CVL1024 PHILOSOPHY OF LAW

The European Law Students' Association

MALTA

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Law in Antiquity

Many philosophers of time gone by ascertained that God created everything ***ex nihilo***, which simply means 'out of nothing'. God had no tools, no blueprints, and no higher entity to guide him all throughout his endeavour of birthing the cosmos, because he is the one and only highest divine entity in existence.

Notions of Justice and Law in Antiquity

In times of ere, the notion of a ceaseless and cyclical movement with regards to justice was, predominantly, the blueprint upon which philosophers based their theories upon.

The ongoing cycle of **Eternal Motion** (*apeiron*) serves as the cornerstone of how the idea of eternal justice functioned: things *are*, and then *perish* into what they *come to be*.

> **"The things that are, perish into the things from which they come to be, according to necessity, for they pay penalty and retribution to each other for their injustice in accordance with the ordering of time."**
>
> Anaximander of Miletus

And this perennial cycle of objective justice is much akin to Nietzsche's theory of **Eternal Recurrence**; which dictates that an occurrence be so perfect, so flawless, that it can be envisioned to happen *ad eternum*.

This well-structured eternal motion is completely conditioned by the raw essence of **Justice**, which conducts any and every occurrence of **Change** (much like Aristotle's theory of Potentiality and Actuality) – which effects all.

Justice is everywhere, nobody may elude it. And Earthly Justice has the duty of mirroring Eternal Justice. Ultimately, the mere function of human beings is to abide by their predetermined place in this **Objective Order**. Fulfilling this function would equate to producing Justice, but if one was to shy away from his duty of abiding by Objective Order, then **Injustice** will be sure to ensue.

Notorious Greek tragedies serve as great examples of how people suffer a fall from grace after running counter to their Objective Order. In Homer's *Iliad* for instance, Achilles becomes gripped by **Hubris** and recklessness after tying Hector's body to his chariot, thus dragging him across the dirty earth in a dastardly exhibition of humiliation which, after all, was hugely uncalled for. And for Hubris to be outmatched, **Nemesis** (retribution), must be permitted to flourish. Through this incessant struggle between Hubris and Nemesis, **Balance** may be borne. And this constant battle between the aforementioned Hubris and Nemesis (which lead to Balance), fuels the cycle of **Justice**.

Hubris → Nemesis → Balance → Justice

> **"…all of your own free will, […] be just and you will never want for joy…but the reckless one, […] the squalls of torment [will] break his spars to bits."**
>
> Aeschylus, *The Eumenides*

Plato's Take on Justice in a Society

Plato's theory of the Tripartite Soul and its application to a social civilisation exhibits how, through his logic, the optimal society should be disseminated.

Fundamentally, Plato trisects the soul into 3 parts: **Reason**, **Spirit**, and **Appetite**; with the former being the most important ingredient by which one may lead a righteous life. He then respectively mirrors these essences unto the roles of persons within a suitable society: **Philosopher Kings**, **Guardians**, and **Artisans**.

Therefore, Plato's logic directs him unto believing that a just society would be one littered with Artisans, who are protected by Guardians, and are ultimately all ruled by a single Philosopher King; much like how he believes that the human soul is comprised of a significant degree of natural Appetite, which is fuelled by Spirit, albeit completely controlled by Reason (***logos***).

And by this, the just polis (governed by a Philosopher King) perfectly mirrors the just soul (governed by the *logos*).

On an aside, Plato's Allegory of the Cave also informs us about how the truth is only attainable through the embracing of the Forms, which are not found dwelling amidst our feet, but rather, reside spiritually in a plane of themselves (hence why Plato is painted pointing upwards in Raphael's *The School of Athens*). And Truth is the only medium by which we humans may ever hope to achieve true Justice.

Aristotle's Take on Justice in a Society

The Aristotelean concept of a well-balanced diet of **virtues** (which are controlled by the **Golden Mean**) is the concoction by which one might live a righteous life, and rule a righteous society.

Justice is one of the Aristotle's four columns of virtue (alongside Wisdom, Courage, and Temperance). In his *Nicomachean Ethics, Book V*, Aristotle stipulates that true Justice "**requires a standard of equality**", and in Book III of his *Politics*, he goes on to say that "**all men cling to justice of some kind**".

And to achieve Justice through feeding the predominant virtues, man also feeds his ***telos***, or his purpose. And once becoming acquainted with his telos will a person uncover true ***eudaimonia*** – which is the optimal state of being wherein persons unlock their true potential. Moreover, his ***entelecheia*** thesis supports the notion that man's *telos* may only be given actualisation through the application of reason (*logos*).

The aforementioned virtues are the dire prerequisite not only for achieving *eudaimonia*, but also for attaining the **Good Life**, which is prompted by the matrimonial effect of **rationality** (*logos*) and the **Golden Mean**.

Ultimately, Aristotle insists that the polis is necessary for man, because he is inherently, a political animal.

> **"Man is by nature a political animal"**
>
> Aristotle

Therefore, active participation in the polis is crucial for the Good Life.

The Good Life in Late Antiquity & Augustine's 'World View'

In his book, Augustine identifies two types of cities: the **City of God (*Civitas Dei*)**, and the **City of the World (*Civitas Terrena*)**. It is important to note that the City of God does NOT denote to the Church, and that the City of the World is NOT the State.

The City of God is that habitat which is composed of people who worship and love God and others.

The Earthly City is composed of people who love them*selves* and other worldly pursuits such as power and wealth.

> ***"Justice is love serving God only and therefore ruling well all else"***
>
> Augustine

Ideal states do not exist because they do not offer their love and service exclusively to God, and let this love guide their actions. Where there is conflict between states, there is a lack of justice. Naturally, some states are more just than others, but none are perfectly ideal, because none can make full claim of being just. However, as unjust as a state could be, it still needs to maintain order of some sort. Some states are organised not because they are just, but for the sake of retaining power.

However, all states, just or unjust have a **Divine Purpose** – as they have been created by God to maintain order and keep individuals in check.

The state functions through the application of punishment, in the same manner that God will punish those who have not been elected to salvation.

Therefore, the polity offers **Relative Justice**, and not True Justice, but by doing so, it serves God's Divine Will.

The **Ruler** is God's minister and has the dutiful right to punish crimes against nature, custom, and law. Rulers have the authority to change customs and laws, as long as they do not oppose God's laws. The Ruler must always be obeyed, irrespective of whether he is righteous or wicked. However, if citizens must choose between obeying God and their Ruler, they must obey God, but willingly accept their punishment for disobedience.

Therefore, **Eternal Law** is the one dictated by God himself.

According to Augustine, Justice is NOT cyclical (unlike the above notion of *apeiron*), but completely linear. And this is because it reflects God's true reason and will.

However, the good order established by God was disrupted by the Fall of Adam. With his free will, Adam chose to run counter to God's will, and this quality became integrated into human nature. Thus, human nature is corrupt with avarice, greed and selfishness. Because of its corrupt nature, humanity is thus condemned to damnation; and only a fickle few earn God's salvation out of His benevolence (the Chosen People).

Therefore, we now have a mix of **Corrupt** and **non-Corrupt** people living together in a single community; but they both inhabit a different reality – the *Civitas Dei* or the *Civitas Terrena*.

The Earthly City is the reality inhabited by the descendants of Adam and Eve. These persons lack the love of God, not because God does not love them, but through their own refusal to love Him by concentrating their love on other material objects. Thus, they inherit the rebelliousness of Adam, and this is shown in their behaviour.

Conversely, those who love God and live as 'pilgrims and foreigners' among the others, inhabit the City of God. Although human societies are composed of these two conceptual cities, persons can only be part of one of these, not both cities.

Augustine's Hierarchy of Laws

Augustine formulates a hierarchy of laws according to their prestige.

The ***Lex Humana*** serves as the base of such a hierarchy. It is tempo-relative, and changes according to specific circumstances. *Lex Humana* is derivative of the Latin maxim '*lex iniusta non est lex*' – meaning that unjust laws which run counter to natural law bear no legitimate authority and are not laws at all.

Secondly, one might find the ***Lex Naturalis***, which refers to the natural order as created by God before the occurrence of the Original Sin. The *Lex Naturalis* also mirrors the highest form of law, as it ingrains God's Eternal Law into every natural orifice of Mother Nature, and acts as a subservient to the higher breed of law.

The highest breed of law (which serves also as the governor of the aforementioned *Lex Naturalis*), would be the ***Lex Aeterna*** – which directly translates to 'Eternal Law', and is reminiscent of God's Will itself. It is the most dominant form of law one may strive to attain, as is perfect in its holistic entirety – due to its being adumbrated by God Himself; and as Augustine liked to preach: all that hails from God's fingertips is perfection incarnate.

Aquinas' Treatise on Law

Aquinas commences by explaining his view on man's composition of the soul – which is comprised of **Rationality** and **Sensitivity**.

Thus, Aquinas proceeds by postulating that it is only when man gives in to his Sensitive desires which, ultimately cross swords with his inherent Rationality, that he also embraces vice and evil.

> ***"Man derives his species from his rational soul: and consequently whatever is contrary to the order of reason is contrary to the nature of man, as man; while whatever is in accord with reason, is in accord with the nature of man, as man"***
>
> Dionysius

Therefore, human virtue is found to be in natural accordance with man's innate nature, and thus, necessarily implies that vice is naturally alien to man's inherent nature as it runs counter to the fundamental quality of Rationality.

Ultimately, it can be said that sin is therefore NOT the corruption of nature, but the negligence towards man's capacity for Rationality. And it is only through **God's Grace** that we, as imperfect human beings, may find salvation and redemption by not letting temptation override our competence for Rationality.

Aquinas calls out the Aristotelean concept that 'man must manage man' because he insists that, when creating human beings, God did not intend their supremacy over other Rational beings; over their kin. But rather, he intended that man govern over Irrational beasts; thus editing the aforementioned Aristotelean notion into *'man must manage beast, not other men'*.

