THE CAMBRIDGE COMPANION TO

Natural Law Jurisprudence

EDITED BY

GEORGE DUKE AND
ROBERT P. GEORGE

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The Cambridge Companion to

Natural Law Jurisprudence

This collection provides an intellectually rigorous and accessible overview of key topics in contemporary natural law jurisprudence, an influential yet frequently misunderstood branch of legal philosophy. It fills a gap in the existing literature by bringing together leading international experts on natural law theory to provide perspectives on some of the most pressing issues pertaining to the nature and moral foundations of law. Themes covered include the history of the natural law tradition, the natural law account of practical reason, normativity and ethics, natural law approaches to legal obligation and authority and constitutional law. Creating a dialogue between leading figures in natural law thought, this *Companion* is an ideal introduction to the main commitments of natural law jurisprudence, while also offering a concise summary of developments in current scholarship for more advanced readers.

George Duke is a Senior Lecturer at Deakin University. His research interests include the political and legal philosophy of Aristotle and natural law jurisprudence. He has published on these themes in journals such as *Legal Theory, The American Journal of Jurisprudence, Law and Philosophy, The British Journal for the History of Philosophy, Political Studies, The Review of Metaphysics* and *The Review of Politics*.

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Introduction 1

George Duke and Robert P. George

The question on which natural law focuses is the eternal question of what stands behind the positive law. And whoever seeks an answer will find, I fear, neither an absolute metaphysical truth nor the absolute justice of natural law. Who lifts the veil and does not shut his eyes will find staring at him the Gorgon head of power.[1]

I

The phrases 'natural law' and 'legal positivism' are surely familiar to anyone moderately versed in Anglo-American jurisprudence. On one standard account, the two approaches disagree on whether there is a necessary connection between law and morality.[2] Natural law theorists, it is said, argue that there is a necessary or conceptual connection, while legal positivists deny this claim. Within positivism, some allow the *possibility* of a connection between law and morality (so-called 'inclusive' legal positivists), while others deny even that ('exclusive' legal positivists).[3] But this neat schema offers a misleading picture of the theses and concerns of natural law jurisprudence – and, as it happens, of legal positivism.

The 'necessary connection' thesis suggests that natural law theorists hold the simplistic view that a norm's immorality or injustice is enough to make it legally invalid, even if it was enacted by the appropriate procedures – a claim captured in the slogan *lex iniusta non est lex* (an unjust law is not a law). But that slogan does not have the role in the

* Thanks to Sherif Girgis for invaluable and extensive editing assistance and to Jonathan Crowe and Mark C. Murphy for helpful comments on this introduction.

[1] Kelsen 1927: 54–55.

[2] See, for example, Meyerson 2007: 3. This way of framing the distinction derives primarily from Hart 1958.

[3] See Green 2016 for similar formulations. As noted below, Green rejects the definitional approach outlined.

natural law tradition that many think it has.[4] More representative are the views of two leading contemporary natural law theorists included in this volume, John Finnis and Mark C. Murphy. Although Finnis and Murphy approach unjust law from different perspectives, they both reject the simplistic view while affirming a strong connection between *central or non-defective* cases of (positive) law and practical reasonableness.[5]

Finnis, for example, has argued that an unjust law is not a law in the focal sense.[6] The notion of focal or central and non-central cases is implicit in ordinary speech. We might say that a fair weather friend is no friend at all. Someone's history with another person, that is, might make him count as friend (i.e. not an enemy or even a mere acquaintance) even though his unreliability when times get tough and when true or full friendship demands taking risks or making sacrifices for friendship's sake prevents him from being a friend in the full-blooded ('focal') sense. Likewise, a norm might meet a particular legal system's requirements for validity even though its injustice makes it a non-focal instance of law (considered from the critical-moral viewpoint of the practically reasonable person).

Murphy approaches the *lex iniusta non est lex* dictum in a more metaphysical key by reference to law's 'non-defectiveness conditions'. In Murphy's view, natural law theories characteristically assert theses of the form that '[l]aw exhibits N, where N is some normative feature' (like *being a legitimate practical authority* or *being just*).[7] On a strong reading, this core natural law thesis would entail a necessary universal generalization: e.g. that 'necessarily, if x is a law, then x is legitimately authoritative, or just'. On Murphy's favoured, weaker reading, it is necessarily the case that *non-defective* law 'is backed by decisive reasons for compliance'.[8] Falling short of this standard makes a law defective as such. This approach has the advantage of reconciling the tradition's

[4] As Norman Kretzmann has demonstrated, the dictum is not *directly* attributable to either Augustine or Aquinas in any case. See *De libero arbitrio* I, v, 11; ST I-II, q. 95 a. 2c and Kretzmann 1988: 100–1.

[5] See Finnis 2011a: 23–55; Murphy 2003; and Murphy 2005: 15–28. One significant way in which Finnis's position differs from that of Murphy is in the strong emphasis that it places upon the role of practical (rather than theoretical) reason in identifying central cases of law even within a descriptive general theory of law. See Finnis (this volume).

[6] Finnis 2011a: 364. [7] Murphy 2013: 5. [8] Murphy 2013: 5.

view that laws are rational guides to action, with an acknowledgement that defective laws may be valid in an intra-systemic sense.

Even in historical terms, the 'necessary connection' thesis conceals more than it reveals. The insight that despite the wide range of human customs and conventions, there are nonetheless standards of just or right conduct, finds expression in the works of Sophocles, Plato, Aristotle, Cicero, Augustine and Aquinas, to name only a few examples from the Western tradition. Theories of natural law can instructively be understood in the broadest sense as 'theories of rational foundation' – as attempts to uncover and articulate the rational basis for the foundations of morality, politics and positive law.[9] Now undoubtedly, on this understanding, consideration of the relationship between ethical and moral principles and positive law forms a central part of natural law jurisprudence. But defining this tradition in terms of a commitment to a 'necessary connection' between morality and law obscures its subtlety and breadth.

Consider the work of St Thomas Aquinas, the paradigmatic natural law theorist, on law's positivity: its status as the product of human will, decision and command. In the treatise on law in the *Summa Theologiae*, Aquinas sets out a fourfold division of analogous kinds of law. The eternal law is the exemplar of divine wisdom.[10] The natural law is the sharing in eternal law by intelligent creatures.[11] Intelligent creatures participate in the eternal law through reason, and the first principle of practical reason is that 'good is to be done, and evil avoided'.[12] On the basis of this first principle of natural law, further propositions can be derived, such as that life and knowledge are goods that are worthy of pursuit—not merely as means to other ends, but as ends in themselves. The divine law is the law promulgated with revelation.[13] Crucially, eternal, natural and divine law are not treated by Aquinas as juristic concepts in the strict sense. This status is reserved for positive law (*lex humanitus posita*), which Aquinas divides into *ius gentium* and *ius civile*.[14] The former is 'the law of peoples', or humanly posited laws deduced from the natural law common to all rational beings. The latter is 'civil law', particular instances of which derive their

[9] Finnis 2011a: 25. This of course raises the difficult question concerning what is 'natural' about natural law. See Finnis 2011a: 23–55 and Oderberg 2010: 44–75 for contrasting responses to this question.

[10] ST I-II, q. 93, a. 1. [11] ST I-II, q. 91, a. 2. [12] ST I-II, q. 94, a. 2. [13] ST I-II, q. 91, a. 4. [14] ST I-II, q. 95, a. 4.

moral weight or status as reasons for action primarily from the fact that they are posited. Both kinds of law are products of human reason and will and depend for their existence upon concrete acts of legislation, application and adjudication. To be sure, part of the positive law, what Aquinas calls *ius gentium*, directly expresses the requirements of natural law. But this in no way detracts from its positivity. And Aquinas recognizes norms as part of *ius civile* (civil law) which are rational guides to action primarily because they were *posited*,[15] having been picked by relevant authorities from a *range* of reasonable schemes for serving the common good (a selection that Aquinas calls *determinatio*).[16]

Thus, Aquinas's claim that positive law – when not corrupt – is derived (either directly or indirectly) from natural law does not undermine its positivity.[17] Finnis has shown three important implications of Aquinas's account. Firstly, positive laws depend on human practical activity in the political and legal domains.[18] Secondly, there can be and are many immoral positive laws.[19] Thirdly, positive laws can be identified as intra-systemically valid prior to any reflection on the relationship such laws have with morality.[20] In sum, the views of Aquinas, the most eminent natural law theorist in a historical sense, are hardly captured by the thesis that there is a necessary connection between law and morality (as least as that thesis is typically understood by legal positivist critics of natural law theory).

