

## **Both Directions at Once?**

### ***The Ontological Status of the Concept of Law between the Artifactual Theory of Law and the Thomistic Natural-Law Theory***

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*If I take a few Legos and connect them together in a random way, it is true that I have construed something that is both an object and artificial; however, in the absence of some sort of purpose it is not properly conceived as an artifact*  
(Himma 2018, 137)

## **1. Introductory Remarks**

In 2018, a lost 1963 recording session of John Coltrane’s “classic quartet” finally saw its first release under the title *Both Directions at Once: The Lost Album* (Impulse!, 2018). Besides the reference to the session’s unearthing after 55 years, this title also attempts to capture the signature sound of Coltrane’s saxophone at that point: after the outline of the main theme, Coltrane explored its fragments often by producing a sound that resembled switching gears between multiple contrasting musical ideas. Those who have heard his more complex recordings, especially from the 1963-1964 period, know that this sound can be, almost poetically, best described as “both directions at once.”

If the attempt to comprehensively confront the artifactual theory of law and the Thomistic natural-law tradition could have a sound, it would resemble this constant struggle to accommodate *prima facie* divergent ideas within the structure of a single musical narrative that can be heard in Coltrane’s playing. One wonders whether there is truly space for “both directions” within a single (“at once”) line of argument, or these levels of analysis are ultimately irreducible and mutually exclusive.

The effort to adequately set the parameters of the prospective points for dialogue between the artifactual theory of law and the natural-law tradition is certainly a crucial issue. This may be done only if the arguments of the parties to the dialogue are correctly understood, even if one does not fully, or at all, agree with them. It is thus imperative to understand and present the central claims of the other side not as “straw-man” arguments, which resemble a caricature and are thereby brushed-aside as unworthy of respect, but as “steel-man” arguments, where contrasting claims are presented in their strongest possible form.

The scope of this paper is to present the central claims of the Thomistic natural-law position in dialogue with what I understand to be the foundational ontological element of the artifactual theory of law. In the words of H. L. A. Hart (2012, 156), the Thomistic version of a natural-law position is the “clearest, perhaps, because it is the most extreme form of expression” of the claim that – especially regarding the role of substantive (and not merely

structural, systemic or procedural) moral values – “between law and morality there is a necessary connection.”<sup>1</sup>

I will show that this “clearest” natural-law position is beneficial for rethinking and understanding what it means to postulate an artifactual theory of law, just as the latter’s core claim is extremely valuable for rethinking and restating a natural-law position in today’s legal culture. In this paper I shall first present the central foundational claim of the artifactual theory of law, namely that law is, ontologically speaking, an artifactual and not a natural kind. Next, I shall present the theory’s respective evaluations of the natural-law theory with a particular focus on their position on the extent to which a dialogue between the two positions is possible and desirable. I shall then present what I understand to be the best arguments of the Thomistic natural-law tradition on the artifactual aspects of law.

## 2. The Foundational Ontological Premise of the Artifactual Theory of Law

According to Jonathan Crowe (2019, 237), almost all explicit and systematic efforts to understand the nature of law through the conceptual lens provided by the metaphysics of artifacts were developed within the last decade. As Crowe notes (2014, 737), the implicit idea that law is an artifact predates these efforts. To my ears, this idea, even *prima facie*, has its doctrinal precedents in at least two major legal-philosophical claims. The first claim (even chronologically) is that the law is not something that pertains to nature, but that it is essentially a convention originating in individual rational choices.<sup>2</sup> The second claim is the best formulation (Marmor 2001, 71; Raz 2007, 22) of the legal positivists’ so-called “separation” thesis, namely that “determining what the law is does not necessarily, or conceptually, depend on moral or other evaluative considerations about what the law ought to be in the relevant circumstances.”

The artifactual theory of law explores the implications of both of these claims for its own core thesis, namely that law is something different from *nature*, and that it has no necessary or essential connections with substantive *morality*. The novel passage accomplished by the analyses of the artifactual character of law – granted, not in all, but only in their most extreme versions – consists in the fact that the law<sup>3</sup> is now explored as an entity *ontologically* distinct, and thus essentially independent, from nature or from substantive morality. Whatever its necessary features, law ontologically is and remains an artifact.

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<sup>1</sup> Joseph Raz (2009, 167) also makes reference to the Thomistic version of the natural-law approach as paradigmatic for the claim that “the law [is] good in its very nature,” citing the work of John Finnis as a modern version of this approach.

<sup>2</sup> A powerful defence of this claim, along with its accompanying broader philosophical-anthropological backdrop, was provided in the last century by Margaret MacDonald (1946-1947, 237-8, 242): “There is no end set for the human race by an abstraction called ‘human nature.’ There are only ends which individuals choose, or are forced by circumstances to accept. There are none which they must accept [...] In short, natural rights are the conditions of a good society. But what those conditions are is not given by nature or mystically bound up with the essence of man and his inevitable goal, but is determined by human decisions [...] Assertions about natural rights, then, are assertions of what ought to be as the result of human choice.”

<sup>3</sup> The same claim holds with regard to the concept of rights. In an ideal-typical artifactual account, rights are reducible exclusively to social artifacts and any discourse on natural rights that would prescind from their essentially artifactual character, i.e., from the fact that they are collectively and intentionally created and recognized as such, would be ontologically misleading.

Building upon the exhaustive ontological bifurcation proposed by the metaphysics of artifacts, the artifact theory of law purports to resolve the problem of whether the law essentially belongs to a natural kind or an artificial kind. While the natural kinds are brought into existence in ways which depend on their natural common properties and independently from human understanding and agency, artifact kinds are neither “fixed by nature,” nor occurring naturally; they are “intentionally produced for some purpose” (Burazin 2016, 386). According to the artifactual legal theory, law pertains to the latter kind.

