DERIVATION OF POSITIVE FROM NATURAL LAW REVISITED

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1

Aquinas's account ofthe relationship of natural law to positive law has a general theory: *every* just human law is *derived* from the law of nature;[1] and two, subordinate theorems:2 *derivation* is always either *per modum conc/usionis* or *per modum determinationis.*[3] I will cal! them sub-theorems. According to the first sub-theorem *"something* may be derived from the natural law . . . as a conclusion from premises."[4] For example, "that *one must not kili* may be derived as a conclusion from the principie that *one must do harm to no one."*[5] For one reason or another, the theory of derivation *per modum determinationis* has been the object of more intense study,[6] but this Note will focus on the first sub-theorem and its concept: derivation *per modum conclusionis.*

Derivation of this first type can be understood in two ways. A first interpretation of it (Interpretation A) follows naturally, in my view, from the key example provided by Aquinas in the crucial article of the *Summa theologiae* on whether every human law is derived from the natural law. There, "one must not kill" is proposed as a specific precept of morality that can be reasoned to (i.e., derived) from another, more general principle of morality: "one must do harm to no one." So "derivation" here is not of positive law from natural law but of (more specific) natural law from (less specific) natural law: we move here within the realm of morality and we never touch the realm of human positive law. I shall call this type of derivation "intra-moral."

John Finnis, however, implicitly suggested a different interpretation (Interpretation B) in his landmark *Natural Law and Natural Rights.* For he assumed that Thomas's example ("one must not kill") is actually an example of a criminal-law enactment: the law of murder: a positive law.[7]

The derivation of this positive law of murder from natural law by way of conclusion flows easily, if one concedes the premise that Aquinas is talking about positive law in those sentences:

> P 1: the law of murder is a conclusion ("deduction") from the moral precept "one must not kill" which is itself a conclusion vom the more general principle ofmorality "one must do harm to no one."

Note that in P 1 there are two types of "derivation by way of conclusion" at work. First, a natural-moral precept is derived from a more general natural- moral principie (the moral prohibition of killing from the principie "one must do harm to no one"); second, a positive law is

derived from the said natural-moral precept (the law of murder from the moral prohibition of killing). In this example, the first type of derivation by way of conclusion is thus "intra-moral"; the second one, instead, moves from the realm of morality into that of positive (or, as Aquinas more commonly says, human) law. I shall call this type of derivation "legal." Both types are useful and readily used in moral, political, and legal theory. Finnis's reading of this part of the *Summa theologiae,* independently of its conformity with the text, is a good instantiation of this usefulness, even if other examples could be provided.
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Although Interpretation B is striking in light of Thomas's key example (i.e., "one must not kill ..."), there is much to be said for it. Aquinas's discussion is included in an article of the *Summa theologiae* on human law, included itself in a *quaestio* titled "of human laws." Furthermore, the idea that Aquinas is dividing the one whole ("human law") into two different parts ("conclusions" and "determinations") has logical appeal-although, as I shall argue in section II, sorne of this appeal is diminished by Finnis's more recent insistence on calling the first part of the human law "natural law." Contrariwise, Interpretation A faces a problem which Interpretation B avoids. Por if the first part of the whole is simply an "intra-moral" derivation (where the starting point of practical reasoning (derivation) is a moral principle) and the second part is a strictly "legal" derivation (where the starting point of practical reasoning (derivation) is an already positive legal principie), the general theory of derivation will seem to be deficient. For the theory claims that *ali* human law is derived either *per modum conc/usionis* or *per modum determinationis.* [10] But if derivation *per modum conc/usionis* is entirely "intra-moral" then only one type of derivation applies to the law (i.e., *per modum determinationis)* and thus all human law would be *determinations-which* is not true and is indeed against one of Aquinas's (and Finnis's) main tenets: that some rules of human law derive their moral import and binding force from natural law (even if they need, as they do, positivization) while others derive that moral import and force only remotely from natural law (so much so that in the absence of a human rule there would be no obligation whatsoever: [11] neither legal nor moral). Inshort, Interpretation B not only has some logical appeal but also avoids this crucial problem.

