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The Common Good and Legal Interpretation: A Response to Leonid Sirota and Mark Mancini

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I. Introduction

A renewed interest in the moral foundations of legal interpretation in the United States is increasingly reverberating in Canada. For example, on February 22, 2021, Leonid Sirota and Mark Mancini published a post on the *Double Aspect* Blog entitled "Interpretation and the Value of Law" ("*IVL I*").[1] Although the post itself merely claimed to show "[w]hy the interpretation of law must strive for objectivity, not pre-determined outcomes,"[2] the timing of the piece implies that it was meant to respond specifically to Josh Hammer, the Newsweek correspondent and constitutional lawyer, who has recently proposed a framework of "common good originalism"[3] to correct the perceived failures of the originalist framework applied by Justice Gorsuch of the US Supreme Court in *Bostock*.[4] This is an argument that Sirota and

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1 Leonid Sirota & Mark Mancini, "Interpretation and the Value of Law" (22 February 2021), online (blog): *Double Aspect* <https://doubleaspect.blog/2021/02/22/interpretation-and-the-value-of-law/> [*IVL I*].

2 *Ibid*.

3 Josh Hammer, "Toward a New Jurisprudential Consensus: Common Good Originalism" (18 February 2021), online (blog): *Public Discourse* <https://www.thepublicdiscourse.com/2021/02/74146/>.

4 *Bostock v Clayton County, Georgia*, 140 S Ct 1731 (US 15 June 2020).

Mancini appear to perceive as a threat to their preferred paradigm — textualism in statutory interpretation, originalism in constitutional matters — on the grounds that it introduces "substantive political content" into the law.[5]

Since then, Sirota and Mancini have published a further blog post, entitled "Interpretation and the Value of Law II" ("*IVL II*"), which purported to respond to the arguments we advanced in an earlier version of this article.[6] While the subsequent post clarified our interlocutors' position on a number of issues, many of our initial arguments remain unaddressed. Separately, our initial response to Sirota and Mancini prompted another comment by Asher Honickman, calling for a more robust contextual approach within an ostensibly positivist, textualist framework.[7] As Honickman observed, "[t]here is a lively debate afoot in legal circles, both in the United States and now in Canada, on the 'common good'" and its relation to juristic activity.[8]

In this article we reprise and elaborate upon our arguments, in light of the subsequent responses by our interlocutors. Specifically, we argue that, to the extent that Sirota and Mancini's posts in *IVL I* and *II* should be read as a response to Hammer, they misunderstand his position as a threat to originalism. Sirota and Mancini's proffered critique of "common good originalism" misses the mark, we suggest, because they confuse Hammer's broadly positivist "common good originalism" with the quite different arguments advanced by Harvard law professor Adrian Vermeule, whom they explicitly criticized in *IVL I* as favouring an approach that "look[s] to extraneous moral and policy commitments as guides for legal interpretation."[9] That said, we *also* object to Sirota and Mancini's characterization of the alternative natural law position they ascribe to Vermeule and others. Whatever else can be said about the ultimate merits of this jurisprudential tradition, proper natural law theories do not constitute a form of legal realism, as Sirota and Mancini appear to believe. That is to say, these theories do not regard legal reasoning or adjudication as mere instruments to achieve "pre-determined outcomes."

II. Sirota and Mancini: Legal Positivism or Anti-Positivism?

Before getting into what Sirota and Mancini misunderstand about Hammer and Vermeule's very different arguments, it is worthwhile to first set out the substance of their position so as to avoid any unnecessary confusion. From the outset, there is an apparent tension in the way Sirota and Mancini frame their arguments in both *IVL I* and *II*. As we will explain, this tension arises because they oscillate between an essentially positivist outlook on law, in which the

5 Sirota & Mancini, *IVL I*, *supra* note 1.

6 Leonid Sirota & Mark Mancini, "Interpretation and the Value of Law II" (23 March 2021), online (blog): *Double Aspect* <https://doubleaspect.blog/2021/03/23/interpretation-and-the-value-of-law-ii/> [*IVL II*]. For the earlier version of our article, see Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "The Common Good in Legal Interpretation: A Response to Leonid Sirota and Mark Mancini" (3 March 2021), online (blog): *Advocates for the Rule of Law* <http://www.ruleoflaw.ca/the-common-good-in-legal-interpretation-a-response-to-leonid-sirota-and-mark-mancini/>.

7 Asher Honickman, "Law, Liberty and the Pursuit of the Common Good" (8 March 2021), online (blog): *Advocates for the Rule of Law* <http://www.ruleoflaw.ca/law-liberty-and-the-pursuit-of-the-common-good/>.

8 *Ibid*.

9 Sirota & Mancini, *IVL I*, *supra* note 1.

"common good" and natural law precepts are presented as *extrinsic* to law and as undermining law's value-neutral application, and a position that purports to ascribe to law an *intrinsic* "value in ordering relations among individuals in large communities" and aims to preserve its "unique and precious function … of providing a touchstone for the diverse members of pluralistic communities."[10]

Starting with the positivist aspects of their position, it was clear to us from the substance of *IVL I* that they were operating primarily within this jurisprudential outlook, even if they showed some inclinations towards a perspective that attributed an intrinsic moral value to law. In typical positivist fashion, they wrote, "good law is better than bad law, but law … is precious quite apart from its substantive merits," suggesting that this is because it allows individuals to predictably interact with each other in a pluralistic society.[11] Law was also said to be "neither sacred nor permanent," a jab at natural law theories that are historically opposed to legal positivism, or at least at what they ostensibly understand these theories to claim.[12]

Sirota and Mancini subsequently appear to reaffirm this basic positivist commitment in *IVL II*, where they acknowledge that "substantive legislation is of course not neutral—it embodies the commitments of its makers", adding that the interpreter's task is:

> precisely to give effect to the commitments made by those with the authority to enact legislation and avoid imposing his own. A judge interpreting the law will never be perfectly neutral *in fact*, but an interpreter has no business abusing his position to advance pluralism in law, anymore than he is free to make the law more conservative, more progressive, or anything in between.[13]

Law, then, is to be abstract process, an abstract form, divorced from the particular preferences of those to whom the law applies. Although it is perhaps impossible to achieve this ideal in practice, the law should instead serve only to channel the substantive commitments of the lawgiver, which in Sirota and Mancini's view appears to mean the proper legislative authorities.

