal system—to deliver such determinate answers is one primary way in which it links together the past, present and future of the community, gives effect to legitimate expectations or at least to legally acquired rights—including rights of property, contractual and quasi-contractual rights, trusts, rights of compensation and restitution, and so forth—and thus makes possible a vast expansion of economic and cultural life and relatively secure and autonomous familial and individual choice of conduct and vocation. All this is a part of political philosophy and the political art, a part so extended and specialized as to deserve its distinct (not separate!) place and name, philosophy of law.

## II. Jurisprudence or Philosophy of Law?

If we follow the unequivocal and salutary example of Aquinas, we will make no distinction between *lex* and *ius* when the latter term signifies what it signifies in, for example, the phrases *ius civile* or *ius naturale*—phrases used by St Thomas entirely synonymously with *lex civilis* and *lex naturalis* respectively.<sup>8</sup> Hence “jurisprudence” and “philosophy of law” can appropriately be used entirely synonymously, as is usual in English-speaking countries. Of course, both etymological elements in the word “jurisprudence” have some gravitational pull (far from irresistible) towards the relatively more particularized, less universal and hence less philosophical.<sup>9</sup> But just as Aquinas treats *legis positio* as a name not only for the highly particular business of making laws but also for the supreme level of *politica*, political philosophy/theory, and treats *politica* as philosophy that is on the same level as *philosophia moralis*—indeed, as being a branch or kind, supremely dignified, of *philosophia moralis*<sup>10</sup>—so too we can rightly take jurisprudence and philosophy of law alike as ranging from the exploration of specific juridical techniques (critically investigating these techniques’ rational foundations in considerations of human flourishing and moral right) all the way up to the highest and widest principles and other considerations of moral and political theory.

## III. Natural Law Theories and Positivism

Since “natural law,” in the present context, has the same reference as “the normative principles and standards of ethics and politics” (or “normative

<sup>8</sup> See Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998) [*Aquinas*], 135.

<sup>9</sup> But that pull is *not* irresistible, as we can see from the opening sentences (from Ulpian) of Justinian’s *Institutes*, sentences that remain sound: “Iustitia est constans et perpetua voluntas ius suum cuique tribuere. Iurisprudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia. Justice is the steady and lasting willingness to accord to everyone his or her rights. Juristic wisdom, by its knowledge of divine and human realities, critically distinguishes the just from the unjust.”

<sup>10</sup> *In Eth.* prolog. (I.1 n. 6) and I. 2 nn. 1-12 (which call the other branches ethics (*monostica*) and the philosophy of the household (*oconomica*)); *Aquinas*, 114-5.

political philosophy”), everything said so far in this article is a piece of natural law theory. That theory autonomously yields, as one of its intrinsic elements, the thesis that human societies need positive law, and an account of many needed features of law, legal systems, and the Rule of Law. Natural law theory, in this context, is just another name for legal philosophy. It is fully positivist, if by that we mean that, properly pursued, it yields a completely sufficient account of the concept and characteristic institutions and sources of positive law and the Rule of Law. There is no proper place for a positivism outside natural law theory.<sup>11</sup>

The (legal) positivism that is self-conceived as somehow in opposition to natural law theory is (just in so far as it *both* maintains that self-identification *and* includes theses differing from those of natural law theory)<sup>12</sup> a set of more or less confused and arbitrarily truncated theories, conceived in some instances on the basis of grave misunderstanding<sup>13</sup> of the tradition of natural law theory and of some of its theorems, and in other instances as simply the expression of moral skepticism (denial that there are any true propositions about human good and moral right)—and in some instances again, such as Kelsen, on both bases. Neither basis is defensible. Misunderstandings should be abandoned, by attending to the classic texts with more care. Skepticism about practical truth may seem at

<sup>11</sup> See further *CEJFIV* essays 1, 5 and 7; and Finnis, “Natural Law Theory: Its Past and Its Present”, in *Routledge Companion to the Philosophy of Law*, ed. Andrei Marmor (New York: Routledge, 2012). There is, of course, place for accurate historical and strictly descriptive doctrinal accounts of particular legal systems. But these do not have the character of *theory* or philosophy. See now also Finnis, “Law as Fact and as Reason for Action: A Response to Robert Alexy on Law’s ‘Ideal Dimension,’” *American Journal of Jurisprudence* 59 (2014): 96-100.

