

The Architecture of Law: Rebuilding Law in the Classical Tradition

Brian M. McCall

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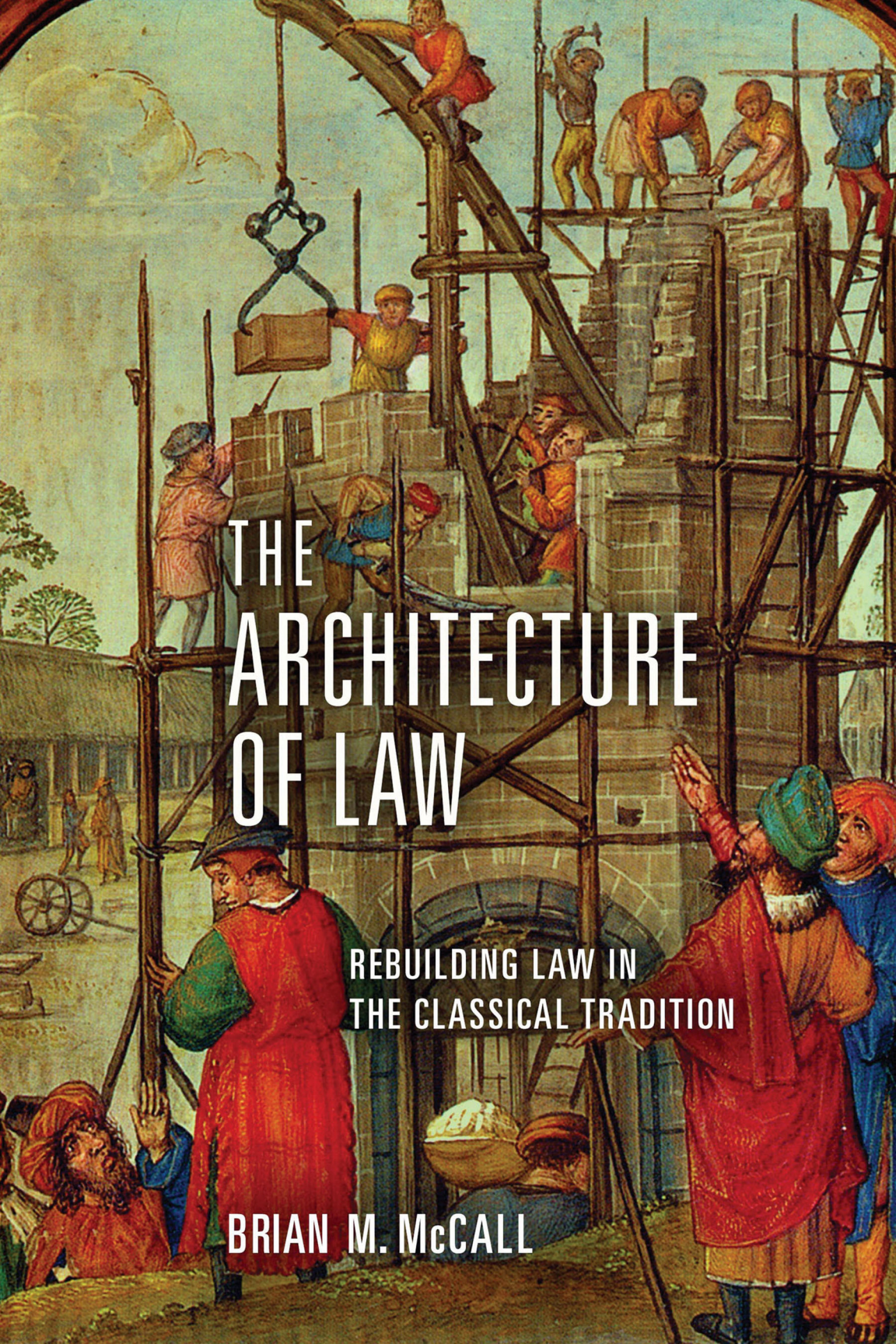
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A detailed medieval manuscript illustration depicting the construction of a large stone building, possibly a church or castle. The scene is filled with numerous workers in period clothing, including tunics, hose, and various hats. They are positioned on a complex system of wooden scaffolding that surrounds the building. A large crane with a long wooden arm and a metal hook is shown lifting a heavy stone block into place. The building itself is made of large, rectangular stone blocks, with some sections already completed and others still under construction. In the foreground, several figures are looking up at the construction, with one man in a red robe and a blue hat pointing towards the building. The background shows a simple landscape with a few trees and a distant building. The overall style is characteristic of medieval manuscript illumination, with vibrant colors and detailed line work.

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REBUILDING LAW IN
THE CLASSICAL TRADITION

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Archbishop Lefebvre
Tradidi quod et accepi

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O N E

Introducing the Building Project

Summum jus, summa injuria.
The greater the law the higher the injury.¹

With these words the great Roman orator Cicero warned against the dangers of an exaggerated exaltation of human law. His words take on a new poignancy in light of much contemporary jurisprudence. Not only have human positive laws grown exponentially in their number and scope, but the dominant theory of legal positivism has exalted the place of human positive law by building an entire system of law upon it alone. Human-made law has come to be viewed as self-referential, self-justified, and essentially self-restrained. Classical natural law jurisprudence understood human law to be merely one part within a grand hierarchical edifice of laws. Human-made positive law is the detailed and varied decoration that brings into clearer view the lines, structure, and foundation of a larger legal edifice. This structure is organized and held together by a frame, or universal principles, and erected on a firm ontological foundation. This book

explores the various components of the legal architecture of the universe. Great jurists and philosophers from Aristotle and Cicero to Gratian and Aquinas, to varying degrees of clarity, saw this cosmological edifice and wrote of its grandeur. The tradition to which they contributed was for centuries the foundation of all legal studies. Yet, in recent times the tradition has all but faded into obscurity. We have lost sight of the legal architecture because of our myopic focus on the decorations. The primary aim of the book is to understand the importance of human law within its proper context, not reducing it to insignificance or elevating it beyond its rightful limits. Putting positive law in its place requires a full exploration of the architecture of the classical natural law tradition and an examination of both the craftsmen who labor on its erection and preservation and the architect who designed it.

Various general themes are woven through the discussion of these components of the architecture of law. In the first theme, the hierarchical frame of natural law will be shown to be anchored to its foundation, the eternal law, by two equal pillars, reason and volition. Outside this structure, law balances precariously either on the sole pillar of abstract rationalism or on that of antirational willfulness. The second theme centers on the interdependence of each level of the structure—natural law cannot survive if severed from its source and foundation, the eternal law. Otherwise it becomes a nonobligatory element floating by itself. Human law severed from the eternal and natural law becomes a scone detached from its wall. It becomes lost and unrestrained. It has become disconnected from its purpose and wanders about with greater danger of oppressing the people the law is meant to guide toward virtue. The metaphor of a building exemplifies the third theme of this book, namely, that law is something real, possessing deep ontological properties and a clear form and purpose. Although human beings have a role in guiding the decoration of this cosmological building, it is not solely a product of human ingenuity or desire. Law has an existence and an essence independent of human understanding of it or human desires for it. By examining these themes, the book binds together an overall schematic for the erection of the complete legal edifice, which will encase and thereby reduce the greatness of human-made law and thereby reduce the injury.

SURVEYING THE BUILDING SITE: CONTEMPORARY LEGAL THEORY AND LAW AS POWER POLITICS

The term “classical natural law jurisprudence” or the “classical natural law tradition” is used to distinguish this type of jurisprudence from three other categories of contemporary jurisprudence identified by Philip Soper: classical positivism, modern positivism, and modern natural law.² Classical natural law refers to the jurisprudential and philosophical tradition shared among Aristotle, Cicero, Augustine, Gratian, and Aquinas (notwithstanding the important differences among them). Contemporary examples of scholars with a close affinity to the classical natural law tradition are Stephen D. Smith, J. Budziszewski, Jean Porter, and Philip Soper. Classical positivism, exemplified by John Austin, understood law as pure command backed by force. Modern positivists, such as Hans Kelsen, H. L. A. Hart, and Joseph Raz, accept the idea of law as command backed by threat, but add the claims that, at least from the internal point of view of a posited legal system, law is normative. Modern natural law scholars, such as Ronald Dworkin, John Finnis, and Michael S. Moore, attempt to salvage normative criteria for evaluating what is binding as positive law but do so by abandoning the philosophical and theological commitments integral to the classical natural law tradition. My summations here of these schools are obviously oversimplified and incomplete, but more of their details will be flushed out throughout this book as I advocate for the superiority (both descriptively and normatively) of classical natural law jurisprudence over the other three schools. Although many points of agreement exist between classical natural law jurisprudence and modern (or new) natural law scholarship, this book will argue that modern natural law cannot prevail as a compelling system without the philosophical and theological commitments of classical natural law jurisprudence. Since positivism, of the classical or modern form, dominates most academic discourse on law, the main focus of the following chapters is to use classical natural law jurisprudence to critique it; however, I do note points of important differences with new natural law scholarship.

Much of what is erroneous about contemporary jurisprudence can be summarized in a misunderstanding of the ancient legal aphorisms: “What pleases the prince has the force of law,”³ and “The prince is not

bound by the law.”⁴ In the nonregal American political context, the principle has been abstracted to a more generalized one: “The intention of the lawgiver is the law.”⁵ The aphorism has become politically ambivalent. Whatever political system happens to be the reigning system for making law (a monarchy, an oligarchy, republic, democracy, totalitarian regime, etc.) is irrelevant. All that matters is that whatever the designated lawgiver decrees to be the law is the law, without any other justification as long as the correct lawgivers comply with the reigning procedures for making and promulgating law. No higher legal criteria or foundation exists to make or judge or legally criticize human-made laws. In fact, this very procedure for making law itself is merely a creature of positive law. Lawmakers only have to comply with the “rule of law,” meaning they comply with the way laws are made, until that rule of law itself is changed. Law has come to resemble the satiric remark of the English poet Alexander Pope: “One truth is clear, ‘Whatever IS, is RIGHT.’”⁶

A common thread running between both classical and modern positivism is the premise that law is in the end a product solely of human will (of either an individual or a society). Like cars and airplanes and computers, law does not exist by nature; it is fabricated by men to help organize their common life. Although the concept might be helpful to coordinate activities, law is not, in the words of philosophers, a naturally occurring real being—it is merely a human construct. Although difficult to imagine, the world could exist without law. The pessimists view this world as possible but unpleasant (the Hobbesian state of nature), and the optimists dream of a natural paradise in which all people are good and law unnecessary.