In Luka Burazin’s account<sup>4</sup> (2016, 397, 399; 2018, 112; 2019a, 1-3), the law is an abstract, intellectual, public and social, highly complex institutional artifact, collectively and intentionally created by its authors. Although, as Burazin notes, to say that law is an artifact may broadly mean that positive law is “human-made, non-natural entity, in the sense that it is causally created by humans,” we are presently more interested in another, more ontologically charged reading of this claim. According to this reading which rests, in Burazin’s words (2018, 112-113), on “an antirealist ontological position,” the law is *essentially* a mind-dependent entity. This means that law is “not only causally, but also existentially or *ontologically* dependent on its authors’ mental states or concepts” (Burazin 2019a, 1, emphasis added). If, as Burazin notes, one were to understand law as a natural kind, then “the concept of law would be a description of law’s necessary *natural* properties, i.e., the properties law cannot fail to have by its nature” (2015, 66, emphasis added).

The preference for the artifactual ontological character of law and the denial of its necessary natural properties represents the foundational claim for the artifactual legal theory. Perhaps this claim has received too little attention and has remained somewhat underdeveloped in the texts of the supporters of this theory in comparison to those elements which are usually built upon this claim, such as the elaboration of volitional, institutional, social or other aspects that describe the characteristics of the law as an artifact.

In what follows I shall analyze this foundational structural moment by presenting an overview of the nuances and distinctions in the ways this moment is envisioned by individual proponents of the artifactual theory of law. When an author makes the claim that law is ontologically an artifact and not something that occurs naturally, the answers to some additional questions should provide this claim with more precision and intelligibility, such as: “What do you mean by ‘law’?”, “All law or just most of its parts?”, “Do you mean that human individual and social nature really has nothing essentially to do with the ontological status of the law in all its instantiations?”.

Burazin is thus always careful enough to specify that he intends “the law” to mean “legal system” precisely to “circumvent” broader philosophical issues (Burazin 2016, 386). Presumably for the same reasons he quite consistently specifies that the intentional (collective) contrivances of the human mind are “*at least partly*” (Burazin 2018, 113; 2019a, 1; 2019b, 231) constitutive of the artifactual existence of law. It generally seems that his interest in the benefits of the ontological implications of the artifactual theory of law is of a more practical nature. This is obvious from the fact that in his texts he is predominantly interested in developing the elements that are subsequent to the foundational moment of the

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<sup>4</sup> In Brian Leiter’s words (2018, 9), Burazin “has given the most systematic account of law’s artifactual nature in the jurisprudential literature and its relationships to claims about function.”

theory, as well as in outlining the more practical “pay-offs” (Burazin 2016, 387-388; 2019a, 3-4) of positing law as artifacts. He seems generally disinterested with the more extreme doctrinal implications of establishing the artifactual ontological status of the law, as well as with the divergencies of this claim with regard to the central arguments of juxtaposed theoretical accounts, such as those that are advocated by the natural-law theory.

Burazin’s seemingly open-ended claim on human reason’s *partial* (“at least”) constitution of law as an artifact is somewhat challenged by a similarly interesting and engaging view presented by Kenneth Einar Himma. Since laws and legal systems are not naturally occurring objects, but the result of human contrivances, law is, in Himma’s understanding (2018, 137-8, 140), “wholly” artifactual, “all the way down.” In his view (*ibid.*, 137), on “all accounts of positive or posited law, the existence and content of legal systems and law can be explained wholly in terms of social facts.” While noting that legal positivism is methodologically predisposed to accommodate the view that law is artificial in character, he maintains (*ibid.*, 137-138) that even the strongest of natural law theories may be said to hold this claim with regard to positive law.

Himma is very precise in detecting two levels of analysis within a contemporary natural-law theory; whereas on a first natural-law level this theory posits a metaethical claim on the principles of objective morality somehow related to human nature, on a second, positive-law level, legal systems may be envisioned as social artifacts “in the sense of being manufactured by human beings,” and ought to conform to the relevant natural laws so that “their content be just” (*ibid.*, 138).<sup>5</sup> It follows, from this natural-law schema, that the only real disagreement between legal positivism and natural-law theory is to be found in the natural lawyers’ claim that “there is something in law’s nature that gestures in the direction of law’s aspiring to be objectively just as a conceptual requirement of being a legal system” (*ibid.*, 138). But if “merely aspiring to be objectively just” does not include the consequence of legal invalidity of the norm in the case when that aspiration is not realized, Himma argues (*ibid.*) that there are no real obstacles between the claim that law has an artifactual character “all the way down” and the central arguments of the natural-law theory.

Himma concludes from these premises (*ibid.*, 138-9) that “even if it makes sense to think of morality as something occurring naturally,” and even if a natural-law position advocates that there are “necessary moral constraints on the content of valid law,” the law can be envisioned as ontologically “wholly artifactual despite any such constraints” even from the perspective of that position. The first-level arguments on necessary moral constraints on law do not necessary compromise the second-level artifactual character of the institution of justice – i.e. positive law – that may even be, according to the natural-law position, “constructed, in part, out of a non-artifactual moral piece” (*ibid.*).

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<sup>5</sup> Himma is correct to point out that the first, natural-law level of analysis amounts to a metaethical theory, which may be envisioned to have juridical consequences only on a second level of analysis. In this sense his description is corroborated by Jeremy Waldron’s argument that John Finnis’s natural-law theory, at least on what Himma labels as the first level of analysis, is not a theory of law at all, but a theory of *morality*. Waldron claims (2013, 74-5, 78) that he was amazed to discover how, in Finnis’s texts, the “law-morality” points of contact actually turned out to be elaborated on the level of a “full-blown complex moral and ethical theory.” His amazement arises from the fact that he could not perceive anything resembling specifically juridical reasoning in Finnis’s account of natural law: “I am going to suggest that Finnis has not really given us a theory of natural law at all – certainly not a theory of natural law considered as [...] something that is capable of fulfilling the governance functions of law in the absence of positive institutions” (*ibid.*, 78).