Man's *telos*, or purpose, therefore, is given to him by God. He "created humankind in his image" (Genesis 1:27), and thus, it necessarily follows that human beings' ***appetitus naturalis*** connotes the inclination towards striving to follow God's will. And Aquinas continues by claiming that through this, we participate in God and his actions by upholding his virtues and giving heed to our inherent Rationality. Thus, through natural reason, we become acquainted with Him – and this is all inscribed in Aquinas' *Analogia Entis*.

Law for Aquinas

Aquinas defines law as a measure for acts, wherein persons become obliged or prohibited to act in favour or against a certain way.

In nature, the measure for human acts is **Reason**, as it directs persons to a desired end. Thus, law strives to mimic this Reason found in nature, therefore, it necessarily follows that laws should be founded on the pillars of natural Reason in order for them to be just.

And as the *telos,* the final end*,* of human life is that of attaining happiness, then law must cater for this target and make sure that it provides the climate wherein persons may attain a perennial state of happiness and well-being

Therefore the definition of law is a rule founded on Reason for the sake of common good, promulgated by him who has great care for his peoples and community.

And as God created us in His image, we could thus envision him being the sovereign ruler of the whole universe, much like how a sovereign ruler of a state would function. He rules by his Divine Reason which, in turn, propels his *Lex Aeterna* – the Eternal Law. And this is why rulers should shadow God's Will and His Eternal Law by concentrating their essence into the laws of their own state – because they are the manifestation of legal perfection. Confessedly, our limited mental prowess may never properly grasp and digest the profound perfection of God's *Lex Aeterna*, therefore we may only comprehend certain principles in their generality, and not in detailed specificity.

And this is the role the *Lex Naturalis* fulfils – because it is the imprinting of God's Divine Will on our natural inhibitions. Therefore, participating and adhering to the *Lex Naturalis* automatically implies participating in God's Will. And as human beings partake in Eternal Law through their capacity for Reason, then that serves as sufficient explanation for why it is a just law – because a just law is that which is bedfellows with Reason.

Thus, the sole duty of a good and just ruler would be that of applying the *Lex Naturalis* to the *Lex Humana* when promulgating rules unto their state. The *Lex Naturalis* is there to guide us onto identifying what the objective Truth regarding 'what is right' is; and we can identify 'what is right' through **Deduction** and **Deliberation** (which is the concept of the promulgation of positive law).

And rationally deductive scientifical endeavours which yield wisdom not imparted to us by nature aid humanity in attaining an even more redefined version of the *Lex Humana*.

Ultimately, Aquinas insisted that the *Lex Humana* be based upon the *Lex Naturalis* and the *Lex Divina* (which is the ecclesiastical take on Divine law); for the simple reason that the *Lex Naturalis* already intrinsically mirrors (as much as it possibly can) God's *Lex Aeterna*. Therefore, it follows that in abiding by the *Lex Naturalis*, one is also abiding by the *Lex Aeterna*. Finally, man must never lose sight of his inherent Rationality – because it is the only essence keeping us participatory in God's Will.

Legal Positivism vs Natural Law

Legal Positivism

What is it that truly encapsulates the essence of a legal positivist? For starters, he is him who believes that laws are constructed upon the foundations of social norms, thus rendering said social norms common laws, and even proper legislations. Hence why the relation betwixt law and morality is heavily dependent on this definition.

The core doctrine of legal positivism is that law is valid on its sources, not its merits. Positivism is neatly divided into three:

Inclusive Positivism: this adheres to soft social sources. Hence, it preaches that the legal validity of a norm may, but not necessarily, be heavily dependent on morality.

Exclusive Positivism: the antithesis of Inclusive Positivism; this maintains strong social sources and claims that the legal validity of a norm cannot depend on morality.

Normative Positivism: acknowledges the claim that basing legislations on morality may equally boast a set of advantages and opposing disadvantages.

What is the Right Thing to Do?

In the early 1800s, British philosopher **Jeremy Bentham** strived to answer this question by bestowing life unto his concept of Act Utilitarianism. Utilitarianism's plants are watered by what is dubbed as the **'Greatest Happiness Principle'** – in which **'happiness' as a factor is used to measure an action's moral worth**. Let us elaborate. This simply connotes that **any action's righteous worth is determined by how many people it benefits**; therefore such an ideology transforms itself into a game of numbers, with its rules being, that the higher the amount of happiness an action erects, the higher the moral worth of that same action. 'Happiness' hence becomes a dependable gauge by which one may determine how upstanding an action is; therefore as Bentham's philosophy wills it:

> ***"That action is best, which procures the greatest Happiness for the greatest numbers; and that, worst, which, in like manner, occasions Misery."***
>
> **Hutcheson, F., 1725, 2008.**

However, as inherent as this might befall one's ear, such a doctrine may indirectly condone the occurrence of disagreeable actions.

Take into consideration, three terminally ill politicians who require different organ transplants to live; and such required biological structures are conveniently found to dwell within a lowly beggar, living on the merciless streets.

So on one hand, we find three important citizens who work for the state, and on the other, we find a peasant; destitute in all elements of life, except that of health. So, walking strictly upon the lines of Bentham's Act Utilitarianism, the state decrees that the peasant be sacrificed, and his organs harvested and gifted to the needy politicians, plunged half-dead in a bed. And lo and behold, sure are these men to be cured from all lethal ailments, and properly returned to their healthy former state. Yet the peasant is to be found six feet under; pillaged from the instruments which orchestrated his drawing of breath. One would correctly be inclined to question that, even though three men were saved, was it just for such affairs to be so? At the expense of another's life? After all, according to Jeremy Bentham's Act Utilitarianism, the happiness ratio of 3:1 does signify that such an action was morally rich… does it not?

Another virtual instance which fuels thought pertaining to Act Utilitarianism is that of the train. What train? The one of death. Imagine the said vehicle shooting faster than a bullet, approaching an intersection in the tracks. On the right path, three people lay oblivious of their untimely demise, and on the left, stands only a single person in complete solitude, awaiting the same potential fate. And interestingly enough, you, yes, the reader, find yourself manning the lever which determines the route the train takes. Would the right path be the direction of your choice? Or would that be of the left route? Jeremy Bentham's Act Utilitarianism flatly suggests that the one in the charge of the lever wills it that the train takes the left path. The sacrifice of a person would indeed be a grim choice, however far better than the bloodshed of three; **as a trio happy people outshines the sorrow of one. Therefore, according to Bentham, such an action would prove to be morally right**.

Yet I do hear the plea of the person criticising such a philosophy. Such a cold, statistical ideology would prove to be phenomenally inhumane! And the aforementioned **John Stuart Mill** strived to set at naught such callous dilemmas, by 'improving' on Bentham's Act Utilitarianism, and birthing **Rule Utilitarianism**. This article of faith brought about a significant change, stating that **the best action would be that which produced the most happiness, as long as it respected the Rules of Conduct, and had its end justify its means**. This glorified amendment was sure to abolish any justification for wrong actions. For instance, to foreordain certain actions such as homicide and label them as wrong, already brings the greatest happiness by itself. Therefore Mill's Rule Utilitarianism is the hallowed brother of Bentham's Act Utilitarianism.

Utilitarianism can be judged by a single simple question: **does the end justify the means**? Definitely not rocket science, it asks whether the method used for tackling a certain situation is just and moral after obtaining the intended result.

Were you to ask Jeremy Bentham and his philosophy of Act Utilitarianism, he would state that the end must justify the means; however it does so as long as the outcome is achieved. A highly immoral viewpoint such as this could result in the occurrence of wrong actions to achieve a 'morally right' Act Utilitarian outcome (as specified high above). On the other hand, Mill's Rule Utilitarianism copies Bentham's statement, but adds with a dash of salt, that the end must justify the means as long as no rules of conduct are defiled. However before enrolling in certain actions in order to achieve an outcome, one must assess, analyse, and consider the aim and intentions of that same action; and **this is the hallmark flaw of Utilitarianism – as it completely overlooks intentions behind actions**.

> ***"Utilitarianism is not interested in the disposition of the actor but rather in the predictable consequence of his act."***
>
> Hallman, 2010

Law-Making in Relation to Rule Utilitarianism

Unless a person, through bad laws, is denied the liberty to use the sources of happiness within his reach, he will not fail to find his privileged existence if he escapes the positive evils of life.

Thus, utility would command, first, that laws should place the happiness of every individual, as nearly as possible in harmony with the interest of the whole.

Deontology and the Rules of Righteousness

Consequentialism plays a huge role in the defining of what is right and what is not. However, the concept of Deontology also kindly steps in here to voice its opinions; which regulates the righteousness of actions according to particular maxims. Fathered by Immanuel Kant, this school of philosophical thought is sure to state its claims as seen below.

In philosophy's infancy, many a theorist's aim was to identify what the 'best' life for a man is. However that infant was destined to grow, and upon adolescence came new perspectives and ideas, new mind-sets and a broader way of perceiving life and the human faculty of thought.

Immanuel Kant took that adolescent's hand and directed it gently towards a new viewpoint upon life. Hence, was baptised what we know today as **Kantianism**. Rather than straining on trying to figure out what the 'best' life is for man, Kantianism suggests identifying what the worthiest and most virtuous human life is like.

Kant reinforces his idea of a 'good will' **by regarding actual actions as the proper scale of a righteous act, rather than feelings themselves.**

And naturally so, because one has little power over his sentiments; and even though a person might harbour negative emotions towards an element, it is ultimately what he decides to do which determines that same person's moral wealth.

Take into consideration, two men who do not see eye to eye. One of such falls grievously ill, and stricken by news of this, the other person does not possess any remorse or pity. Kant does not condemn the latter for harbouring such negative emotions; however according to the philosopher, it is up to that person's actions which determine his moral worth. Sympathizing and showing support would result in the healthy individual being righteous; however failing to dismiss negative energies or wickedness, and letting emotions like these manifest in oneself, would direct that person into becoming a despicable individual. So, since man is so easily over-powered by sentiment, Kant emphasizes on doing right for goodness' sake irrelevant of our emotions on the matter.