This outlook on law is reminiscent of, and broadly compatible with, the views espoused by the foundational English legal positivists going back as far as John Austin. Indeed, it was Austin who asserted that "the existence of law is one thing; its merit or demerit is another."[14] The implication is that legal rules amount to nothing more, and nothing less, than social facts that can be identified without the need to agree or disagree with their content. As Joseph Raz would later call it, this is the "social thesis," and in his positivist account it is, or at least was, all that is required for a theory of law to be properly deserving of the label:

> A jurisprudential theory is acceptable only if its tests for identifying the content of the law and determining its existence *depend exclusively on facts of human behaviour capable of being described in value-neutral terms, and applied without resort to moral argument*.[15]

10 *Ibid*.
11 *Ibid*.
12 *Ibid*.
13 Sirota & Mancini, *IVL II*, *supra* note 6 [emphasis in original].
14 John Austin, *The Province of Jurisprudence Determined*, ed by Wilfrid E Rumble (Cambridge, UK: Cambridge University Press, 1995) at 157.
15 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 39-40 [emphasis added].

Or, as the late John Gardner put it, referring to the one and only "distinctive proposition" of legal positivism:

> In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits.[16]

Taken as a description of "legality" in all its senses,[17] the idea that law is reducible to social facts or sources can and has been challenged repeatedly by jurists far more established than we, and it is not our intention to retread those critiques here.[18] In fact, it is not even necessary to do so, given the tension in Sirota and Mancini's argument to which we have already alluded.

That tension arises because, for them, the neutral application of law, and indeed law itself, is to be justified on the basis of an overarching value commitment: the function of ensuring some degree of social cohesion in a pluralistic society. As Sirota and Mancini wrote to conclude the first section of *IVL I*:

> But for law to fulfil its function, indeed to be law at all, it must have a fixed content independent of the views and preferences of those to whom the law applies. To the extent this understanding of law is now considered unorthodox, we hope to correct the record.[19]

And, as they again affirmed in *IVL II*, this time drawing explicitly on the work of Lon Fuller:

> For us, as for Fuller, what matters is "the inner morality of law", or its "artificial reason" as Coke put it — the morality or reason of legal craft and technique, which ensures that law is intelligible to all those subject to it, simply because they are thinking, reasoning human beings, and which is inherent in the enterprise of governing through law, properly understood, rather than emanating from some benevolent ruler whom the "[s]ubjects will come to thank". Our interlocutors' focus is less on form and more on the content of the law; the reason they appeal to is more substantive than the one on which we focus.[20]

Taken together, the above excerpts thus point to Sirota and Mancini's partial endorsement of an anti-positivist view of the law in both *IVL I* and *II*. They do so by asserting that the law ultimately serves valuable "functions", and further contains within it a certain kind of "inner morality".

The trouble, of course, is that this view of law is in tension with their broader argument that rests on positivist foundations. In contrast to that argument, they advance here a particular idea of the rule of law that prescribes a minimum content for legal norms to qualify as "law", which does *not* correspond to an approach that allows judges or anyone else to apply the

16 John Gardner, "Legal Positivism: 5½ Myths", in *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012) 19 at 19.

17 It should be noted, as Gardner points out, that the proposition may be understood as defining "legal" validity only in the sense of *lex* and not *ius*. Legal positivists need not deny that in the sense of *ius*, that is, "the second moralized sense of 'valid law', laws may be more or less valid depending on the extent to which they exhibit legality, and hence depending on their merits": *ibid* at 52. See also John Finnis, "The Truth in Legal Positivism", in *Philosophy of Law: Collected Essays*, vol 4 (Oxford: Oxford University Press, 2011) 174 at 184-86.

18 For an especially apposite critique of the "social fact" thesis, see John M Finnis, "On the Incoherence of Legal Positivism" (2000) 75:5 Notre Dame L Rev 1597.

19 Sirota & Mancini, *IVL I*, *supra* note 1.

20 Sirota & Mancini, *IVL II*, *supra* note 6.

law in an absolutely neutral fashion. Rather, the value or social utility of law remains subject here to a particular normative framework — a form of rule utilitarianism — which is incompatible with the truly value-neutral perspective on law and legal interpretation characteristic of legal positivism. Even if these commitments relate to the formal or procedural qualities of the rule of law, in Gardner's words, they still imply that legal validity is determined "according to [a norm's] formal *merits*."[21] And so long as this is the case, a judge called upon to apply the law will be required to ask not only whether the law was *authoritatively enacted*, as for instance by the competent legislative authorities, but also whether it is worthy of application in the first place.