Likewise, many contemporary *legal positivists* have expressed severe doubts about defining their view by the claim that there are *'no* necessary connections between law and morality'. John Gardner, for example, characterizes the view as absurd – as perhaps the most pervasive and pernicious myth regarding legal positivism – on the grounds that there are many necessary connections between law and morality.[21] Most important, perhaps, is that law and morality both comprise valid norms.[22] It is also plausible that the propositions that law 1) deals with moral matters, 2) makes moral claims on its subjects and 3) is apt for appraisal as just or unjust, are themselves necessary truths.[23]

[15] On this point see Finnis 2011b: 183 and George 1999: 102–112. [16] Finnis 2011b: 183.
[17] ST I-II, q. 95, a. 2. [18] Finnis 2011c: 185 (citing Raz 1986: 81–82).
[19] Finnis 2011c: 185 [20] Finnis 2011c: 185
[21] Gardner 2001: 223. See also Green 2016. [22] Gardner 2001: 223.
[23] Gardner 2001: 223. Green 2016.

So we need a more fine-grained analysis to distinguish divergent approaches in contemporary legal theory. Gardner's own statement of a central claim of legal positivism is now often taken as canonical. According to the principle he labels LP*, 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 (where the merits, in the relevant sense, include the merits of its sources)'.[24] According to Gardner, that is, the best way to formulate the core legal positivist thesis is in terms of the descriptive (normatively inert) proposition that legal validity is solely a function of 'sources, not merits'.

It is arguable that LP* does not *itself* provide a principled basis for distinguishing legal positivist and natural law approaches. Finnis, as suggested above, acknowledges a sense – consistent with LP* – in which laws that are clearly unjust from the perspective of a practically reasonable agent may nonetheless be valid from an intra-systemic point of view, insofar as they meet formal criteria of legality.[25]

Nonetheless, not all contemporary natural law theorists would accept LP*. Robert Alexy, in his contribution to this volume, maintains a long-standing commitment to Radbruch's Formula that extreme injustice can deprive appropriately enacted and socially efficacious norms of their legal validity. In recent work, Murphy has also questioned LP* on the ground that law's function is to serve as a rational guide to conduct, which requires it to be constitutionally capable of doing so – the latter criterion being a merit, not a source.[26]

One thing that is clear is that LP* is not a complete legal theory. As Gardner himself suggests, LP* cannot even 'distinguish law from a game'.[27] In a similar spirit, Leslie Green has written that no 'legal philosopher can be only a legal positivist', at least if legal positivism is equated with the claim that legal validity is a matter of sources and not merits. As Green notes, this thesis says nothing about what kinds of things could count as merits of law; what role law should play in adjudication; what claim (if any) law has on our obedience; and 'the pivotal questions of what laws we should have and whether we should have law at all'.[28] On these, LP* is silent; it is thus a claim that might be affirmed or denied by a range of legal theories.

[24] Gardner 2001: 201. [25] Finnis 2011c: 105 and 112. [26] Murphy 2013: 19–20.
[27] Gardner 2001: 227. Cf. Green 2016. [28] Green 2016.

The last of the further questions enumerated by Green – about 'what laws we should have and whether we should have law at all' – has undoubtedly been a particular focus for theorists in the natural law tradition. In this spirit, Julie Dickson has argued that 'positivist' and 'natural law' theories are best distinguished by whether they give priority to law's social facticity or its 'normative point'.[29] Dickson rejects the latter approach on the ground that it demotes or neglects features of law that sound theories must explain.[30] It might, she thinks, lead us to overlook the law's often bad outcomes, for example, or to think that its mere existence gives us reason to comply with it.[31]

It is not clear whether Dickson proposes this distinction as a principled boundary or merely as a difference in emphasis. In the background of Dickson's argument is a further distinction between, on the one hand, indirect evaluative judgements about what it is important for jurisprudential theories to explain in order to construct an adequate jurisprudential theory and, on the other, direct moral evaluations as to whether the law is, or is not, morally good.[32] This distinction helpfully reveals that argument is required to get from the premise, common to Dickson and Finnis, that any theory of law involves evaluation on the part of the legal theorist to a substantive moral claim such as that 'law is rightly conceived of as by its nature morally valuable'.[33] Yet nothing prevents a theorist such as Finnis, who gives priority to law's normative point in developing his legal theory, from also acknowledging the importance of law's social facticity. Dickson's analysis is potentially misleading insofar as it can be taken to suggest that giving less explanatory priority to something means deeming it unimportant.

At this point, legal positivists keen to maintain a clear-cut contrast with the natural law tradition might shift from a methodological to a metaphysical key. Scott Shapiro, for example, suggests that there have been two fundamentally different answers to the question of the nature or essence of law.[34] Legal positivists from John Austin to the present day, Shapiro claims, have argued that it is a necessary property of law that 'all legal facts are ultimately determined by social facts alone'.[35] By contrast,

[29] Dickson 2012: 56–58. [30] Dickson 2012: 56–62.
[31] See Green 2008 for discussion of some of the immoral outcomes the law makes possible.
[32] Dickson 2001: 44. [33] Finnis 2011c: 27. [34] Shapiro 2011a: 27.
[35] Shapiro 2011a: 27.

Shapiro insists, natural law theorists believe that it is a necessary property of law that its 'existence and content are ultimately determined by social and moral facts' – that in this respect, 'the nature of law is similar . . . to the nature of political morality'.[36] Formulating matters this way, Shapiro suggests, provides a clear boundary between alternatives within analytical jurisprudence.[37]

Setting aside the accuracy or usefulness of Shapiro's formulations, his own project points to the difficulty of upholding the thesis that legal facts derive exclusively from social facts.

According to Shapiro, laws can be identified with plans, or plan-like norms.[38] This 'planning' theory of law can purportedly make good on Hart's intention to ground norms in social facts because 'the existence of fundamental legal rules' is secured by a shared master plan that is adopted and practiced by a political community.[39] Shared master plans (plans *for* legal planning) exist when certain social facts obtain: namely, that the plan has been designed for a group, that it authorizes some members of the group to plan for others, and that it is publicly accessible and generally accepted.[40] In this way, Shapiro argues, plans are better suited than Hart's rules to vindicate the legal positivist thesis.[41] Both the social facticity of plans and the evident possibility of evil plans seem to guarantee that the law's existence is one thing, its merits another. If a primary function of plans is to resolve doubts and disagreements about the best way to act, moreover, then it must be possible, Shapiro insists, to determine the plan's content without reference to moral facts.[42]

At two points, however, the planning theory is arguably in tension with Shapiro's own definition of legal positivism. Firstly, although on

[36] Shapiro 2011a: 28. This emphasis upon political morality reflects Shapiro's problematic failure to draw an explicit contrast between the normative jurisprudence of Dworkin and the analytical project of Finnis and Murphy. Dworkin's 'particular jurisprudence' renders dubious his status as a natural law theorist because, as Murphy puts it, a 'parochial natural law theory is no natural law theory at all'. Murphy 2003: 241.

[37] Shapiro 2011a: 50. [38] Shapiro 2011a: 119–120. [39] Shapiro 2011a: 181.

[40] Shapiro 2011a: 180.

[41] Shapiro 2011a: 26–27 and 45. An ultimate fact is a fact that does not exist in virtue of other facts. Legal facts are never ultimate facts; i.e. they always exist in virtue of other facts. So the question of the ultimate source of legal authority for Shapiro is the question as to the basic facts in virtue of which legal authority obtains.

[42] Shapiro 2011a: 177. For critique of this assumption see Hershovitz 2014.

Shapiro's account moral facts play no role in determining the existence or content of law, some principles of practical rationality do.[43] Plans, Shapiro says, possess a 'limited' normativity insofar as they are governed by the instrumental principle (IP) that if you intend an end (E) and judge that a certain action is a necessary means (M) to E, then you should also intend M. In particular, this norm of instrumental rationality plays a central role in Shapiro's resolution of the so-called 'possibility' puzzle about legal authority.[44] The puzzle is that the existence of legal authority seems to require the prior existence of authoritative legal norms, which in turn seems to presuppose the existence of legal authority. Shapiro breaks the vicious circle by pointing out that IP is not itself a plan, created by any authority, but a rationally valid principle.[45] This suggests that on his account, the existence of law does not depend on social facts alone, but also on the normative fact 'that planning agents have the rational authority to give themselves plans'.[46] As for the second point of tension, Shapiro asserts that the constitutive aim of legal activity is to resolve deficiencies (of a morally significant type) that are associated with the complexity, contentiousness and arbitrariness of pre-legal communal life. Social planning is *desirable* because it helps to resolve these problems.[47] Yet this claim, as many commentators have noted, seems to bring the planning theory in close proximity to natural law theory.[48]

We cannot demonstrate here that Shapiro's robust form of legal positivism must ultimately agree that law's existence depends on some normative facts. But it becomes more difficult to deny the latter claim if one grants that law must be capable in principle of offering reasons for action – a tension that Murphy has shown in his insightful discussion of Joseph Raz's argument that law necessarily claims authority.[49]