But one might rightly ask, how are we to know which actions conduct a ‘good will’? To which Kant would present two virtual tools - the **Hypothetical** and **Categorical Imperatives**. Let us tackle such rules diligently by breaking them into halves. The Hypothetical Imperatives give birth to two variants: the **Technical** and **Assertoric** Imperatives. Put simply, the former Imperative is essentially **a set of instructions** that lead a person to a desired aim; such as building a miniature toy set using an instruction manual. The latter Assertoric Imperatives on the other hand lead oneself onto achieving a desired element which is a bit more sophisticated than the previous one; for example happiness. Building a miniature toy set and achieving a state of happiness are definitely not two fruits harvested from the same tree; however both of these elements can be achieved by a set of rules or guidelines - the Hypothetical Imperatives.

Alas, there exists a chink in this chainmail; as **such Imperatives may be dismissed with ease**. Want to become wealthy? Then work! A person might easily be disheartened at such an Imperative which demands hard labour and dedication. Therefore Hypothetical Imperatives might not fully hit the nail on the head.

Conversely, the Categorical Imperatives are impossible to dismiss. **They are true at all times, in any situation, and are guidelines of how one ought to act**. A good traditional example of a Categorical Imperative would simply be a promise - an oath which one ought to abide by.

Other such imperatives may also include acts of social taboo; for example to not kill or maim intentionally unless in self-defence. However the layman might intelligently question the factual aspect of such Imperatives. For instance, is the statement 'one ought not to steal' backed up by any facts? What if the so-called thief is constrained to act in that way because he is close to starvation? In this case, how can we be sure that such rules are morally right?

Kant would then wisely introduce what he calls **'Pure Practical Reason'** - a sort of gauge by which one might determine the moral value of an action.

Kant lets us ponder about 'Pure Practical Reason' by giving us an example in imagining a world full of perfect, sinless entities. Such beings would act purely and righteously without any second thoughts. Therefore Kant begs us to question such upright actions for a reason behind them - which he calls the **Maxim**. He continues to contemplate on whether acting on such a Maxim would be a law of nature in the home world of this perfect race. If not, then the submitted action in question would not turn out to be harmonious in a perfect world, resulting in that action not being morally right.

Therefore as Kant cites in his work 'The Grandwork of the Metaphysics of Morals', one should

"Act only on that Maxim whereby thou canst at the same time will that it should become a universal law".

And to this, the **Universalisability Test** is set to be born. This fancy statement simply connotes to the application of the above quote - boiling down to a simple yet very important question: **"what if everyone did that?"** Such an inquiry is sure to prove the moral worth of an action.

Take into consideration, for instance, a person who is suffering from a terminal illness and wishes to administer euthanasia instead of fighting for his life. In much simpler terms, this relates to the mentality of 'if life presents you with a problem, then kill yourself'. What if everyone did that? The whole human race would be extinct if such an action was to be considered morally right! Another example shows us an instance in which a man gently picks up a piece of litter from the ground. After disposal, the man in question irritably asks himself: "have I stooped down to such a level of ridiculousness such as picking up litter after other people!?" However when that same person applies his action to the question "what if everybody does what I just did?" then that person would grin, and continue with his day knowing he has committed a good, righteous moral action.

Kant eventually draws out a rudimentary moral law dubbed as the 'Respect for Persons'. In his writing 'The Grandwork of The Metaphysics of Morals', Kant cites that one should:

"Act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as a means only".

And what does this mean? To simply treat humanity as a valuable race; to treat others as you would treat yourself. A very wholesome, just and fulfilling ideal.

John Austin as a Legal Positivist - the Command Law Theory

John Austin's Command Law Theory wills it that law coming from the sovereign's mouth is the highest order of law possible; therefore, law is the command of the sovereign, safeguarded by the threat of sanction in the event of non-compliance. Here, sanctions are the methods for the modification of behaviour of those who do not comply. He adds by stipulating that law is the medium by which one might observe the relation of power with obedience. Thus, Austin adds that once one has a set of sovereign laws which are also encased underneath the shield of the threat of sanction, then one also has a legal system.

Thus, laws not established by political superiors are not laws at all.

In his career's infancy, Austin was gripped tightly by the influence of Jeremy Bentham, and Bentham's Utilitarianism is lucidly implemented in Austin's most famous works.

In Austin's viewpoint, **Divine Will** is akin to Utilitarian principles:

> ***"The commands which God has revealed we must gather from the terms wherein they are [promulgated]. The command which he has not revealed, we must construe by the principle of utility."***
>
> Austin 1873: Lecture IV, p. 160

Some stipulate that Austin also preached some form of Mill's Rule Utilitarianism, such as in **Austin 1832: Lecture II, p. 42**, wherein Austin suggests that we weigh the "classes of an action" before observing its utility.

Austin views law as being "**imperium oriented**"—referring to rules ordained from above, emanating from particular authorized sources.

Austin was also the first practitioner of a law known as "legal positivism." The majority of thinkers dealing with jurisprudence mainly dealt with philosophical, and unobjective questions, such as asking, 'how should a state govern?' and 'in which circumstances should citizens be held legally responsible in order for them to be subject to adjudication by law?' Austin tackled jurisprudence from a different angle. He injected science into his thinking techniques and strived to treat law systematically, thus amassing massive clout amongst English attorneys who wanted to employ a more serious filter to their line of work in the late 1800s.

Legal positivism asserts that it is equally possible and important for one to have a morally neutral descriptive theory of law. It does not shy away from the fact that moral and political criticism of legal systems is highly valuable, but strongly suggests that a descriptive approach to law is optimal.

Prior to Austin, both Thomas Hobbes, in his book, *Leviathan*, and David Hume, with his argument of dividing "is" and "ought", set forth claims quite similar to those of Austin's legal positivism, thus 'foreshadowing' it.

Austin's dogma of legal positivism suggests that:

> ***"The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation."***
>
> Austin 1832: Lecture V, p. 157

H. L. A. Hart as a Legal Positivist - His Critique of Austin's Command Law Theory

Hart analogises Austin's Command Law Theory by imagining a robber holding up a bank. The robber places the person in charge of the money at gunpoint and orders him to do as he says, or else he will spread his brains all over the white and marbly interior of the bank. And through this intimidation, the bank employee complies. And Hart equates this to the sovereign asserting its laws and threatening its subjects with sanction if they do not adhere to said laws.

Moreover, Hart asserts that in order for one to have a prolific legal system under Austin's Command Law Theory, then one also needs the following ingredients:

1. **Generalisability**; the laws asserted must be capable of applying to the people as a whole, and not a specific audience.

2. **Persistence** in maintaining the laws.

3. **Efficacious**; there must be a habitual obeying of the law asserted by the sovereign.

4. **Supremacy**; the sovereign needs to be supreme within its own state.

5. **External Independence**; the sovereign must be independent of outside forces.

However, Hart objects that not all laws are necessarily commands (ex. customary law or power-conferred rights). Therefore, a problem with Austin's Theory arises here – as **the sovereign thus becomes subject to obeying those laws that are not necessarily commands**, which crosses swords with the notion that the sovereign must be supreme within its own state.

Hart points out another conundrum regarding Austin's theory: what if a king dies and is succeeded by his kin? In that case, wouldn't the successor require time for him to gain respect and obedience from his subjects? (- which are the two primary ingredients needed for order to be maintained throughout the state).

Therefore, a **problem of continuity and persistence of legislative authority** erects itself. What about the laws established before the reign of the current king? Do those laws stop being laws once the former king who promulgated them dies? The answer is NO – they remain there; therefore highlighting the conundrum of persistence.

However, one can defend Austin's views by stating that being a sovereign is very akin to like being in office; wherein one inherits the legislation established by preceding authorities. **One must not confuse habits with rules**. Habits do not explain anything, but rules do. And Hart's point is that in order to explain obedience, one requires a complete understanding of the concept of rules; and the notion of rules is intimately related to the notion of having an office.

And the rules that explain which other rules declare an entity as a legal authority are vital for a legal system to exist.

Hart then highlights the fine line between being obliged in contrast to being under an obligation. One is not obliged to fulfil a promise, however, he is under the obligation to do so. Thus, this instils a sense of duty within oneself. Yes, there *are* commands which oblige oneself to do something, but the majority of laws place a person under an obligation.

We, as humans, commit certain lawful actions due to the habitual influence of doing so – thus also being tinged by a pseudo-behaviourist effect. We stop at the red light because we know that a red light on the street means stop, to the extent that we mindlessly stop at a red light without hesitation – because we inherently learn that it is signifies halting. Therefore, the conjunction of these elements creates a behaviourist nature. And Hart affirms this by concluding that the car stops because the person stopping has *internalised* the law of stopping when the light is red. And this is why we require the notion of a rule for a successful legal system – as we must not view rules as obligations we commit out of threats of sanction, but rather because we know that it is beneficial both for us and others to commit to these rules.

By this, Hart determines three vital characteristics of obligations:

1. There must be **social pressure** to conform with the rules, and to not abide by said rules should instigate feelings like guilt, shame, and remorse.
2. Obligations are **necessary for social order**.
3. Obligations **involve a sacrifice** from the position of the obliged.

Fundamentally, obligations *cannot* be understood from the point of view of coercion.

Hart, however, asserts that positivism can been criticised on many levels. Holistically speaking, Legal Positivists made three claims:

1. The Command Theory of Law
2. Analytical Jurisprudence
3. The Separation Thesis

To this, Hart argues that only ONE of the above ideas properly define the essence of positivism. The other two, albeit proposed by other Positivists such as Austin and Bentham, may be rejected, and the only digestible essence is that of the **Separation Thesis**. Therefore, Hart values the Separation Thesis to be the inherent gist of Legal Positivism. He even marches on by arguing that the fact that the Command Theory is unsound does not necessarily imply that the Separation Thesis is also untenable. For Hart, it is possible for one to reject the Command Theory of Law (as it does not accurately define law, its nature, and the legal system), and at the same time embrace the Separation Thesis.