To illustrate Sirota and Mancini's oscillating conception of law, let us consider what would happen under their view if a legislature were to enact a statute — an "illiberal" statute — that undermined this function and threatened pluralism, perhaps even at the level of the legal system as a whole. Would a judge be expected "to give effect to the commitments made by those with the authority to enact legislation and avoid imposing his own [values]?"[22] Or would a judge be allowed to disregard what the statute says, and to appeal instead to what amount from a positivist perspective to "extraneous moral and policy commitments" if this allows him to uphold the function of the broader legal system?[23] Sirota and Mancini are silent on this issue, at least as far as we can surmise.[24]

Our point, we hasten to add, is not that the belief that whether a statute is undesirable (or even "illiberal") should allow a judge to adopt an unfaithful interpretation of that statute. It is simply that, on Sirota and Mancini's own terms, the "value" of law and the need to avoid judicial activism would appear to be contingent on the character of the political forces in society. With a "liberal" legislature, the law would be valuable because it serves as a "touchstone" of pluralism; with an "illiberal" legislature, it would lack such value because it would undermine pluralism. Either way, it is significant that this purported "value of the law" derives from and is dependent upon sociopolitical factors *extrinsic* to law itself, at least when viewed through a truly value-neutral framework.[25]

Now, if we are being charitable to the two authors, it appears to us that there is a relatively easy solution to the dilemma of the "illiberal legislature" while remaining consistent with a neutral conception of law. This solution is the one offered by Raz's social thesis or Gardner's sources thesis as outlined above: the law remains the law, independent of its content, while the choice of what content actually goes into it is a matter of politics, and thus ostensibly for the

21 Gardner, *supra* note 16 at 30 [emphasis added].

22 Sirota & Mancini, *IVL II*, *supra* note 6.

23 Sirota & Mancini, *IVL I*, *supra* note 1.

24 It is no answer to simply say that a judge can apply principles "in a largely neutral and consistent fashion" (Honickman, *supra* note 7) or in a manner that avoids "abusing his position to advance" his personal preferences (Sirota & Mancini, *IVL II*, *supra* note 6). While we agree that judges should strive for neutral application of the law in the sense of being consistent and eschewing personal preferences, Sirota and Mancini stray beyond the mere claim that judges should be neutral in this sense. Their claim is more ambitious, as illustrated most starkly when they critique "common good originalism" for drawing on *extra-legal* considerations, even if its proponents seek to source their interpretations from the constitutional text itself. Thus, the real question at issue here is what qualifies as *law*.

25 Sirota & Mancini, *IVL I*, *supra* note 1.

legislatures, not the courts, to address.[26] Such legislatures could adopt a substantive content that reflects a commitment to the maximization of social utility or aspects of the "rule of law", just as easily as they could adopt laws with discriminatory effects. To quote Austin again, on this view, what the law is, is one thing; its merit or demerit is another.

But this is a rather different assertion than the one Sirota and Mancini appear intent on making, especially in *IVL I*: namely, that the law is *itself* grounded in utility or "valuable functions" while somehow still remaining neutral in content.[27] Only the Austinian assertion can reasonably claim to amount to a purely descriptive approach, and so can presumptively avoid reliance on "extraneous moral and policy commitments," as Sirota and Mancini ostensibly understand these terms, when interpreting the meaning of any particular legislative enactment or constitutional provision. A commitment to the value-neutrality of the legal positivist approach thus extracts a price. It requires them to abandon the claim that law has any intrinsic value at all, much less any intrinsic value as "a touchstone" for pluralism.[28] This is perhaps why Sirota and Mancini appeared to resile partly, though not completely, from their commitment to value-neutrality in *IVL II*. Nonetheless, adopting this approach would, in its broad strokes at least, be compatible with the idea of "common good originalism" that Hammer now seeks to advance.

III. Originalism and the Common Good

Armed with this understanding of what a truly "value-neutral" approach to law should strive toward, it is a bit surprising that Sirota and Mancini should feel compelled to react as they do to Hammer's proposed "common good originalism", at least if we take their own commitment to neutrality at face value. In our view, their misgivings are likely due to a misapprehension of Hammer's proposal that conflates it with the common good constitutionalism advanced most notably by Adrian Vermeule. Hammer draws inspiration from Vermeule's work, but his approach also appears to depart from it significantly. Unlike Vermeule, he sets out an approach that remains entrenched in the more established and better understood method of constitutional interpretation favoured by American conservatives, namely, originalism.

This last feature, to us at least, is clear from the articles in which Hammer expounds his proposed theory, even if Sirota and Mancini are correct to note that his project possesses a "political valence."[29] To quote one choice excerpt, which we take to be representative of the core *legal* claim he is advancing:

26 Of course, a positivist framework does not strictly speaking require that legislatures wield an exclusive law-making authority either. If a given legal system recognizes the authority of judges to (also) make law, then this authority can and should be recognized from a positivist perspective. See Gardner, *supra* note 16 at 37-42.

27 Sirota & Mancini, *IVL I*, *supra* note 1.

28 *Ibid*.

29 Sirota & Mancini, *IVL II*, *supra* note 6. While Mancini and Sirota would likely deny that their project aims to advance any substantive political commitments, their own emphasis on the "function" of law belies this claim, at least if we understand "politics" to be "the activity of attending to the general arrangements of a set of people whom chance or choice have brought together." Michael Oakeshott, "Political Education" in *Rationalism in Politics and Other Essays* (Indianapolis: Liberty Fund, 1991) 43 at 44.

> Fortunately, such a method of constitutional interpretation is not merely legitimate — it is the most authentic of all forms of originalist jurisprudence. That's because it is anchored in the prescribed aims of the Constitution's Preamble, the Constitution's "statement to explain 'whither we are going.'" While the Declaration of Independence — Abraham Lincoln's "apple of gold" around which the Constitution was but a surrounding "frame of silver" — is undoubtedly important in constitutional interpretation, the geopolitical circumstances in July 1776 were quite different from those during the 1787 Constitutional Convention. The leading draftsmen of both documents, moreover, were also very different. It is rather curious, then, that the Preamble has been so readily ignored in constitutional interpretation. Common good originalism seeks to rectify this mistake.[30]

The focus in the above passage, then, remains squarely on the text of the US Constitution, and particularly on what that text enacted. The Constitution, the legal instrument *positively enacted* by the constitutional assemblies, is given the place of honour at the interpretive table. The question that follows is simply what exactly *is* included *in* that document — or, what perhaps amounts to the same thing, how it should be *authentically read*. Hammer suggests that the Preamble of the US Constitution provides us with a set of interpretive clues — i.e., a context — within which the rest of its provisions should be read. That these textual clues are geared towards a certain set of values that Hammer associates with "common good" conservatism is beside the point: he is sourcing his interpretation from the constitutional text itself, not some extraneous well of moral values.