At this point it is instructive to return to Hans Kelsen's critical statements on natural law cited in the opening. It is certainly the case that all the contributors in this volume would deny Kelsen's claim if it is to be

[43] Shapiro 2011b: 69. [44] Shapiro 2011a: 181. [45] Shapiro 2011a: 181.
[46] Shapiro 2011b: 69. [47] Shapiro 2011b: 69.
[48] Murphy 2011: 369; Waldron 2011: 894; Edmundson 2011: 273–291; Plunkett 2013: 563–605. Shapiro defends his positivist credentials by emphasizing that the fact law necessarily has a moral aim does not entail that it is successful in satisfying that aim. Shapiro 2011a: 277–280.
[49] Murphy 2013: 18–19.

understood as asserting that *all* that lies behind the veil of positive law is the Gorgon head of power. Now in one sense it would be quite unhelpful to characterize natural law jurisprudence as the rejection of Kelsen's claim. For all its rhetorical charm and apparent hard-headed realism, Kelsen's characterization of the ultimate determinants of positive law in terms of power is, at least when interpreted in a robust sense, manifestly implausible.[50] Few legal positivists today – certainly not Raz, Gardner, Green or Shapiro – would subscribe to such a one-sided picture with its crude reduction of the normative considerations that inform the enactment, adjudication and application of law to facts about power. The recent focus of the vast majority of contemporary legal theorists on normative considerations and the interaction of law with our capacity for practical reason, however, speaks in favour of the need for caution regarding the continued usefulness of framing jurisprudential debate in terms of a distinction between 'legal positivists' and 'natural law theorists'. In the broadest sense, what distinguishes the natural law approach, including the contributions in this volume, is a self-conscious commitment to investigating the relationship between positive law and its rational foundation. This theme, however, must surely be addressed by any attempt to provide a cogent and explanatorily adequate theory of law.[51]

II

The architecture of this volume reflects both the distinguished and complex history of the natural law tradition and its awareness of the impossibility of providing a satisfactory legal theory without reference to wider considerations of practical reason, normativity and justice.

Part I brings together four chapters on the historical and metaphysical foundations of natural law jurisprudence. John Finnis opens the

[50] Of course, it is also important to distinguish between Kelsen's critical statements regarding natural law and his own positive account of the content and implications of legal normativity.

[51] The centrality of the relationship between positive law and its rational foundation or normative basis to contemporary political and legal theory is itself sufficient to dispel the common prejudice that natural law theory has little to offer contemporary political and legal reflection under conditions of liberal value pluralism, social differentiation and 'the rationalization of the lifeworld'. See Habermas 1996: 95.

volume with a treatment of Aquinas's thought. Touching on the themes discussed throughout this volume, Finnis's contribution shows that Aquinas's jurisprudence has much to offer to contemporary reflection. In the second chapter, Robert P. George illuminates some of the foundational concepts of the natural law tradition, including knowledge of human goods and moral principles, human rights and dignity, and our susceptibility to moral failure. George also addresses the relationship of theism to natural law and its principles. The third chapter focusses on the natural law tradition's enormous and sometimes unacknowledged influence on the early modern period. In that third chapter, Knud Haakonssen emphasizes the diversity of early modern natural law theories and questions the widespread opinions that such early modern natural lawyers were either the seedbed of modernity's human rights or a pale reflection of scholasticism. In the final chapter of Part I, Jonathan Crowe considers the metaphysical foundations of natural law approaches to ethics and jurisprudence. Crowe demonstrates how the claim that law is necessarily a rational standard for conduct raises fundamental questions about the nature of law and presents his own account of the metaphysical status of law as an artefact kind.

Part II turns to the themes of practical reason, normativity and ethics. Christopher Tollefsen opens with an explication of the influential natural law account of practical reasoning and moral deliberation developed by Finnis, Germain Grisez and Joseph Boyle. Tollefsen discusses the foundational role that a variety of basic goods play (on this account) in our practical deliberation, and he contrasts natural law conceptions of practical and moral reasoning with contemporary rivals. In her chapter on the relationship between law and practical reason, Verónica Rodríguez-Blanco draws on Elizabeth Anscombe's influential action theory to elucidate central features of law such as authority and normativity. Rodríguez-Blanco closes by arguing that competing conceptions of law are parasitic on the core idea that law is the result of our practical reason. Thomas Pink's chapter examines the relationship between two conceptions of the self: one that concentrates upon our capacity to reason and the other that focusses upon our susceptibility to attributions of positive and negative personal worth. Pink explores how the marriage of these two conceptions produced important tensions within the natural law theory of obligation. In the final chapter of Part II, Jacqueline Laing illustrates the natural law tradition's

explanatory power within applied ethics. Laing considers four ethical issues – genocide, disproportionate punishment, mass live-birth cloning and sexual vice – and defends the plausibility of a natural law approach to each in contrast to rival conceptions.

The final part of the volume opens with Nigel Simmonds's discussion of how jurisprudential inquiry is shaped by the use of the law as a justification for deploying the state's coercive force. Simmonds argues for the importance of connecting jurisprudential inquiry with doctrinal legal thought and shows how this insight explains the moral obligation to uphold the rule of law. Mark Greenberg's contribution provides an introduction to his influential moral theory of law, which holds that the content of the law is the content of the moral obligations (and powers, permissions, rights, etc.) that are brought about in a certain way by the actions of legal institutions. Greenberg's chapter begins by explaining that the Moral Impact Theory is a member of a family of theories ('Dependence Theories') and then clarifies how the Moral Impact Theory differs from traditional natural law theories and other contemporary non-positivist or anti-positivist approaches. Greenberg argues that the Moral Impact Theory is more thoroughgoing in its rejection of positivism than much of the natural law tradition and more thoroughly moralized than Ronald Dworkin's 'law as integrity' theory. Finally, Greenberg addresses a potential objection based on the widespread assumption ('the Standard Picture') that the content of the law (in any legal system) is constituted by the linguistic meaning of authoritative legal texts.

The main theme of Robert Alexy's chapter is the ideal dimension of law. Alexy argues for a dual nature thesis – which contends that law necessarily comprises both a real and factual dimension and an ideal or critical dimension – and demonstrates how the ideal dimension (which refers primarily to moral correctness) implies the truth of non-positivism. Mark C. Murphy's chapter confronts recent high-level criticisms of natural law jurisprudence to the effect that the whole natural law enterprise is wrongheaded or that it has no defining plausible thesis about law's nature. Against the first objection, Murphy shows that investigating the nature of law is legitimate even if law is an artefact, an artificial kind. Against the second objection, he contends that there are plausible natural law theses that entail the falsity of the canonical formulations of basic positivist theses.

George Duke's contribution explicates the normative role played by the common good in natural law theories of law, authority and obligation.

After some historical and conceptual background, Duke lays out some of the virtues of a natural law account of authority grounded in the common good as the principal normative reason in the political and legal domains. Gerard V. Bradley's chapter addresses whether and how a natural law jurisprudence guided by an account of human flourishing might inform contemporary constitutional theory. Bradley considers the relevance to public authorities of the exceptionless moral norms characteristic of almost all natural law theories, the relationship between positive (written) law and natural (unposited) norms of justice in the interpretation of constitutional provisions, and the social circumstances that make effective constitutional governance possible.

In the final chapter, Kristen Rundle considers the particular ways in which Lon Fuller – whose distinctive contribution to theorizing the 'procedural' or 'formal' dimensions of a legal system has long been associated with natural law commitments – did and did not identify his own thought with the wider natural law tradition. Rundle draws extensively on Fuller's unpublished manuscripts to illuminate his commitment to a natural law approach to legal theory, despite his misgivings about particular traditional natural law commitments or doctrines.

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Part I

Foundations

Aquinas and Natural Law Jurisprudence 2

John Finnis

The best way to understand Aquinas, even historically, is to read him as a participant in today's debates. Though this involves both some risk and some contextualizing, the effort is rewarding, and can be quite faithful to what he meant. So this essay follows the volume's course; without knowledge of the other essays' content, it takes up the topics suggested by their titles, in their sequence,[1] after a general introduction to Aquinas's law-related theory.

1. Aquinas and 'New Natural Law Theory'

The natural law theory underpinning Aquinas's jurisprudence (theory of human, positive law) is one that, when he articulated it, was substantially new. Plato had said interesting and true things about what is naturally right according to a rational standard and measure that has a divine origin and can be called a law governing human lawmakers; Aristotle's remarks about natural justice implied the same sort of appeal to rational standards of conduct that are applicable in any human community; and the Stoics of Greece and Rome undertook to root such standards in a cosmology and an anthropology (theories of the nature of the cosmos and of human beings). Almost all of this – along with the Roman jurists' slogans about it, and St Paul's insight that the basic elements (the Decalogue) in the divine law proposed to the Jewish people through Moses and later prophets correspond to what even a pagan conscience can know to be wrong – is transmitted to Aquinas as he begins to write in the 1250s. His theory of moral law and of positive law gives those classical theories a new intelligibility and better vocabulary, and can rightly be called a new – but new *classical* – natural law theory.