Hart explains that the Separation Thesis discerns between law as it is, against law as it ought to be. However, Natural Theorists make their voices heard here, stipulating that if a man-made law goes against God's will and natural law, then one has the right to disobey said law (much like the argument used by Antigone in Sophocles' '*Antigone'*, which triumphs over King Creon's man-made law).

Therefore, Legal Positivism started to get rejected not only because it was thought to be wrong and inaccurate, but because it was regarded to be morally corrupting.

But once again, Legal Positivist John Austin butts in here, claiming that:

> ***"The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry."***
>
> Austin 1832: Lecture V, p. 157

Thus, this shifts the query on what the prerequisites for something to be considered as law are.

> ***"A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation."***
>
> Austin 1832: Lecture V, p. 157

Blackstone also chimes in, stating that he agrees with Austin's assertion that the law of God should function as a model on which humans should base their laws upon, **BUT**, if Austin is also preaching the idea that a law has no validity if it contradicts the law of God, then Blackstone crosses swords with him.

Jeremy Bentham then claims that the argument of disregarding law which contradicts the standards set by morality would be one used by an anarchist.

Fundamentally, the Legal Positivists' creed is that law is a social fact; a fact that one discovers by empirically observing society. And this revolves around Hart's **Rule of Recognition** – which is the confusion of persons with regards to *which* requirements are to be met in order for law to be considered as law. **To this, Hart stipulates that a true and recognisable law is one which is founded on social facts.** For instance, if a law was published by Parliament (which in itself reflects social norms) then, yes, it should be regarded as law.

Legal Positivists promote the criticising of laws where necessary, but one cannot pretend that the law they are criticising is not law. If one wants to amend or repeal said law, then one has to do so through proper legal mediums.

It is also important to note that for Hart, Analytical Jurisprudence is a valid method for understanding the Separation Thesis. He does, however, keep on shunning the Command Theory of Law.

Hart stipulates that the notion of the Natural Law Theory (accepting that law should be established on the basis of natural moral standards), and the notion that there are NO moral standards are both very dangerous mindsets. Just because law is a social fact does not necessarily imply immunity to social criticism. Criticism of promulgated laws must, in fact, exist – as they spur change for the better. For instance, political spheres may uphold moral debates regarding abortion; and said spheres diplomatically explore the potentiality of legalising such a concept. Legal positivists still acknowledge moral arguments, respecting the fact that certain laws are definitely founded on basic moral rules and principles (such as the legal taboo of committing wilful manslaughter). **One can be a legal positivist, and still believe in moral standards.**

Hart also points out that judges themselves have the duty of making interpretative work - thus meaning that they have to actively perform on a moral basis.

The Hallowed Penumbra

A legal Penumbra is an uncertainty regarding an element which is similar but not identical to other legally disallowed elements. Take into consideration, a law asserting that automobiles are not to be used in a park. And a judge has been tasked with deciding on whether or not the law in question is also applicable to other methods of transport such as scooters and roller skates. To this, the scooters might argue that they are not 'automobiles'; therefore, a Penumbra arises. Therefore, there must exist a provision which anticipates certain penumbras. If uncertainties persist in all laws, then chaos will ensue. Lacunae make common appearance in many cases, and as such, crimes may be legally dismissed on frivolities beset by uncertainty. Therefore, a judge must be given the legal tools to define the cases in front of him, and logical deduction must be mitigated to the minimum.

In a judge's eyes, problems of a complex nature which tend to make minimal progress are fruits of Penumbras. When a law is clear, then all is well; however when doubts are instilled, the judge must be constructive in his approach. When faced by an uncertainty, the **judge should interpret the law in terms of the social policies of the country or state he is from**.

Hart claims that the judge must be constructive, avoid logical deduction, and take responsibility for the interpretation of the law. The judge should decide on the lines of social policies, and observes why said law was passed in the first place. Therefore, one could argue *against* Legal Positivism here, by stating that the judge is merging law as it is, and law as it ought to be; or that he is at least *appealing* to what law ought to be.

Hart acknowledges that the judge, in this case, might interpret that law ought to be in a certain way – **but this 'ought to be' is not akin to the moral definition asserted by the Natural Theory**.

This Penumbral thought might also exist in an evil legal system. The judges in a Nazi regime might interpret and apply the law in the context of social policies of a Nazi-occupied state. However, this 'ought to be' is not moral in essence. It is simply a constructive conclusion based on the influence of social policy with regards to a Penumbral law.

Here, Hart refers to a particular post-war case:

A wife sits in a tense quiet, awaiting her husband's return from war. Her husband, a Nazi, does so, and is physically untainted by the ravages of war. To which she is gleeful. However, he proceeds to confess his distaste towards the Nazi methods of doing things after having experienced the cruelties of war first hand. To which she is not gleeful. The wife then decides to report her husband to the authorities, under the allegation of expressing himself in a critical fashion towards Nazi doctrines. And to this, the husband is thus sent to the front – a sentence which ensures his impending doom.

It was the war's turn to die, and after it did, the woman herself was, in turn, tried in a non-Nazi West German court. The court proclaimed that she deprived her husband from the liberty of expression, even though she defended herself with the argument of 'following and adhering to the law'. However, she was found guilty of the asserted accusation, as the law which prohibited the liberty of expression also impinged a natural and moral right – thus meaning that the law she obeyed was, in fact, defective. The court argued that the law she abided by could never be valid, because it crossed swords with the innate principles of morality. And many consider this as a victory of Natural Law over Legal Positivism, as the assertion that there exist uncodified yet inherent laws prevailed in this case.

Hart, however, denies full accreditment to Natural Theorists by stating that we should, instead, accept the fact that sometimes, laws are so evil that it would imply irrationality were one to obey them. And here, the notion of what law is and what it ought to be is blissfully highlighted.

If the wife was not brought to justice even though she ultimately abided by the words of Nazi law, then that would have been an evilly atrocious act of injustice in itself. Hart thus asserts that sometimes, man-made legal systems simply do not work. Therefore, in this case, the judges of the post-war West German court had to choose between two evils: that of leaving the woman unpunished, or that of applying a retrospective criminal law. And Hart advocates for choosing the latter evil – because even if we regard something as law, it does not necessarily imply that it is *really* law. And in fact, the law applied by the judge ultimately disregarded the *written* law to be social fact, as he applied an *uncodified* natural law.

Lon L. Fuller as a Natural Theorist – the Different Strains of Natural Law

Fuller steps in here to avow his stance on Natural Law by introducing its many flavours.

Procedural Natural Law argues a necessary relationship between law and morality.

Substantive Natural Law relates to the *content* of a law. Similarly, in morality, substantive claims deal with the *content* of morality. For instance, advising someone that he ought not lie would be making a substantive moral claim; as lying would thus cross swords with the inherent moral principle of keeping a promise. Therefore, substantive laws (such as the prohibition of stealing) are directly derivative. Substantive Natural Laws (such as Aquinas' theories), exist as moral principles independent of whether human beings opt on establishing them as laws or not. Therefore, even if humans do not choose to codify said moral principles as laws within written legislation, these moral principles are still to be considered as laws. And a Substantive Natural Law theorist would argue that if our human-made laws go against these substantive principles, then our human-made laws are not valid in nature. Therefore, **Substantive Natural Law states that there are objective moral principles human-made law cannot contravene**.

Fuller, as a natural law theorist, believes that morality **cannot** be separated from law. However, he is NOT a substantive law theorist. He *does* argue that there are certain moral conditions a law must satisfy in order for it to be valid, but these conditions are solely procedural in nature, not substantive. For example, the idea that laws have to be lucidly explained is one of the moral yet procedural principles a law must adhere to. Therefore, these moral conditions have to be sustained by laws if the law sustaining them desire to be considered as laws.

If a law is written very badly and is incoherent/illegible, then it cannot be validly considered to be law. And Fuller claims that there are certain moral conditions that, if left unfulfilled, then the *whole* legal system would be defective. Thus, he argues that the **Inner Morality** of law is inescapable. *External* Morals are not necessary for a legal order to thrive, but Inner Morals are. Thus, if a legal system does not abide with Fuller's criteria of moral conditions, then that legal system would be founded on sand.

Fuller's 8 principles of Inner Morality are as follows:

1. Laws must be **general** and must apply to a category or office of people.
2. Laws must be **promulgated and publicly accessible**.
3. Laws must be **prospective**.
4. Laws must be **clear and coherent**.
5. Laws must **not be contradictory**.
6. Laws must **not be impossible to follow**.

7. Laws must be **constant**.
8. The **relativity of laws and their enforcement must be solid**.

Fuller thus insists that if the above moral principles are not injected into the legislation, then the whole legal body is rendered faulty. And this is owed to the fact that **the above principles ensure respect to human agency and autonomy**. If human beings did not have autonomy, the inherent concept of morality would be surely inane. And this is exactly why law is not ascribed to animals – because they are considered to be incompetent possessors of rationality and moral agency. Therefore, **Fuller's eight principles preserve the concept of human agency**.

Fuller also disputes Hart's Rule of Recognition as a social fact. He illustrates his arguments by imagining a civil war which stops after a peace treaty is established. Those involved in the treaty decide that they now need to draft a constitution, and do not waste precious time in doing so. Fuller asserts that in order for people to start obeying the newly drafted constitution (while also considering it to be legally-binding), they must also, through some means, believe that the new constitution is *good*. But in this hypothetical scenario, there is no law guiding the draftsmen on *how* to create the new laws of the new constitution. So how could the people consider that constitution to be law? To this, Fuller argues that the constitution in question gains value once it becomes founded on a moral standing. Therefore, it **directly implies that the inherent foundation of law must be based on some sort of moral principles**. Finally, Fuller concludes by proclaiming that fidelity to law must also be grounded on moral attitudes.

On an aside, Fuller also insists that Nazi laws were not really laws - as they ran direct counter to the above procedural moral ideas; without which a law cannot be considered to be law.