If we are being good positivists here, then none of this should bother us in the least. Indeed, the notion of "contextual enrichment" — the idea that the context of an utterance or text can assist in fixing meaning — is familiar to originalist theorists,[31] and Hammer can readily be read as arguing that the historical context of its enactment imbued the US Constitution with certain moral, philosophical, and metaphysical presuppositions that should guide the interpretation and/or construction of the text.[32] At worst, what Hammer's theory signals is the possibility of a disagreement over what the text of the US Constitution means, even abstracted from external sources. Simply put, he is saying that the "common good" in "common good originalism" can be traced to the text of the Constitution itself. And that is on all fours with the kind of inclusive legal positivism Sirota and Mancini have espoused, in which judges may "engage in moral and practical reasoning" where "invite[d]" to do so by "constitution-makers and legislators."[33]

This suggests that there are in fact two ways of objecting to Hammer's argument, the first being to simply claim that his common good-inflected interpretation of the US Constitution is not, in fact, supported by the constitutional text. Such an argument may well prevail, though it is not in our view clear that this is the case. Certainly, Sirota and Mancini have offered no arguments to support this contention in either *IVL I* or *II*, nor, more importantly, have they offered

30 Hammer, *supra* note 3.

31 See, e.g. Lawrence B Solum, "Communicative Content and Legal Content" (2013) 89:2 Notre Dame L Rev 479 at 488; Randy E Barnett & Evan D Bernick, "The Letter and the Spirit: A Unified Theory of Originalism" (2018) 107:1 Geo LJ 1 at 34. See also Lawrence B Solum, "The Interpretation-Construction Distinction" (2010) 27:1 Const Commentary 95.

32 For discussion of "presupposition", the idea that communicative content can be "provided by an unstated assumption or background belief that is conveyed by what is said," see Lawrence B Solum, "Originalist Methodology" (2017) 84:1 U Chicago L Rev 269 at 289-90.

33 Sirota & Mancini, *IVL I*, *supra* note 1.

arguments against such a reading of the *Canadian* Constitution. The lack of such arguments regarding the US Constitution is all the more surprising given that the libertarian strands of thought they ostensibly favour were present in American jurisprudence from the early days of the Republic, and so might reasonably be taken to have been enshrined, to some extent, in the US text. In Canada, by contrast, it would be very difficult to support the view that our constitutional order is founded on anything like this kind of thinking. This is especially so as our Constitution — both unwritten and written — contains far more references to precisely the type of "common good" espoused by Hammer than could ever be amassed in favour of such a view in the United States. As Professor Bradley Miller (as he then was) has pointed out, for example, elements of a non-aggregative conception of collective interests — i.e., an idea of the common good — can be discerned in Canadian jurisprudence even in such places as the test for the granting of an interlocutory injunction.[34]

The second way of objecting to Hammer's arguments, by contrast, is to fall back on a direct challenge to the values that Hammer suggests are to be found in the text of the US Constitution, and to defend instead the particular, libertarian-influenced vision of constitutionalism that Sirota and Mancini appear to prefer. Suffice it to say, this is not an option of which either author will likely want to admit availing themselves, though they appear to have moved in this general direction in *IVL II*. To follow this argument properly would mean resolving the tensions implicit in Sirota and Mancini's own framework, by favouring the overarching value of law as a necessary element of a functioning pluralistic democracy. It would also mean abandoning legal positivism, and certainly the value-neutral application of law, entirely. What it would seek to show is that their preferred reading of the US Constitution — or of the Canadian one, for that matter — must prevail because it is the only one that allows for the proper operation of a constitutional order, and of the rule of law, at least in a modern Western democracy. Constitutionalism, they could say, requires adherence to a form of rule utilitarianism. And this is where their argument would start to look a lot more similar to the very kind of instrumentalist thinking with which they brand Vermeule's "common good constitutionalism."

IV. Natural Law and Common Good Constitutionalism

We turn, now, to the last point that should be made in response to Sirota and Mancini's argument, which was likely meant to target Vermeule's common good constitutionalism,[35] and not Hammer's "common good originalism". By contrast to Hammer's approach, this is indeed one in which the "moral principles that would guide this endeavour are those drawn, above all, from the Catholic natural law tradition,"[36] as Sirota and Mancini correctly surmise. What this means is that the US Constitution, or indeed the Canadian Constitution, *qua* positive legal enactment, is not the ultimate fount of legal normativity. Rather, because both are part of the

34 Bradley W Miller, "Justification and Rights Limitations" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge, UK: Cambridge University Press, 2008) 93 at 104, citing *Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110, 38 DLR (4th) 321 [*Metropolitan Stores* cited to SCR].

35 Adrian Vermeule, "Beyond Originalism" (31 March 2020), online: *The Atlantic* <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>.

36 Sirota & Mancini, *IVL I*, *supra* note 1.

positive law, they are posterior to, and must ultimately be understood *through*, the underlying principles of natural law.

There is a lot to unpack here, and more than a few misapprehensions about the natural law tradition to clarify. To begin, the main point we would urge in response to Sirota and Mancini's argument is this: any natural law theory deserving of the name is *not* a framework that "look[s] to *extraneous* moral and *policy* commitments as guides for legal interpretation,"[37] but rather one that seeks to understand the law's own, deeper rationality *from within*. In our view, this essential point underscores why it is important to distinguish the natural law approach from the one that Hammer favours, in which the principles of natural law — or something like them — are understood to have been incorporated into the Constitution by its framers. On Hammer's account, these principles derive their authority from, and should thus ultimately be understood through, the positive legal enactment. Here, the situation is instead reversed. Natural law precedes, and more importantly *grounds*, the normativity of the posited Constitution, as well as the whole of the positive law. The Constitution cannot make sense as a work of reason without recourse to natural law principles — that is, without reference to the law's inner morality, or so natural law theorists claim. From this perspective, these principles are every bit a part of the *law*, just as much as any legal text, rule or doctrine.