[1] For a brief synoptic view of Aquinas's thought in this domain see Finnis 2016. For fuller discussion and citation of primary texts see Finnis 1998: 255–274.

What are its new elements? Most important, perhaps, is its insistence that, in this whole domain, the primary meaning and reference of the term 'natural' is: *reasonable*.[2] To say that some kind of conduct is required or excluded by natural law (or natural right) is to state the conclusion of an argument which begins with premises about what kinds of conduct one needs to choose (or reject) if one is to act *reasonably*. To say that a disposition is natural and a virtue, or unnatural and a vice, is to express a conclusion that follows from premises about which dispositions to act ready one for acting reasonably and which ready one to choose unreasonably (unjustly, self-destructively, and so forth). Moral arguments should never run from what is natural to what is reasonable – a fallacy that can well be called 'naturalistic'. Their conclusions about what is required by reason *need* never (but always *can*) be expressed also in terms of the natural or unnatural. For, however frequent or even predominant ('typical') unreasonable conduct is, it is natural for human persons to be reasonable and behave reasonably: they have that capacity by their nature (unlike the nature of giraffes or mice) and are in best shape as human beings when they so act and are disposed to act.

Second, the idea of reasonableness in choice and conduct – practical reason(ableness) – is not just (as in Kant) a matter of coherence (absence of self-contradiction). Rather, it is a matter of choosing and acting in line with the *first principles* of practical reason(ableness). The identification of these substantive first principles is Aquinas's greatest single contribution to the renovation and development of classical natural law theory. He fills in the obvious gap in Aristotle's account of *practical* reason: that is, of intelligence and reasoning directed towards choosing well. Going beyond the formal first principle that *good is to be pursued and done (and evil avoided)*[3] – a principle comparable to theoretical reason's formal principle that contradiction is to be excluded – the substantive (though not yet moral) normative principles of practical reason pick out and direct us to the basic *kinds* of intelligible human good – 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

[2] Thomas Aquinas, *Summa Theologiae* [hereafter *S.T.*] I-II q. 71 a. 2c; Finnis 2011a: 35, 395; Finnis 1998: 91n, 141, 246.

[3] *S.T.* I-II q. 94 a. 2c.

reasonableness in actualizing these intrinsic, self-evident forms of human good, these aspects or elements of wellbeing (flourishing, in Greek *eudaimonia*; in Latin *beatitudo* or *felicitas*).[4] It is the last basic good in this list, practical reasonableness (*bonum rationis*) itself, that directs us towards, and oversees, the pursuit of (and respect for) all the other basic human goods. And it is this supervision and structuring of deliberation and conscience that enables us to understand and reason about the *moral* implications of the first practical principles.

These moral implications emerge, as identifiable *specifications* (as in 'making more specific') of the first practical principles *taken as a set* (integrally) and *taken as* directing us to goods that each are *as good* in the lives of other human persons as in one's own life. So what we call morality is the working out of the implications of that truth for the prioritizing of kinds of human good which I am (in my specific kind of circumstance) to pursue, and of persons for the sake of whom I am to act (in my specific kinds of circumstance). Aquinas envisages a rational process of *specification* of the first principles of practical reason,[5] into moral precepts such as those against homicide, rape, theft, defamation and so on, as well as those picking out affirmative moral responsibilities such as to enter and sustain communal forms of life such as marriage, educational and economic associations, political communities and so forth.

Thirdly, then: assisting Aquinas in his strong development and improvement of the rational structure of Plato's and Aristotle's ethical theories is his assiduous deployment of a methodological or epistemological principle that he found in Aristotle: 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*.[6] For the objects of intelligible human acts are the human goods which provide the rationale for the acts, whether the objects be ends in themselves (intrinsic goods) or means to some further good. Thus, the adequate understanding of human nature is a *resultant* of a prior adequate understanding of the basic human goods picked out and

[4] The open-ended list of first practical principles and primary human goods in *S.T.* q. 94 a. 2c and 3c includes all these except artistic accomplishment; Finnis 1998: 79–94.

[5] See *S.T.* I-II q. 100 a. 3c; Finnis 1998: 126–129. [6] Finnis 1998: 29–31; Section 5 below.

directed to by *practical* reason's first principles. So once again Aquinas's new classical theory of the natural moral law is free from any kind of naturalistic fallacy.

But that is not to say that it is a set of *a priori* 'intuitions' ungrounded in any facts and data of experience. On the contrary, we each gain our initial insights into the basic goods (and the corresponding first practical principles) only on the basis of a prior awareness of factual possibilities – for example, that knowledge is possible (on the basis of experience, questions and instruction or insight). Still, the insight that, say, knowledge (or friendship) is *a good* is an insight different in kind – an instance of *practical* intelligence and reason – an insight not deducible from the factual awareness of knowledge's (or friendship's) availability and causalities. Rather, it is self-evident: in Aquinas's language,[7] it is *per se notum* and *indemonstrabile*. And it is in the form of a practical principle, *directing* us to the relevant good, picking it out as an object(ive) that, by reason of its intrinsic worth (good) *is to be pursued*. That 'is to be' is not at all factual-predictive. It is normative. And though it is not yet moral normativity, this normativity of each first principle of practical reason is the source of all moral normativity. The pre-moral normativity of each first practical principle becomes moral normativity by being taken *together with* – integrally with – the normativity of each other such principle, under the integrating directiveness of the one basic human good (and corresponding first practical principle) that is precisely *about* (concerned with) the actualization of the other goods (and corresponding first principles).

So, fourthly: the final main element in Aquinas's novation of classical natural law theory is his explicit identification of a basic human good which, though no more valuable than any other, consists nonetheless in supervising and shaping the way the other basic goods are actualized (and thus too the way it is itself made actual and specific in one's living/acting). He calls this the *bonum rationis*, the good of being (practically) reasonable.[8] Insofar as one actualizes this good in one's deliberations, choices and conduct (carrying out of choices), one acts with *prudentia*, practical reasonableness. As actualized, it is a virtue – a morally good disposition to have – and indeed it is the master virtue, without which one

[7] *S.T.* I-II q. 91 a. 3c; q. 94 a.2c; Finnis 1998: 79–90.
[8] *S.T.* I-II q. 61 a. 2c; q. 94 a. 3; Finnis 1998: 83–85, 98–99.

cannot really have any of the others (notably, justice, and the self-mastery whose main aspects are courage and temperateness). *Prudentia* presides over the identification of and compliance with the moral precepts or norms, the propositions that state the implications of pursuing the basic goods *integrally* (including reasonable concern for their actualization in the lives of other people). The first or supreme principle of *prudentia* (and so of specifically *moral* thought), Aquinas says,[9] is that one choose and act always with 'love of neighbour as oneself' (where 'love' denotes not so much some state of the emotions or affections as, rather, a willingness to favour and respect the wellbeing of others as one favours and respects one's own).

In the centuries after Aquinas, philosophers and theologians working in the same broad tradition tended to neglect each of these important philosophical building-blocks, their distinctness, and their inter-dependence.[10] They tended to leave aside Aquinas's idea that obligation is always a matter of the necessity of some end or means to an end, replacing it with the idea that obligation is always a matter of some superior will (God's, or some sovereign's or other ruler's) calling for compliance by an inferior's or subject's will (see secs. 3 and 7 below). They tended to treat as first practical principles not the pre-moral principles identified by Aquinas, but fully moralized precepts such as those of the Decalogue, forbidding homicide, theft and defamation, or commanding respect for parents (familial or political). They swung back and forth between forms of voluntarism (will-theories of obligation), rationalism (seeing immorality as acting contrary to rational nature, without scrutinizing, as Aquinas did, the basis of our knowledge of human nature and its flourishing) and contractarianism (a form of voluntarism prioritizing voluntary assumption of obligations, and perhaps relying on a shaky idea of self-contradiction to prevent voluntary annulment of what one had by promise assumed).

So when, in the 1960s, Aquinas's new classical theory of natural law was closely studied on the basis of his own texts rather than neo-scholastic textbooks, and treated not as theology but as rigorous philosophy, the resultant recovery of his theory by Germain Grisez and then by the present writer and others was greeted with a good deal of incomprehension and hostility by moral and political theorists reared in a tradition calling itself

[9] I-II q. 99 a. 1 ad 2; Finnis 1998: 126–129. [10] Finnis 2011a: 42–48.