If law is merely an artificial fabrication of men, then it can be whatever men want it to be. There are no universal intrinsic principles of law that enable us to identify any purported command to be law. It is simply a rule of behavior that, once posited by someone in a position of power, becomes law. John Austin, the father of the various forms of legal positivism, argued that any command to guide the behavior of persons that is given by one with power to back up his command is a law.⁷ In Austin’s own words, the idea of a command is “the key to the sciences of jurisprudence.”⁸ According to Austin, “If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I

comply not with your wish, the *expression* or *intimation* of your wish is a *command*.”⁹ This understanding places law solely within the power of the will. It is a verbal manifestation of a desire or wish. For Austin, the source of our duty or obligation to obey this wish or desire of another is that the one uttering it can inflict harm on us if we do not comply.¹⁰ The only requirements necessary for some statement to become a law are that (1) it is the wish of someone (2) who can inflict harm on one who fails to comply. Law is located in the will of one person to move the will of another by threat of harm. Jeremy Bentham, a disciple of Austin, defined law as “an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state.”¹¹ Bentham’s formulation (“or adopted by”) indicates that politics has been transformed into the game of “capturing” the will of the sovereign (the levers of power). The sovereign need not even “conceive” of the new law or in fact desire it. If the sovereign can be made to “adopt” it, the new command becomes law. Lawmaking is the art of persuading the sovereign to adopt one’s particular desire. Thomas Hobbes expands this notion of human control over law to the very idea of justice itself. Hobbes argues: “We ourselves make the principles—that is; the causes of justice (namely laws and covenants)—whereby it is known what *justice* and *equity*, and their opposites *injustice* and *inequity*, are. For before covenants and laws were drawn up, neither justice nor injustice . . . was natural among men.”¹² Even positivists who have developed more nuanced positions beyond this blunt Austinian variety, such as H. L. A. Hart and Joseph Raz, are still faced with this strong dependence on the will to legitimize law. Although attempting to tone down the raw power element of this system by explaining how the sovereign (the dispute resolver) is bound by rules as to the way disputes are settled,¹³ they never offer criteria for establishing, evaluating, and changing these primary or system rules, which ultimately rest on the will of the sovereign.¹⁴ The will of the personal sovereign has been abstracted into impersonal concepts or systems (Hart’s “Rule of Recognition” or Kelsen’s “Basic Norm”), but even if the collective will of a society over time replaces Austin’s personal sovereign, the basis of the system is still unrestrained volition. The offspring of these theories is law as power politics. Pope Benedict XVI summarized the contemporary effect of the raw conception of power at the heart of modern law thus: “Today, a positivist conception of law seems to dominate many thinkers.

They claim that humanity or society or indeed the majority of citizens is becoming the ultimate source of civil law. The problem that arises is not, therefore, the search for good but the search for power, or rather, how to balance powers.”¹⁵

For our purposes, two consequences follow from this concept of law. First, it does not contain a requirement that this wish or desire be reasonable to become law. There is no quality other than the desire itself being expressed by the right person or persons to conclude that the utterance is a law. A more refined positivist might insist that an unreasonable law is a bad law but it is a law nonetheless. Second, if one having power to use force utters the wish, it is law regardless of the command’s content. Hart attempted to soften this brute positivism by arguing that not everybody has the power to issue commands backed by force. To have this power, the one speaking must be authorized to do so through some other law (Hart’s Rule of Recognition, which tells us who has the power to command us to obey their wishes).¹⁶ Yet, this refinement only obscures the problem. It leads to an infinite regress. Who gave the one who commanded the Rule of Recognition the power to do so? Who gave that person the power to command, and so on and on? To avoid infinite regress, Hart merely assumes that a Rule of Recognition exists within every legal system, and whatever one or more people it designates as having the power to command can make law. We find this assumed Rule of Recognition by identifying whomever we would recognize as the one holding the power viewed from within that legal system.¹⁷ More importantly, any restraint the Rule of Recognition places on whose command counts as law does not restrict the content of the command. Even for Hart, law is a closed system that is caught within the internal point of view.

In his attempt to return normativity to law and transform classical positivism into modern positivism, Hart struggles to distinguish three things from law properly speaking.¹⁸ First, Hart is haunted by the need to distinguish law from the command of an armed gunman. We may comply with a gunman’s command, but we would not consider it law or normatively binding. Hart eventually uses procedure to distinguish the two: the posited Rule of Recognition tells us the gunman’s order is not law (until the Rule of Recognition is changed to declare the gunman capable of making law). (In contrast, classical natural law uses the concept of au-

thority flowing from the eternal law to provide a clear distinction between the gunman's order and law.) To remain faithful to positivism, Hart struggles to maintain law's normative claims while arguing that law is separate from morality. At one point, Hart claims that "law is best understood as a 'branch' of morality."¹⁹ This branch theory understands law and morality as two separate normative systems. Normativity returns to a positivist conception of law, but law is kept completely separate from morality, which is only analogous to law as a different normative system. Throughout this book, I will argue that morality and positive law are not two independent normative systems but, rather, they are both particular determinations of general principles of natural law. They are both part of the same normative system founded on eternal law. The distinction between law and morality (as opposed to separation) lies merely in the identity of the person entrusted with making the determination and the jurisdictional scope of that determination: individuals or personal superiors, as opposed to governors of political communities. Finally, Hart seeks to distinguish law from rules, particularly developing customary rules of a community. Hart struggles to define rules in a way that distinguishes rules of law from rules as predictions of future behavior (i.e., as a rule people go to the cinema once a week), rules of games, rules of etiquette, and rules of morality.²⁰ Hart experiences a problem defining the concept of a rule. He explains that definitions are usually a statement of a *genus* and the *differentiae* distinguishing the thing defined. Yet, for Hart, this method does not work because it is not clear to which genus these different types of rules belong.²¹ Once the full architecture of the cosmological legal system is explored in future chapters in this book, this difficulty will be solved. Rules as a principle of human action will emerge as a *genus* to which different types of rules belong. Legal rules are a species of rules demonstrated or determined from the precepts of the natural law. All rules in some way are related to natural law. Even rules of a game are particular determinations of just treatment of people's interaction in a social context. They are not legal rules, because they are determined by those devising the game and not political authorities.

Having severed the ontological connections between law and morality, even modern positivism places the origin and meaning of law solely within human control. Legal systems are self-referential and closed within

the will of whoever, from the internal point of view, is recognized as having the power to command and harm. Utterances that purport to be obligatory as law can only be judged to be such on the basis of other commands within that same closed system. Purported laws can only be denied legal validity on the basis of procedural flaws or inconsistency with other commands. The substantive content of a command is irrelevant to it being law. Using our human reason, we might judge a particular law to be harmful or unjust. It may command something we know to be unacceptable. Yet, it is still a law we are legally obligated to obey (even if we are compelled in fact to break the law sometimes). Hart and Kelsen solve the ontological problem by simply avoiding the question and pushing it outside of the internal point of view of the legal system. Hart's Rule of Recognition or Kelsen's Basic Norm are merely assumed to exist without any explanation of their origin.

Legal positivism deeply affects how people think about law. First, we tend to shut down our reason when considering the law. The law simply is; it does not have to be reasonable. It simply exists, and we must unquestionably obey even if we disagree with its content—unquestionably because there is no purpose to questioning it. The only questions we entertain are these: Was the law made by the correct person? Can we persuade the correct person to change the law in the future? Did it come from Congress? Was it signed by the president? Is it permitted by the Constitution? If there is no procedural flaw, we stop questioning the legally obligatory nature of the utterance. Our only option is to lobby those in power to change the law to something else. In the interim, if we find the law to order something unjust, we may disobey but we accept that we have “broken the law” and must accept the consequences of doing so as oxymoronically unjust but legally justified.

Most people have come to understand law as only the specific rules promulgated by the recognized authority. The law is confined to the texts produced by the correct persons. The only contexts for a law are other promulgated texts. Law has become synonymous with texts. This has led to an explosion of particular laws. Since nothing can supplement the law, the legislator is tempted to say everything. Legislatures try to write texts to cover every conceivable situation. To make certain a law is written for every scenario, we write more and more laws. The understanding of law as text has resulted in the depersonalization of law. Law, although seen as

a product of human volition, is not understood as the product of any actual person. This tendency is exacerbated by prevalent forms of government that disperse lawmaking power throughout many populated institutions, parliaments, congresses, or administrative agencies.

These consequences have produced a dangerous legalism in our culture. We focus on the strict letter of the promulgated text, shutting down our reason or at least limiting its purview. We can also become acculturated to living with contradiction. In a legal positivist world, the law can, and does on occasions, contradict reason and what we perceive to be just. We can be presented with conflicting obligations, legal and moral. The two are not necessarily reconcilable. Even if the pull of our conscience requires we disobey a particular law (that commands something wrong, for example), we accept that we have broken the law and deserve any legal consequences. We do not conclude that the text purporting to be law is not binding as law and that it would be unjust to punish our apparent disobedience. As long as it is written in a book and we can prove its legal genealogy, its obligatory force is unquestioned.

Politicians should not be surprised at the lack of “bipartisanship” or “cooperation” in our political system. Under positivism, politics is merely the combat to see who can control the “intention of the legislator.” Lawmaking and politics are about power, not justification. Democrats or Republicans, as the case may be, can pass whatever laws they want because they have a “mandate” to do so in conquering the will of the legislature by winning an election. This is no different from the victorious prince claiming the right to revise the laws of the vanquished territory according to “his” will. The principles of legal positivism apply equally to the “rule of law,” the procedural system for controlling the will of the legislator. Thus, when a desired result is not obtained, the power seekers need only change the rules of the game or the existing “rule of law” so that they can effect their will. Thus, when the proposed EU constitution was voted down in France and the Netherlands,²² “the will of the people” was not allowed to stand as the rule of law. The will of the governments of the member states simply dismissed the need for a popular referendum to enact the constitution and simply amended existing treaties to accomplish the same changes voted down in France and the Netherlands. According to a UK Parliament research report: “Under the Lisbon Treaty most of the text of the *Treaty Establishing*

a *Constitution for Europe* concluded in 2004 (referred to here as the EU Constitution) will be incorporated as amendments to the existing Treaties.²³ A document with essentially the same provisions was repropounded as amendments to existing treaties, thus avoiding a vote in all countries except Ireland.²⁴ When elections produce an undesired result, the rules of the game are simply changed. As Pope Benedict XVI has remarked: “*It is necessary to go back to the natural moral norm as the basis of the juridic norm*; otherwise the latter constantly remains at the mercy of a fragile and provisional consensus.”²⁵

This paradigm of law as power is not the only available paradigm. Other structures have and can be utilized. Classical natural law jurisprudence encapsulates the act of making human law within a broader and more complex system. For thousands of years, from ancient Greek philosophers through Roman and medieval jurists, understanding of this vast system developed, and the interaction, relationship, and interdependence of the components of its structure have been elucidated. This book seeks to rediscover these lost threads of the tradition and weave them back into a richer, deeper, broader, and ultimately more accurate understanding of the thing we call “the law.”