We see here that the typical contemporary view of natural law, as a thing somehow apart from the positive law, yet justifying departure *from* the positive law, is largely a caricature. Indeed, most natural law theorists have rarely focused on that putative role of natural law in any meaningful way,[38] and to the extent that they have, the use of natural law as a justification for setting aside positive law has almost always been severely constrained. What natural law most properly concerns itself with instead is the exposition, interpretation, and application of the positive law, which, again, proponents take as only capable of making sense when understood in the context that natural law principles provide. This being so, it follows that the form of positive law — its text, rules, and doctrines — is central to the natural law tradition, which, properly understood, has never held that natural law has direct and unmediated application to any given society.[39] To the contrary, it is only upon *this* text, and *these* rules and doctrines, that natural law can have any juridical force whatsoever. Positive law and natural law are reciprocally interrelated; within human relationships, each presupposes the other. Natural law reflects an idea of reason immanent in positive law and lends it intelligibility; while in making its general precepts more specific, positive law realizes and makes concrete the otherwise abstract elements of natural law.[40]

In this regard, it is instructive to identify a few possible symptoms of the confusion about the natural law tradition we have diagnosed. First, in ascribing to Vermeule's "common good constitutionalism" a desire to "impose some pre-*determined* set of values onto the law," the authors also quote a description of his approach as one that would "involve officials reading vague clauses in an openly morally infused way … to reach *determinations* consistent with the

37 *Ibid* [emphasis added].

38 See John Finnis, *Natural Law and Natural Rights*, 2nd ed (Oxford: Oxford University Press, 2011) at 364-66.

39 For a summary of the relation between natural law and human law, see John Goyette, "On the Transcendence of the Political Common Good" (2013) 13:1 National Catholic Bioethics Q 133 at 138-46.

40 Saint Thomas Aquinas, *Summa theologiae*, vol I-II, q 91, a 3; q 95, a 2 [*ST*].

common good."[41] However, it should be understood that as Vermeule and others working in the natural law tradition use it, the term "determination" does not refer to fixing a preordained outcome. This is because the tradition sees the principles of natural law as *under*-determined in many cases; they do not offer self-executing commands or policy commitments. Rather, "determination" (*determinatio*) refers to a mode of relation between natural law and positive law, in which the latter is understood to be a concretization or specification of the former, which supplies sound, general principles of practical reasoning.[42] Far from demanding that judges superimpose a pre-determined outcome, the idea of specification calls for a respectful attitude toward other institutional actors involved in the "creative yet bounded role" of concretizing vague criteria.[43]

Second, it is a gross distortion to regard natural law theory, including the specific, Dworkinian version championed by Vermeule, as an extrinsic imposition on the scheme of positive law.[44] *Pace* Sirota and Mancini, the aspiration of natural law theorizing is not to embed pre-determined outcomes into the law, but to construe the law itself as permeated by reason.[45] Such an outlook, we suggest, puts into sharp relief the positivist's preconception of the law as a mere instrumentality of the will of some law-giver.[46] And in deprecating as a subjective "policy preference" this aspiration to elaborate the reason *in* the law, Sirota and Mancini's position on this point appears to echo a key refrain of the Critical Legal Studies movement, which questions the very idea that the law may "display, though always imperfectly, *an intelligible moral order*."[47] From the perspective of the CLS movement, the law is not constituted by reason but by will; and as such, the law can only ever reflect the radical contingencies of the wills that brought it into being. Sirota and Mancini's apparent assertion to this effect, combined with

41 Sirota & Mancini, *IVL I*, *supra* note 1 [emphasis added]. Sirota and Mancini source this quotation from a forthcoming paper on common good constitutionalism, even though in the paper the term "determination" is properly used to refer to the natural law concept of *determinatio*. See Conor Casey, "'Common Good Constitutionalism' and the New Battle over Constitutional Interpretation in the United States" (2021) Public Law (forthcoming in 2021), available on SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3725068>.

42 See Adrian Vermeule, "Deference and Determination" (2 December 2020), online (blog): *Ius & Iustitium* <https://iusetiustitium.com/deference-and-determination/>.

43 See *Pong Marketing and Promotions Inc v Ontario Media Development Corporation*, 2018 ONCA 555 at para 48, per Miller J.A.

44 Whether Dworkin himself should properly be considered a natural law theorist is controversial. See María Lourdes Santos Pérez, "Dworkin and the Natural Law Tradition" in Francisco José Contreras, ed, *The Threads of Natural Law*: *Unravelling a Philosophical Tradition* (Dordrecht: Springer, 2013) 211. See also Ronald A Dworkin, "'Natural' Law Revisited" (1982) 34:2 U Fla L Rev 165 (writing that his theory has been characterized as a natural law theory by his critics and discussing whether this characterization is accurate).

45 Ernest J Weinrib, "Legal Formalism: On the Immanent Rationality of Law" (1988) 97:6 Yale LJ 949 at 1016; *ST*, *supra* note 40, vol I-II, q 90, a 3; q 92, a 2; and q 96, a 5 (explaining that law is a work of reason). The idea that the law is animated by reason and a "moral concept of law [that] gives juridical law its brain," rather than being a purely empirical phenomenon à la the social thesis, is shared by natural law theories generally, including the liberal thought of Immanuel Kant. See Patrick Capps & Julian Rivers, "Kant's Concept of Law" (2018) 63:2 Am J Juris 259.

46 Weinrib, *ibid* at 955 ("In the positivist conception, a legal reality is brought into existence by an act of will that transforms into law that which is otherwise not law.").