Frederick Schauer (2012, 457) stands rather firm in his position that law is “a social construction and not a natural kind.” “Whatever law is,” he says (2018, 29), “it is importantly different from water, gold, or elephants.” He claims that the artifactual theory of law suggests that “not only specific laws, specific legal sources, and specific legal institutions but also *the very idea of law itself* lies on the artifactual side of the line between the artifactual and the natural” (ibid., 29-30, emphasis added). The implication of shifting the discourse on the artifactual character of law to an ontological level implies, according to Schauer (ibid., 30) that “humans can remake or modify the very concept of law that exists within some community.”

Even assuming that legal positivism is correct, and thus that moral acceptability is not a necessary property of law as understood by *our* concept of law, there is no reason, for example, why a different concept of law could not treat moral acceptability, as in the classical version of natural law, as a necessary property of natural law in all possible legal systems in all possible world, and thus as a necessary legal property of law wherever and whenever it appears (ibid., 36, emphasis original).

Schauer thus concludes that the “most important feature of artifacts” is their “contingency” (ibid., 43). He maintains (ibid., 29) that the only theoretical position that would argue for a different outcome – i.e., deny the ontological status of law as an artifact – is a “very strong version of classical natural law.” When mentioning this “very strong” version of a natural-law theory, he immediately adds (ibid.) that he refers to the “possibility – and it is no more than a possibility – that human law or positive law (or a legal system) [...] could be understood as emanating from God, or in some other way being part of the furniture of the world.” His overall conclusion (ibid.) is, however that it is possible that “no one has ever actually believed that human positive law and the human institutions that make, interpret, and enforce it are truly natural in any important ontological sense.”

In Andrei Marmor’s estimation (2018, 44-5), the positive law does “not form part of the fabric of the natural universe,” and in some fundamental sense the law is “in our minds”; it is “created by humans [...] for some typical or designated purpose or other.” Furthermore, he says, “if *conventions* are at the foundations of law, law is, fundamentally, an artifact” (ibid., 57, emphasis added).<sup>6</sup> Again, if the law is an intentionally made, completely mind-dependent, convention, then people perhaps can be mistaken about its artifactual nature (i.e., whether it is a natural or an artifactual kind, “God’s command, or long gone aliens’ gift to humanity, or anything of the sort”), but not about what the law in their community *is* and what are its essential properties “as a kind of content that figures in our practical reasoning” (ibid., 59).

In his exploration of the conditions for potential overlapping points between what he calls the “ideal-typical” natural-law theory and the artifactual theory of law, Corrado Rovorsi holds (2018, 106-107) that the latter theory does not necessarily rule out even the stronger versions of the former. The artifactual theory of law is, in his estimation (ibid.), a “liberal” theory; it envisions “a whole range of possibilities” for teleological reasons behind legal

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<sup>6</sup> “I want to argue that between the general reasons for having law, and the local conventions that determine what counts as law in particular legal system, there is an intermediary layer of deep conventions [...] Our concept of law partly depends on the deep conventions that determine the basic organisation of a legal order, and partly on the specific institutions we have in our community [...] Both are conventional.” (Marmor 2011, 154, 157).

artifacts, even of natural-law based objective moral standards. Or, in his exact words, the artifact theory of law “neither *rules out* the possibility of these reasons being objective nor *requires* them to be objective” (ibid., emphasis added). The merely putative and ultimately contingent substantive moral objectiveness of law, in all its forms, is wholly dependent on the ontologically artifactual essence of law instantiated in what Roversi calls the purely technical objectivity of the law’s “deliberative histories.” In his view, then, a natural-law position could even well be a theoretical backdrop that had formed part of a concrete deliberative history of legal artifacts, e.g., some particular historical or contemporary legal systems, “thus influencing the way in which they are framed” (see ibid., 108). But this position ultimately has nothing substantive to offer with regard to the concept of law at an ontological level.

Brian Bix contributes to the debate on the ontological status of law by introducing, at a point relevant to our present analysis, the comment that John Finnis’s natural-law position might imply that law is, at least in its core elements, something akin to a natural *moral* kind. To be sure, Bix himself advocates the idea (2007, 2) that there is “little reason to believe that a natural kinds approach might work for law.” In his understanding (ibid.), “if the boundaries of law are not set by ‘the way the world is’ [...] then [...] the obvious answer appears to be [that it is] the concept of law itself [...] that sets [these] boundaries.” Nonetheless, he claims (2018, 173) to have found an interesting theme about law and artifacts in Finnis’s argument for the existence of certain moral norms that are a part of law “even if never promulgated by a social source, and, indeed, even if there are socially promulgated norms that purport to be contrary.” He deems this claim (ibid., 174) “controversial,” since according to such a position certain moral norms “can also be considered legal norms, despite the absence of any social act.” His preoccupation is quite similar to Dworkin’s comment (1978, 344) on what he called “the extreme natural-law theory,” namely that such a theory ultimately denies the difference between legal and moral arguments in hard cases.”

In a similar vein, Kenneth M. Ehrenberg, who advocates a function-based core of the artifactual theory of law, argues that for the natural-law theory law is not an artifactual but a natural kind because positive laws which “utterly fail their natural or rational function thereby fail to be members of the kind.” (Ehrenberg 2019, 274). Perhaps natural lawyers would agree, in Ehrenberg’s estimation (ibid.), that positive laws are causally made by human beings, but they could support the claim that law is an artifactual kind either only metaphorically, i.e. by claiming that “there is an element of legality that is beyond its positive, artifactual, aspects, or by keeping in line with their tradition’s thesis that law is “an artifact designed by God” (Ehrenberg 2016, 80). Therefore, on this account, when the natural lawyers “profess” that positive law may be beneficially said to be artifactual is not really equivalent to what the legal positivists or philosophers of law in general hold when they highlight law’s artifactual character.