<sup>12</sup> Note that it is not clear how far these two characteristics are to be found in theories or theoretical stances such as those of John Gardner and Leslie Green, or even (at least much of the time) of Joseph Raz. For these theorists, each in his own way, accept that philosophy of law legitimately contains theses—perhaps numerous—which cannot be called positivist and are theses of morality and/or moral philosophy; each regards as positivist only the narrow thesis that positive law is identified by reference only to social-fact sources, a thesis explicitly compatible with the position that judges may legitimately and often ought to reason “according to law,” a law and form of (Raz says) “legal reasoning” that includes (besides positive law identifiable from social-fact sources) also moral principles (even, according to Raz, if there is no positive law even tacitly authorizing such judicial resort to moral principles): see the passages from Raz and Gardner quoted and cited in *CEJF IV*, 9 and 188, and the passage from Green quoted *ibid.*, 247, ending his article expounding and defending legal positivism:

Evaluative argument is, of course, central to the philosophy of law more generally. No legal philosopher can be only a legal positivist. A complete theory of law requires also an account of what kinds of things could possibly count as merits of law (must law be efficient or elegant as well as just?); of what role law should play in adjudication (should valid law always be applied?); of what claim law has on our obedience (is there a duty to obey?); and also of the pivotal questions of what laws we should have and whether we should have law at all. Legal positivism does not aspire to answer these questions, though its claim that the existence and content of law depends only on social facts does give them shape.

Green, “Legal Positivism,” *The Stanford Encyclopedia of Philosophy* (Spring 2003 edn); <<http://plato.stanford.edu/archives/spr2003/entries/legal-positivism>> (last accessed October 28, 2014).

<sup>13</sup> See e.g., *CEJF IV*: 7-8, 105, 182-6 (the last-mentioned pages being the main part of the essay “The Truth in Legal Positivism”); *NLNR*, 363-6.

first to be a more worthy basis for legal positivism. But, leaving to one side the responses that can rightly be made to skeptical theses and arguments in ethics (or “meta-ethics”),<sup>14</sup> it should be acknowledged that if skepticism is correct, there is no *philosophy* of law. At most there can be historical accounts (tracking competent legal practitioners’ accounts) of particular communities’ accepted or imposed normative systems self-interpreted as legal, and of systems analogous to those. The history or set of histories might be eked out by some sort of statistics concerning frequency or “typicality.” But if nothing true can be said about human good, there is nothing of philosophical import to be thought or said about normativity, authority, obligation, validity and similar concepts, all of which get their sense on the presupposition that practical reason can distinguish between true and false, good reason and lack of reason, and so forth.

As for that attention to fact which positivists think a virtue of their method, it is fully present and operational in any adequate philosophy of law (natural law theory). For: practical reason advances in deliberation towards choice (whether concretely or more universally and abstractly, “philosophically”), and does so by the use not only of normative premises about the good and the right but also, *indispensably*, of factual premises about the conditions in which the good can be attained or would be harmed. The truth of those premises has to be earned, by rigorous attention to facts, experience, the typical, the likely, the physically, biologically or psychologically possible, and so forth.

In short: the philosophy of law is best pursued without reliance on such equivocal labels as “positivist” (or “non-positivist”). Should we also dismiss the label “natural law theory”? Any sound theory or philosophy of law will need to attend to two broad kinds of principle, norm and standard: those applicable by persons of practical reasonableness only because of they are standards chosen or otherwise factually established by past choices of their community, and those that are applicable whether or not so chosen or ratified. For the latter, the history of our civilization has adopted the name “natural law.” The adoption can be traced to Plato’s engagement with the Sophists’ theory that more or less egoistic strength and cunning naturally, and so to say “by right” and reasonably, hold sway in human deliberation. Plato’s brilliant recapturing of “right by nature” from this sophistic error<sup>15</sup> has been decisive for our vocabulary, making its way through Aristotle, the Stoics, Cicero, St Paul, Gaius and Aquinas and their successors down to the United Nations Charter<sup>16</sup> and today. There is no symmetry of unserviceability between the labels “positivism” and “natural law theory.” though the latter, to be sure, labors under misinterpretations as grave as the Sophists’ and further tangled by a long civilizational sequence of reversions, accretions and quasi-philosophical flotsam and jetsam.

<sup>14</sup> See e.g., Finnis, *Fundamentals of Ethics* (Washington, DC: Georgetown University Press, 1983), ch. II; *CEJFI*, essays 1 to 6.

<sup>15</sup> See Finnis, “Natural Law Theory.”

<sup>16</sup> Art. 51: “Aucune disposition de la présente Charte ne porte atteinte au *droit naturel* de légitime défense . . .” Art. 111: “The present Charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic . . .”