Thomistic but neglectful of St Thomas's distinctive account of practical reason. The most hostile of these critics took to calling the Grisez–Finnis account 'new natural law [theory]', as if it were a novel imposition on Aquinas and the tradition. As the dialectics of the last forty years have confirmed,[11] the new account was in truth largely a *recovery* of Aquinas's own account with *its* authentic newness. Insofar as it used modern idiom, emphasized aspects of Aquinas's work that he left in shadow, and developed in the light of modern philosophical discourse some elements in his account which he left relatively undeveloped, it could justly be called new. But like his, it would more appropriately be called a *new classical natural law theory*.

2. Natural Law, Divine Wisdom and Human Dignity

Aquinas's position about the relation between the natural moral law (which provides human positive law with its justification and rational limits) and the question of God's existence and will has a central thesis: everything that has been divinely revealed about God's will for human conduct – that is, every divine moral imperative – is *also* discoverable by human understanding and reason *independently* of any knowledge of or belief in God's existence, purposes or self-disclosure (revelation).[12] So Aquinas offers us not only theological/historical exegesis of the texts of Jewish and Christian revelation, tradition and moral doctrine, *but also* purely philosophical explorations of and reflective discussions of morality. These can be engaged with by any philosopher or philosophically curious person using 'natural reason' – that is, premises and modes of reasoning that in no way rely upon revelation (in other words, on the information or alleged information conveyed by or on behalf of the transcendent creator).

But moral norms are, in Aquinas's view, not the only propositions that are to be found in the overlap between natural reason and divine revelation. Other propositions which are both divinely revealed and accessible by purely philosophical argument, using data available to

[11] Finnis and Grisez 1981: 21–31; Grisez 1987: 307–320; Grisez 1988: 269–291; Finnis 1998: 20–131.

[12] *S.T.* I-II q. 100 a. 1c; q. 108 a. 2 ad 1; Finnis 1998: 125, 128, 295–296.

people of any time or place, include these: (1) that the whole universe ('Nature') is the result of the decision of a transcendent mind and will to create it – that is, bring it 'into being' 'out of nothing' and to sustain it in being; (2) that the world (universe) so created and sustained is dynamically ordered, so that the many chances or random occurrences in it are subordinated to vast patterns of order, system and information that dominates activity: patterns that we call the natural laws investigated by physics and other natural sciences; (3) the development of the universe, whether over the short period envisaged by the understanding of revelation prevalent in Aquinas's era or the very long period calculated empirically by contemporary sciences, has yielded biological life, and the evolving ascent of living beings that culminates in the emergence of the human species, members of which find themselves equipped 'by nature' not only with the kinds of characteristics found in subhuman animals, plants, minerals and so forth, but also with the characteristics and capacities we call intelligence and reason in all its 'theoretical' and 'practical' aspects. These aspects of rationality include 'conscience',[13] one's capacity to reach judgements about the moral rightness or wrongness of kinds of choice and conduct in which one might engage, or which one is deliberating about engaging in, or did at some time past engage in. But our rationality includes also capacity for the investigations and discoveries we call the natural sciences; for logic in its broadest senses, and for arts and techniques (including games) of every kind.

In each of these four broad domains (see Section 4, below) are found normativity and criteria of validity and correctness, considerations that (even when they happen to concern factual causalities) are simply not a matter of X causing or causally affecting Y, but about what *ought* or ought *not* to be thought. This is mind radically transcending matter even though working in the material matrices of physical, biological and neurological bodiliness. Aquinas revolutionized mediaeval thought on these topics by bringing to light the astonishing unity of rational soul and body, such that the former is the *form* and the very *act* of the latter – so that if the one is to be said to be 'in' the other it is one's body that is in one's soul rather than the opposite.[14] Body without soul, as in death, is no longer *that* body, but a heap of disintegrated and ever less complex chemicals.

[13] I-II q. 19 a. 5c & a. 6c; q. 79 a. 13c; Finnis 1998: 123, 256.
[14] See Finnis 1998: 14, 176–180.

Attempts to reduce the reality of a human being's existence to matter in complex patterns of motion that could in principle be accounted for by the operation of the laws of physics (laced with dashes of chance) all fail. Determinism that presupposes the completeness (in principle) of physical explanations, though it is in hard or soft form the regnant view among twentieth- and twenty-first-century philosophers, is falsified by effort to defend it by arguments which one (or one's interlocutor) accepts *ought* to be coherent, attentive to data and argument, and honestly/conscientiously conducted. For there is no normativity (in the relevant sense of 'ought') unless there is freedom to violate or depart from the norm – a freedom that contradicts the determinism one set out to defend (see further Section 4).

This freedom is the core of Aquinas's conception of human dignity. For dignity is always a matter of superiority – in this case, of the human over all the subhuman that, whatever its beauty, complexity and agility, *lacks* this freedom of choice, this most radical manifestation of spirit mastering matter.[15] (It is not, of course, the only manifestation: think of a word, any word spoken or written: 'purely' material sounds or marks are in reality the bearer of meaning and of truth or error, which effortlessly transcend time and space and the material aspects of symbols, so that *the very same* proposition as Plato affirmed or denied can be affirmed or denied by you or me in another era and language altogether.) Reflection on this dignity of the *rational* animal, and on the place of this kind of animal in the vast order of the universe, leads Aquinas to affirm that this degree of authorship of one's own life, this sense in which one acts for one's own sake and on one's own account (even in acts of self-sacrificial love or service of others), *corresponds to a truth* about the divine plan of creation: that in that plan, each human person (unlike any sub-rational kind of being) is a *per se* end (an end in oneself) – the plan is directed towards one's personal flourishing, for one's own sake, not *merely* for the sake of the good of the whole.[16] These are truths about the species to which we each belong by virtue of our rational soul, that is, of its/one's *radical* (root-) capacities, even if these

[15] Finnis 1998: 179–180, 313–314.

[16] *Summa contra Gentiles* III c. 111; c. 112 (we are masters of our own acts, authors of our own providence, principals, free people, governed for our own sakes, having a nature that is not instrumental but needed for its own sake); c. 113 (each of us is directed to God by what befits not only the species but also the individual, individually and personally). See also Finnis 1998: 170 n. 167; 313–314.

capacities are not yet developed, or are decayed, or are impaired by sleep, or disease or injury or other disablement. They entail, therefore, the *equality* in dignity and therefore in rights that Aquinas constantly affirms despite every form of human inequality in attainments and in operational capacities.[17]

The idea of divine revelation is, of course, the idea that, once the created universe developed to the point that it included created *minds*, the transcendent Creator could now communicate information, not simply by impressing it on the storm of activity that we call the material universe, but now also by conveying it to understanding minds, in the form of propositions, arguments, warnings, predictions and directives that appeal to freedom and contemplate rejection. Modern natural science's ever-growing disclosure of the reign of *information* of unimaginable complexity over activity of unimaginable rapidity and variety – a disclosure of the superficiality of all the picture-ideas of material 'atoms' that have sustained pre-Socratic[18] and modern materialism – should make even more available to us than to Aquinas the possibility that information might be transferred in a way that transcends the designs brought to light by scientific investigation, experiment and mathematical modelling – a way more analogous to our own linguistic communications to each other.

But, as noted at the beginning of this section, Aquinas's guiding thought is that in relation to morality, divine revelation does no more than lend some clarity and assurance to what is ascertainable by conscientious rational reflection unaided by any historical events of revelatory communication by word or deed. Still, that element of clarity and assurance is not to be neglected: no civilization has thought its way through, by natural reason (reason unaided by historical events of revelation), to the truths our civilization now takes for granted: human dignity and equality. They are truths grasped more clearly and firmly by the prophets of Israel than by Plato or Aristotle or other philosophers, and are confirmed by the prophetic and other revelatory words and deeds in the New Testament. With that before us, or behind us, we seem to see purely philosophical reason to affirm them. But materialism

[17] See Finnis 1998: 170–176.

[18] For Aquinas's constant concern with this philosophico-scientific counter-position, see *S.T.* I q. 47 a. 1c; q. 84 a. 6c; Finnis 1998: 298.

subverts them, as does a sentimentality about the lives of subhuman animals.