Perhaps the most extreme artifactual account of the ontological status of law, at least in its evaluation of opposing views, comes from Brian Leiter. In a passage which immediately unveils the quality of Leiter’s preference for the core argument of the artifactual theory, but also his evaluation of the central claims of a natural-law theory, he claims (2018, 4) that “laws are not God’s commands, they are not handed down from ‘on high’: their existence and character is due to nothing more than certain kinds of human activity.” After disqualifying norms of transcendental origin from contributing any essential cognitive insight into the

nature of positive law, Leiter does not spare even the broad category of “moral truths”; these latter are “controversial at best and incredible at worst” (ibid., 19). What is his stance on the tension between natural and artifactual kinds relative to law’s ontological status? In his words, which, not only for the difficulty in discerning their exact doctrinal reach, we will not comment,<sup>7</sup> but leave to speak for themselves,

The concept of law is the concept of an artifact, that is, something that necessarily owes its existence to human activities intended to create that artifact. Even John Finnis, our leading natural law theorist, does not deny this point. [...] Those who might want to deny that law is an artifact concept are not my concern here; the extravagance of their metaphysical commitments would, I suspect, be a subject for psychological, not philosophical investigation. (2011, 666).

Some general conclusions may be extracted from this brief overview of the rather broad palette of evaluations regarding the foundational ontological premise of the artifactual theory of law.

First, different or at least nuanced accounts exist among the proponents of the theory regarding the doctrinal reach of the claim that law has an artifactual ontological status, as well as regarding the evaluation of a natural-law critique of this claim. Second, all the proponents of the theory envision law as essentially positive or human intention-based law, whether under the rubric of the “systemic” meaning of law as an institution, or that of a legal system, or of legal norms. Third, most of the authors hold that if someone would argue for a purely natural ontological status of the law this would amount to saying that law is something that occurs like the outcome of a genetic structure, or the atomic structure of water or gold, or the law of gravity, etc. Fourth, some of them acknowledge that the natural-law theory, even in its strongest Thomistic version, does not hold that all positive law pertains to a natural kind (Schauer 2018, 29; Burazin 2018, 112; 474; Himma 2018, 138; Ehrenberg 2019, 274; Priel 2018, 239), but that only its core claims – i.e., those somehow related to a moral account of the basic human goods – may be envisioned, within this theory, as having a non-artifactual, but more like natural or moral, mediate and remote origin (e.g., Roversi 2018, 106; Toh, 2018, 72; Himma 2018, 138).

It seems that the field of the debate between the artifactual theory and the strongest Thomistic natural-law approach to the concept of law is narrower in the face of these overall conclusions than it might have appeared to be in the course of the presentation of the ideas of individual artifactual lawyers. Thus, instead of addressing single arguments of each author at their proper level, in the remainder of this paper I will rather concentrate on what is arguably the most pertinent focus of the divergence between the two approaches. We have seen that some artifactual lawyers, at least to a certain extent (e.g., Burazin, Himma, Roversi, etc.), do not advocate a complete exclusion of certain *moral* elements (hence, not the dynamics inherent to genetic or atomic structure, nor God’s immediate commands) from the overall artifactual status of law. Instead of switching gears in focalizing the concept of law between

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<sup>7</sup> One wonders, though, to what extent a different claim, such as that “Finnis’s challenge is now plainly moribund outside certain Catholic sects” (Leiter 2018, 21) steps outside the realm of commonsensical, or at least artifactual, recommendations regarding good manners for academic debates, now that its author professes not to follow any kind of, “at best, controversial” universal truths inherent to moral action.

the mutually exclusive arguments on its pertaining to either a natural or an artifactual kind, we should focus on, as Mark C. Murphy suggests (2017, 343, 346), the “notion that there is some sort of tension” between these two kinds in relation to human posited law.

In other words, reconnecting our present analysis with Himma’s quote on Legos from the beginning of this paper: since probably everyone considers that laws are not simply a random pack of Legos, are laws, then, essentially purposeful but contingently designed Legos that offer entirely different building opportunities and outcomes, or are they Legos that come with the overall design and inbuilt boundaries but remain open to multiple artifactual scenarios of achieving this design?

### **3. The Natural-Law Position on the Ontological Status of Law and the Question of its Artifactual Character**

Surely, there is not one contemporary natural lawyer that would argue for the resolution of the “natural-artifactual” tension in the concept of law wherein something like a “natural” component in artifactually conceived positive law would be presented as emerging from the dynamics of, say, atomic or genetic structure (as is the case in some objects of natural science), or otherwise from wholly unintelligible moral claims or from God’s immediate commands. Not even a thirteenth-century natural lawyer like Thomas Aquinas would advocate such a claim. In the first part of this section, I shall revisit Aquinas’s account on the artifactual mind-dependent operations regarding the concept of law, since I think that this might be of some interest to any reader, if only for historical-cultural reasons. I shall then present a comprehensive account of contemporary Thomistic argument for the juridical domain of the moral core elements in the artifactual setting of positive law. This presentation should provide the debate on “natural-artifactual” tension in the concept of law with a clearer, narrower focus on certain crucial doctrinal contrasts and prospective points for dialogue.