#### IV. Legal Normativity as Distinct from Moral Normativity

A main reason for wanting to introduce positive law and the Rule of Law is to resolve disputes within a political community about what morality (especially justice) requires, recommends, or permits. There is thus good reason to introduce a way of thinking—call it legal thinking—in which (within undefined but important limits) the sheer fact that a legally (“constitutionally”) authorized person or body of persons has pronounced a *determinatio*<sup>17</sup> of some disputed or disputable issue is taken as sufficient ground for affirming the legal validity of the *determinatio* and its propositional product (rule, judgment, etc.). In this way of thinking, issues of the justice or injustice of the *determinatio*, once it has been made, are pushed to the margins of the legal domain. Only when moral extremes are approached do questions of justice and morality become once again relevant. Thus talk of “validity” can be more or less fully and cleanly reserved to intra-systemic legal (positive-law) discourse, and taken to entail not moral but *legal* obligatoriness (an obligatoriness not to be understood reductively as merely liability to penalty or punishment).<sup>18</sup>

Natural law theory has no quarrel with—indeed, promotes—a distinction or bifurcation between *intra-systemic* [legal] *validity* (and *obligatoriness*) and *legal validity* (and *obligatoriness*) *in the moral sense*.<sup>19</sup> Indeed, it is not unreasonable to see such a distinction at work in the famous tag “An unjust law is not a law.” Such a way of speaking is not self-contradictory, paradoxical, or even remarkable: “an insincere friend is not a friend”; “a logically invalid argument is no argument”; “a quack medicine is not medicine,” etc. So too in the famous tag or theorem: “unjust law” (*lex iniusta*) here refers to an intra-systemically valid legal rule or order,<sup>20</sup> and “not law” (*non lex*) signifies that, moral limits having been transgressed, this same law lacks *validity (as law) in the moral sense* (i.e., legitimacy) and thus, as such,<sup>21</sup> lacks moral obligatoriness.

Shifts of meaning of this kind were studied closely by Aristotle in connection with his accounts of the kinds of equivocation or homonymy, and of what we would now call analogous predication. A word can be said to be analogical when its meaning shifts more or less systematically according to context. The kind of analogy most relevant in the context of human affairs is what Aristotle called *proshen* homonymy. This is where the various relevant meanings of a word are all

<sup>17</sup> See *NLNR*, 284-6, 294-5, 380; *CEJFIV*: 2, 12, 123, 128, 131-2, 149, 161, 179-83, and essay 13.

<sup>18</sup> In such a discourse context, one may choose to use “legitimacy” to signify *moral* relevance, grounding moral obligatoriness. But “legitimacy” too is not free from ambiguity, since some writers in contemporary legal theory seem to treat it, perhaps, as synonymous with (purely legal) validity. On legal and moral validity, see my response to Maris Köpcke Tinturé in “Reflections and Responses,” in *Reason, Morality and Law: The Philosophy of John Finnis*, ed. John Keown and Robert P. George (Oxford: Oxford University Press, 2013), 553-6.

<sup>19</sup> *NLNR*, 314-20.

<sup>20</sup> Of course, the speaker could alternatively be intending to predicate injustice of certain beliefs and practices—observable as social facts of acknowledgement of certain acts and facts as laws—while not intending to assess legal validity even in a technical, constrained and amoral sense.

<sup>21</sup> Compliance with it may to some extent remain morally obligatory, because of the unjust side-effects of (public) non-compliance: *NLNR*, 361. On these problems, see now Finnis, “Law as Fact and as Reason for Action,” 100-109.

relatable to a focal meaning or sense or use, a meaning which picks out a primary or *central* case of the kind of reality or subject-matter under consideration—focal and central in some context of discourse or inquiry. The non-focal senses and non-central cases can be thought of as secondary because they are immature or deviant or in some other way watered-down instances or kinds of the reality, at least when regarded from some appropriate viewpoint or for some appropriate theoretical or practical purpose. Legal theorists self-identifying themselves as positivist—that is, as opposing what they think of as natural law theory—have paid all too little attention to this aspect of our language and its engagement with reality (and fulfillment). So the entire legal science of a Kelsen will be constructed on unexamined and simplistic assumptions about the univocality of “law” and the supposed need for a single form of norm to correspond one-to-one with the single-feature definition of law as a social order for controlling conduct by threat of sanction.<sup>22</sup> And the near-universal hostility of self-identified positivists to the *lex iniusta non lex* theorem overlooks the multivocality of terms such as “law” and “validity.” What is central in one context or for one set of purposes is secondary in another context or relative to other purposes. Hence the complexity of the relations between legal validity and law’s moral legitimacy, and between legal obligatoriness in an intra-systemic sense and in a moral sense, manifests itself in dual poles of centrality: the technical-legal, and the morally conscientious. But since immoral or amoral projects of law-making and -maintaining are parasitic on the fuller reasonableness of morally just law, it is the latter pole that has philosophical primacy as well as primacy in the conscience of the legislative reformer and (with some added complexities of responsibility) in the conscience of the true (central-case) judge.