47 Roberto Mangabeira Unger, "The Critical Legal Studies Movement" (1983) 96:3 Harv L Rev 561 at 565 [emphasis added].

their characterization of natural law perspectives as "pursu[ing] external policy goals", is all the more surprising in light of their own appeals to Fuller's "inner morality of law" in *IVL II*.[48]

Finally, it should also be clear from the foregoing that an orientation toward the "common good" does not imply that the jurist "wants to upturn settled jurisprudence" or is "skeptical about aspects of constitutional law that have been taken as a given for generations," as Sirota and Mancini claim.[49] While a full exposition is beyond the scope of this essay, we observe that this charge overlooks that the common good itself calls for constraints on the judicial role. Contrary to claims that it "regards separation of powers as passé,"[50] the constitutional principle of separation of powers may well be justified by the fact that the distinct governmental powers — executive, legislative, and judicial — "are well-placed to identify *different aspects of the common good*."[51] The common good prompts reflection upon the distinct domain of each branch of the state, a domain that is constituted not by external considerations of "efficiency," welfare-maximization, or aptness to promote a libertarian-influenced vision of the state, but by stable features intrinsic to the nature of each type of power.[52] In short, the powers are distinct because they are each directed to the common good in different ways.

From this perspective, the legislative and judicial powers must remain separate in virtue of their distinct natures and not thanks to any utilitarian calculation. This is entirely consistent with an orthodox view: that it is in the nature of the judicial power "to say what the law *is*," not what it should be.[53] Conversely, the common good is hardly inimical to "the authority of democratic institutions."[54] In fact, "the common good requires an institution that has the capacity to change the law" when reason dictates, and the well-formed legislature can be taken as legislating for the common good of the community.[55] It makes intelligible the need to respect legislative authority because "[t]he legislature responds to *reasons* to change that law" and its capacity to legislate is not exercised arbitrarily, but is the expression of a reasoned choice to change the law for the common good.[56]

As we will now set out to explain in the last part of this article, the above insight explains why juristic invocations of the "common good" are well within the mainstream of Canadian jurisprudence.

48 Sirota & Mancini, *IVL II*, *supra* note 6.
49 Sirota & Mancini, *IVL I*, *supra* note 1.
50 *Ibid*.
51 N W Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018) at 51 [emphasis added].
52 See *ibid* at 51-56. Perhaps the best example of this type of external approach to law is law and economics. See generally Richard A Posner, *Economic Analysis of Law*, 9th ed (New York: Wolters Kluwer, 2014).
53 *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357 at 367, 9 DLR (4th) 161 quoting *Marbury v Madison*, 5 US (1 Cranch) 137 (1803) at 177 [emphasis added]. See also *Vriend v Alberta*, [1998] 1 SCR 493 at para 136.
54 Sirota & Mancini, *IVL I*, *supra* note 1.
55 Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012) at 120.
56 *Ibid* at 123-24 [emphasis added].

V. The Common Good in Legal Interpretation

We have already referred to the case law on interlocutory injunctions, where the Supreme Court of Canada emphasized that laws "enacted by democratically-elected legislatures … are generally passed for the common good."[57] To acknowledge the common good's relation to interpretation is to break no new ground either, much less to introduce extraneous concepts into the law.[58] As distinguished Canadian jurists have observed, "legislating is reasoned activity,"[59] and the object of legislation is "to secure the common good."[60] This insight also brings to light one truth in the oft-abused notion of "purposive interpretation," namely, that all legislation is promulgated to fulfill an end — a *telos* — that is intelligible to reason. In the apt description of Professor Richard Ekins, legislators reason from "relatively abstract ends" toward "more particular states of affairs that are more attractive elaborations of the more abstract ends," culminating in "a complex scheme of means-end relations, which the legislature may choose, in which case it acts *intending the means and the ends*" reflected in the legislative proposal.[61]

From this teleological outlook on the essential nature of legislation, it follows that the point of interpretation is to understand the legislature's *reasons* for acting.[62] The focal inquiry is not what the legislature *said*, but what it *did*. Or, put differently, the object of interpretation "is not to interpret words but to interpret language use."[63] Hence, as Justice Brown and others have explained, "[s]tatutory interpretation entails discerning *legislative intent*" — the legislature's reasoned plan to alter the law — by examining the form in which that act is communicated, that is, "the words of [the] statute in their entire context."[64] To interpret is to inquire about the reason the legislature chose the specific *means*, the specific *determinatio*, it adopted in pursuit of the ultimate common good.

In practice, the interpreter's reflection on the common good serves to avoid the insipid literalism that undermines legislative intent. Consider, for example, *R v Jarvis*, a case concerning the interpretation of the voyeurism offence under the *Criminal Code*.[65] Whereas the majority of the Ontario Court of Appeal concluded from the dictionary definition of the word "privacy" that a high school was too public to be covered by the provision, Justice Huscroft

57 *Metropolitan Stores*, *supra* note 34 at 135, per Beetz J. See also *Harper v Canada (Attorney General)*, 2000 SCC 57 at para 9.

58 We would observe that, despite our interlocutors' contentions to the contrary, they have failed to cite any Canadian jurisprudence to support their position that the concept of the common good is "extraneous" to the law or a purely political notion.

59 *R v Walsh*, 2021 ONCA 43 at para 133, per Miller J.A. (dissenting) [*Walsh*].

60 *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 146, per Côté and Brown JJ. (dissenting), quoting Richard Ekins, "Legislation as Reasoned Action" in Grégoire Webber et al, eds, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge, UK: Cambridge University Press, 2018) 86 at 92.