READ: *'Law as a Leap of Faith'* by John Gardner

READ: *'The Concept of Law'* Cap. 2 by H.L.A. Hart

READ: *'Positivism and the Separation of Law and Morals'* by H.L.A Hart

READ: *'The Morality of Law'* by Lon L. Fuller

Dworkin *contra* Hart

Before understanding Dworkin's critique of Hart, let us first rekindle our memories with regards to what he is criticising.

A Terse Recap on Austin's Legal Positivism

Hart's affinity towards Legal Positivism is lucidly show through his **Separation Thesis**, in which he (alongside Bentham and Austin) upholds the notion that law and morality are to be alienated from each other. And that is why these Legal Positivists sustain the argument that what law *is* and what law *ought to be* are two separate arguments altogether.

> ***The existence of law is one thing, its merits or demerits are another.***
>
> John Austin (1832)

Therefore, it can be safely stipulated that, for these philosophers, a law being 'unmoral' does not undress it from its inherent status as 'law'. Naturally, this goes against Augustine's theory that conversely claims that an unjust law is not a law at all.

Hart then moves a step further by erecting his thesis of the **Rule of Recognition** – which asserts that a law is valid based on its sources. Therefore, a particular state would have different laws based on how, in *that* particular state, social sources interpret laws. Another state may interpret a law in a completely inverted manner, but the interpretation would still be valid, as it would nonetheless be the product of that state's social sources.

With this mindset therefore, one can postulate that what is not written in the law, is NOT law. However, Hart acknowledges that, sometimes, judges are faced with the problem of the **Penumbra** – wherein they encounter a legal lacuna and must thus act on baselines estranged from the written law. Here, Hart argues that the judge must do some creative work by taking into consideration the *social purpose* of a general law in order to dictate a more specific statement wholly derived from said general law.

Dworkin's Attack on Hart

Dworkin commences his critique of Hart by bringing the separation of **Legal Principles** and **Legal Rules** to the table, stipulating that they are creatures of a different breed altogether.

For Dworkin, **Legal Principles are a constellation of principles that are *not* formally written down and *not* specified in the law, *but they are there, nonetheless***. Adhering to them would equate to adhering to rationality and the inherent social purpose of law.

Legal Rules on the other hand, are very lucid in their definition. They either apply, or they do not. For instance, a Legal Rule might be one which prohibits persons from parking in front garages. Legal Principles on the other hand, are much more open-ended in their definition. But they add weight.

Let us take into consideration the following premise:

The Legal Principle absolving persons from benefitting from their wrongdoing is *not* a Legal Rule. However, the hefty influence borne by the aforementioned Legal Principle still demands significant attention, regardless of it being a Principle, and not a Rule.

For instance, I defy a hypothetical Legal Rule of curfew in order to go outside and place a bet. Alas, I get caught breaching the stipulated curfew, but I nevertheless win the bet I placed; therefore, I benefit from my wrongdoing. So should the court deny me the winnings I earned from my bet dur to it ultimately being product of illegality?

The Integrity of Law

Dworkin speaks quite a lot about judicial processes; ultimately dubbing his views as the **Integrity of Law**. Dworkin asserts that courts gain Integrity of the Law when seeking two things before passing a judgement:

1. **Best Fit** – a judgement which is in agreement with the law of the state and previous case law. The judge refers back to prior cases and ensures that the case he is presiding over is judged in accordance with the written laws that are relevant to the case at hand.
2. **Best Light** – a judgement which is in agreement with moral and political soundness, and thus also in accordance with the inherent values of liberty, fairness, equality, and individual rights.

Therefore, the criterion of Best Light makes sure that the judgement being passed reflects something which is, in essence, broader than what the written law and any other previous judgements suggest. **And this is how Dworkin introduced law's Integrity – which is the idea of judgements being <u>legally coherent</u>**.

A judge might notice that a Legal Rule applying to a case he is presiding over crosses swords with a fundamental Legal Principle. And in taking Dworkin's thesis into consideration, the judge might be inclined to prioritise the Legal Principle over the Legal Rule. However, a judge may nevertheless opt apply the Legal Rule in its entirety, regardless of how harsh it may be (*dura lex, sed lex*).

The Analogy of the Novel

Dworkin gives a brilliant analogy in order to paint a colourful picture portraying his thesis:

Imagine that judgements are an open-ended novel. A group of select people is assigned to write a chapter each, succeeding the chapter prior in a ceaseless cycle. Therefore, if seeking to be logically congruent in their writings, every author is obliged to study the chapters written before – so that the one the author is being tasked to write sensibly aligns itself with the flow of the novel.

Dworkin puts emphasis on the fact that the book is never finished, and that each author (representing different judge in courts of law), must make the novel the best it can be. And doing so requires one to refer back to what previous authors have written.

And this is what truly encapsulates the idea of the Integrity of Law – because there must be honour in the way law develops, honour which can only be attained through the fair adherence to the previously formulated system of law. When awarding judgements, the point of view of judges is clinically equal to the analogy of the novel; and when a judge looks retrospectively, the judge must make sure that a systematic thread of coherence is maintained. **Therefore, what the judge states in his judgement must be congruent with what happened before**.

Judge Hercules

Dworkin also goes as far as claiming that there is only one best way of continuing this novel. Alas however, judges are what they are – imperfect human beings. But to this, Dworkin sets forth his imagining of a judge boasting infinite wisdom and the competence of identifying a single, true answer to problems splayed before him; whom he calls **Judge Hercules**.

Fundamentally, Judge Hercules is Dworkin's idealised version of a jurist with perfect legal skills who is capable of ascertaining a single legal verity which can be applied to all legal cases… much like a legal version of Nietzsche's Ubermensch.

However, this notion might prove to be an inch problematic because implying that there exists only *one* right answer when it comes down to issuing sentences, one would also be implying that the art of being a judge is highly mathematical. But it is common knowledge that when meddling with human affairs, law may never be mathematical. In fact, one might also imply that bearing a mathematical attitude towards affairs between human beings would be an immoral and inhumane thing to do.

However, Dworkin stands his ground and positively argues that there *does* exist a single answer to every legal problem by asserting that Hart's problem of the Penumbra *would not even exist* were we to embrace a single verity with regards to law – because each legal void would be duly filled with this hallowed 'right answer'.

Case Law: Riggs vs Palmer

In 1889, a New York state Civil Court case took place, upon which the Court of Appeals of New York issued an opinion.

Francis Palmer had a favourite grandson – **Elmer Palmer**. And he decided to make Elmer his main beneficiary in his will. 16-year-old Elmer knew that he was his grandfather's favourite, but a sprouting doubt had him suddenly suspecting that his grandfather was going to change the will in order to make it a bit more favourable to Francis' other next of kin.

So Elmer killed his grandfather to prevent him from altering his will.

Caught, convicted, and sentenced, Elmer was awarded a lenient prison term after being charged with second-degree homicide. After serving his sentence however, it seemed that there existed no legal obstacle which impeded Elmer from gaining his inheritance.

This did not slide well down the throats of Francis Palmer's two daughters – **Mrs Riggs** and **Mrs Preston**.

Elmer's aunts therefore decided to legally challenge the inheritance and thus took Elmer to a place he now knew very well – court. Alas, the court decided that the plaintiffs had no right to deny Elmer his inheritance because, as stipulated in the law, *nothing* absolved Elmer from his rightful entitlement to the inheritance Therefore, this was a **formalist** and literal interpretation of the law; as the law did not, in any way whatsoever, object against Elmer gaining his entitled inheritance.

However, this decision was then appealed in the Court of Appeals of New York, and the decision borne of the Court of Appeals overturned the previous judgement. There was high disagreement amongst the presiding judges, but the major decision was that Elmer Palmer should NOT benefit from his wrongdoings.

The judge who wrote the Majority opinion was **Justice Earl**, and the Minority opinion was written by **Justice Gray**.

> **"The matter does not lie within the domain of conscience. We are bound by the rigid rules of law, which have been established by the legislature, which has, by its enactments, described exactly when and how wills may be made, altered, and revoked."**
>
> ***Justice Gray,*** *MINORITY opinion*

Here, Justice Gray is saying that the law is very clear in its dictations, and that the conditions stipulated by it MUST be satisfied – as there is NO law stating that Elmer Palmer should be disqualified from getting his inheritance. And even though we might not like what the law says, Justice Gray asserts that the only correct decision is to abide by it nonetheless (***dura lex, sed lex!***).

Here therefore, Justice Gray is taking a very **Positivist** approach in the law's application. Clearly, Justice Gray advocates Austin's notion that what the law *is*, is very different from what it *ought to be*, and that its merits or demerits are another argument altogether. Therefore, if there exists sufficient interest in amending a certain law, then that duty resides within the legislature's capacity to amend it.

What we have exhibited here is the notion that even if the law seems like it is heading in an immoral direction, we must nevertheless abide by it.

When writing the Majority position however, Justice Earl claims otherwise. He asserts that, in this particular case, rational interpretation (or *equitable construction*) must take the wheel. He decrees that it is not simply a matter of what the law *is* and how it *applies*, but the mental stance taken by the members of the legislature when passing the law in the first place must also be considered. **In simpler language, to consider the primary intention behind the enactment of the law would be the wiser route to take when interpreting and applying laws**. The law cannot possibly list every single scenario to which it does or not apply. Therefore, if we safely assume that the legislators were *rational* in their approach when enacting the law, then we are directed unto questioning whether they would have permitted Elmer Palmer to gain his inheritance – which would equate to him benefitting from his own wrongdoing.

For instance, let us take the hallowed Jewish rule that one must not work on the Sabbath – would this also condemn those who are forced to work on the Sabbath, either by necessity or by other means (such as charitable work)?

Therefore Dworkin employs these examples to show that the law is not exclusively constructed out of Legal Rules, but also of Legal Principles. And he promptly highlights that persons should *not* benefit from their wrongdoing; even though the law does not explicitly preach against benefitting from deliberate wrongdoing, the Legal Principle of being prohibited from doing so complies with integrity and rationality.