It is significant, then, that when Aquinas gets closest to affirming directly what we call *human* rights, he is expounding the precepts or commands of the Decalogue: in particular, those of the Ten Commandments of Mosaic revelation that concern our duties to other persons. The object of this set of principles of justice is the set of rights that belong to everyone *indifferenter*: alike, without discrimination.[19]

3. Aquinas and 'Early Modern' Confusions

Some of the soundest aspects of Aquinas's moral and legal thought fell into disfavour or neglect quite soon after his death, and were replaced by currents of thought that can conveniently be labelled nominalist and voluntarist. Nominalist thinkers tended to reject his critical realist position that understanding and judgement can attain truths about reality and, in the sphere of practical reason, about true human goods, as elements of real human flourishing realizable by choice and action. Voluntarist thinkers tended to assert that there can be no obligation save obligation imposed by a superior will, and to deny that obligation is essentially a matter of necessary means to intrinsically desirable ends, particularly the end or good of practical reasonableness itself (along with the intrinsic human goods the pursuit of which it integrates). These tendencies persisted into the revival of Thomist scholarship and philosophy in the sixteenth century (Vitoria, de Soto, Molina, Suarez). Suarez's attempt at a *via media* retained doses of nominalism and voluntarism which left early modern philosophy of law so flawed in its foundations that it broke down completely in the works of Locke – a breakdown from which philosophy of law has begun to recover only in the last fifty or sixty years.

Suarez's vast and subtle synthesis rested unstably on two legs: right and wrong are a matter of conformity or disconformity to *rational nature*

[19] *S.T.* II-II q. 122 a. 6; Finnis 1998: 136–137. I use 'discrimination' here in the modern, discriminating sense of 'unjust discrimination'. Acting (or speaking) without discrimination (including between one person and another) in a wider sense is wrong, foolish, even insane.

(the nature of a rational being); and law and obligation result from the prohibitions and commands of a *superior will*.[20] Suarez takes for granted that, though it is reason that discerns good from bad and right from wrong, motivation to action comes from will. He fails to understand Aquinas's most basic positions in this domain: (1) what motivates intelligent action is, fundamentally, one's reason's (one's intelligence's) grasp that a possible object of choice and action is a *good* that it would be good to bring about by choice and action; (2) in one's intending, choosing and carrying out one's choice of such an object, one's will moves one to choice and action by responding to the motivation supplied by the intelligible good (benefit); (3) the carrying out of one's chosen option is presided over by the *imperium* (command) of one's *reason* holding before one's attention the benefit (desirability, worth or utility) of achieving the chosen object/intention. In rejecting, as 'certainly a fiction',[21] Aquinas's idea of a post-choice *imperium*, Suarez showed himself to be in the grip of a voluntarism – a theory of will's primacy over reason in matters of action – that extends beyond that narrow topic of action-analysis and includes also an anti-Thomist understanding of obligation and of moral or legal normativity.

To Aquinas, that whole course of European legal theory in which *will*, usually in particular the will of a superior, is treated as the most explanatory source of obligation and of moral/legal normativity in general, would have seemed – as indeed it is – a capital error, a fundamentally unreasonable thesis, a major philosophical regress. It is a generalized version of the particular mistake that H.L.A. Hart pointed to in John Austin's account of law and legal obligation: it confuses 'I was obliged [by threat of pain or death] to hand over my wallet' with 'I am under an obligation to pay the lawfully enacted income tax'. Superiors may enforce their will (and manifest their superiority) by imposing on me penalties of loss, pain or death, but that kind of motivation is radically distinct in kind from the motivation afforded by my rational judgement along the following lines: unless I cooperate in a more or less reasonable scheme of social coordination, by accepting its burdens of compliance along with the benefits it tends to afford me (*via* other subjects' compliance) of peace,

[20] Francisco Suarez, *De Legibus ac Deo Legislatore* (1612) II c. 6; Finnis 2011a: 45–49, 54.
[21] *De Legibus* I c. 5; Finnis 2011a: 338–340, 347, 350.

justice and prosperity, I am cutting myself off from the goods of practical reasonableness, in particular of basic fairness and intelligent recognition that the basic goods are as real in the lives of others as in myself. Such a scheme of cooperation involves acknowledging the enactments of legislative authority, and in *that* sense, superiority, and similarly the orders or directives of executive (e.g. tax collectors') and/or judicial authority, as well as the authoritative normativity of promises and contracts and other voluntary assumptions of obligation – involving acts of *will* that are not of *superiors*. But none of these acts of will have the slightest normativity, or capacity to create obligation, save by their inclusion in or under some rational scheme(s) of coordination for the sake of intelligible goods. *Will* without *reason*'s insight into indispensable goods is voodoo; there is something primitive, infantile, about appeals to it as the explanatory source of obligation, even in the many cases where an act of will – a choice (by a legislator, or by contracting parties . . .) preferring one reasonable option over alternative reasonable or unreasonable options – is a necessary condition for the creation of the obligation in question.[22]

A stream of juridical thought, running from the non-voluntarist strand in Suarez through the highly influential Grotius down to Blackstone, Kant and beyond, kept alive the tradition of natural law and rational political morality, by way of Grotius's adoption of Suarez's 'conformity with rational nature'.[23] But the phrase remained deeply opaque. Which is doing the normative work, 'rationality' or 'nature', and in either case, how? The idea functioned as little more than a placeholder, to be given content as Grotius gave it, by survey of and judiciously eclectic selection from the vast range of juridical doctrines, axioms and institutions coming down to us from the antiquity of several civilizations, or from the sayings and practice of our own common law judges.

[22] For Aquinas, 'Your [= God's] will be done' (in the daily prayer prescribed by Jesus of Nazareth on the mountain: *Matthew* 6: 10) is to be understood as normative – and the divine will is universally to be taken as obligatory – because it is so connected to divine wisdom and benevolence that adhering to God's revealed commandments and precepts is the most reliably reasonable way of promoting the true human goods in oneself and in the common good of all human persons (themselves goods participating in and contributing to divine glory), goods which are the primary explanatory source of the divine will's normative force (as manifesting divine reason). On the question as to *why* God's will should be judged to be obligation-imposing, see also Finnis 2011a: 343, 350, 388, 403, 405.

[23] Hugo Grotius, *De Jure Belli ac Pacis* (1625), Prolegomena, para. 11; Finnis 2011a: 43–44.

Meanwhile, more radical minds, ill content with such opacity to reason, resorted to solutions achieving triumphantly direct transparency at the unadmitted price of the above-mentioned infantilism. Notable specimens include several of Hobbes's central teachings. (1) To secure one's safety, one enters with others into the social contract of subjection to the sovereignty of Leviathan. But what and whence is this contract's obligatoriness? Hobbes oscillates between *'clubs are trumps'* (the contract obliges because the sovereign will crush you for disobedience to it) and *non-compliance is self-contradictory*, illogical (your promise at time t_1 was 'I will obey at time t_2'; so now that t_2 has arrived 'I will disobey at t_2' is self-contradictory – the mistake of logic is, however, Hobbes's, for the second statement is entirely coherent and need say no more than 'I have thought better of my earlier (and honest) statement; I have changed my mind'). Hobbes's account of obligation is empty or fallacious, and Kant's attempt 130 years later to revive the argument from self-contradiction to explain the obligation of contracts fares no better.[24]

(2) Hobbes's account of rights as the negation or absence of duties[25] is a similarly complete failure. Aquinas presents rights as the correlative of duties: for A to have a duty of law or justice to B is for B to have the correlative right (*ius*) that A do his duty.[26] That is the core of Hohfeld's account of rights, as sound today as when Aquinas adumbrated it. Hobbes defined a right as the liberty A has when he has no duty, and then claimed that in the 'state of nature', where there are no duties because there is no sovereign and so no law, everyone has the widest conceivable range of rights. It would have been less misleading for him to admit that, on his own assumptions about duties (no sovereign, so no laws, so *no duties*), there are in the state of nature *no rights at all*.[27]

Locke experimented with various incompatible theories of ethics, including quasi-Grotian, proto-utilitarian and quasi-Hobbesian. It is the last-mentioned, radically voluntarist experiments, early and late in Locke's career, that proved most influential in Jurisprudence (to its loss). An early venture in voluntarism is his long-unpublished *Questions Concerning the Law of Nature* (c. 1660–64): 'No law without a legislator'.[28] No obligation without subjection to the 'will of a superior power'.[29] 'Law's formal

[24] See Finnis 2011a: 344–350. [25] Hobbes 1651: chapter xiv; Finnis 2011a: 208.
[26] *S.T.* II-II q. 58 a. 1; Finnis 2011a: 133; Finnis 2015: 213–220. [27] Finnis 2011a.
[28] Locke 1664: 192. [29] Ibid., 158–159, 166–167.

definition is: the declaration of a superior will.'[30] 'The rule of our actions is the will of a superior power.'[31] In his mature *Essay Concerning Human Understanding* (1690), when answering the question how we 'know whether [our] actions are morally good or bad', he teaches even more radically that:

> Good or evil is nothing but pleasure or pain, or that which occasions or procures pleasure or pain to us. Moral good or evil, then, is only the conformity or disagreement of our voluntary actions to some law, whereby good or evil is drawn on us by the will and power of the law-maker: which good or evil, pleasure or pain, attending our observance or breach of the law, by the decree of the law-maker, is [w]hat we call reward or punishment.[32]

On this sort of view, what makes (say) torture morally bad is not the victims' suffering but the torturer's own pain *when, if ever, he is punished* by someone who, having forbidden such torture (why?), has the power to inflict punishment for violation of his decree. Can one imagine a more abject failure to state, let alone account for, the meaning of moral obligation? Yet for John Austin, at the dawn of English law-school positivism, this passage 'evinces ... matchless power of precise and just thinking, with ... religious regard for general utility and truth', and provided a welcome support, perhaps even a primary original inspiration (along with Hobbes and Bentham), for his own decision, in his *The Province of Jurisprudence Determined* (1832), to define law in terms of commands of superiors over inferiors.