#### *3.1. Aquinas and the Artifactual Nature of Law*

There is more than one line of argument related to artifacts in Aquinas’s texts. He does not comprehensively and explicitly connect his doctrine on the artifactual operation in the legal domain with his discussion on the difference between substances and artifacts,<sup>8</sup> the latter being a medieval version, with somewhat different metaphysical focal points, of the contemporary distinction between natural kinds and artifactual kinds. His account of artifactual operations relative to the concept of law may be said to be, in a sense, analogical or metaphorical. Nonetheless, he quite consistently uses the image of artifactual operation to describe real ontological *causality* of the law.

In contrast to modern and contemporary legal culture, Aquinas’s theory is developed within peculiar doctrinal coordinates. On the one hand, it is developed in a juridical culture deeply marked by the tension between anthropocentric conceptions of subjective right-claims

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<sup>8</sup> For a good overview of this latter discussion, see Stump (2003, 39-44, 49-59).



and the reicentric focus on the nature of the things themselves as objects of relationships of juridical justice, i.e. as rights. On the other hand, the legal order is conceived as irreducible to positive law alone, but as the hierarchical network of mutually inclusive and interdependent plural orders of law; from the highest, eternal law, through natural law, right down to positive law.

Aquinas generally holds (1954, q. 2, a. 8)<sup>9</sup> that the so-called “practical” artifactual knowledge – i.e. when the artificer “by his intention ordains the principles of the work to operation as an end” – follows and applies to work a “speculative” artifactual knowledge, namely that which consists in the cognition of the “intimate nature” of a certain work or project. On a “speculative” artifactual level, the artificer views the artifactual work or project in the light of his own purposes, i.e. “he sees that it could attain such and such an end by means of such and such a device” (ibid.). “Just as conclusions are known in their principles,” Aquinas adds, “products of art are known in the light of their purposes” (ibid.).

The hermeneutical key to Aquinas’s understanding of the artifactual operation, as applied to the juridical domain, is provided in his argument on the right, *ius*, rather than in his texts about the nature of law. He thus says that,

Just as there pre-exists in the mind of the craftsman [*artificis*] an expression [*ratio*] of the things to be made externally by his craft [*artem*], which expression is called the rule of his craft [*artis*], so too there pre-exists in the mind an expression of the particular just work which the reason determines [...]. If this rule be expressed in writing it is called a “law” [*lex*], which [...] is “a written decree”: and so law [*lex*] is not the same as right [*ius*], but an expression of right [*aliqualis ratio iuris*]. (Aquinas, 1947-1948, II-II, q. 57, a. 1, ad 2).

Aquinas thus uses the artifactual character of agency for the analogical explanation of the paradigmatic mode in which the law originates. There is first a *ratio*, a rational purposeful orderedness, of a certain work of justice in the artificer’s mind. This *ratio* is the foundation of the juridical domain, *ius*, which Aquinas defines as the “just thing itself,” *ipsa res iusta*, the object of justice (ibid.).<sup>10</sup> Furthermore, the form of an artifact, as a plan or idea, is “in the artificer,” while it is said to be “outside of the artificer” if he “imitates it when he makes a thing” (Aquinas 1954, q. 3, a. 1). Now, according to Aquinas’s understanding, law may be “in” something in two ways, namely “in” the reason whose role is to rule and measure, as well as “in” that which is measured and ruled (ibid., I-II, q. 90, a. 1, ad 1).

Since positive law, in Aquinas’s quotation from above, is only one among various orders of legality, and thus only one aspect of the *ratio* of the juridical domain (*ius*), it will perhaps be useful to start from the top of his peculiar system of multilayered legal order.

He holds that at the top there is the *eternal law*, which is in the *ratio* in God’s reason, but it is also, at the same time and by participation, in the lower orders of law. God’s knowledge of created things is generally compared to “that which an artist [*artifex*] has of his artistic products [*artificiata*]” (ibid.; 1947-1948, I, q. 14, a. 8).

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<sup>9</sup> Instead of pointing to the page numbers, I shall refer to the citations from Aquinas’s works by highlighting the year of the relevant English translation of the text and then use the standard format for the reference to his texts.

<sup>10</sup> For the analysis of various meanings of this Aquinas’s claim, see Popović (2018, 65-103).

God, by His wisdom, is the Creator of all things in relation to which He stands as the artificer [*artifex*] to the products of his art [*artificiata*]. [...] Wherefore as the type [*ratio*] of the Divine Wisdom, inasmuch as by It all things are created, has the character of art [*artis*], exemplar or idea; so the type [*ratio*] of Divine Wisdom, *as moving all things to their due end*, bears the character of law. (ibid., I-II, q. 93, a. 1, emphasis added)

Moving one step lower in the hierarchy of legal order, Aquinas defines the *natural law* as “the participation of the eternal law in the rational creature,” whereby the rational creature “has a natural inclination to its proper act and end” (ibid., I-II, q. 91, a. 2). This participation is “impressed”<sup>11</sup> in the rational creature’s order of being (ontology) and his order of knowledge (cognition). The natural law has, in Aquinas’s view, the following basic structure: “All those things [that] are naturally apprehended by reason as being good [constitute the] objects of pursuit, and their contraries as [...] objects of avoidance” (ibid., I-II, q. 94, a. 2). I shall have more to say about the “natural” apprehension of the good as the object of the precepts of natural law in the following sections.

Although, in Aquinas’s reasoning, the artificer of natural law is God Himself, the artifact – the natural law – is intelligible on the basis of the cognition of the rationality (*ratio*) that is “impressed” and, at the same time, promulgated through human rational nature. He makes explicit the mode of cognition of the natural law in the claim that “we cannot know the things that are of God as they are in themselves, but they are made known to us in their effects” (ibid., I-II, q. 93, a. 2, ad 1, emphasis added). Therefore, if allowing for some instance of a natural-kind necessary element of law might putatively smuggle certain transcendent or otherwise revelation-based content into the necessary philosophical schema of the legal order (as some artifactual lawyers claim or imply, e.g., Schauer 2018, 29; Ehrenberg 2016, 80; Leiter 2018, 4), this smuggling is not among the goals of a natural-law theory, including those that form part of the original Thomistic version of the theory.