THE DEFINITION OF LAW AS A DIALECTIC AMONG REASON, COMMAND, AND CUSTOM

Harold Berman once described three modes of jurisprudence: *positivist* (will of lawgiver), *natural law* (expression of moral principles as understood by reason), and *historicist* (law as a development of custom).²⁶ For Berman, all three are necessary elements of law, as all three are intrinsic to all being. He explains:

Will, reason, memory—these are three interlocking qualities, St. Augustine wrote, in the mind of the triune God, who implanted them in the human psyche when He made man and woman in His own image and likeness. Like the persons of the Trinity itself, St. Augustine wrote, the three are inseparable and yet distinct. He identified will (*voluntas*) with purpose and choice, reason (*intelligentia*) with knowledge and

understanding, and memory (*memoria*) with being—that is, the experience of time. . . . Their applicability to law is particularly striking, for law is indeed a product of will, reason, and memory—of politics, morality, and history—all three.²⁷

Three of the schools identified by Philip Soper²⁸ can be understood as disproportionately emphasizing one of these three modes. Classical positivism embraces commands to the exclusion of the other two. Modern positivism reintroduces the historically situated (custom) Rule of Recognition of a particular legal system to restore normativity to positivism, but excludes reasoning from universal principles. Finally, the “new” natural law school relies almost exclusively on abstract rationality (or, in the vocabulary of John Finnis, practical reason) to the displacement of the other two modes. The following chapters will demonstrate that classical natural law jurisprudence advocates the integration of all three elements of jurisprudence—universal principles understood by reason, commands of the legislator, and developing historical customs—into a harmonious, although dialectical, definition of law. The three components, though part of a unified system, have been considered distinct parts of the legal order. As Berman has observed, medieval jurists not only divided law by jurisdiction and subject but also among reason, custom, and command.²⁹ Advocates of new natural law jurisprudence, reacting to both forms of positivism, often reduce it to universal moral principles accessible by reason. For example, Lloyd L. Weinreb defines the point of natural law jurisprudence: “The task of natural law is to identify, in a form acceptable to the modern mind, some aspect of human existence that validates moral principles themselves as part of the description of reality.”³⁰

In contrast to this more abstract new natural law, the classical definition of law, best formulated by St. Thomas Aquinas, combines all three elements. Aquinas defines law as “an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”³¹ The first element, “ordinance of reason for the common good,” incorporates within the concept of law universal principles of reason concerning the common ends of human nature. Second, “made” and “promulgated” refer to an act of the will—a command of a specific authority whose command binds as a rule and measure. Finally, laws are made by one who “has

care of the community.” Lawmaking must be historically situated within a developing community and not be a mere abstraction of reason or disembodied commands. Classical natural law jurisprudence considers all three elements as necessary components of law. A proper definition and explanation of these three elements is contained in the remainder of the book. In this introductory chapter, I will merely attempt to sketch their terms and highlight some of the tensions and difficulties that will emerge during lengthier considerations.

Ordinance of Reason: Reasoning from Nature

Aquinas’s definition of law begins by clarifying that anything which does not possess the qualities enumerated in his definition is not in fact a law—“nothing is [law] other than that which . . .”³² There are definitional criteria, beyond the volition of the lawgiver, necessary to make an utterance or command a law. Although the ultimate answer is more complex, a primary reply to Hart’s question of what distinguishes the command of a gunman from a law³³ is that a law must be an ordinance of reason (*ordinatio rationis*).³⁴ Law is a product of reason. The primary criteria for something to be a law is that it must be “of reason” or reasonable. The great medieval jurist Gratian notes this requirement of law when he says that law “*ratione consistat*,”³⁵ which can be translated “consists in reason” or “stands with or agrees with reason.” In the same section, Gratian points out that reason designates (with a connotation of entrusting) the law (*legem ratio commendat*), and that if law consists in reason, then it will be all that may have already stood (or agreed) by reason (*si ratione lex constat lex erit omne iam, quod ratione constiterit*).³⁶ The use of the perfect subjunctive (*constiterit*) in this last phrase is interesting. It expresses the temporal potentiality of law. Law arises after truths may have been constituted in reason. The grammatical mood of the verb *constiterit* acknowledges the uncertainty of success in this first step—“may have stood by reason.” There is no certainty of complete success in deriving law from truths known from reason. This uncertainty underlines one of the tensions of natural law jurisprudence: objective truths of reality are accessible to human reason, but we may fail to access them fully.

This relationship between law and reason is clearly distinguished from positivism, which accepts as law anything that meets the currently

reigning procedural requirements for making a law. For the natural law system, such is not sufficient; to be a law, the rule and measure must agree with or stand in the faculty of reason, not merely the will.

As Aquinas's and Gratian's definitions highlight, law is first an ordinance formulated by the rational power. Yet, as Gratian indicates, the rationality of human law flows from prelegal truths known by reason, with which law must agree. Classical philosophy distinguished different types of reasoning—the speculative and practical intellect. As the Thomist Henri Grenier explains, the two types of intellect are not two different powers but one single power distinguished by the two different types of ends to which the power can be directed.³⁷ According to Grenier, “The *speculative intellect* is the name given to the intellect as it knows truth for the sake of the knowledge of truth. The *practical intellect* is the name given to the intellect as it directs knowledge to work, i.e., it directs its knowledge to some practical end.”³⁸ The speculative intellect is directed at knowledge of things as they are. It seeks to know the truth of things for what they are. The practical intellect is directed to action. The former seeks to know what something is and the latter seeks to know what someone should do. Law is a practical discipline. Its end is action. A law is at its core a rule directing one to act. Yet, jurisprudence is rooted in both the speculative and practical intellect because one must first know things for what they are before one can know how to act. As Grenier explains, the practical intellect, although aimed at knowing the right action to attain an end, presupposes the speculative intellect has come to know the end to which the practical intellect tends:

An act of the practical intellect presupposes an act of the will: v.g. an act of the intellect concerning means presupposes the act of willing an end. An act of the speculative intellect does not presuppose an act of the will: v.g. an act of intellect concerning an end. Since an end is proposed to the will by the speculative intellect, and since an end is the first principle of action, the speculative intellect is called the first rule of all action. Thus we understand how everything practical is radicated, i.e., has its foundation in the speculative.³⁹

Law directs action, and therefore in order to know how to make good law, we must understand to what end it directs human action. We must

know what is the nature and end of human action. The classical natural law tradition refuses to accept the segregation of such practical enquiry from speculative knowledge about universals. Cicero (whose influence on the natural law tradition is significant) explains how speculative knowledge is essential for knowing how to live: "He who is to live in accordance with nature must base his principles upon the system and government of the entire world. Nor again can anyone judge truly of things good and evil, save by a knowledge of the whole plan of nature and also of the life of the gods, and of the answer to the question whether the nature of man is or is not in harmony with that of the universe."⁴⁰ The breadth of speculative knowledge essential to living well is not only natural but even touches knowledge of things divine. Throughout this book we will return to the question of whether speculative knowledge of not only natural things but also supernatural things is necessary to perfect practical reason. From Cicero's quotation, we can see that for him knowledge of things divine was essential.

Putting aside this issue of the necessity of knowledge of things divine, we can establish for now that at least some speculative knowledge is essential to natural law jurisprudence. As philosopher Ralph McInerny indicates, some forms of intellectual activity require the engagement of both speculative and practical knowledge.⁴¹ When one is making a law, one is engaging the practical intellect—what law in this particular set of circumstances conforms action to the good? Yet, to engage in this reasoning, the lawmaker must know what is truly good. Analogically, a housebuilder uses the practical intellect in knowing how to build a house, but his intellect must know what it means to be a house. He must understand the universal "house" before he can know how to build this house.

Alasdair MacIntyre explains that two interrelated questions must be asked in any craft, including the craft of philosophy (and I would add law): What is good and best for me within the context and limitations in which I find myself? and What is good and best *per se*?⁴² The answers to these questions are inherently interdependent. For the natural law tradition of Aquinas, and for the Augustinian and Aristotelian strands upon which it drew, "there is then no form of philosophical inquiry . . . which is not practical in its implications, just as there is no practical enquiry which is not philosophical [i.e., speculative] in its presuppositions."⁴³

Modern philosophy forces a cleavage between speculative and practical knowledge, because they are seen as incompatible. The theories of Descartes, Rousseau, Hobbes, and Locke choose the speculative. Knowledge about ourselves or society comes from speculative contemplation of a mythical disembodied self or a mythical state of nature. The other extreme, represented by Edmund Burke, disparages speculative knowledge and contends that politics and law must be purely practical.⁴⁴ Burke maintains, "Whereas theory rejects error, prejudice, or superstition, the statesman puts them to use."⁴⁵ It is a myopic focus of modern conceptual jurisprudence on practical knowledge that lies at the heart of Aaron Rapaport's critique of how it has obscured the big questions that must be addressed to make jurisprudence meaningful and useful.⁴⁶ John Finnis is a good example. He presents his concept of law as practical knowledge, and although he believes there is a sound speculative foundation for it, that speculative knowledge is not essential to his presentation of practical reason. Speculative knowledge, for Finnis, is literally an appendix rather than a foundation. This separation of speculative and practical intellect is a break with classical, and particularly Aristotelian, thought.⁴⁷

Law is a practical discipline because law involves knowing what to do. Yet, law is dependent on speculative knowledge. As the Thomist Charles De Koninck explains, "Political science and prudence are practical in that they direct towards an end in conformity with right reason. But that presupposes that we know in some way the nature of the thing to direct and of the end; which is to say that the rectitude of practical rule presupposes the rectification of the speculative intellect."⁴⁸ The speculative must come first. We must know what the goal is, and then law, practical knowledge, can tell us how to attain it. De Koninck further compares speculative and practical knowledge and shows the dependence of the latter on the former: "In speculative knowledge the intellect is measured by the object, and in speculative wisdom we are principally concerned with things better than ourselves. . . . In practical knowledge, insofar as it is practical, the intellect is itself measure."⁴⁹ Law can direct actions but it must first know the end to which it is directing in order to formulate its content.

A simple example can illustrate this primacy of the speculative. If I am lost and stop to ask for directions, I cannot simply ask, "Which way should I turn?" The person I ask cannot answer this question. If he just

formulates a practical rule “turn left” without knowing my ultimate end, the practical rule is of no value. If he happens to choose the direction that will take me to my goal, it is only accidentally a good rule. To formulate a rule for my action, the end must be known. The proper question to ask in this situation is this: “I am trying to reach place X, which way should I turn?” The speculative knowledge, where I am going, must come before the practical question.

But the relationship is in fact more complex. Not only is practical knowledge dependent upon speculative knowledge, as we shall see in chapter 3, but we come to know the universal nature of things through our knowledge of particulars. We come to understand the universal truths of the speculative intellect in the context of making practical decisions in contingent situations. Speculative truths are learned through encounters with particulars. This conclusion is a corollary of the general principle that sense knowledge is the material cause of intellectual knowledge.⁵⁰ Aquinas, relying on Aristotle, argues that classical jurisprudence understood the principles of natural law to be general rules not made by human reason but rather discovered through reflecting on human nature in a process that is both inductive and deductive. These principles of natural law must be known both for their own sake (because they define the good of human existence) and for the sake of directing human lawmaking. Human-made positive laws, on the other hand, are formulated by human reason to add greater specificity to the general principles of natural law to direct people to specific action in particular circumstances and to help them to know the principles of natural law that they should see in particular laws. We can see in this simplified description of the natural law legal order (which will be developed throughout the book) the interconnectedness of speculative and practical knowledge.

It is time to make explicit what has been implied thus far in the consideration of the role of reason in natural law jurisprudence. A law is not just any ordinance. It is an ordinance of reason, by which is meant a particular type of reasoning from nature. This concept is at the heart of the importance of speculative knowledge to natural law jurisprudence. An ordinance of reason is a rule that is consonant with the way things truly are. In short, legal rules are rationally discovered from considering the nature of things.