4. Metaphysical Foundations

The metaphysical foundations of Aquinas's theory of natural law – and of the late twentieth-century 'new [classical] natural law theory' – are stated by him at prominent junctures in his work on ethics. One is the prologue to the Second Part of his own master textbook, *Summa Theologiae* (the part that deals with ethics/morality, natural law and the virtues, both in general

[30] Ibid., 102–103.
[31] Ibid., 204–205. All these definitions apply as much to the natural moral law as to human positive law.
[32] Locke 1690: Bk. II, chap. xxviii, quoted in Austin 1885: 206.

and in great detail over many hundreds of pages). Another is the prologue to his commentary of Aristotle's *Ethics*.

The prologue to the *Summa Theologiae*'s second part says that this part will deal with people precisely as beings who have *free choice*. For this metaphysical reality about them makes it appropriate to consider them (us, oneself) as, each of us, the source and owner/master of one's own deeds, having power over them – a power which he compares with the astounding power of the Creator of the universe (to decide whether or not to create something out of nothing, and this universe rather than alternatives). At many points in his writings he says that but for this fact about us, morality and moral theory would make no sense at all. Since he does not develop an explicit, articulated argument against modern forms of soft and hard determinism, his new-classical natural law followers gave priority, in their development of that theory, to developing a defence[33] of the metaphysical reality that, even if a good deal of the behaviour of healthy adult persons is spontaneous or automatic, there are in the lives of such persons at least some *free choices* – choices such that nothing either inside or outside the person, save the choosing itself, determines which option will be chosen. The choosing person is causally (as well as morally) responsible for the option-for-action chosen, in a radical way that is the foundation for moral responsibility/culpability/merit. But, even more fundamentally, the *ought* of moral (including legal-moral) obligation makes no real sense unless it is understood as addressed to persons *capable* of acting without regard to or in compliance with it – who therefore need (and are in position) to be summoned, by the norm that articulates this *ought*, to act in line with it (for the sake of the relevant benefits to common good at stake). This metaphysical foundation is widely denied in today's philosophical and wider culture, but it is essential to any natural law (or other moral) theory worthy of the name.[34]

The wider metaphysical framework is recalled in the prologue to Aquinas's *Commentary on the Ethics*, stating that there are four distinct basic kinds of order with which our thinking and knowledge engages:[35] (i) the order of realities that are what they are whether or not we

[33] Boyle, Grisez and Tollefsen 1976; Finnis 1983: 137–138; Finnis 1998: 22, 58–60, 177–178; Finnis 2011c: 4–5, 7.

[34] Finnis, Boyle and Grisez 1987: 256–257.

[35] Finnis 1998: 20–23; Finnis 2011a: 136–138, 457; Finnis 2013: 462 n.14.

understand or consider them at all (the order of *nature*, the domain of the natural sciences and of metaphysics itself); (ii) the order we need to bring into our thinking if it is to engage accurately with natural realities and with any of the four kinds of order (the order of logic in the broadest sense of the term); (iii) the order we need to bring into our deliberations towards the choices and actions which shape and determine what character (a kind of second nature) we will have as individuals and groups of persons (the order of morality and moral philosophy, under which come also political and legal philosophy); and (iv) the order we can bring into matter under our control so as to achieve specific purposes in work or play (the order of arts and crafts, techniques and technologies of every kind, including our languages as specific vehicles for thought in all four orders).

This grand *metaphysical* overview of reality, and of our knowledge ('theoretical' in the first two kinds of order, 'practical' in the second two) of it, has been as fundamental to the new classical natural law theory from its beginnings as it was to Aquinas. It enables us to identify as illegitimately reductionist almost all the streams of social-theoretical thought, including political and legal, that have emerged since early modernity. It helps in identifying the errors of those would-be followers of Aquinas who reject the new-classical natural law theory on the ground that it neglects or subordinates nature and metaphysics; the misunderstanding of Aquinas, and of the relation between practical and theoretical thought is theirs (see further Section 5 below). And it enables the complex question of the nature of human law to be much clarified (see Section 13 below).

Aquinas accepts Aristotle's fundamental insight about the significance of chosen action. Besides the 'transitive' effects such chosen action pursues and (if successful) actualizes in the world outside the acting person's mind (understanding and will), there are the 'intransitive' effects such choosing has on the person – the self-determining, character-shaping effects of choices, each of which lasts in one's will until it is reversed, if it ever is, by an incompatible or repudiatory choice.[36]

In the first order, nature, each of us enters upon deliberation and choosing already equipped by nature with a range of *capacities*. Some of these are more or less passive potentialities, and others are more or less

[36] Finnis 1998: 23.

active inclinations – including the inclination to question, investigate, learn and deliberate towards choice and action, not randomly or at the behest merely of emotions and sub-rational inclinations or aversions but rather towards intelligible goods such as life and health, knowledge, friendship with other human persons and so forth. The inclination we call *will* is, in the precise central sense of that term, the inclination to respond to *intelligible goods* as we understand them to be desirable, fulfilling and available in our general (possible) and/or particular circumstances. That capacity and inclination, will, exists in the form of general aliveness to desirable states of affairs, and then also of more specified intentions to pursue ranges of opportunities, through the formation of fully specific intentions in the choice of one option over others (each presented to oneself by one's intelligent grasp of more or less specific ends/purposes and means, shaped up into a proposal so incompatible with alternative proposals that one must *choose* between them, can choose between them, and does freely choose between them).[37]

The lastingness (intransitivity) of choice shows itself most directly in the formation of *dispositions* to more or less specific kinds of action/conduct. Dispositions are more than bare capacities and less than concrete actions; they are an intermediate reality, a readiness to act, that Aquinas calls *habitus* (better translated 'disposition(s)' than 'habit(s)'). As he explains in relation to our knowledge of the fundamental moral principles and precepts that he calls *natural law*, our understanding of, say, arithmetic, once we have acquired it, persists in us as a *habitus*, a readiness to deploy, say, the multiplication table at need, even after years without an arithmetical need or thought.[38] Our understanding of a language or of principles and rules of our country's particular laws has the same dispositional character.

When dispositions are morally good they are virtues; when bad they are vices. Aquinas organized his discussion of morality and law in the *Summa Theologiae* in terms of ordered ranges of virtues (and vices). But the actual discussions are controlled by his understanding of the principles and norms/precepts which identify which kinds of choice (and thus dispositions to choose) are good (morally sound) and which are bad (unsound).

[37] Finnis 1998: 65–71.

[38] *S.T.* I-II q. 94 a. 1; Finnis 1998: 89 n. 139 on the derivative character of *synderesis*.

So, against sceptics about morality in general, or about our or our law's moral judgements in particular, we have to get beyond mere appeals to virtue and denunciation of vice, and instead work – as Aquinas did with such patience and detail in practical reasoning – to identify the norms and principles in issue, and to show their soundness; that is, that they are indeed requirements of practical reasonableness: *recta ratio*.[39]

The fundamental metaphysical truth conveyed by Aquinas's analysis of the four kinds of order and of *scientia* is this. The nature of human persons – each with a bodily life that is from its outset shaped inwardly by a soul that is in its radical capacities *rational* – is different from that of all other natural realities within our experience. For the flourishing – the fulfilment *of the nature* – of beings (us) with radical capacities of this kind depends on our using intelligence and freedom to go beyond what is given by our natural structure and dynamisms, and to enter by *choice* into the realms of friendship, justice, self-sacrifice, devotion, heroism, contemplation, statesmanship, sanctity if not also the realms of poetic or musical or other aesthetic creativity and appreciation: possibilities which in their flowering are not given, but rather are achievements of insight (both contemplative and practical) and of one's free practical responsiveness (in willing) to insight – achievements which are not unnatural or praeter- or supernatural, but the flourishing of beings of this *sui generis* nature.