Regarding the passage from the natural law to the order of human *positive law*, Aquinas does make the general claim that “every human law has just so much of the nature of law, as it is *derived* from the law of nature” (ibid., q. 95, a. 2, emphasis added). A *contrario*, a law that “deflects from the law of nature” is “no longer a law but a perversion of law” (ibid., I-II, q. 95, a. 2). The doctrine on unjust laws is, however, far more nuanced, since Aquinas argues (ibid., I-II, q. 91, a. 2, ad 4) that an unjust (or tyrannical) law is not a law “absolutely speaking.” Relatively speaking, however, even such substantively perverse law participates to a certain degree in what we (together with Raz 2009, 172-3; 2007, 19-21) could call the Thomistic case for the systemic moral value of the nature of law and its claim to legitimate authority. Even though such a law is a perversion into violence of the metaphysical continuity of legal orders, it still shares in the systemic structure of orderedness that generally “aims at the citizens’ being good” (Aquinas 1947-1948, I-II, q. 91, a. 2, ad 4) and still pertains to law’s authority because it “retains some appearance of law” (ibid., I-II, q. 93, a. 3, ad 2).

Where does Aquinas’s argument for the “systemic” value of positive law come from? I shall argue that it comes from his version of a theory on the artifactual character of positive law. Positive law’s artifactual character is not manifested only in the case of an unjust law. It

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<sup>11</sup> Aquinas, 1947-1948, I-II, q. 90, a. 4, ad 1; I-II, q. 91, a. 2; I-II, q. 91, a. 3, ad 2; I-II, q. 93, a. 5.

is present also in the moment of derivation from natural law. In Aquinas's words (*ibid.*, I-II, q. 95, a. 2),

It must be noted that something may be derived from the natural law in two ways: first, as a conclusion from premises, secondly, by way of determination of certain generalities. The first way is similar to that by which, in sciences, demonstrated conclusions are drawn from the principles: while the second mode is likened to that whereby, in the arts [*in artibus*], general forms are particularized as to details: thus the craftsman [*artifex*] needs to determine the general form of a house to some particular shape.

Aquinas goes on to say that even the most basic norm of natural law, e.g. one which protects the good of human life, is subject to the first process of derivation as a conclusion from the natural law. He concludes (*ibid.*) that,

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

Thus, even though the positive laws that have some force (“also”) from the natural law, and although the things which are derived as conclusions from natural law (e.g. basic human goods) do not emanate “exclusively” from positive law, these things nonetheless participate in that peculiar *artifactual* agency that is proper to that level of legal order which pertains to positive law. Not bad for a thirteenth-century argument.<sup>12</sup>

### 3.2. *The Juridical Domain of the Moral Core Module in Positive Law's Artifactual Character*

In Veronica Rodriguez-Blanco's line of argument (2018, 193-5, 212-4), legal artifacts belong to *voluntary* things, i.e. to principles of determination and *intention* as parts of the active power to order something toward certain ends. These principles are, therefore, “in the author herself” (*ibid.*, 193). Their underlying structure is the dynamic structure of practical reason.

Now, the link between the artifactual character of law and the structures of practical reason relates to two discrete levels of analysis.

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<sup>12</sup> It is interesting to note that Aquinas has already responded to Bix's and Dworkin's reading of natural lawyers' epistemic failure to adequately distinguish moral norms from legal norms. Aquinas has already put this critique on the lips of his hypothetical objector (1947-1948, I-II, q. 91, a. 3, ad 1): “Natural law suffices for the ordering of all human affairs [and] consequently there is no need for a human law.” To this objection Aquinas responded (*ibid.*) by claiming that “on the part of the practical reason, man has a natural participation of the eternal law, according to certain general principles, but not as regards the particular determinations of individual cases, which are, however, contained in the eternal law; hence the need for human reason to proceed further to sanction them by law.” In addition, Aquinas held that positive law is necessary for the establishment of peace and the suppression of chiefly those vices without the prohibition of which human society could not be maintained (*ibid.*, I-II, q. 95, a. 1; I-II, q. 96, a. 2).

On a first level, there are good practical reasons that support the *systemic* and *procedural* features of law *qua* artifactual institution that, as Rodriguez-Blanco says (ibid., 212), involves systemic good-making characteristics and “makes possible for citizens to understand the reasons of the law as good-making characteristics.” From the perspective of the natural-law theory, as already seen in Aquinas, this level of analysis forms part of the *moral* value of the artifactual character of positive law. The fact that positive law *qua* institutional artifact is a highly complex intention-based structural vehicle for furthering the specification of substantive moral principles in view of social peace and the stability of society represents in itself, to use Finnis’s words (2017, 45), a “moral idea.” The premise for acknowledging positive law as distinctive kind of reasons for action which inhere in the structures of practical reason is, in Finnis’s view, a moral premise (ibid., 51). This is why he praises (ibid., 49) and, in a way, prefigures<sup>13</sup> the more recent efforts to explain the nature of positive law through the paradigm of artifactual kinds.

Finnis immediately adds (2017, 51), though, that this artifactual paradigm needs “a better inventory of kinds.” I suspect that he particularly refers to the reductionist bifurcation of the ontological status of the concept of law between the natural and artifactual kinds. This bifurcation is unable to fully explain that systemic and procedural aspect of the domain of law *qua* institution, which even an arch-positivist such as Joseph Raz understood (2009, 172-3, 178) to be somehow relatable to essentially *moral* values. In other words, the first, systemic, procedural, and institutional level of analysis is reducible neither to a pure artifactual paradigm, nor to a normative structure inherent to the dynamics relative to natural kinds such as water or gold.