I I

I have just mentioned that Finnis is keen to call "natural law" that part of positive law comprised (or comprised mainly) [12] of *conclusiones.* He made this call at least twice in more or less recent years. [13] I shall focus here on a

paper he delivered at the IVR meeting held in Frankfurt in 2012, where we read: "Where the derivation is by logical specification (as killing or wounding are distinct specifications of harming), that part of the state's positive law can be called natural law or *jus gentium* (law common to all peoples).
"[14]

I think this might be confusing. It is one thing to admit, as reason requires, that *conclusiones* "owe their moral import partly to the fact that they pertain to the natural law."[15] Or, in Aquinas's old-fashioned, translated words, that *"those things* which are derived in the first way, are contained in human law not as emanatinft therefrom exclusively, but have sorne force from the natural law also." [6] It is different to call "natural law" "those things"-i.e., the part of positive law labeled *conclusiones,* whose moral import is not (only) a consequence of its positivity but also of its independent (one could even say prior) [17] moral content. Of course, if one is willing to renounce Interpretation B in favor of Interpretation A, which flows more clearly from Aquinas's central example (section I above), one can then conclude that "those things derived in the first way" are not "enacted laws," and admit that Aquinas's *conclusiones* are simply moral conclusions: "intra-moral" practica! reasoning. But if one were to accept all this, calling "those things" "natural law" would be unsurprising and hardly risky.

At any event, does Aquinas really call *conclusiones* "natural law"? Even if the question of labels is, in the end, less important -*de nominibus non est disputandum*- I shall briefly address it.

Although Finnis suggests that "[i]n the *Summa* he [i.e., Aquinas] treats the division between natural and civil as a distinction *within positive law,"*[18] the textual references he provides only show that in the *Summa Theologiae*

Aquinas on occasion [19] called *conclusiones "ius gentium"-but* not "natural law *orjus gentium,"* as Finnis would have it in bis 2012 paper. fu the same *quaestio* 95 of the *Summa,* 1-2 that we are dealing with, Aquinas claims: "Positive law is divided into two, the *ius gentium* and the *ius civile,* according as there are two ways in which something can be derived from

natural law."[20] This quote, provided by Finnis,[21] is of particular interest for the obvious reason that it does not say "natural law or *jus gentium";* and also because in this passage natural law comes clearly mentioned as something different from *ius gentium,* not only from a terminological point of view but also because both *ius gentium* and *ius civile* can be derived from natural law. Furthermore, if one were to accept Finnis's notion that *ius gentium* and natural law are synonymous-both referring to that part of *ius civile* comprised of *conclusiones--one* would have to readily admit that here are two different uses of the term "natural law" at work in this part of the *Summa.* For it is clear that by and large Aquinas uses the term "natural law" to

refer to what we loosely call "morality"-or, in his own terminology, "the rational creature's participation in the eternal law',[22] and not by and large to refer to sorne part of positive law *(conclusiones).* Finnis himself, after stating that Aquinas's division between natural and civil is a distinction within positive law,[23] affirms that *conclusiones* "are the parts of the positive law that Aquinas calls *ius gentium."*[24] That the precepts of the *ius gentium* reappear as precepts of natural law in parts of the *Summa* dealing with "the Old law" and "the natural law"[25] seems to indicate what, thanks to Finnis, we know full well by now: that

> "[s]ome positive laws *[conclusiones]* are also norms of the natural moral law."[26] But *calling* those positive laws "natural law" seems to me unwarranted.

III

I will finally move to a different, though quite related question: Is the theory of derivation of positive from natural law a theory of the coexistence of two normative orders? In his Frankfurt piece Finnis seemed to reject this possibility: "[t]he relationship of natural law to the positive law of a particular state . . . is . . . *not best thought* of as a coexisting of two normative orders."[27] I will now argue that this statement may need qualification.

Indeed the theory of derivation of positive from natural law is (or can be viewed as) a theory of the coexistence of two normative orders. In the theory of derivation, coexistence is not understood as in rationalistic accounts of natural law, where two *separate* legal orders coexist, one natural, one positive.[28] Rather, for derivation theory coexistence of normative orders means pretty much what Finnis explained in *Natural Law and Natural Rights:* that the law of murder, one of several examples of *conclusiones,* "corresponds rather closely to the requirement of practical reason, which would be such a requirement *whether or not repeated or supported by the law of the land:* that one is not to deliberately kill the innocent."[29] In other words, the moral obligation not to intentionally kill would exist even if there were no legal obligation not to intentionally kili, given the hypothetical absence of a legal rule against murder. The hypothesis shows how two different (not separate) normative orders are at work. Even if normally both orders coexist in a way similar to that in which what is received (natural law) exists in the recipient (positive law), the not altogether rare cases in which the recipient (via the human legislator) chooses not to receive natural law--cases of "unjust laws"[30]-remind us of the distinctness of these two orders. It is an example of how the pathology sometimes helps to enlighten the central case. In his later work Finnis

reiterated the idea:

> [s]orne positive laws are also norms of the natural moral law-that is, are requirements ofpractical reasonableness. But to say that is not to detract in the least from the positivity of those laws-tha js from the fact (*where it is thefact)* that they have been posited humanly.