## V. Legal Philosophy and New Ethical and Political Challenges

Though, as has been said above, law and legal philosophy has a quasi-distinct domain and technical character, the very idea (concept) of law (an idea without which no laws will be made or maintained) is so dependent upon wider principles of moral and political thought and philosophy that neither law nor its philosophy can avoid engagement with the ethical and political issues and challenges of the age. Particular aspects of our law’s content (including its procedural rules and institutions) can enhance, or in other cases harm, our community’s common good. The legal *instrumentarium* can, not infrequently, provide an easy route to destructive social changes, as the apparatus of human rights litigation has, in many places, provided an easy route to injustices involved in or connected with abortion, euthanasia, fraudulent or clandestine migration, and same-sex “marriage,” to the oppression of critics of these, and to other destructive evils. But

<sup>22</sup> See Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, MA: Harvard University Press, 1945), 19, 45 (“If ‘coercion’ in the sense here defined is an essential element of law, then the norms which form a legal order must be norms stipulating a coercive act, i.e. a sanction.”) The “must” is a *non sequitur*, as H.L.A. Hart showed in *The Concept of Law* (Oxford: Clarendon Press, 1961).

what social elites desire can very often be achieved without much resort to that *instrumentarium*, or even in defiance of it.

It seems to me that the task of legal philosophy today is twofold. It must keep clear its intrinsic relationship with, and dependence upon, *all* the truths of moral and political philosophy, not least by providing a constant critique of every form of legal philosophy that denies or distorts that relationship. And by its mastery, and its foundational explanatory understanding, of the law's technical *instrumentarium* it must remain in a position to criticize and expose—in the hope of deflecting—every manipulation of it for purposes destructive of the common good, a good that includes but is not exhausted by the upholding of juridically cognizable rights.

Of special importance in the coming decades will be a recovery of awareness amongst legal philosophers that law's paradigmatic form, the sophisticated municipal legal system or *ius civile*, is the law of a people,<sup>23</sup> posited by a constituent act (or constitutive custom) and ongoing legislative acts of their self-determination as a people, acts which can and should be consistent with their obligations to do and respect right (human rights, as contained in the *ius naturale*) and their responsibilities towards other peoples and those other peoples' self-determination, rights and needs. Just as countless thinkers in the nineteenth and twentieth centuries too casually assumed the justice of communist notions of a private-propertyless community, notions inadequately attentive to the long-term conditions of a sustainable, prosperous and just society of free persons, with the result that countless millions of people suffered more or less directly from the application in their polities of these errors of practical thought, so likewise many thinkers today too casually assume (explicitly or implicitly) the justice of quasi-communist notions of a borderless humanity, notions incompatible with the long-term conditions of a sustainably just and civilly free political order and Rule of Law. Even in the short term, this kind of error of practical thought results in the kind of political community increasingly familiar, whose peoples' multi-cultural internal diversity of ultimate allegiances is both promoted and countered by an ever-growing apparatus of security and surveillance (rightly fearful of civil war or gross disorder), a severe diminution in freedom of political and intellectual discourse, and an explosion of law-making and regulatory bureaucracy indifferent to the benefit of having a society whose self-determination takes in large measure the form of that sharing of expectations which Ulpian and Aquinas<sup>24</sup> called common custom.

Practitioners of the philosophy of law may be especially susceptible to this kind of error, to the extent that they envision legal systems simply as sets of norms, rather than as the principles, norms and institutions adopted by a people extended in time and in territorial bounds, in more or less adequate fulfillment of its moral responsibility to do so.<sup>25</sup>

<sup>23</sup> See *CEJF* IV.21, sec. V (pp. 430-4) and n. 25 below.

<sup>24</sup> See *Summa Theologiae* I-II q. 97 a. 2 (Should human law always be changed when there is opportunity for making an improvement in it? No.)

<sup>25</sup> See *CEJF* IV: 16; *CEJF* II, essays 6 ("Law, Universality and Social Identity") and 7 ("Cosmopolis, Nation States, and Families"), and n. 23 above.