Finnis advocates the inclusion of at least one additional kind, domain or pattern in the metaphysical schema of explaining the nature of human law; this kind or domain, discrete from the natural and the artifactual kind, is the *moral* domain of the structures of *practical reason* (2011b, 218; 2017, 32). In his estimation (2017, 49), thinking about human law, besides taking into consideration at least these three kinds or domains, must “avoid describing and explaining law reductively, as if it pertained essentially to only one [or two] of them.” On the contrary, the properties necessary to constitute positive law and fully instantiate its nature include properties of *each* of these kinds or domains (ibid., 49-50). In his own words (ibid., 50),

What best explains the features law has [...] is its [moral or practically reasonable] character as a response to human communities’ morally significant need for the kind of access to justice that only law systematically provides. The [moral]-domain reasons which give law its characteristic shape and nature are reasons for making it have the character it has as participating in [other domains of explanation].

The artifactual status of law, therefore, may reasonably be said to have an inbuilt and essential moral or practically reasonable core module. I do not see how, at least on this first level of analysis, the inclusion of such a core module could be incompatible with legal artifactuality, as some of the more extreme artifactualist positions seem to maintain.

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<sup>13</sup> See Finnis 2011a, 281-289; 2011b, 219-20; 2011c, 186; 2014, 93.

Moving on to the second level of analysis, the question shifts to the interrelatedness of the natural, moral, and artifactual elements regarding *substantive moral values*. The systemic and procedural morality of the law *qua* institution is not detached from considerations that this particular institution is *instrumental* for the safeguarding of what Finnis refers to as basic human (moral) goods (2017, 41). A brief, but precise, overview of natural-law theory's central claims on substantive moral values should be premised by an advertence that theoretical accounts on this level of analysis are more diversified within the natural-law theory than one would expect. Nonetheless, it is possible to extract the core claims of this theory.

Any Thomistic natural-law account of human values is founded and must necessarily be traced back to the ontological status of the "good" and the ways in which the "good" may be predicated of anything. Stephen L. Brock affirms (2010, 248) that the metaphysical meaning of "good" is nothing other than that perfection or fullness of "being" which everyone desires *according to its own nature*. Commenting on Aquinas's argument that (1947-1948, I-II, q. 94, a. 2) "good" has the nature of an *end*, Brock considers (2010, 52) the ontological status of the "good" in the following terms: "The being is essentially constituted according to the orderedness towards its own good, towards the fullness of its being. It possesses that order in itself, according to its own nature."

The metaphysical good thus concerns the actualization of the fullness of each "being" according to its specific nature, e.g. the metaphysical fullness of "being" that is instantiated in a tree, in a bee, in water, etc. With human persons, the ontological status of the "good" is related to our peculiar psychoaffective-corporeal rational nature in all its elements. In short, the "good" of that being which is the human person includes not only aspects which are reduced to elements of natural kinds, but must take into account also those aspects which are related to the *moral* good.

Why these back-to-basics metaphysical remarks? Well, because they constitute the crux of the problem on the ontological status of the concept of law particularly on this second level of analysis which concerns issues of substantive morality. If we do not perceive or refuse to take into consideration the question of whether the "good" itself has an ontological status, it will be hard to conceptually grasp how this ontological good is instantiated in certain aspects of human moral agency. Why, in the ultimate analysis is it morally bad and perverse to torture another person to death for fun or for any other reason and why can acts of sexual violence never be deemed morally good? Is this something purely conventional, or do the adequate answers to these questions somehow pertain to the ontological status of the "good"? Consequently, without the ontology of the "good" we shall be left without any middle ontological ground within the bifurcation between natural (considered as devoid of reference to morality) and artifactual (considered as purely intentional-technical) concept of law.

Regarding that "being" which is the human person, certain aspects of his or her ontological and relational reality are apprehended by human reason as desirable and perfective, and consequently as objects of pursuit because they instantiate aspects of the "good" – i.e. of a broader telic context which concerns the whole human good, human perfection or fulfilment. There is a *ratio* within this particular set of Legos that is the human person and it consists of certain core values, while each individual human life is a unique one-

of-a-kind final design of the multiform ways in which this rationality of the Legos is concretely brought together, i.e. existentially lived out, or not.

These particular aspects of the whole human good are usually called the basic human goods (Finnis 2011a, 59-97; Brock 2011, 692-9). In the most complete, but still an “open-ended” list, Finnis (2017, 18-19) includes the following “basic *kinds* of intelligible human good”:

The normative principles of practical reason pick out and direct us to (...) goods such as life and health, marital/procreative union, knowledge, friendly association, artistic accomplishment, friendship with the divine transcendent source of all these goods, and practical reasonableness in actualizing all these intrinsic, self-evident forms of human good.

These basic human goods form part of the theory of *natural* law because human practical reason identifies them as ultimate reasons for action which instantiate and express human *nature*, in the sense that participating in those goods actualizes aspects of human flourishing (see Finnis 2011b, 214). In Finnis’s understanding (2017, 19),

To identify and understand X’s nature you must identify and understand its capacities (powers); but to do the latter you must identify and understand its activities (which actualize those capacities); and to understand those activities you must identify and understand those activities’ objects. For the objects of intelligible human acts are the human goods which provide the rationale for the acts.

To this extent, at least, the domain pertaining to basic human goods represents the overlapping structural field between natural and moral kinds or patterns.

When traced back to the Thomistic natural-law account of the concept of law, these basic human goods represent the core module of substantive morality which enters into considerations of practical reason upon artifactual agency relative to the creation of positive law.