We must presuppose that the legislators were rational and well-intending when enacting the law, therefore judges must apply that rationality when interpreting the law themselves. The law is not simply black on white, but is the medium by which those interpreting it may break down the main intention behind said enactment. Again, we must pretend that each judge is writing a chapter over a chapter written by a preceding the judge; and to maintain logical congruence would imply also applying both the Best Fit *and* the Best Light. We must interpret the law in the Best Light of fairness, justice and equity. And this is how judges maintain the Integrity of Law.

Critique on Dworkin's Thesis

Finnis, being a moral objectivist through his Substantive Natural Law Theory, argues that Dworkin's theses assumes that a convergence is always present between Best Light and Best Fit. He thus proceeds unto saying that these two essences are **incommensurable** - meaning that they cannot possibly be reduced to an equal quantifiable standard by which their value may be measured and compared. may. There exists NO common standard of measurement which can be applied to both.

Another possible critique is that attorneys might abuse Dworkin's thesis; maybe even regarding Legal Principles to be *much* more important than Legal Rules themselves in order to defend their clients on the basis of morals, rather than on what the written law itself dictates. And to attempt to do this would be to swim against the tides of the inherent point of law itself.

Kelsen's Pure Theory of Law: Positivism with a Difference

A primary architect of the 1920 Austrian Constitution, Kelsen introduces his **Morality Thesis** on the inseparability of law and morality. And he does this by making an enquiry – 'does the fact that some action is required by law count in favour of performing it?'.

But before answering this question, let us first analyse law's normative nature. Law gives us moral reasons for our actions; therefore, persons may be tempted to answer the above question on moral-ideological foundations – 'because it is good'. However, Kelsen argues against the temptation of referring to the moral content of law.

Kelsen combats this by insisting that we would have to show that there are certain non-normative and non-standardising facts that determine what the law *is*.

A **Reductive** approach would favour trying to explain a phenomenon (such as 'law') in terms of another, more basic phenomenon. However, Kelsen argues that we should resist this temptation; that we should not belittle jurisprudence into a science (such as sociology). Therefore, we should refrain from explaining law by using a reductive approach.

Kelsen's theory departs from the traditional positivistic view of the separability of law and fact, making him an **extreme positivist**. He wanted to develop a legal theory absolved from all types of political ideology (such as the inseparability of law and morality), and every other element of the natural sciences. Therefore, his theory is predominantly conscious of the autonomy of the object of its enquiry – law as an independent phenomenon.

Kelsen strived to explain legal normativity on grounds separate from moralistic argumentation; thus, he views law as a **scheme of interpretation**.

Let us take the following premise into consideration: what renders an event as a legal act? Kelsen acknowledges that law has a coercive nature, but its inherent *meaning* is what makes it a legal act. And this meaning originates from a **norm** bearing content which directly relates to the law being enacted, thus conferring meaning unto it. Therefore, it is the fundamental norm which essentially functions as a scheme of interpretation.

For Kelsen, an act gains its legal-normative meaning by means of a higher legal norm which, in turn, confers that normative meaning unto it.

For instance, a vote in parliament is not *law*, but the law that they promulgate gains legal validity through a higher norm (ex. Art. 4A of the Drug Dependence Act gains legal meaning through a higher norm which, in this example, is Art. 65 of the Constitution of Malta; and *this* Art. 65 retains legal validity from an even higher norm – Art. 6 of the Constitution of Malta).

But what exactly are these 'legal norms'? **For Kelsen, legal norms are "ought" statements which assert good conduct.**

To this, David Hume, adds that no "ought" statement (such as a norm) may be logically derived from a set of premises expressed only in the terms of "is" statements. Put simply, this means that for one to obtain an "ought" conclusion from a set of "is" premises, one must point to a preceding "ought" premise which confers the normative meaning on the relevant type of "is"; logically, this may connote to **(A v B) → C** (where '**A**' is an '**Is**' statement, '**B**' is an '**Ought**' statement, and '**C**' is the **resulting norm**); therefore **(A v A)** by themselves may *never* result in **C**, because a set of '**Is**' premises alone does not produce normative meaning – a preceding '**ought**' must be present).

But if one was to retrace his steps, a parent 'ought' must be discovered. Therefore, which is the Ought of Ought's?

The Basic Norm (Grundnorm)

Kelsen's proposed Grundnorm, which is the most basic norm, must be **presupposed**. Through this, the Grundnorm becomes the content of the presupposition of the legal validity of our Constitution.

In Kelsen's *Pure Theory of Law*, the Basic Norm provides a **non-reductive** explanation of the legal validity and the normativity of law, and explains the systematic nature of law.

The Systematic Nature of Law

Legal norms are confined in legal systems, and a legal system is defined by its systematic unity, meaning that two norms that derive their validity from one basic norm belong to the same system; and all legal norms of a given legal system derive their validity from one basic norm. This implies that there is a connection between the systematic unity of law and its legal validity; because a norm is legally valid within the system.

Therefore, a legal system becomes baptised, which, through the Basic Norm, combines ALL legally valid norms. And a norm which does not conform to this system loses its legal validity.

Kelsen also refers to Ehrlich's three main sources of law; but first, let us understand what they actually are:

1. **Statutory Law**
2. **Judge-Made Law**
3. **Living Law** (which exists independently from the above two)

'Living Law' denotes law which dominates life itself even though it has not been posited in legal propositions.

Ehrlich argues that law emanating from the 'Living Law' subheading is product of man-made social institutions, and that these types of norms are sometimes 'captured' by the State in the form of legal dispositions. These 'facts of the law' have the greatest impact on human life. Thus, it follows that as soon as a legal disposition is in conflict with the 'Living Law' (ex. when socio-ideological cultures change), then the legal disposition itself becomes redundant.

To this, Kelsen rebuts by claiming that Ehrlich's 'Living Law' *cannot* form part of the systematic unity of legal norms, as they are not fruits harvested from the same tree. And this is because, according to Kelsen, Ehrlich amalgamates social norms with legal norms, which for Kelsen, completely misses the mark. **Ergo, for Kelsen, 'Living Law' is not law at all.**

Do note however, that here, Ehrlich's 'Living Law' applies to legally *pluralistic* communities. And on the other hand, Kelsen straps his thesis unto *monist* communities; so the two might be regarded to be incommensurable with each other.

To recap therefore, norms are legally valid if and only if they exist within a system of norms in a given place and time. However, the system must be **efficacious**. Efficacy is not a condition for legal validity and norms, but rather is the condition of the system as a *whole* (which ultimately gives individual norms their legal validity).

Kelsen admits that efficacy is the condition for the validity of the Grundnorm, and that the Basic Norm is legally valid only if it is spatiotemporally relative.

The content of the presupposed 'ought' is what gives validity to a supreme constitution… but what is the content which leads us to make such a presupposition? – its content must reflect the social practices of those who are following it.

Sometimes however, the Basic Norm of a legal order changes through means NOT authorised by the Basic Norm itself (such as the revolution of the 1921 Self-Government Constitution of Malta after the riots of Sette Giugno).

Marmor's Critique of Kelsen's Theory

Andrei Marmor dares to ask the following: 'if the content of the Basic Norm is determined by actual social practices, then doesn't that render Kelsen's explanation reductionist? Also, if the Basic Norm is relative to a certain factor (its efficacy), doesn't it become highly difficult to separate the explanation of *that* normativity from the facts that constitute that same factor?'

Finnis' Theory on Natural Law

Before delving deep into Finnis' Social Sources Theory, we must first understand the notion that law is valid on its sources. This implies that **formal sources** of law (such as statutes), serve as the instruments by which a state manifests its will. Therefore **law directly derives its validity and authority from its sources**. Sources may also be '**soft**' (or **inclusive**), found in the form of recommendations, guidelines, and codes of conduct.

Finnis' Social Sources Thesis

As legal positivists, Bentham, Austin and Kelsen all stipulated that law (as a social fact) and its obligatoriness are product of the will and coercive power of a superior (the social sources).

Therefore the above legal philosophers are neutral on the question of whether there exist any moral standards whose authoritativeness can be explained by social facts *outside the law*.

But if law gives reason for actions which stand detached from the inherent essence of 'law', then one cannot be neutral about the existence of this 'reason for action', and thus ignore its relation to law.

Therefore, Finnis argues that, to a certain extent, even 'modern Natural Law theories' (like Locke's and Hobbes') take for granted the fact that law is a force of power emanating from the superior.

The problem with Natural Law theory is that this 'rational nature' is innate and normative – but *why* is it normative and *why* does it oblige and direct the acts of persons? To this, Finnis says that obligation from such a 'rational nature' is openly deduced from fact – the fact that this or that law has been willed by one who has the power to harm.

> **The rule of our actions is the will of a superior power**
>
> *John Locke*

When it comes to Natural Law and morality, God is assumed to be wise. But the idea of divine wisdom is given no positive role in explaining why God's commands create obligations for a rational conscience. Therefore it lacks the explanation of why there are obligations imposed on us rational beings. It is simply explained as sheer power – but *how* and *why* is it obliged on us?

Thus, Finnis stipulates that the fact that a rule is powerful still provides no explanation for why one should act in the manner it decrees. The will of God does not, in itself, provide a reason for me to act.

Simply saying that law is the will and coercive power of a superior does not justify said power, and the fact that it emanates from a superior power does not necessarily imply its rationality and justifiability. Even if a certain method of conduct was established by a superior power, it does not, in itself, rationally explain *why* that conduct is obligatory.

Finnis thus argues that Legal Positivism (as put forward by Bentham and Kelsen) takes for granted the fact that law is solely the will and coercive power of the superior; and he continues by saying that Natural Theory builds a bridge between rationality and human nature – which mirrors the relationship between law and morality. However, it *still* does not tackle the issue of *why* law is obligatory.