So where it is *not* the fact that a certain requirement of practica! reasonableness has been posited humanly, that requirement will still be morally obligatory even if is not at the same time legally obligatory.

In sum: if by a coexisting of two normative orders one understands the coexistence of two separate, complete codes that are called to exist without each other Finnis is right in dismissing the usefulness of such a notion. But the relationship of natural law to the positive law of a particular state is indeed one of coexistence. In normal cases, in which natural law exists in the positive law of a state (by way of conclusion and by way of deterrnination), it also continues to exist as a normative order independent of the legal order, both in the practica} reasoning of the citizens of that state

and in the intelligence of the creator of that natural law.[32] In pathological instances (unjust laws), where the positive law of a state rejects a relevant natural law precept, natural law will not exist in that positive law-this is what is meant by the tag "unjust laws are not laws"[3] -but, again, it will exist independently of the positive law and will provide the citizens a moral reason to react in one way or another against the unjust law. Furthermore, the pathology also shows at work the coexistence of that unjust legal order with the natural law, insofar as that unjust order may still generate legal obligations that *ex hypothesi* do not derive from the moral content of the positive law.

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1. In the sixteenth century the English lawyer Christopher St. German announced the following, similar dictum, which was later popularized by Finnis: "[i]n every law positive well made is somewhat of the law of reason." John Finnis, Natural Law and Natural Rights, 2d ed. (Oxford: Oxford University Press, 2011; 1st ed., 1980), 281. 2. The idea of a general theory and a subordinate theorem I borrow from Finnis, Natural Law and Natural Rights, 285.

2. Both the theory and the two sub-theorems are compressed in Summa theologiae (S. T.), 1-2, q. 95, a. 2c, conventionally titled "Whether every human law is derived from the natural law?" See also 1-2, q. 95, a. 4c. In a. 2c Aquinas

switches between the plural (per modum conclusionum) and the singular (per modum determinationis), but in a. 4 ad 2 he uses the singular (per modum conclusionis), which I will use because my discussion will generally focus on one derivation (i.e., on the derivation of one precept from one principle) at a time, and because there seems no real reason to use the singular for one mode and the plural for the other.

4. ST., 1-2, 95 a. 2c.

5. S. T., 1-2, 95 a. 2c.

6. Finnis, Natural Law and Natural Rights, 281-90; "The Truth in Legal Positivism," in The Autonomy ofLaw, ed. Robert P. George (Oxford: Clarendon Press, 1996), 201-203, 212-214 (now in Collected Essays of John Finnis [CEJF], Vol. IV, Philosophy of Law (Oxford: Oxford University Press, 2011), essay 7, pp. 174-88); Aquinas: Moral, Political, and Legal Theory (Oxford: Oxford University Press, 1998), 266-270.

7. Interpretation B seems clearly implicit in two separate passages in Chapter X of Natural Law and Natural Rights: (i) "Consider the law of murder. From the layman's point of view this can be regarded as a directive not to intentionally kill (or attempt to kill) any human being, unless in self-defence.. . . The legal rule, conceived from this viewpoint, corresponds rather closely to the requirement of practical reason, which would be such a requirement whether or not repeated or supported by the law of the land: that one is not to deliberately kill the innocent. . . . Hence Aquinas says that this sort of law is derived from natural law by a process analogous to deduction of demonstrative conclusions from general principles." (281). (ii) "[T]he process of receiving even such straightforward moral precepts into the legal system deserves closer attention. Notice, for example, that legislative draftsmen do not ordinarily draft laws in the form imagined by Aquinas: 'There is not to be killing'- nor even 'Do not kill', or 'Killing is forbidden', or 'A person shall not [may not] kill'. Rather they will say 'It shall be [or: is] an offence to. . .' or 'Any person who kills . . . shall be guilty of an offence"' (282).

8. In the light of Finnis's comments in his response I would like to clarify that in P1 I use the word "conclusion" as a shortcut for the more proper expression "derivation by way of conclusion," which avoids the ambiguity of terms like "conclusion" (or "deduction"). These nouns might suggest something false, aptly pointed out by Finnis, below: that the (broadly speaking legislative) act of positing is equivalent to deducing or announcing the conclusion of a deduction.