To introduce the term “nature” raises a host of issues. As Finnis remarks, as far back as the Stoics this term has possessed a variety of meanings: “Being scholastics, interested in establishing a technical vocabulary, the Stoics were aware that *natura* was a word with a variety of meanings and shifting references.”⁵¹ Confusion over the meaning of the claim that rules of action can be discovered from rightly understanding nature has led to a widespread rejection of classical natural law reasoning as a fallacy. Since the Enlightenment, this ancient epistemological approach has been dismissed as the “naturalist fallacy.” The simplified version of the argument is that it is not possible to demonstrate from what something is what it ought to do, or one cannot derive an “ought” statement from an “is” statement.

MacIntyre explains that the key to recognizing the legitimacy of classical reasoning from nature is that classical authors clearly understood that the word “nature” had two related meanings. MacIntyre explains that for Aristotle, ethics is the science of the transition of “man-as-he-happens-to-be” to “man-as-he-could-be-if-he-realized-his-essential-nature.”⁵² Those who decry natural law reasoning as fallacious would be correct if it merely argued that man-as-he-happens-to-be at a moment in history tells us what man-ought-to-be. This would be an unsupported mere rationalization of whatever man-happens-to-be at any point in time. It would provide no universally valid rules of action other than justifying the ever changing status quo. In contrast, for Aristotelian and hence natural law jurisprudence, one critically considers what man-happens-to-be in light of the potential for what man-could-be if he perfected the elements of what makes him what he happens to be. Aristotle’s central concept of potency and act is at the heart of MacIntyre’s insight. We consider man-as-he-happens-to-be in order to discover the potencies for what man-could-be-if-he-realized-his-essential-nature. Likewise, by considering water as it happens to be we can discover that it has the potency to become steam under the right conditions. When those grounded in the naturalist fallacy argument encounter the term “man-as-he-happens-to-be,” they understand it only to encompass current acts. Yet, for Aristotelians the term also includes the unrealized potentialities within what man-happens-to-be. Man-as-he-happens-to-be encompasses both what man is in act at the moment plus all the potencies for perfection contained within man. Identification of natural law precepts involves, at its heart, identifying these potentialities contained within

man-as-he-happens-to-be and then specifying rules directing action toward actualizing these potencies.

The closer one comes to attaining the state of man-as-he-ought-to-be the closer one comes not only to goodness or perfection but to the fullness of being. The more good or perfect something is, the more real it is or the more being it possesses.⁵³ Many modern authors who have an aversion to understanding rules in light of human nature are really arguing against basing laws on man-as-he-happens-to-be in act rather than the position of classical natural lawyers that it should be based on man-as-he-could-be-if-he-realized-his-essential-nature as evidenced in the potencies for perfection. The transition from the former to the latter involves an interconnected examination in light of reason and experience of (1) man-as-he-happens-to-be, (2) the precepts of the natural law (or “rational ethics”), and (3) man-as-he-could-be-if-he-realized-his-essential-nature.⁵⁴ Rather than deriving the precepts from man-as-he-happens-to-be as conclusions from premises, there is a more nuanced dialectic among all three perspectives. Their relationship involves a movement from man-as-he-happens-to-be to man-as-he-could-be-if-he-realized-his-essential-nature by means of the principles of natural law.⁵⁵ But it is only through the process of attempting this movement from one to the other that we discover those principles of natural law. The process is not a simple movement of one to the other through the third. It is dialectical. The Christian synthesis expands (in a paradoxical way that simplifies rather than complicates matters) the notion of man-as-he-could-be-if-he-realized-his-essential-nature to include not only a natural component but a supernatural component, and also an expanding notion of rules of rational ethics that includes precepts of divine law.⁵⁶

Jean Porter similarly highlights the tension between facts about things as we find them and their underlying order and intelligibility in natural law jurisprudence. Nature as we find it must be understood in terms of its preordained intelligibility. She explains that natural law reasoning involves rational evaluations of natural facts in light of the intelligibility of nature. She begins by distinguishing between

nature seen as the ordered totality of all creatures, and nature seen as the intrinsic characteristics of a given kind of creature. It can also refer to the human capacity for rational judgment, which gives rise to

moral norms, or to God's will as revealed in Scripture, since the divine will certainly exists prior to all human enactments and provides their ultimate norm. At the same time, while this interpretation of the natural can be extended widely, it does not encompass every possible sense in which nature can be understood. In order to be incorporated into the concept of the natural law, a given idea of nature has to carry connotations of order and intelligibility. Nature in the sense of sheer facticity is not incorporated into the scholastic concept of the natural law, because nature taken in this sense cannot offer a basis for understanding the regularities of the non-human or social world.⁵⁷

Reasoning from nature involves rational consideration of the facts as we find them throughout history. The facts of human experience of living in society and living with laws are the matter necessary for speculative reflection on the underlying order and purpose of human existence that imperfectly shows itself through these facts. If we can define it by a negative, reasoning from nature is not merely accepting facts about human experience as we find them. It is about discerning the underlying intelligibility hidden beneath often contradictory facts.

Aristotle likewise mentions two competing understandings of nature as either the matter of something or its substantial form: "Some identify the nature or substance of a natural object with that immediate constituent of it which taken by itself is without arrangement, e.g., the wood is the 'nature' of the bed, and the bronze the 'nature' of the statue. . . . Another account is that 'nature' is the shape or form which is specified in the definition of the thing."⁵⁸ He concludes that the "form indeed is 'nature' rather than the matter; for a thing is more properly said to be what it is when it has attained to fulfilment than when it exists potentially."⁵⁹ The form of something contains the definition of that which constitutes its fulfillment. Thus, another way to define nature is "the end or 'that for the sake of which'" of a thing.⁶⁰ Even in saying that the form is the proper meaning of nature, Aristotle argues that we need knowledge of both particular matter and the universal form to know something, whether in the discipline of medicine, physics, housebuilding, or law. He concludes:

But if on the other hand art imitates nature, and it is the part of the same discipline to know the form and the matter up to a point (e.g.,

the doctor has a knowledge of health and also of bile and phlegm, in which health is realized, and the builder both of the form of the house and of the matter, namely that it is bricks and beams, and so forth): if this is so, it would be the part of physics also to know nature in both its senses.⁶¹

Yet, although the end of something is properly its nature, the end “belongs to the same department of knowledge as the means.”⁶² As we have seen throughout this discussion, Aristotle also argues that practical knowledge of the means is related to speculative knowledge of the end, or “that for the sake of which.” Law is about human actions. The matter of the jurisprudential reasoning is actual human actions; jurisprudence requires the discovery of the forms that transcend individual human acts.

Thus, returning to the alleged naturalist fallacy, as MacIntyre points out, the question of what something “is” and what it “ought” to do are not distinct questions but rather the same question. What I ought to do is a function of what I am. As MacIntyre notes: “So ‘such and such is the good of all human beings by nature’ is always a factual judgment, which when recognized as true by someone moves that person toward that good. Evaluative judgments are a species of factual judgments concerning the final and formal causes of activity of members of a particular species.”⁶³ Elsewhere, MacIntyre argues that evaluative and factual judgments are commonly encountered together. The claim of those who decry of the “naturalist fallacy” is itself a fallacy, for the rule that an “ought” judgment cannot be derived from an “is” statement is not universally true. For example, MacIntyre observes when we state that this is a watch, we can and do conclude that it ought to display the correct time, because the reason we identify it as being a watch is that it is a being that ought to keep time. This conclusion is true even if we find as a fact that it has been keeping incorrect time. Notwithstanding this fact, it ought to be keeping accurate time. The more accurate time it keeps, the more perfect a watch it will be.⁶⁴ Likewise, if we know that a person is a firefighter, we regularly conclude that he ought to fight fires. The ought conclusion flows from the function or purpose identified in the predicate of each sentence (i.e., is a fireman).⁶⁵

At the heart of classical natural law jurisprudence's understanding of law as an ordinance of reason is this claim that rules of action ("ought" conclusions) can be known from speculative knowledge about the nature (or end or "that for the sake of which") of things. By rationally considering what human beings do we can discover what they can do, their potencies for perfection. Rules can then be formulated directing human action toward these potencies of perfections. It is in this sense that we can say that an ordinance of reason is a rule derived from nature. This claim is at the heart of the fundamental break of the so-called new natural law school of jurisprudence, which abandons this leg of the three-part classical understanding of law as historically and communally situated commands that agree with ordinances of reason derived from the natural end of human nature. For classical authors, all law must be rooted in the metaphysical realities of human nature, properly understood. Porter explains this cleavage with classical jurisprudence by means of a compelling example:

There is more fundamental difference between the "new natural law" of Grisez and Finnis and the scholastic conception of the natural law that cannot be brought out simply by a comparison of relevant texts on the natural law and reason. That is, Grisez and Finnis share in the modern view that nature, understood in terms of whatever is pre- or non-rational, stands in contrast to reason. This is implied by their insistence that moral norms must be derived from reason alone: that is, from pure rational intuitions that are in no way dependent on empirical or metaphysical claims about the world. They insist on this point because they are persuaded by Hume's argument that moral claims cannot be derived from factual premises but, as a result, they are forced to deny the moral relevance of all those aspects of our humanity that we share with other animals. Even the traditional Catholic prohibition of the use of contraceptives is interpreted by them as a sin against life, which represents the same stance of will as is present in murder, rather than as a violation of the natural processes of sexuality. No scholastic would interpret reason in such a way as to drive a wedge between the pre-rational aspects of our nature and rationality.⁶⁶

Law as Command: Promulgated by One Who Has Care of a Community

As we have seen from Aquinas, law may not be made by just anyone but only “by him who has care of the community” (*ab eo qui curam communitatis habet*).⁶⁷ It is not someone merely in authority or in possession of power. The rule maker must have care of the community. Note that this formulation is not regime-type specific. It does not require the law be made by a king, or a legislative body, or the people at large. The test of legitimacy (that which binds) is that the lawgiver has care of the relevant community. There must be a relationship of entrustment and responsibility between the community and the legitimate lawgiver. The order of reason must not just exist in the mind of the lawgiver but must be externalized; it must become word; it must be publicly spoken or “promulgated” (*promulgata*). Although born of reason, law becomes an act of the will, not just a product of speculation. Reason gives rise to the act of promulgation.

Although much of this book is critical of legal positivism’s claim that human law should be understood solely or primarily as a volitional act, that criticism does not mean that positivists are wrong in understanding lawmaking to involve an act of the will. The enacting of human law involves a free human choice, albeit a choice that is still constrained by ordinances of reason. That we must drive on the right as opposed to the left side of the road is not determined by human nature or an ordinance of reason. A lawmaker must make a choice between left and right. Higher law would preclude a choice requiring random changes in driving direction, as that would unduly endanger human life. Yet, within the constraints imposed by higher law, the choice of left or right is reserved to the election of the lawmaker. Law is an ordinance of reason, yet it is more than pure intellectual speculation. It involves willed human choice.