Therefore, Finnis makes it his main aim to try and explain why law is obligatory to persons and why it directs our actions. He criticises Legal Positivism for its weakness to derive an 'ought', but also hints at the restating and reexplaining of the Natural Law theory. **Therefore, he goes on to state that, owing to its fundamental nature, Natural Law is self-contradictory to deny; and this is the rationality of logical coherence**.

So why does law direct our actions? If it is guided by the fundamental principles of Natural Law (which are, in themselves, self-contradictory to deny), then this would provide sufficient explanation to all this 'obligatoriness'.

The Myth of Classical Natural Law Theory:

Classical Natural Law theory does not deny the thesis that law which has been posited is positive, and that law which has not been posited is not positive. However, Finnis asks: 'what does it mean to say that a rule or principle 'has been posited by a social-fact source?'.

To this, Kelsen answers by saying that nothing short of **express articulation**, and NOT by inference, shall suffice. Anything beyond express articulation is outside the law, thus meaning that it would NOT be positive.

But Finnis rebuts this by asking about which kinds of requirements would serve as a standard for what should be posited or not were there not to exist such a clear demarcating line of 'what falls in and what falls out of law'? Put simply, this question asks regarding the consistency needed between what has been articulated, and what has been posited.

Therefore, Finnis argues that Legal Theory must go *beyond* merely reporting the social facts about what has and has not been expressly posited.

Finnis *contra* Raz

Being an exclusive Legal Positivist, Raz explains that judges have the capacity for making judgements which may be morally true but, at the same time, might not be legally valid through social sources (ex: acts of parliament).

Therefore, judges have the legal obligation to refer to these natural and fundamental principles *not* because they are legally valid, but because they are morally true.

Legal Theory must go beyond what has been expressly articulated through social facts.

So what does 'to posit law' mean? Kelsen argues that it simply boils down to express articulation. As already said above, Raz takes the position of stating that it does not make a difference whether a law has been expressly posited or not, because he advocates the notion of having judges that apply principles not on the basis of whether they are legally valid or not, but because they are morally true. And this is why Legal Theory must go beyond what has been expressly articulated.

Finnis then deals with the *juristic* process of identifying a moral standard. Usually, this moral standard is an explanation of another general principle of law (such as equality or fairness); but such a specification cannot proceed without close attention and understanding of what has already been expressly articulated.

Finnis refers back to Raz's argument and highlights that when a judge does what Raz is saying, he would also be creating a new law through the application of principles which are morally true.

This indubitably creates a sense of **responsibility**. However, this juridical type of responsibility is very different from legislative authority. And the principle upon which a judge acts is usually very general (such as the above-mentioned general principles of fairness and equality). However, these general principles sometimes prove to be too little or too much. But why is this?

This is because our interpretation of the law has developed *beyond* what has been expressly articulated; therefore, what has been expressly articulated yields **too little** – because it finds the need to be reinforced by certain moral standards which are product of the aforementioned developments that have been made.

On the other hand, the social facts of positing sometimes yield **too much** – because express articulation may be so morally flawed that the judge himself must set it aside when dealing with a case.

Therefore, Finnis here is arguing that any moral standards upon which a judge may act have moral authority; thus meaning that moral standards are to be counted as part of law. With this, Finnis solidifies the relationship between law and morality.

Inclusive Positivists (insisting that legal validity **can** depend on morality) would say that this juridical standard is, in essence, already part of the law.

Exclusive positivists (harbingers of the Separation Thesis, thus insisting that legal validity **cannot** depend on morality), would reject this notion altogether. But Finnis deduces that disputes between Exclusivists and Inclusivists are "fruitless".

Finnis thus sets the table for two ways one may consider law:

(a) a complex fact which is product of a multitude of opinions and practices belonging to a set of persons for a specific moment in time; or

(b) as good reasons for action.

Those who consider law to be (b), such as Hart, give priority to the internal point of view – '**law as good reason for action'**. A judge would thus act by means of his internal point of view, and this suggests rational and coherent guidance. But Finnis argues that one need not make judgements regarding whether rules are coherent with one another (or whether the basic Rule of Recognition gives a truly coherent reason for acting in a particular way).

For instance, Hart advocates a Rule of Recognition – in which a law becomes articulated on such a Rule, thus meaning that it gives reason for action. Therefore, judges (through their internal point of view) will endeavour in standardising the system of law. That said, one does not need an all-encompassing morality to connect a single law's coherence with another's. And this is why one may understand law as a social complex fact which is product of a multitude of opinions and practices belonging to a set of persons for a specific moment in time.

However, Finnis also argues that moral reasons are the **only** truly sufficient reasons we have for action – and never law by itself. For him, nothing may count as law unless it is entirely juxtaposed with morality. And this way of considering law enables us, through a sound morality, to maintain positive, social, source-based laws while keeping them coherent with one another; because there would thus exist an all-encompassing sound morality in such a scenario.

The 2 Challenges Of Natural Law Theory:

Thus far, we have witnessed how Positivists argue that there is no necessary connection between law and morality. And proponents of Natural Law Theory (such as Finnis) do not deny this claim.

Finnis stipulates that some laws are so utterly immoral that, even though a law might be promulgated through social sources, it does not necessarily imply that it is also morally admissible. **A law's moral justification is not connected to its enactment**.

The second challenge crops up neatly here, as we find two Natural Law Theorists who, conversely, claim that for a law to be considered as law, it *must* be bedfellows with morality. However, Finnis rebuts by arguing that this is a false claim, and that most of the time, reality is the other way round – **it is the law that creates a moral standard, not morality that creates a law.** For instance, the law stipulating that one cannot drive beyond 80 km/h provides a moral standard through its inherent articulation. Before that law was enacted and articulated, there was no moral standard specifying that one may not speed above this limit. But owing to this statute, it is now morally required for persons to abide by such a limit.

So here, Finnis once again hints at a restatement of Natural Law Theory, whilst also defending certain objections made to Natural Law Theory.

The Incoherence of Legal Positivism:

Legal Positivism fails to acknowledge that no fact (or set of facts), however complex, can, by itself provide a good reason for acting. Therefore, Legal Positivism also falls short of offering an 'ought' which can speak authoritatively against an individual's self-interest. And since Legal Positivism prides itself in dealing *only* in itself, it hugely fails to offer an adequate understanding of reasons for action ('ought's'), and of the truly intrinsic values of said 'ought's'.

On Law's Authoritativeness

Finnis here argues that the law's authoritativeness is nothing other than its moral authoritativeness. Therefore, morality begets legal authority. And thus, unjust laws which are starving from morals are not legally authoritative.

Finally, it can be said that the authority of unjust rules is akin to the authority of powerful people who can oblige oneself to comply to their will, but fail at providing adequate reason as to why their obligation counts as legitimate.

READ: *Natural Law and Natural Rights,* by J. Finnis (2011)

READ: *On the Incoherence of Legal Positivism*, by J. Finnis

Finnis' Restatement of the Natural Law Theory

Finnis departs from the premise that if there is a point of view which presupposes that legal obligation is akin to moral obligation, then such a viewpoint constitutes to the central case of the legal standpoint. In lay terms, he is thus saying that **the viewpoint whereby one can assume that legal obligation equals moral obligation must be found**. **Such a viewpoint would thus secure law's authoritativeness by simply stating that it is, also, of moral authority**.

Finnis discredits the stance Hart occupies, stipulating that Hart describes law with regards to the concerns of people brandishing an *internal point of view*. And Finnis suggests that this is unsatisfactory, because the internal point of view itself consists of a multitude of *other* viewpoints. For instance, one's allegiance to the legal system may be based on different viewpoints (ex. calculations of long-term interest). Therefore, Finnis criticises Hart's thesis by saying that Hart's internal point of view is, ultimately, an amalgam of many other viewpoints, thus rendering it unstable.

So, Finnis is left with the task of identifying a proper viewpoint founded on the premise of not having law's authoritativeness become estranged from its moral authoritativeness.

Now therefore, Finnis attempts to solve the famous '*is* vs *ought'* problem which, in his eyes, renders Legal Positivism incoherent, but, at the same time, is not a problem which modern Natural Law Theory accomplishes in tackling comprehensively.

Therefore, Finnis reverts back to Aristotle and Aquinas' antique theories on law. However, let us first understand the backdrop under which Finnis merges both philosophers' ideas.

Let us commence by taking Aristotle's thesis first. In his teleological ***entelecheia*** concept, Aristotle claims that the ***telos*** (the ultimate purpose of man) is given a potential which is actualised only when matter is processed by active practice and movement. And the potential which is actualised is thus enabled by reason (***logos***).

On the other hand, Aquinas asserts that Natural Law is nothing other than the active participation of natural creatures in God's Eternal Law. Therefore, Natural Reason is the imprint God generously leaves on us mortal beings. And from the principles of Natural Law, human reason proceeds to establish a more particular strain of law appurtenant to particular matters – the *Lex Humana*.

Thus, the rules Aquinas' Natural Law specifies are the basic forms of good and evil which can be adequately grasped by *anyone within the age of reason*.

Therefore, these principles are ***per se notum***, because they are **self-evident** and, thus, indemonstrable (due to their being so self-evident). To this, Aquinas asserts that the 'ought' is self-evident and does not beckon explanation. And this is exactly Finnis' *punto di partenza*.

In stark contrast to Aquinas, Finnis' restatement of the classical Natural Law Theory is devised outside any religious framework. Thus, he does *not* build upon Aquinas, but rather, adopts from it as deemed fit, and coins a restatement found alienated from religious opinion. Hence why Finnis does not mention a 'transcendent God'. To this, one may muse that Finnis is not teleological, nor theological, but rather, logical. He simply derives his theories on reason, and not religious or teleological bias.

The 7 Basic Goods

Finnis substitutes Aquinas' precepts of Natural Law with what he dubs as the **Basic Goods** – which are ultimately grasped through reason.

So how does Finnis bring about morality?