61 Ekins, "Legislation as Reasoned Action", *ibid* at 100 [emphasis added].

62 Ekins, *The Nature of Legislative Intent*, *supra* note 55 at 136-37.

63 Richard Ekins, "Objects of Interpretation" (2017) 32:1 Const Commentary 1 at 2.

64 See *British Columbia v Philip Morris International, Inc*, 2018 SCC 36 at para 17 [emphasis added]. See also, *R v Paterson*, 2017 SCC 15 at para 31; *Rogers Communications Inc v Voltage Pictures, LLC*, 2018 SCC 38 at para 20; *Keatley Surveying Ltd v Teranet Inc*, 2019 SCC 43 at para 95, per Côté and Brown JJ. (dissenting); *Canada Post Corporation v Hamilton (City)*, 2016 ONCA 767 at para 36, per Miller J.A. ("Acts of legislation are, paradigmatically, reasoned plans enacted either to change or confirm existing legal rights and obligations of persons").

65 *R v Jarvis*, 2017 ONCA 778 [*Jarvis*].

dissented and approached the voyeurism provision from the standpoint that "Parliament can be taken to have made a reasoned choice for the common good."[66] In contrast to the majority's literalist view, he treated the provision as a reasoned act of lawmaking intended to promote an aspect of the common good, namely, the human goods of personal and sexual integrity.[67]

While the divergence between the majority and dissent in *Jarvis* might be rationalized as a mere difference in the "application of the principles of statutory interpretation,"[68] this would miss the fundamental point: it was precisely his recognition of the legislature's role in realizing the common good that prompted Justice Huscroft to discern, in the provisions at issue, a reasoned plan to protect certain human goods. In framing the legislation as a reasoned choice of specific means to that end, he was led to conclude that the majority's interpretation of the word "privacy" was overly literal because it was "both under- and overinclusive when considered in terms of the choice Parliament has made — the good that s. 162(1) is intended to protect."[69] What Justice Huscroft's reasoning in *Jarvis* reveals, in our view, is a perspective on the nature of legislative intent — one that takes the legislature as making reasoned choices for the common good and the legislative act as "grounded in an intelligible chain of reasoning."[70] Properly understood, this standpoint is not an interpretive, but a *pre*-interpretive precept that directs the interpreter in framing the object of interpretation and thereby informs his or her implicit approach to selecting the focal text at issue and situating it in a broader context.[71]

Our point here is not that a court may override the terms or the finitude of a statute.[72] In truth, legislation is inherently constrained by its terms, and no human law-giver can conceivably grant benediction to the common good across the whole of human affairs. Rather, our point is that the legislature's reasoned choice is rendered intelligible by the idea of the common good, an aspect of which is the *telos* of all laws.[73] The task of the judge, acting *in* the common good, is to understand and give effect to the legislature's specific chosen means, the *determinatio*, that is illuminated *by reflection on* the common good.[74] Such a modest conception of the

66 *Ibid* at para 123, per Huscroft J.A. (dissenting).

67 See *ibid* at paras 124-28, 132-33, per Huscroft J.A. (dissenting). The Supreme Court of Canada allowed the appeal: *R v Jarvis*, 2019 SCC 10, rev'g 2017 ONCA 778. Regrettably, however, the Court's majority judgment indulged in a literalism of its own, by asserting that the words "reasonable expectation of privacy" meant that Parliament intended to incorporate the *Charter* jurisprudence on s. 8 privacy rights to "inform the content and meaning of these words" (*ibid* at para 56), per Wagner C.J. But as Justice Rowe, in concurrence, observed, this "would be to apply a meaning intended to substantiate a breach of an individual's fundamental rights by a state actor to the inverse context of subjecting a citizen to criminal sanction" (*ibid* at para 95), per Rowe J. (concurring). In fixating on the words, the majority overlooked that the voyeurism provision contributed to an altogether different aspect of the common good than the *Charter* right.

68 Honickman, *supra* note 7.

69 *Jarvis*, *supra* note 65 at para 124.

70 Ekins, "Legislation as Reasoned Action", *supra* note 60 at 97.

71 See Anya Bernstein, "Before Interpretation" (2017) 84:2 U Chi L Rev 567 (explaining that before interpretation occurs, the interpreter must arrive at an identification of the object of interpretation and the background which makes its contours visible).

72 See Ekins, *The Nature of Legislative Intent*, *supra* note 55 at 250-54 ("it is unsound to abandon the legislature's intended meaning (and hence its lawmaking act) in preference for either the further end or ends for which the legislature acts, commonly termed the statutory purpose").

73 See, e.g. *Jarvis*, *supra* note 65 at para 123, per Huscroft J.A. (dissenting), citing Ekins, *The Nature of Legislative Intent*, *supra* note 55 at 246-47.

74 See *Walsh*, *supra* note 59 at para 171, per Miller J.A. (dissenting).

judicial role belies the charge that promoting the common good necessarily implies that "it is legitimate to impose [one's] respective hierarchy of values on society through judicial and administrative fiat."[75]

Nor is it necessary for us to deny our interlocutors' demurrer that legislative activity may on occasion be "directed at the private benefit of law-makers … or at entrenching outright bigotry."[76] The premise that legislating is reasoned activity is not an empirical claim of legislative infallibility, but rather the adumbration of an inquiry into "the central case of the legislature."[77] Far from detaching our legal understanding from reality, attending to the central case serves to elucidate the activity of legal interpretation and its underlying logic.[78] As Honickman rightly observes, many interpretive canons presuppose the existence of a "rational lawgiver,"[79] and this suggests that there is value in taking the law's own perspective — which takes the legislature as intending to act for the common good — in seeking to understand the law.[80]

Returning to the allegation that common good jurisprudence is extrinsic to our legal traditions, we may also look to the constitutional law "taken as a given for generations" to find a basis for rejecting this claim.[81] It is arguable, we venture to say, that the enigmatic and celebrated judgment of Justice Rand in *Saumur v City of Quebec* represents an implicit endorsement of the tradition of natural law theorizing.[82] In an evocative passage, Rand J seems to invoke the idea of specification or determination of the "original freedoms" by the positive law embodied in "the creation of civil rights." To quote:

> Strictly speaking, *civil rights arise from positive law*; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and *the primary conditions of their community life within a legal order*. *It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates*. What we realize is the residue inside that periphery. Their significant relation to our law lies in this, that under its principles to which there are only minor exceptions, there is no prior or antecedent restraint placed upon them …[83]

In his suggestion that the "original freedoms" are "the primary conditions of … community life within a legal order," Rand J gestures toward something akin to principles of natural law,[84] which by virtue of their primacy and generality have "a unity of interest and significance extending equally to every part of the Dominion."[85] It is through the determination or "cir-

75 Sirota & Mancini, *IVL I*, *supra* note 1.
76 Sirota & Mancini, *IVL II*, *supra* note 6.
77 See Ekins, *The Nature of Legislative Intent*, *supra* note 55 at 121.
78 See Grégoire Webber, "Asking Why in the Study of Human Affairs" (2015) 60:1 Am J Juris 51.
79 Honickman, *supra* note 7.
80 Honickman also contends that because "our 'lawgivers' are incorporeal entities," they "cannot, strictly speaking, exhibit 'reason' beyond their enactments." *Ibid*. However, this objection overlooks the possibility that legislative intent is "the *collective* intent of the legislature as *jointly* expressed in the legislative act" as well as "the typical conception of a legislature as an institution which acts only through the *corporate* legislative expression of its membership" found in the jurisprudence. *Frank*, *supra* note 60 at paras 133-34, per Côté and Brown JJ. [emphasis added].
81 Sirota & Mancini, *IVL I*, *supra* note 1.
82 *Saumur v City of Quebec*, [1953] 2 SCR 299, 4 DLR 641 [*Saumur* cited to SCR].
83 *Ibid* at 329 [emphasis added].
84 *Ibid*.
85 *Switzman v Elbling*, [1957] SCR 285 at 306 per Rand J, 7 DLR (2d) 337.

cumscription of these liberties" by the creation of concrete "civil rights against defamation, assault, false imprisonment and the like," that the common good is "realize[d] … inside that periphery."[86] Needless to say, the outcome and constitutional valence of the *Saumur* case refute the insinuation that natural law theory is nothing more than an artifice for anti-pluralist views.

Furthermore, our consideration of the concept of the common good in interpretation, taken with our broader arguments outlined above, refutes Sirota and Mancini's suggestion that an appeal to the common good amounts either to a "sort of 'living tree' for conservatives" or to a "limited, well-understood, and innocuous" concept that simply changes the "emphasis in textual interpretation."[87] Simply put, the dichotomy that they seek to establish between a principled, text-centred approach to constitutional and statutory interpretation, on the one hand, and the values intrinsic to legislative activity, on the other, is one that cannot be sustained when viewed through the lens of natural law theory. As we have explained, the natural law perspective rejects the dualistic assumption that the only repository of juridical values lies in the text and that any reference to extra-*textual* values — including the "inner morality of the law" that Sirota and Mancini seem to embrace — is necessarily extra-*legal*. It matters little, moreover, that even among those who subscribe to the natural law tradition, there have been and continue to be debates about the nature and content of the "common good".[88] The meaning of concepts such as the "rule of law" or "liberty" are likewise deeply contested and continue to be a perennial subject of academic debate; yet, the apparent interminability of the debates is hardly taken to preclude the invocation of those terms in legal discourse.

VI. Conclusion

It is, of course, not our intention to convince our interlocutors of the ultimate merits of our position on the intellectual rigour and teachings of theories of natural law. Still, we hope to have shown that there is much to misapprehend but little to fear from the concept of the common good. What this understanding of the natural law tradition should underscore, moreover, is that appeals to natural law principles do not amount to a form of legal realism — as Sirota and Mancini appear to believe. Law, on this reading, is not simply what judges do,[89] nor is it naked power. Quite the contrary, as one recent post by Arizaga in our view cogently argues, it is in fact legal positivism that rests on a commitment to law as power.[90] And the caricature of natural law as allowing for the effacement of positive legal orders on a whim is just that — a caricature, founded on a resolutely modern misunderstanding.

86 *Saumur*, *supra* note 82 at 329.

87 Sirota & Mancini, *IVL II*, *supra* note 6.

88 See *ibid* ("it is important to emphasize that the idea of the 'common good' … has been put to very different uses by very different people"); Honickman, *supra* note 7 ("[t]he 'common good' is invariably articulated in vague or indeterminate language").

89 See Allan Beever, "The Declaratory Theory of Law" (2013) 33:3 Oxford J Leg Stud 421 at 425-26, 439-44. See also William Blackstone, *Commentaries on the Laws of England: Book 1 of the Rights of Persons*, ed by David Lemmings (Oxford: Oxford University Press, 2016) at 53: "*the law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law" [emphasis in original].

90 Rafael de Arizaga, "Notes on the Ius Commune – Part I: The Hydra of Legal Positivism" (23 February 2021), online (blog): *Ius & Iustitium* <https://iusetiustitium.com/notes-on-the-ius-commune-part-i-the-hydra-of-legal-positivism/>.

To inhabit a world of law is not to view it as the product of a disordered miscellany of individual wills, but to engage in the juristic enterprise of understanding its moral unity. What the natural law tradition avers, at its core, is that positive law is infused with a deeper meaning, with a deeper significance, than can be conferred as a contingent choice of some legislative or judicial will. In other words, it is to see the ensemble of legal doctrine as a whole painting and not merely "nothing but a smear of pigments."[91] In this sense, the natural law framework is perhaps the only way in which any legal text, rule, or doctrine can be truly intelligible as the product of reason and properly given the weight which it justly deserves.

91 Roger Scruton, *The Soul of the World* (Princeton: Princeton University Press, 2014) at 40.