The crucial issue is, however, the determination of the extent to which moral issues enter into the focus of specifically juridical considerations. Finnis’s theory, as noted by some authors (Himma 2018, 138; Waldron 2013, 74-5, 78) operates within a twofold schema of ethical (and, therefore, meta-juridical) and positive-law domains. A Thomistic theory may broaden this schema by providing precise criteria for the narrower, *strictly juridical* domain of substantive morality. The criteria for the juridical status of ethical values at the same time provide a Thomistic answer to the question on whether human positive law is the exclusive manifestation of juridically valid legal norms regarding basic human goods. As already seen, in Aquinas’s doctrine (1947-1948, II-II, q. 57, a. 1), the primary meaning of right – *ius*, the primary phenomenon of the juridical domain – is that of the “just *thing* itself” (*ipsa res iusta*), precisely as the object of justice. In addition, Aquinas considers juridical justice as the “perpetual and constant will to render to each *his own right*” (ibid., II-II, q. 58, a. 1, emphasis added). This view may be called Thomistic juridical realism.

In my reading of crucial Aquinas's passages on the juridical domain,<sup>14</sup> the "thing" itself (*ipsa res*) – e.g. a basic human good such as life, to the extent that it is referred to as the right (*ius*) – does *not* pertain to a moral domain. A "thing" (*res*) becomes a specifically juridical good or right (*ius*) when it is attributed by a specific title (e.g. norm of positive law, or in secondary attribution by a contract, will, etc.) to a person as the titleholder. The fact that the "thing" – the titleholder's *suum* – is or is able to be in the sphere of power of other persons and susceptible to their interference, constitutes the obligatoriness of the right: all potential subjects of interference become debtors in the relationship of juridical justice. Furthermore, besides the above-described property of *other-directedness* of right ("render to each *his own right*"), only the *outward* domain of "things" (*res*) may be constituted in juridical goods or rights. As Aquinas says, a "thing" becomes *ius* only according to the domain where "the way in which [justice] is done by the agent" is irrelevant (see *ibid.*, II-II, q. 57, a. 1, emphasis added). The juridical domain is, in principle, not concerned with operations and things which pertain to internal "passions" of the subjects (*ibid.*, II-II, q. 79, a. 1, ad 1).

Following this Thomistic reading of the juridical domain, if the title that attributes "things" or goods to their titleholder is a precept or cluster of precepts of natural law, then this normative structure takes the narrower, essentially outward and other-directed, form of *natural norms of justice*.<sup>15</sup> When the focus is shifted from the orderedness "basic-human-goods/whole-human-good" towards their being attributed to persons in the order of juridical justice, these human moral goods are reconstituted by the natural norms of justice as juridical goods or natural rights. We have passed the "threshold" of the juridical domain without the necessity, but only with instrumental expediency, that natural rights be recognized by positive law as legal rights.<sup>16</sup>

Do these considerations alter the artifactual ontological status of positive law? In my estimation of the Thomistic doctrine, the moral requirements of the basic human goods and the correlative precepts of natural moral law are translated into positive law through artifactual agency, while still retaining, as Aquinas says (*ibid.* 1947-1948, I-II, q. 95, a. 2), "some force from the natural law." In this sense, I would support the position according to which the positive law has a decidedly artifactual causal *character*, but when speaking about its ontological status, I would agree with Finnis's claim that the properties necessary to constitute positive law and fully instantiate its nature ultimately include properties of *each* of the kinds or domains, natural, moral and artifactual (see Finnis 2017, 49-50).

I suppose that this line of argument is to some extent intelligible even to those legal philosophers who do not endorse the full range of basic human goods as expounded by the Thomistic natural-law theory. Again, even before discussing which basic human goods are included in the schema of the whole human good, the fundamental question is: what is the

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<sup>14</sup> This interpretation is inspired by the works of the Spanish jurist and legal philosopher Javier Hervada (2006; 2008). For a more detailed account of the juridical status of the precepts of natural law, see Popović (2019).

<sup>15</sup> This line of argument hopefully resolves at least some elements in Burazin's advertence (2015, 66) that law is taken to be of a natural kind from some natural-law perspective, according to which (here Burazin cites Kelsen) norms of morality or law do not have to be posited by any act in order to be valid.

<sup>16</sup> The alternative, ontologically artifactual, conception of basic human rights would amount to the possibility, for example, that the (purely conventional) idea on human rights as inherent to all human beings alters towards the similarly conventional idea that some or all these rights are conceived as non-inherent to some or all human beings.

ontological status of the “good” in itself and, then, with regard to the concept of law? H. L. A. Hart perceived the existence of some core substantive moral values which may be accepted as “objective and rationally determined criteria for the evaluation and criticism of law” (1983, 111-112). He considered them (Hart 2012, 191-200) to form an ultimately contingent set of values, and referred to them as the “minimum content of natural law.” Finnis rightfully suggests (2011d, 262) that we should, instead, refer to Hart’s proposed set of values as the “minimum content of positive law.” The latter understanding would be in line with Himma’s claim that positive law may even be “constructed, in part, out of a non-artifactual moral piece” in a way “does not alter the artifactual ontological structure of positive law” (see Himma 2018, 138-40).

In the end, we finally arrive at what seems to be the only real difficulty in the exchange of arguments between the artifactual theory of law and the natural-law theory. Is the core module of substantive *moral* values (with their underlying *natural* features) in the *artifactual* causal character of positive law is repristinated in the ontological status of that law? Or does the ontological character of positive law remain ultimately detached from the ontological status of the “good”? The extent to which this question is a restatement of the older questions on the identification of law and its social sources, only now on an ontological level, does not alter my personal estimation that the inclusion of the latter level of analysis constitutes some promising prospective points of dialogue between the artifactual lawyers and natural lawyers.

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