His framework follows the concept of having a set of basic principles (the Basic Goods) which indicate the basic forms of human flourishing. They are Goods pursued by everyone encapsulated within the age of reason, and are the fundamental requirements for **reason** to ensue (which is, in itself, also one of the Basic Goods). These requirements provide the criteria for distinguishing between acts which are reasonable (right), and acts which are unreasonable (wrong). And the product of being able to reasonably discern right from wrong births the notion of Morality.

Finnis determines **7** Basic Goods, which are ***per se notum*** (**self-evident)**, not **demonstratable**, and **underived**. They are simply **Truths** grasped through the employment of reason (*logos*):

1. Practical Reasonableness – in addition to its being the main propellant for persons to pursue other Basic Goods, it also refers to the employment of one's intelligence in tandem with reason, thus producing an element of freedom. It also works *internally* (ex. when bringing peace of mind), and *externally* (ex. when rendering actions genuine once the operator realises the full liberty of said actions). Thus, Practical Reasonableness involves liberty, integrity, authenticity, and intelligence.

2. Knowledge – Finnis uses this factor to highlight the self-evidence of the Basic Goods, which are the substratum of all moral judgement. By 'Knowledge' Finnis refers to wisdom which is sought for its own sake, and not sought instrumentally during the pursuit of something else. Therefore, one might stipulate that by Knowledge, Finnis simply implies the search and desire for Truth, and the aversion of Ignorance. Knowledge may be participated in, or realised in an indefinite number of ways and occasions.

And it would be a misconception to assume that every True proposition is equally worth knowing; or that the pursuit of Knowledge is equally valuable for each person. Knowledge is holistically good and desirable for its own sake.

Finnis supplements his definition of Knowledge by deploying the following query: 'Is it not the case that Knowledge is really a Basic Good? Does this principle not formulate a good reason for action?'. And he answers his own enquiry by asserting that the Goodness of Knowledge is obvious and *per se notum*. It cannot be demonstrated, and *needs* no demonstration, because everyone at the age of reason recognises the inherently Good value of Knowledge.

However, one must not be deflected by the fact that the human inclination for seeking the Truth has psychological roots. It is not psychologically innate, but is something we may only grasp through reason and experience. And also, man's inherent desire to *know* does not justify the desire itself. For instance, to desire wealth is not a sufficient basis upon which one might state the object being desired is desirable.

Finnis also adds that the fact that Knowledge lacks derivation does not necessarily imply a lack of justification. In simple recap, Knowledge is Good.

3. Life – the drive for self-preservation is Good and *per se notum*. The value of Life signifies the aspect of the vitality which puts a human being in good shape or self-determination. This factor also includes physical health. mental health, and the freedom from pain. Finnis also claims that Life also comprises the transmission of it through the procreation of children. Therefore, Life in transmission is also, self-evidently, Good.

4. Play – this refers to the engagement in performances which have no point beyond the performance itself; activities that are enjoyed for its own sake.

5. Aesthetic Experience – elements of Play may partake in Aesthetic Experiences, but essences such as beauty lie beyond the limitations of Play. For instance, beauty may be enjoyed in nature, thus being external, or may be, in any other way, internal (unlike Play, which involves an action on one's own).

6. Sociability/Friendship – in its weakest form, Sociability refers to general peace, but when it is strongest, it adopts the form of Friendship. It is a Friendship which involves actions committed purely for the sake of a friend's purpose and well-being.

7. 'Religion' – after asserting the pursuit of Life, Truth, Play, and all the other Basic Goods in one's life, Finnis goes on to question their relation to the inherent holistic systemisation of the cosmos.

Is it not perhaps the case that human freedom is, in itself, somehow subordinate to something which makes said human freedom and intelligence possible? Does it not merit time and effort to ponder on the possibility of the existence of something which is free and sovereign in a way no human being may ever be?

So, even though Finnis departs from Aquinas' religious foundations, it does not necessarily mean that he discredits them. He also *does* acknowledge the presence of those who doubt the presence of entities superior to empirical and scientific evidence, but he stresses on the importance of thinking *reasonably* before admitting to atheism and agnosticism. There is no shame in being atheist or agnostic, but first, one must first plunge in reasonable thought regarding the possibility of a superior and divine entity. For instance, even though Sartre claims that God does not exist, Finnis appreciates the fact that Sartre accepts responsibility for what he believes in, and recognises the fact that to even challenge the question of whether God exists or not in the first place is, in itself, commendable.

"Man is born free, and everywhere he is in chains"

Jean Paul Sartre

Finnis acknowledges that there may exist other formulations appertaining to his Basic Goods. But he suggests that other forms of Good are simply combinations of pursuits already in search of attaining the seven Basic Goods. For example, notions such as courage or generosity themselves are not Basic Goods, but are ways of pursuing the aforementioned Basic Goods.

He also implies that there is NO objective hierarchy of Basic Goods. Fundamentally, they are all self-evident, and may, in no way, be analytically reduced to being a mere aspect of another. Upon dedicating particular focus, each Basic Good may indeed look shinier than another. But this is simply an illusion. A logician may deem Knowledge to be superior to the other Basic Goods, but it appears to be so only because the logician is exerting special focus unto it. Thus, the illusion of having a particular Basic Good being more significant than other Basic Goods is naught but an exhibition of misconception.

The 9 Requirements for Achieving Practical Reasonableness

Finnis issues a list of nine requirements which are mandatory if one desires to achieve true Practical Reasonableness. Thus, one requires:

1. A **coherent plan of life** which comprises a set of rational essences that work in harmonious tandem with each other in order to thus baptise a rational and coherent string of life events. Committing exclusively to a single project would be irrational. Thus, this slightly reflects the Aristotelean notion of the **Golden Mean**.

2. **NO arbitrary preferences amongst the Basic Goods**. To focus on a single Basic Good, and to disregard (or devalue) the other Goods would be irrational. Similarly, to overvalue a Basic Good for the sake of its instrumentality in one's life, would also connote irrationality.

3. **NO arbitrary preference amongst persons**. However, one might remark that someone else's flourishing is beyond another person's power to effect; but Finnis simply underlines the fundamental need for impartiality amidst human subjects who pursue the Basic Goods. Naturally, there is adequate reason for self-preference, but there must also be allowance for this hallowed impartiality – *to do unto others as you would have them do for you*.

4 & 5. On one hand, Practical Reasonableness requires that we maintain a certain degree of **Detachment** towards the endeavours we undertake, such that, if a project fails, our life would not be drained of meaning. Ergo, this directly related to Finnis' abhorrence of fanaticism. However, Finnis promotes a necessary sense of **Commitment** towards the projects we undertake. Commitment serves as the bridge between being a fanatic to something, and dropping out of something. Ultimately, one should not abandon their commitments lightly, especially after having drawn them out with exceeding effort. Therefore, one should resort to strategies which ensure the sustaining of personal endeavours, but should equally absolve from any developing fanaticism towards the project at hand.

6. **Efficacy**; **that is, that actions be efficient for their reasonable purpose**. We must not waste time and opportunities meddling with means that are inefficient, but should rather pursue the optimal route of guaranteeing the actualisation of said opportunities. Therefore, our actions should be judged by their effectiveness. But if one was to take this requirement on its own, that person might be inclined to familiarise it with Utilitarian principles. *And that is why one must not view this notion solitarily*. This requirement must be viewed holistically; and the above doctrine of Detachment makes sure that we take up an action *limitedly* and not because it simply guarantees mass efficacy.

7. **Respect for every Basic Good in every act committed**. One should not directly and deliberately damage a Basic Good, in any way whatsoever, by choosing to commit an act of indirect benefit. For instance, using this tenet, Finnis would combat any notions of abortion, because in doing so, one would be directly infringing the Basic Good of Life in Transmission.

8. **The fostering of Common Good**.

9. **To follow our Conscience**; that is, that one should not commit an act he or she knows or feels should not be committed. Therefore, to act in accordance with one's conscience is imperative.

"If one chooses not to do what one judges to be required by reason, then one's choice is unreasonable. If one chooses to do what one judges to be unreasonable, then that choice is unreasonable also."

St Thomas Aquinas

Thus, the product one obtains after achieving all these requirements would be Morality itself.

Finnis understands that the fundamental concern of the Natural Law Theory is to understand the relationship between posited laws and the permanently relevant principles of Practical Reasonableness. Ergo, this necessarily equates to the relationship between law and morality.

Therefore, Finnis believes that the central meaning of law is that of an act of Practical Reasonableness made by an appropriate authority for the common good.

This definition closes the loop which started the argument that law's authoritativeness is naught but its *moral* authoritativeness. And this is solely due to the fact that Finnis defines law based entirely on its Practical Reasonableness, and that **when one achieves Pure Practical Reasonableness, then one also achieves Morality**.

The *secondary* meaning of law, then, is based on how close or removed a particular instance of law is to the aforementioned primary meaning. The question of identifying which laws dwell in tandem with Practical Reasonableness thus gets answered when observing its proximity to the inherent and primary meaning of law. And once again, Finnis here refers to Aquinas.

For instance, in the law of homicide, Aquinas would say that such a law is derived from Natural Law through deduction from the above general principles. Finnis would similarly say that it is derived from the Basic Value that Life is, *per se notum*, good. Finnis also goes a step further by stating that, in this example, the law is not posited in the form of *'there is to be no homicide'*, but in the form of *'any person who commits homicide shall be guilty of an offence…'*. And this is what Finnis dubs as the **Indicative Propositional Form** which dictates how laws are posited.

And from this, Finnis connects the **Subordinate Theory** (*cioe*, the legislator's rational freedom) with the **General Theory** (*cioe*, the stating that the law of murder is derived from Practical Reasonableness). Thus, Finnis here argues that the manner by which law is posited is not simply a clear-cut act of Practical Reasonableness, but also a display of rational freedom which the legislators apply (***determinatio***). However, this rational freedom must be compatible with the General Theory. For instance, the legislator's rational freedom must be bound by the rule of law, or to other **Second Order Principles** remotely related to the requirements of Practical Reasonableness.

NB: Second Order Principles are versions of First Order Principles, which are themselves the requirements needed to achieve Practical Reasonableness.