Law is a product of both reason and will. Errors occur when either one or the other is overemphasized. As Brian Tierney has demonstrated in his discussion of Villey’s theory of Aquinas on natural law, Aquinas maintains a distinction between law as describing things the way they are and ought to be and law as a set of precepts.⁶⁸ Law is both a system that explains things as they are and a system of precepts directing action. Yet, after Aquinas, the volitional sense of law as precept seems to dominate

later natural law thinkers' understanding of all kinds of law, to the exclusion of the first. This emphasis on the volitional aspect predates and in some senses prepares the way for Austin. Francisco Suárez, although still clearly a natural law jurist in the Thomistic tradition, tends to emphasize law as "binding precepts, promulgated to rational creatures only, who are directed to a morally good life."⁶⁹ As the centuries have gone by, this second concept of law, law as willed precepts, and not the former, law as that which is and ought to be, has come to dominate. Therefore, contemporary defenses of natural law may err either by overemphasizing the intellectual component of natural law jurisprudence or by focusing on natural law as a list of commanded precepts. The two aspects are indispensable and related for Aquinas. Law is not merely an ordinance of reason. To be law, it must be promulgated by a real person in time. Law, in the first sense of the state of affairs that exists and that ought to exist, produces precepts. Reason is necessary to produce the precepts. It is in this sense that human laws (as precepts) are derived from the natural law principles, which in turn are derived from the proper ends contained in the exemplar, idea, and type of all laws, the eternal law. In chapter 7, we shall explore in more depth the greatness of the power to make human laws. It is nothing other than a participation in the authority of God himself. This participation involves moving from the purely intellectual—knowing the nature of things and therefore what they ought to do—to an act of the will, the promulgation of a precept. Austin is correct that laws are commands of one with the authority to utter them. Yet, natural law jurisprudence qualifies this claim by limiting the scope of those commands to commands consonant with reason and human nature.

Although law is more than precepts, Suárez is correct that law is a system of binding precepts that direct human, that is, rational, action. The incorporation of the idea that natural law is a set of rules or precepts into natural law jurisprudence is one of the contributions of Stoicism to the tradition. Although it is certainly true that the classical natural law tradition is rooted in Aristotle's distinction between natural justice and conventional justice, Aristotle does not discuss natural justice as a system of laws containing precepts. The Stoics later add to the more general understanding of Aristotle a definite law-like quality to their understanding of natural law. The Stoics develop Aristotle's notions of natural justice or a

natural order into laws that create duties on us.⁷⁰ By the time of Aquinas, the natural and eternal laws are not seen as analogous to law or merely law-like. His argument sets out to prove that they clearly satisfy all the criteria of a real law. To do so each of them must contain real rules or precepts that have been promulgated.⁷¹ Natural law is an ordinance of divine reason and contains precepts promulgated by God.

In so doing, Aquinas distinguishes two aspects of the concept of legal precept. Law is both a rule (*regula*) and a measure (*mensura*).⁷² These two terms indicate that to be a law a thing must both direct an action toward an end and must serve as a basis for evaluating a completed action. A rule directs or restricts action by binding or requiring actions to conform to a standard. Aquinas notes that one Latin word for law, *lex, legis*, is derived from *ligare* (“to bind”).⁷³ Law binds specific acts to their proper ends. As a rule, a law has a dual function of proscribing and prescribing actions that hinder or further, respectively, the end of human nature. As a measure, law serves as a way of evaluating or measuring acts to see to what extent they conform to the rule. Did a chosen action bind the actor to a proper end, or was the act unhinged from human perfection? The measure is not simply a binary evaluation (it complies or not) but determines how far along the line formed by the directing rule an action lies. Precepts involve both prospective and retrospective evaluation. In this dual function, we can again see Aquinas’s understanding of law both normatively directing action (a rule) and descriptively telling us about the state of affairs (a measure).

However, not all precepts are of the same species. All laws are precepts, but not all precepts are of the same level of generality. Consideration of laws must therefore take account of whether the particular ordinance of reason is a general or a specific rule. Both types of laws can bind to varying degrees. Both aim at the same end but with lesser or greater specificity. If one asks for directions, one may receive a general or a specific rule of action: “Head north” or “turn left on a particular street, right on another.” Both types of rule are necessary due to the variety of contingent circumstances in which people find themselves. Rules that are drafted in more general language encompass more contingent circumstances and thus apply to more people. The more particular and concrete the rule, the more limited circumstances to which it will apply. The complexity

emerges once we understand that every human act is a means to some end; the act is oriented either toward the end, or goods, of human nature, or it is directed away from this end. It is in this context that we can introduce the concept of intrinsically evil acts.

Chapters 2, 3, and 4 will define in more detail the concept of “good” and its relation to “end.” For now, we can state in general that an action is good if it directs the actor toward a perfection or end of human nature, and evil if it directs toward its opposite. In this sense, we consider objectively the relation of the act to its end and not the subjective awareness of the actor of this relation. For example, if a person is walking north objectively, the relation between his act, walking, and its end, the north, exists irrespective of whether or not the person subjectively knows or wants to walk north. A person who is in fact walking north but erroneously believes he is walking south is objectively walking north.⁷⁴ Yet, all human acts cannot simply be categorized as good or evil. Some acts are indispensable for the attainment of the end of human existence and are therefore called “intrinsically good.” Others are incapable of being oriented to the end of human existence regardless of circumstances and are designated as “intrinsically evil.”⁷⁵ A third category of acts comprise those that in and of themselves are indifferent toward the end; they can be related either to the end of human nature or its opposite.⁷⁶ An act that in and of itself is incapable of having a transcendental relationship of harmony with the end of human nature is intrinsically evil. Thus, a rule of a general nature can be formulated that applies objectively to all beings who share this common nature or end. Such a rule would be a general principle of natural law that universally directs them to that end. Disregarding the subjective knowledge and hence culpability of an actor, one who engages in an intrinsically evil act is objectively not oriented to his proper end and hence objectively acting contrary to the universally binding precept of natural law. The person’s culpability or responsibility for so doing is another matter. He may be inculpably ignorant of this fact.

Many human acts fall into the third category. They are by their very nature capable either of being oriented toward one’s end or toward its contrary. For example, if a person must travel from Dallas to Chicago, we can say that his end is Chicago. The simple act of boarding a plane is not intrinsically oriented toward or opposed to this end. If the airplane is

traveling to Chicago, then the act of boarding the plane is oriented to the end, but if it is flying to Mexico City, then the act of boarding the plane is not oriented to the end. Acts of this third category may become good or evil acts not by any intrinsic quality of the act. Once the owner of a plane decides that a particular flight is flying to Chicago, then the act of boarding the plane becomes oriented to the end of the person wanting to go to Chicago, not by the act of boarding the plane itself but by the extrinsic choice of the owner. Acts oriented to an end of human nature not by virtue of the act but by the willed choice of someone can be called extrinsically good, and acts oriented to the opposite of an end of human nature by virtue of a determination are extrinsically evil.⁷⁷ For example, stopping one's car when encountering a light that is red in color is not in and of itself good or evil. Once a legitimate authority has determined that in order to protect human life from unnecessary danger that a red light means a car should stop, then doing so becomes oriented to the end of the preservation of life and hence extrinsically good. We will return to this example in chapter 7.

Rules that state what actions are intrinsically good or evil are therefore of the general type, because they apply to all human beings in all circumstances. Rules that change the nature of an otherwise neutral act to good or evil are specific rules because they apply only to the circumstances enumerated in the rule in which the otherwise neutral act will be good or evil. The determination of the owner of the airplane to fly to Chicago applies only to the particular time a particular flight is departing, not to all flights and all passengers in general.

Rules of law can thus be distinguished as either general or specific. General rules are universal in application. They direct human nature not by the choice of any human lawgiver, but by the intrinsic nature of the act and its intrinsic compatibility, or not, with universal human nature. Specific rules are more limited in scope. They apply extrinsic criteria, chosen by the applicable legislator, to otherwise neutral acts (*vis-à-vis* the end of human nature), and the fact of the rule itself is what establishes a transcendental relation between the act and the end of human nature by virtue of the specific rule. The two types of rules are distinct, yet not unrelated. Specific rules are limited to those that conform to general rules. Thus, an intrinsically evil act cannot be made good by a specific rule. General rules limit and define the scope of specific rules.

Legal positivism in all of its various forms emphasizes law as a collection of individual rules. For the pure positivists, such as Austin, law is composed of whatever particular collection of rules the sovereign declares. More nuanced positivists such as Hart surround this core concept with procedures, such as Hart's own concept of the Rule of Recognition. Yet even for Hart, a legal system is composed of those rules from the internal point of view that one in the system would recognize as law. Rules are detached from reason. Although more moderate positivists such as Hart and Raz might advise that a legal system would be a better system if its rules were formulated and promulgated in a rational manner, the quality of reasonableness is not a necessary condition for the rules to be recognized as law. They might be poorly crafted rules, but they are law nonetheless. As we will examine throughout this book, classical natural law jurisprudence accepts that law is composed of rules, but those rules promulgated by the will of a lawgiver must be consonant with the precepts of natural law that are known to human reason.

Custom and Mores

Historicism understands law merely as the product of particular communities' societal evolution. Laws develop out of the lived experience of cultures. In a certain sense, historicism is a form of collective positivism. Positivism relies upon the will of a particular person or persons at a point in time. The law is whatever the sovereign decrees. Historicism sees law as an undirected and unconstrained social phenomenon arising out of the collective will of a community that reveals itself over time. Despite rejecting historicism's exclusive reliance on a historically unfolding collective will as the only source of law, natural law jurisprudence does recognize a role for historically developing societal practices. As Aquinas's definition makes clear, law is more than an abstract ordinance of reason; it is a rule promulgated by a particular lawgiver, one who has care of the community, for the purpose of the common good of a particular community. Law encompasses both general principles of reason applicable to all communities and particular laws made for historically situated communities.

Natural law reasoning involves discovering general rules of action from rational consideration of human nature. Yet, human nature is not disembodied. It is encountered in historically situated contexts. Leo Strauss

explains that at the heart of the emergence of philosophy is the recognition of the distinction between natural and conventional, between natural and ancestral.⁷⁸ Likewise Aristotle recognizes that justice can be divided into general or natural justice and political or conventional justice.⁷⁹ Something natural is that which it is simply by its own being; whereas something conventional is what it is due to the convention of human society. Although this distinction seems clear at first, the complexity lies in the fact that the natural and conventional are intermingled. The natural is not simply known naturally. It is hidden within the conventional. The ancestral conventions contain principles incorporated from nature and practices established merely by the community. Philosophy is the quest to disentangle them and to find the distinction. The quest ultimately leads to questions about the first things and the nature of man as perfect or imperfect.⁸⁰ As we shall see in chapter 6, one task that natural law jurisprudence assigns to human lawmakers is to distinguish within the ancestral conventions of a community those consonant with nature and those opposed to it. To separate the natural from the conventional and the good customs from the evil ones, we require principles, rules against which to measure historically situated customs. The precepts of the natural law provide these principles against which the customs of a people must be measured. Historicism is correct in seeing that laws have evolved through historical circumstances. Yet, it attains this insight at the cost of losing sight of the natural that is intertwined within this process.