9. See e.g., S.T., 1-2, q. 100, a.1c. Another example of "intra-moral" derivation by way of conclusion, by Finnis: "some parts of a legal system commonly do, and certainly should, consist of rules and principles closely corresponding to

requirements of practical reason which themselves are conclusions directly from the combination of a particular basic value (e.g. life) with one or more of those nine basic 'methodological' requirements of practical reasonableness." Finnis, Natural Law andNatural Rights, 282, emphasis added.

10. In Finnis's words: "[a]ny proper example (central case) of legal systems will be positive law in its entirety and all its parts." John Finnis, "Natural Law Theory: its Past and its Present," 94.

11. Thomas Aquinas put it thus: "those things which are derived in the second way have no other force than that of human law [ex sola lege humana vigorem habent]." S. T., 1-2, q. 95, a. 2c. Finnis tuned in to Aquinas's dramatic intensity: "This last statement really goes further than the analysis itself warrants." Finnis, Aquinas, 267 (where the justification for this observation is provided).

12. Finnis, Natural Law and Natural Rights, 283-284: "the integration of even an uncontroversial requirement of practical reasonableness into the law will not be a simple matter." In fact, that integration will need not only conclusiones but also determinationes. "Hence the legal project of applying a permanent requirement of practical reason will itself carry the legislator into the second of the two categories of human or positive law." Ibid., 284. "In sum: the derivation of law from the basic principles of practical reasoning has indeed the two principal modes identified and named by Aquinas; but these are not two streams flowing in separate channels." Ibid., 289, emphasis added.

13. Finnis, "The Truth in Legal Positivism." 202: "In the Summa he [i.e., Aquinas] treats the division between natural and civil as a distinction within positive law." See also next footnote.

14. Finnis, "Natural Law Theory: its Past and its Present," 94. Compare this with what Finnis holds in his book devoted exclusively to Thomas Aquinas's moral, political, and legal thought: "For this part [conclusiones], which is both 'natural' and 'positive,' he reserves the Roman juristic name ius gentium, the law that is substantially adopted by all peoples (and in that sense is positive law) because recognized virtually everywhere as what is required by reason (natural law)." Finnis, Aquinas, 268.

15. Finnis, "The Truth in Legal Positivism," 202.

16. S.T, 1-2, q. 95, a. 2c, emphasis added.

17. See section III below on the coexistence of normative orders. 18. Finnis, "The Truth in Legal Positivism," 212 (= CEJF It: 182).

19. "On occasion" but not in the crucial ST., 1-2, q. 95, a. 2c., where he fleshes out his theory of derivation of positive from natural law.

20. ST., 1-2, q. 95, a. 4c.

21. Finnis, "The Truth in Legal Positivism," 213n43 (= CEJF II: 183n40).

22. S. T., 2-2, q. 91, a. 2c.

23. Finnis, "The Truth in Legal Positivism," 202 (= CEJF II: 182).

24. Ibid., 213n44 (= CEJF II: 183n41).

25. I am paraphrasing the footnote cited in n. 24. For the reason expressed in the text I find unpersuasive the examples offered by Finnis in his footnote.

26. Finnis, "The Truth in Legal Positivism," 202 (= CEJF II: 183): "Some positive laws are also norms of the natural moral law-that is, are requirements of practical reasonableness."

27. Finnis, "Natural Law Theory: its Past and its Present," 94.

28. J.M. Kelly, A Short History of Western Legal Theory (Oxford: Oxford University Press, 1992), 260: "Particularly in Germany, natural law was taken-of course in the secular sense which Grotius had given it-to be a material from which whole systems of municipal law could be fashioned" (commenting on the work of Pufendorf, Wolff, Vattel, and others).

29. Finnis, Natural Law and Natural Rights, 281, emphasis added.

30. This a subordinate, albeit important concern of natural law theory. S. T., 1-2, q. 96, a. 4. Finnis, Natural Law and Natural Rights, 351-52.

31. Finnis, "The Truth in Legal Positivism," 202-203, emphasis added.

32. ST., 1-2, q. 90, a. 1 adl. In his oral intervention at the Frankfurt meeting, Finnis seemed to suggest that even if coexistence of normative orders thus understood might have some truth to it, it is not really relevant for us jurists, because we look at natural law in, or in connection to, human law. But he seemed happy to admit that in that sense there might be room for a reconciliation of the different positions regarding this issue.

33. See Finnis's fundamental clarification of "lex iniusta non est lex": Natural Law and Natural Rights, 363-66.