Further confusion arises in contemporary jurisprudence when jurists such as Hart confuse morality with *mores*, or the customs of a people. The contemporary notion of morality differs dramatically from our ancient and medieval ancestors' understanding of the subject. The word "morality" as used to mean a compartmentalized set of nonlegal norms (primarily negative) governing personal behavior did not even exist in the vocabulary of classical or medieval philosophers.⁸¹ The concept of a distinct body of nonlegal rules directing individual action as a science or discipline distinct from law or politics was alien to classical and medieval writers. Ethics was an integral part of politics for Aristotle.⁸² One of the most important, and least noted, achievements of Porter's work on law and morality is to remind us that our grouping of natural law and morality on one side and human laws on the other is alien to classical and medieval

philosophy and jurisprudence, including that of Aristotle and Aquinas.⁸³ As we shall see throughout this work, morality is inseparable from law, not in the sense that law embodies moral rules but that moral rules embody law. “Morality,” as used in this book, includes the determination of natural law precepts by individuals applying them to their personal actions, as distinguished from determinations of natural law made by authorities (either personal or political superiors), and applicable to multiple members of a community.⁸⁴ We shall see that morality is distinct from human law, but merely as a different species of the same genus, not as belonging to a different genus or normative system.

The root of the confusion over law and morality can be seen in Hart’s introduction of the subjectivist idea of understanding law as the concept that most people in the community or legal officials have of law.⁸⁵ Finnis adopts this concept approach to law.⁸⁶ Hart sees both law and morality as the concepts a society has of these terms. He refers to “morality of a social group”⁸⁷ rather than morality as such. For Hart, morality is virtually synonymous with the tradition or customs of a society. He struggles to distinguish law and morality from the custom of a man taking his hat off indoors.⁸⁸ He argues that morality does not have to conform to reason.⁸⁹ Morality can be whatever a people consider as morality as long as it contains certain characteristics; there can be such a thing as a barbarous morality for Hart.⁹⁰

In contrast, classical philosophy anchors both morality and human-made law in the same source, the eternal law that is known through the natural law. Grenier defines morality as “the transcendental relation of a free act to its object as in conformity or disconformity with the rules of morals, i.e., with right reason and the eternal law.”⁹¹ Morality is therefore not distinct from law but rather ultimately derived from the eternal law. Yet, morality involves a particular type of conformity. It is the conformity of a free act. A bee that produces honey conforms to the eternal law in a different, unfree way. A free act is one in which the intellect knows and the will chooses the act in conformity with the eternal law. Therefore, as Grenier states, the “proximate rule of morality is right reason, and its supreme rule is the eternal law.”⁹² The proximate rule of both morality and law is therefore natural law (or right reason), but the remote rule is eternal law. Yet, this conformity is known and willed in three distinct ways,

corresponding to the classical three-part division of morality, based upon the person establishing the conformity of acts to right reason and the eternal law—individuals (monastics, or ethics), domestic superiors (morality of the family), and legal authorities (politics, or the morality of civil society).⁹³ Rather than attempting to divide “law” and “morality” as Hart sought to do,⁹⁴ classical philosophy and hence jurisprudence understood that human beings are whole beings who live not only as individuals but within domestic and political communities. Their freely chosen actions are directed to their proper end ultimately by the eternal law and proximately by their own determinations (ethics), their personal superiors (domestic commands), and political authorities (civil laws). To separate morality from law is to separate morality from its origin.

The development of human law unfolds in the context of historical communities—families, social groups, and political communities—all making determinations of natural law precepts. Human lawmaking is a part of this integrated system of developing rules of ethics (or monastics), customs, and human laws.

Throughout the remainder of the book, we will see how the classical natural law tradition requires a dialectical interaction of three components. Law must be an ordinance of reason that results from reflection upon the natural ends of human nature. The conclusions of reason must be embodied in actual rules promulgated following a willed choice of one who has care of a community. Finally, the specific laws of a community must be devised and revised in light of the developing and evolving practices of that community.

THE COMMON GOOD

This chapter has continually referred to the end or object of human acts. Chapters 2, 4, and 9 will consider the end of human acts in greater detail, but for now we need to make a few clarifications. The end or object of human activity is incorporated into the definition of law in the phrase “for the common good.” This part of the definition indicates the purpose of law: it answers the question, “Why does law exist?” Law exists to orient human actions to their common natural end. Law is a rule and measure

that directs the human intellect and will toward the object or end that is common to all human beings. Yet, like the false dichotomy between law and morality, the term “common good” can be misunderstood as in opposition to the individual end, the object of the life of an individual human being. Like the false dichotomy between law and morality, we will see that there is no dichotomy between common and individual good: they are parts of the same whole.

As we move through the different layers of the legal edifice, we will continually add to our understanding of this purpose of law, but for now it is sufficient to establish that for something to be part of the common good it must be both *good* (i.e., objectively oriented to a good) and *common* to members of the species. The concept of “good” will be developed in greater detail in chapters 2 and 4, but now we can state that something which is good is a perfection of the intrinsic nature of a thing. The more perfectly a thing conforms to what it is, the more it partakes of the attribute of goodness. Since an individual exists as a particular instantiation of a universal, individuals transcendently related to the same universal share a common nature and hence a common mode of perfection. That which is therefore good for all instances of a universal is a common good. To be common, a good must be a good that is not unique to one individual or group of individuals but it must be a good common to all in the relevant species. “Common” here means capable of being participated in by more than an individual. A purely personal good is one that is good only for the individual and cannot be participated in by others. A common good is more universal in that it can be the good or end not of one singular person, but of many persons. The common good is the composite of all the goods common to human nature and is equivalent to the end of human nature. The common good is more than the collection of the private good of each person. It is, however, not separable from the good of the individual members because that which is good for an individual is always consonant with that good common to all. As De Koninck explains, “The common good is not a good other than the good of the particulars, a good which is merely the good of the collectivity looked upon as a kind of singular.”⁹⁵ Because of this connection, an individual can say that the common good is his good and by that claim he does not mean it is his good in opposition to the good of other members of society. The common good is

his good and also the good of others. Since the common good transcends the singular good, it is each member's good simultaneously because it is the end of each member by virtue of their common metaphysical composition.

As we will see in chapter 2, good and being are deeply related. The good or end of something is to attain the perfection of its being. The common good is the attainment of the perfection of each person that is common to all people. Thus, the end or perfection of man, as we shall see in chapter 3, is fixed by his nature. The particular end of each man is therefore the same or common end of all men, to attain the perfection of their common nature.

Although the term "common good" has been abused by collectivists of various stripes, it is opposed to a collectivist agenda that obliterates the particular good of individuals. The common good is greater than the singular good in that it is a good, a final cause for the singular, but it transcends the singular: "It reaches the singular more than the singular good: it is the greater good of the singular."⁹⁶ The common good is greater in the sense that it is a genus that includes the species of the singular good. The family presents a good example. If the father of a family obtains a new job for higher pay, this is a good for the father, but it is also a good for the entire family. The new job is a good that diffuses itself throughout the whole family, while also being a singular good for the father. The highest end of the singular is to desire that which is good for itself and good for the entire species. The collectivist error conflates the common good of man with the political common good. Collapsing all into the individual and the political state, the collectivist limits the common good of man to the political aspect of man's nature. But as Aquinas notes, "Man is not ordained to the body politic, according to all that he is and has."⁹⁷ As De Koninck explains:

It is not according to all of himself that man is a part of political society, since the common good of the latter is only a subordinate common good. Man is ordered to this society as a citizen only. Though man, the individual, the family member, the civil citizen, the celestial citizen, etc., are the same subject, they are different formally. Totalitarianism identifies the formality "man" with the formality "citizen." . . . Man cannot order himself to the good of political society alone; he must order him-

self to the good of that whole which is perfectly universal, to which every inferior common good must be expressly ordered.⁹⁸

This profound reflection of De Koninck points out the poverty of understanding wrought by a simplistic debate between collectivists, who understand the common good to consist solely in the political good of the state, and the personalists, who combat collectivism by exalting the particular good of individuals. As De Koninck indicates, the common good is composed of many common goods. There are as many common goods as societies—family, local communities, the nation. Yet these component common goods are themselves part of the ultimate common good of man and are hierarchically related as moving from smaller to greater, each higher good encompassing the lower ones.⁹⁹ Just as the simplified dichotomy of morality and law has obscured the more complex nature of morality, so too modern discussion of the common good has become two-dimensional, individual and common, whereas in reality the common good is composed of a variety of common goods, all related to aspects of common human nature.

The common good is also distinguishable from the aggregate good of some forms of utilitarianism that measure good by that which is good for the greatest number of singulars. The common good is not the aggregate good. As De Koninck explains, “The common good is greater not because it includes the singular good of all the singulars; in that case it would not have the unity of the common good which comes from a certain kind of universality in the latter, but would merely be a collection, and only materially better than the singular good.”¹⁰⁰ Recognizing the singular good as a component of a more comprehensive common good flows from the statement that whatever is good for the part is also good for the whole. Utilitarianism, on the other hand, can only understand the good of the part to be oriented to the good of many other parts as parts, rather than the good of the whole. Education provides a good example. To truly educate an individual is good for the one educated, but, by being good for the one, education is also good for the entire community because the educated individual as a social animal communicates this good throughout the society through the shared natural inclination to know the truth. By perfecting an aspect of the individual through education, the common

good is also perfected. Collectivism sees the common good as a good in itself but ultimately an instrumental end to satisfying singular goods. The communist collective is seen as good because it is seen as superior at satisfying the material needs of individuals. The proper understanding of common and personal good recognizes that neither is a merely instrumental good for the attainment of the other. The common good is an end in and of itself, which includes within it the singular good of the members of the community. De Koninck explains:

It is the singular itself, which, by nature, desires more the good of the species than its particular good. This desire for the common good is in the singular itself. Hence the common good does not have the character of an alien good—*bonum alienum*—as in the case of the good of another considered as such. Is it not this which, in the social order, distinguishes our position profoundly from collectivism, which latter errs by abstraction, by demanding an alienation from the proper good as such and consequently from the common good since the latter is the greatest of proper goods?¹⁰¹

The collectivists create a good of the whole that is distinct from the good of the individual. The true notion of the common good is not in contrast to the singular good because, as we shall see in examining the natural law, the desire for the good of the society in which one lives is a part of the natural end or perfection of each individual as a social being. Jeremiah Newman explains that it is important to note that when men are considered parts of the common good, they are not parts only. The common good is the unity of order proper to the group. But the parts of the whole are also wholes themselves possessing their own end.¹⁰² They are part-wholes of a larger whole. This is why the common good of the part-wholes also implies concern for the part-wholes as wholes. Likewise, the common good does not mean the good of a majority, but the good common to each and every member.¹⁰³ It is more than the sum of the individual goods.

We moderns have a difficult time comprehending this conclusion because when we hear the phrase “the good of the individual” we tend to understand that to mean “the good chosen by the individual.” We ask: What if the individual chooses a good other than that of other individuals? We

often see conflict between individual good and common good because we conceive of good as something arbitrary, chosen, or selected. In reality, as we will see in chapter 2, individual good is distinct from individual desire. Modern individualism with its basis in individual and competitive passions cannot conceive of this commonality of good. We harbor a notion that it is possible in theory, at least, for an individual to cheat the system, acting on his own outside the given qualities of human nature to achieve “his” uniquely chosen good, which differs from other humans’ good. But the meaning of man being a social and political animal is that this is impossible. Man needs society to attain his end common with other men. As Aristotle noted, a man living outside society is either a beast or a god—he is either below or above human nature. The common good corrects this erroneous understanding by reminding us that the good of the individual is not chosen, but given. It is the good common to all individual humans.

To work explicitly for the common good is proper to the perfection of each person, and it is a good denied to lower creatures. This inclination to work for the common good is a distinguishing trait of human existence. De Koninck continues:

Beings are more perfect to the degree that their desire extends to a good more distant from their mere singular good. The knowledge of irrational animals is bound to the sensible singular, and hence their desire cannot extend beyond the singular and private good; explicit action for a common good presupposes a knowledge which is universal. Intellectual substance being “*comprehensiva totius entis*,” being in other words a part of the universe in which the perfection of the entire universe can exist according to knowledge, the most proper good of it taken as intellectual substance is the good of the universe, an essentially common good.¹⁰⁴

In sum, “imperfect beings tend towards the mere good of the individual as properly understood; perfect beings tend towards the good of the species; and the most perfect beings towards the good of the genus.”¹⁰⁵ The common good is not desirable by individuals merely because it benefits them, but it is desired by individuals in itself as a good common to all people. As Aquinas explains, “Therefore, to love the good in which

the blessed participate so that it might be had or possessed does not make man well-disposed toward beatitude, because the wicked also desire this good. But to love that good for its own sake in order that it might remain and be made wide-spread, and that nothing might act against that good, this does dispose man well toward that society of the blessed.”¹⁰⁶

Aquinas summarizes this interdependence of individual and common good: “The goodness of any part is considered in comparison with the whole. . . . Since then every man is a part of the state, it is impossible that a man be good, unless he be well proportionate to the common good: nor can the whole be well consistent unless its parts be proportionate to it.”¹⁰⁷ De Koninck comments on this statement of Aquinas:

This ordering is so integral that those who strive towards the common good strive towards their own proper good *ex consequenti*: “because, first, the proper good cannot exist without the common good of the family, of the city, or of the kingdom.” . . . And because, in the second place, as man is a part of the household and of the city, it is necessary for him to judge what is good for himself in the light of prudence, whose object is the good of the multitude; for the right disposition of the part is found in its relation with the whole.¹⁰⁸

The exaltation of private individual goods over a common good, which is a hallmark of modern philosophy and jurisprudence, has been understood by those rooted in classical jurisprudence to lead to tyranny. As De Koninck states, “A society constituted by persons who love their private good above the common good, or who identify the common good with the private good, is a society not of free men, but of tyrants . . . who lead each other by force, in which the ultimate head is no one other than the most clever and strong among the tyrants, the subjects being merely frustrated tyrants.”¹⁰⁹

Still, the foregoing has not described what the matter of the common good is. We now understand its nature in general but need to bring more specificity to its content. A complete consideration will be deferred until chapter 4. Since the common good is the perfection of human nature, we need to understand the components of human nature. It is precisely the primary precepts of natural law that define for us those aspects of human

nature and hence the common good. Yet we can summarize, in general, the content of the natural or temporal common good.¹¹⁰ It can be summarized as the “‘unity of order’ . . . [a] dynamic order, the good life of the multitude.”¹¹¹ The proximate aspect of the common good of a political community is peace, prosperity, and training in virtue as necessary elements to living the good life.¹¹² Its more remote and more primary aspect is the actualization of the good life by the members of the community as members of the community.¹¹³ Thus there are two different purposes for which any law made for the care for a political community can aim. The proximate end can be to prohibit and require acts necessary to bring about the potency for individuals to perfect their nature by living a good life. Those acts that are contrary to this proximate end require law, or the potency cannot exist. Those acts that prevent actualization of the remote end are also subject to law, but if they do not affect the proximate end, then they are less urgently addressed by law. The prudential balancing of which acts of virtue to prohibit is a balancing between these proximate and remote ends of law.

Since a prong of Aquinas’s definition of law is that it is directed toward the common good, the effect or end of law must be the common good of those subject to the law. As this section has argued, the common good of man is his “proper virtue” or “that which makes its subject [man] good.”¹¹⁴ In order to make men good, law fixes punishment with respect to three kinds of human acts: (1) those intrinsically good (*ex genere*, having connotations of birth or generation), (2) intrinsically evil (*ex genere*), or (3) intrinsically indifferent (again *ex genere*). As to the first type of acts, the law may order or command (*praecipere vel imperare*) that these acts be done, as political prudence requires. With respect to the second, the law prohibits (*prohibere*) them as political prudence requires. As to those acts neither good nor evil in themselves, the law leaves them alone (*permittere*), neither requiring nor forbidding them by the fear of punishment. Although discretion is left to those who have care of the community as to the details of which acts to require, prohibit, or permit, the bounds of the exercise of political prudence are fixed by the nature of the acts. A lawgiver may for political prudence refrain from prohibiting a particular intrinsically evil act, but he may not require it. Something may be against natural law and therefore contrary to the end

of human existence but not be a violation of positive law because due to political prudence it has not been enacted in civil law. But whenever individual action affects the common good, it becomes proper matter for positive law to address.

OVERVIEW OF THE EDIFICE: DO WE NEED TO KNOW ITS ORIGIN?

Combining the elements of Aquinas's definition and effects of law produces an understanding of law as a rule and measure of human acts ordained by reason toward the common good, which is promulgated by one who has care of the community and which makes use of punishment to make men good by commanding good, forbidding evil, and permitting neutral acts. This definition identifies the genus of law, but when we penetrate deeper we see that law is composed of different species. To help understand these distinctions we can draw upon the image of an architectural structure. Just as a building is composed of many levels, so too the genus of law is composed of several levels of law. Before looking at individual levels, however, it is necessary to survey the design of the overall structure. How do the pieces fit together?

Gratian begins his treatise on laws with the following division of the types of law making up the legal structure: "The human race is ruled by two things: natural law and long-standing human customs."¹¹⁵ Gratian immediately sheds more light on this two-part division of law in the first *causa* of this first distinction when he quotes Isidore of Seville:

All the laws that exist are either of divine or human origin. Divine laws are constituted [*constant*] by nature, but human laws are constituted by human customs, and therefore human laws differ from community to community because certain things are pleasing to different communities. The immutable divine will [*fas*] is the content of divinely made law, and political or conventional justice [*ius*] is the content of human law. That is why it is in accordance with divine law [*fas*] to cross through the field of another person, but it is contrary to human-made law [*ius*].¹¹⁶

The passage begins with a differently worded two-part division. Whereas the first division was between *natural law* and *custom*, the second is between *divine law* and *human law*. The terms “divine” or “human” can be reconciled to the earlier division, natural law and custom. The second division refers to their respective origins, whereas the first refers to a representative type of each genus produced by divine or human agency. Huguccio in his commentary on Gratian confirms the divine origin of natural law and verbally links Gratian’s opening division to the passage of Isidore quoted by Gratian.¹¹⁷ He also explains that custom (*mos*) is human law (*jus humanum*), which is invented by man.¹¹⁸ Isidore says that divine laws stand in or are based on (*constant*) nature, whereas human law is based on long-standing practices. Hence, natural law has its origin in God, and custom is the creation of human law. The Ordinary Gloss on this opening passage explains natural law is “divine,” and “custom” is “customary law or written or unwritten human law.”¹¹⁹ Isidore further notes that since human laws are rooted in the customs of nations, they can vary from nation to nation and are not universal. The implication is that divine law, rooted in nature, does not so vary. The divine law is immutable because it has its source in nature, which is universal.

Gratian’s text then introduces yet another pair of words to identify each of these two categories. First it calls laws of divine origin (that which stands in the nature of things) “*fas*.” This Latin word means that which is “right or fitting or proper according to the will or command of God.”¹²⁰ Its universality and unchangeable nature is conveyed even by its grammatical status as an indeclinable noun—a noun that, uncharacteristically for Latin, does not change its ending according to its function in a sentence. Huguccio describes *fas* as whatever is “permitted,” “said to be appropriate and good,” and “ought to be said to be pleasing.”¹²¹ As opposed to customs that may please one people but not another, *fas* ought to be pleasing to all. The text then calls all human laws “*jus*.” This is a general Latin term often translated as “law,” but as Kenneth Pennington has argued, it conveys a rich penumbrae of meanings beyond mere legal enactments.¹²² It encompasses the sense of that which is right or just in light of human judgment.¹²³ Justinian’s *Digest* contains a general definition of *jus* as that which is “always equitable and good” (*semper aequum ac bonum*).¹²⁴ Cicero in a letter to Atticus uses the same construction of *fas* and *jus* to refer to everything that is

right according both to divine and human reckoning.¹²⁵ Natural law (*jus naturale*) and long-standing custom (*mos*) thus stand in the opening lines of the *Decretum* as representatives of these two overarching groupings of everything that is right and good, from both the perspective of God (*fas*, rooted in the nature of things or natural law) and man (*jus*, rooted in human determinations of what is right or of long-standing customs). Both sides of this coin of what is right and good must be examined to determine a rule and measure for conduct. Man is ruled by both natural law and custom, *fas* and *jus*. Gratian gives a specific example to illustrate the need to consult both types of law for a complete answer: human law (*lex humana*) might prohibit something that could be permissible by divine law (*lex divina*). Passing through another's field may be permitted by divine law (*fas*), but prohibited by human ordinance (*ius*).

Thus, for a complete understanding of the rule and measure of human action, both groupings of law must be consulted. In this vein, Justinian's *Digest* defines jurisprudence (the wisdom of law) as "the knowledge of divine and human things, and the knowledge of justice and injustice."¹²⁶ Natural law is a component of a dual system. To understand natural law, one must know it in this context.

As Gratian comments, this two-part division of law is itself subdivided into many species.¹²⁷ This first category of law identified by Gratian, divine, contains the three types of law, which Aquinas calls eternal law (*lex aeterna*), natural law (*lex naturalis*), and divine law (*lex divina*), the last sometimes referred to as the law of the scriptures (*lex scripturae*). Each of these types has been promulgated directly by God. Gratian's second category contains written statutes and long-standing customs, both promulgated by human lawgivers. Each of these species of law is epistemologically and jurisdictionally related to the others. One can understand neither one of these individual species nor the entire concept of law as a whole without understanding the essence of each species. Most contemporary jurisprudence proceeds on the assumption, stated or implied, that either (1) only the species contained under the heading "human law" exist and the others are not real, or (2) if the other species under "divine law" exist, knowledge of them is unnecessary to understanding human law. Classical jurisprudence rejects both assumptions. Simply because the trim carpenter cannot see the foundation or the wall studs does not mean they

do not exist. At least some knowledge of the entire edifice is indispensable to anyone who works on or within its walls.

As we will explore in chapter 2, the eternal law is the most general and foundational element of the structure. It contains the definition of all created finite beings. Its precepts, legislated from the foundation of the world, determine the end or perfection of each substance and provide means for the attainment of that end. The eternal law does not directly tell rational creatures how to act. It rather invites rational creatures to participate in the determination of human action by electing means to the end established by eternal law. In this sense, eternal law limits action by limiting the end of human action. The natural law is deeply connected to the eternal law and provides precepts orienting rational beings to their end established by the eternal law. The precepts of natural law provide generally worded principles of action that orient freely chosen human action to the perfection of human nature. Natural law precepts thus rise up out of the eternal law as a frame of a building rises out of the foundation. A frame gives more concrete definition to the structure of a building, which is constrained by the footprint of the foundation. Yet, the frame only generally defines the final appearance of the building. Many more details will determine its final appearance. Likewise, the natural law, by identifying hierarchically related ends of various aspects of human nature, provides more direction for electing means to attain the end of human nature. Yet, these precepts of natural law by their very design require further determination or specification, which specification is left to legal authorities, personal superiors, and individual persons, depending upon the nature and effect of the particular action contemplated. Human beings thus participate in making specific laws or rules of action at varying levels depending upon the circumstances. Likewise, artisans and craftsmen add detailed work and decoration to a frame to give the structure its final appearance.

To decorate the legal structure, practitioners of the legal craft must understand the eternal and natural law to know what it is they are decorating. This knowledge is not merely interesting but essential. Even the pagan philosopher Cicero understood that knowledge of these fundamental laws was necessary to the study and practice of law. In *De Legibus*, which is written as a dialogue, Atticus and Quintus want Cicero to begin discussing the details of the civil laws of Rome. Cicero responds that he cannot start a

discourse on law at that point. First the most basic truths about human nature and the purpose of human existence must be understood:

You must understand that there is no subject for discussion in which it can be made so clear what nature has given to humans; what a quantity of wonderful things the human mind embraces; for the sake of performing and fulfilling what function we are born and brought into the world; what serves to unite people; and what natural bond there is among them. Once we have explained these things, we can find the source of laws and of justice.¹²⁸

Atticus then objects that in this plan of discourse Cicero is departing from the common practice that the understanding of law should be drawn from the “praetor’s edict . . . or from the Twelve Tables.”¹²⁹ To which Cicero responds:

In this discussion we must embrace the whole subject of universal justice and law, so that what we call “civil law” will be limited to a small and narrow area. We must explain the nature of law, and that needs to be looked for in human nature; we must consider the legislation through which states ought to be governed; and then we must deal with the laws and decrees of peoples as they are composed and written, in which the so-called civil laws of our people will not be left out.¹³⁰

Cicero understood that the study of law must begin with the most fundamental principles of human nature, which are known through the eternal and natural laws, but contemporary legal scholarship and education in American law schools limit themselves to cataloging, interpreting, and discussing the details of the edicts and other texts of civil law. If Cicero were alive today, he likely would say all of this work needs to follow and be subordinate to a knowledge of these higher laws.

Later Christian philosophers and jurists add to Cicero’s understanding a new font of knowledge. In addition to the eternal and natural law, which all rational creatures can come to know by use of their innate reason, God has promulgated a third type of law, referred to as the “divine law” or the “law of the scriptures.” One of the roles of the precepts of this

type of law is to reveal principles of natural law more clearly. In addition to relying on our own, fallible reason to discover these fundamental laws, Gratian and Aquinas argue that we have direct access through revelation. Gratian makes this point clear in the opening passage of the *Decretum* when he introduces the division of law into natural law and long-standing custom. He explains that the natural law is contained in the Law (by which he means the law revealed in the Old Testament) and the Gospels, which he summarizes by quoting the Golden Rule (Matt. 7:12).¹³¹

Cicero's insistence that we must start with cosmological and ontological truths, and later Christian jurists' insistence that we must consult the divine law, before studying the details of civil laws raises an important question that will surface throughout this book. The classical natural law tradition is rooted in a theological perspective. For the pagan philosophers and jurists this perspective was a vaguely articulated perspective, sometimes pantheist and sometimes a monotheist tendency, that transcended the popular polytheist religions of Greece and Rome. Upon the dawning of Christianity, the perspective shifted to a clearly articulated Christian theology. For Cicero, the eternal and natural laws had their origin in a vague supreme power in the universe. For Gratian and Aquinas, jurisprudence was firmly rooted in the soil of Christian theology, and the origin of all law was more than a cosmic force—it was a personal God who became incarnate to save mankind and make the contents of divinely promulgated law more clearly and widely known.

The question then arises for jurists who are committed to the natural law tradition but are living in a pluralist and largely secular and atheistic world: To what extent is belief in and knowledge of God (either vaguely as for Aristotle and Cicero, or as with the revealed God of the Trinity) a prerequisite to accepting, understanding, and using natural law in legal practice? We will return to consider this important question throughout the book, but we can sketch a preliminary answer here.

Scholars such as Michael S. Moore have argued that commitment to natural law jurisprudence is possible without any theological commitments. Unlike Moore, a professed atheist,¹³² Finnis clearly professes Christianity but argues that although one who accepts Christian revelation may understand the purpose and origin of natural law better than one who does not, Christian revelation and theological commitments are not necessary

to come to know natural law or, in the nomenclature of Finnis, the principles of practical reason. Theological truths may be important to Finnis in other contexts, but they are not necessary to articulate his understanding of practical reason. On the other end of the spectrum from the claims of Moore and Finnis, Kai Nielsen has argued that “if there is no God or if we have only the God of the Deist, the classical natural law theory is absurd, for there will then be no providential governing of creation, no plan for man of which the natural law is a part.”¹³³ Although Nielsen is no fan of classical natural law, his reading of Aquinas is more faithful to the Angelic Doctor than that of Finnis. Nielsen rightly sees that Aquinas’s, and hence all classical natural lawyers’, understanding of and justification for natural law is dependent upon specific theological (at least those of natural theology) claims: “For such [Aquinas’s] natural law theory to be justified, God, in fact, must exist; and it must be a further fact that God’s nature is essentially what Aquinas says it is.”¹³⁴ Although on this point, and not on many others, I agree generally with Nielsen’s claim that at the end of the analysis God and particular aspects of His nature are ultimately indispensable to a complete justification for and understanding of natural law, my own answer, however, does add a nuanced distinction to Nielsen’s claim. The philosophers and jurists of antiquity demonstrate that one can come to know that natural and even eternal law exist and can come to know specific precepts thereof. Thus far, Finnis and Moore are correct that some knowledge of and argument in favor of natural law can be had without specific theological commitments. Yet, I will argue, owing to failures of both the human will and reason, a theologically neutered approach is ultimately incomplete and likely to persist in erroneous conclusions. One who follows the thread of natural law reasoning, because it argues from final ends, that is, teleology, must one day reach the question: From where did these final causes arise? Since these final causes as precepts of eternal law are an ordinance of reason, they must come from somebody’s reason. As Aquinas argues, to be law they must be promulgated by someone. Ultimately, a natural law jurist must confront this question. Likewise, as we will argue in chapter 5, anyone’s ability to accurately know all of those principles of natural law and, more to the point, correctly apply them to particular circumstances is severely limited without recourse to divine law. The history of unjust and evil laws and legal

regimes throughout history is evidence of the difficult work of knowing and correctly applying the principles of the natural law. Succeeding in this task without recourse to divine revelation is analogous to building an edifice without consulting an architect. The approach of Finnis to minimize the role of God in natural law jurisprudence may have some initial success and overcome the initial mocking of critics like Nielsen, but I will argue it will be ultimately unsatisfactory.

Moore offers a categorization of different metaphysical foundations for a natural law that can be very useful in explaining my answer to this question. Moore first formulates a two-pronged, general definition of any form of natural law theory: “(1) there are objective moral truths; and (2) the truth of any legal proposition necessarily depends, at least in part, on the truth of some corresponding moral proposition(s).”¹³⁵ This definition clearly distinguishes natural law jurisprudence from positivism because it requires that laws (legal propositions) have a relationship to truths outside of the legal system. Yet, according to Moore, different proponents of this relational view can have very different understandings of the nonlegal truths. Moore identifies four possibilities:

1. Moral realists who hold that the nonlegal propositions to which law must relate really exist independently of both (1) what people think them to be (mind-independent) and (2) human conventions (convention-independent) regardless of whether those truths both exist naturally and are known naturally (or through some suprasensible faculty).
2. Naturalist moral realists who hold that the nonlegal propositions to which law must relate really exist, are mind- and convention-independent, and exist in the natural world and can be known by a natural power or faculty.
3. A particular species of naturalist who holds that “a universal and discrete human nature” determines the content of the nonlegal moral truths to which legal propositions must relate.
4. Religious tradition-grounded naturalists who hold that the “(human) mind- and convention-independent” nonlegal truths to which legal propositions must relate “depend on the natural fact of divine command.”¹³⁶

I will argue that one can fully comprehend the essence of law (speculative knowledge) and have greater success in reaching good (meaning true) judgments about what human laws ought to contain (practical knowledge) only from a perspective that combines both the third and fourth categories. A jurist who accepts both the real, naturally existing moral truths and their ontological origin in and revelation by the mind of God will attain greater speculative and practical knowledge of law than one who approaches jurisprudence from one of the other limited perspectives. Classical antiquity demonstrates that philosophers and jurists such as Aristotle, Plato, and Cicero accepted a natural law philosophy and jurisprudence and had significant success in acquiring speculative and practical knowledge of the law. Yet, their advocacy for natural law was inchoate because they could not clearly articulate the attributes of the divine origin. Their work, despite its greatness in some areas, clearly contains conclusions about the content of natural law that are, in light of Christian revelation, strikingly false. Aristotle's claim that slavery is a natural and good state for some is only one example. Augustine, Gratian, and Aquinas surpassed the achievements of the ancients because they had recourse to the fuller source of knowledge in revelation.

A critical difference between natural law jurisprudence undertaken from one of the first three perspectives (listed above) alone and the combination of the third and fourth is the same difference that John L. Hill identifies between Greek philosophy and Christian philosophy. The former "tries to explain the world by giving us a pattern, whereas Christianity gives us a Person."¹³⁷ The revelation of the three divine persons within God makes philosophy, and hence law, personal rather than merely conceptual. Throughout this work, we shall note how classical natural law jurisprudence makes law personal in contrast not only to the jurisprudence of Hart and Raz but also to that of Moore and Finnis.

Notwithstanding this and other differences, one can certainly be persuaded to accept and practice aspects of natural law jurisprudence without necessarily accepting the theological commitments of the fourth category, and fruitful conversation and dialectic can occur among scholars coming from all four perspectives. Yet, as we shall see in more detail in chapter 5, the fourth perspective offers the most complete and successful approach to solving the epistemological problems inherent in unaided natural law

jurisprudence. Although intelligent conversation is possible and fruitful among those coming from all four categories, the benefits to be gained from accepting the commitments of the fourth category should not be ignored and left out of the discussion simply for the sake of gaining wider acceptance for natural law jurisprudence. Since all of those who argue from the first three categories lack the ultimate metaphysical foundation for law (and all of reality), they can only reach a certain extent of knowledge. Those who tend to try to appeal to positivists (or other non–natural law jurists) by arguing exclusively from the first three metaphysical positions do a disservice to, and ultimately undermine the deep metaphysical grounding of, natural law jurisprudence. Ignoring or downplaying the metaphysical foundations ultimately leads to their dismissal. As Jonathan Crowe has observed, the result is that, for Finnis, law does not really have an ontology; it is merely a hermeneutic to explain and justify normative social practices.¹³⁸

The remainder of this book will provide more complete answers to these questions and further elaborate these critiques. The metaphysical and theological claims of the natural law tradition are ultimately the most unique contribution they can bring to jurisprudence and should therefore not be left out of the discussion.