5. Epistemological Foundations: The Understanding of Basic Human Goods and their Rational Implications

Aquinas's most fundamental epistemological axiom, pervading his work from its earliest pages to its most mature, was mentioned in Section 1. We cannot understand/know the *nature* of any dynamic reality without first understanding its *capacities*, but these we cannot understand/know without first understanding the *acts/activities* which manifest/actuate those capacities, and we cannot understand those acts/activities/actuations without first understanding their *objects*, that-to-which those acts are

[39] That is why there was little overt reference to virtues in Finnis 2011a: see 421–422 (and 84, 102, 372). But the book's discussions of *practical reasonableness* and of *virtue* were in fact discussions of the content of those two master *virtues*. See also Finnis 2015: 205–213.

directed.[40] The application of this axiom to human realities is not difficult to discern. The objects of intelligent human acts are intelligible goods, basically the intrinsic goods such as life or knowledge discussed in Section 1 above – the goods to which the first principles of *practical* reason, all *per se nota* and *indemonstrabilia*, direct us. Without the understanding which is made available to us by ethics and by awareness of the morally developed lives of saints and moral heroes, we cannot understand human nature in its fully natural flourishing. Practical reason's understanding of its objects, though not data-free or without some prior non-practical knowledge of possibilities and causalities, is not read off, or deduced or inferred from, a prior adequate theoretical knowledge of human nature. On the contrary, an adequate knowledge of human nature is made available to us by practical reason.

Of course, the metaphysical order (sequence) of dependence runs in precisely the opposite direction: the objects of our choice could neither be understood nor attained by our actions were it not for the capacities given us by or with our nature. So the metaphysical and the epistemological orders/sequences of dependence are precisely complementary. The way to uncover the relations between nature and normativity is to follow the route prescribed by Aquinas and followed by the new classical natural law theory (and forgotten by many of its critics): start with practical reason's understanding of the basic elements of human flourishing, the goods that are the objects of all intelligent human activity.

The substantial originality of practical reason in its understanding of first principles and basic human goods is, of course, only the beginning of any piece of practical reasoning, reasoning which always needs a second premise about causalities and effects (if not also circumstances, conditioning and/or consequential). So moral, political and legal theory, although practical in its basic principles and some of their primary moral implications, is dependent on substantial doses of historical/empirical information in the form of informed 'generalizations' about what tends to happen in human affairs if, for example, land and other natural resources are left 'in common' to be exploited by first-comers, or if social rules or laws are left to be enforced by self-help (careening into revenge

[40] See the texts of Aquinas cited in Finnis 1998: 29 n. 1, to which add *De Veritate* q. 10 a. 1 & a. 9.

and/or vendetta, and free-riding by the strong or ruthless). Knowledge of this 'general-sociological' kind constitutes, or at least contributes to, a sort of metaphysics of human groups. Hart's *The Concept of Law* develops Hart's conception of law – an improvement on many common-sense ideas about law, and on conceptions (such as Bentham's, Austin's, Kelsen's and Holmes's) severely distorted by bad philosophy – by attention to generalizations of this sort, along with a conception of practical principles (albeit very truncated by fear of going too far from complete scepticism about goods/values). Such knowledge is also the basis for Aquinas's treatment of the place of coercion in a conception of human positive law: not part of the very definition of law, but practically essential to law and legal order of this kind.[41]

6. Practical Reason and Law

Aquinas's discussion of law begins by noting that practical reason – reasoning about what *ought* to be done, or about *what to do* – has a logical structure parallel to or analogous with the structure of speculative/theoretical reason (reasoning about what *is*). Just as theoretical reasoning can validly deduce a conclusion from two appropriately interrelated premises (and so far forth has a 'syllogistic' structure), so too can practical reasoning be syllogistic.[42] But practical syllogisms can be (A) particular or (B) universal in their conclusions.[43]

(A) Practical reasonings (syllogisms) that are particular in their conclusions are of dominant importance in the work of courts, and in individual or group decision-making that involves adherence to legal or moral constraints. The principle or rule providing the first premise is (whether wide or narrow in scope) a universal. The facts subsumed under the rule are (i) universal insofar as they denote a *kind* of which there are (or may be) many instances; and are (ii) particular in any such instance. To adapt Aquinas's characteristically bare and dry examples (and italicizing the relevant *kinds* and emboldening the relevant **particulars**):

[41] *S.T.* I-II q. 90 a. 3 ad 2; q. 96 a. 5c; Finnis 1998: 256. [42] I-II q. 90 a. 1 ad 2.
[43] I-II q. 76 a. 1c; *De Malo* q. 3 a 9 ad 7.

1a *Insider trading in shares* is a *criminal offence*;
1b One *legally must* not and morally should not commit *criminal offences*;
2. **My selling my husband's shares in X Corp. after seeing its confidential draft accounts the day before their publication** would be **an act** of *insider trading*;
3. **I** *legally must* not and morally should not **sell those shares now**.

This is the staple fare of the law's *application*, and less ordinarily but not rarely can include complex phases of *interpretation* aiming to establish the legal meaning of the relevant term, of the terms used to define that term, and of the relative authoritativeness or authenticity of competing definitions. Modern Jurisprudence (e.g. Hart's *The Concept of Law*) tends to adopt systematically the viewpoint of those who are confronted by a rule within a system of rules, *accept* it, and as judges, officials or private citizens, apply it in their conduct. Practical reasoning of this kind is the staple of this viewpoint's working out in practice.

But Aquinas's account of law – particularly his account of human law – focuses primarily on the viewpoint and acts of the law-maker, and only secondarily on judges or subjects. Having defined law as an ordinance of reason for the common good of a [complete] community, promulgated by the person or body responsible for looking after that community,[44] he immediately adds that a law 'is simply a sort of prescription [*dictamen*] of practical reason *in the ruler* governing a complete (*perfecta*) community'.[45] By prescriptions (*dictamina*) he means, he adds, universal propositions of practical reason which prescribe and direct to action.[46]

(B) So, more important for law, and more difficult than the rule-subsumption/application model of practical reasoning, is another kind of practical reasoning, whereby a legislature – intending the political community's common good – reasons and chooses universals to serve as rules for that community: universals that will be more specific than the universals which the legislature takes as its first premise(s) for its legislative conclusion. Very wide or general universals/principles justify the adoption of a system of property law; other similar principles justify the legal authorization and/or encouragement of joint-stock corporations (the shareholders in which are liable not for all the corporation's debts and

[44] I]-II q. 90 a. 3c; Finnis 1998: 255–256. [45] I-II q. 91 a. 1c; q. 92 a. 1c.
[46] I-II q. 90 a. 1 ad 2.

losses but only for the value of their respective shares); other principles justify the permission and regulation of a market in shares; other principles again a law of theft, and the extension of *its* principles to justify prohibiting insider trading in shares, the defining of 'insiders' and 'insider trading', and so forth. At every point, uncertainties about the real-world effects – what Aquinas calls *contingentia* – of various alternative rules about each of these sorts of matters will make reasonable certain incompatible alternative rules within these broad categories, and will thus require that the legislature *choose* between the alternatives, none of which offers *all* the benefits offered by the others plus some more benefit.[47]

Aquinas's name for such a legislative judgement-and-choice (and for the rule *qua* chosen) is *determinatio*, signifying that the reasoning to it was not deductive (not a matter of *conclusiones ex principiis*) and therefore was more permissive/justificatory than rationally compelling.[48] He makes clear[49] that, despite the non-deductive character of the practical reasoning, and the rational eligibility of more than one option for legislative adoption, the rules brought into force by the adoption and enactment of one option in preference to the other(s) are nonetheless – provided they are not unjust – *derived* (not deductively but in a less determinate way) from the natural law moral principles or other universal propositions of practical reason of which they are a *determinatio*, a making-more-specific.

To be specific is still to be a universal, and not yet to be a particular or singular. The application of the rule to or in particular circumstances is the work of a further practical syllogism, considered in (A) above as the domain of the judge, executive official or other public or private subject of the law.

7. Normativity and Obligation

Aquinas reserves his explanation of the moral 'ought', and of *obligation*, to the article in which he proposes that all moral norms/precepts should be

[47] That is to say, the alternatives between which it is reasonable to choose are *incommensurable* by reason, though they are comparable along various rational dimensions of assessment: see essay 17 in Finnis 2011d and essays 14 and 15 in Finnis 2011b.

[48] I-II q. 94 a. 4; q. 95 a. 2; Finnis 1998: 266–8; Finnis 2011a: 284–289. [49] I-II q. 95 a. 2.

understood as implicit in or conclusions from a primary and self-evident 'first and common precept of the law of nature': *one should love one's neighbour as oneself*. It is in the course of discussing this primary moral principle that he defines the (morally) obligatory as what 'ought (*debet*) to be done' and says that this ought/obligation 'comes from the necessity of some end'.[50]

This is all of a piece with his fundamental conception of law as a matter of reason (rather than either will or sub-rational inclinations); and with his fundamental conception of *imperium* as a matter of reason (rather than will); and of his understanding that it is (intelligible) good(s) that have primacy in the explanation of right and wrong, of rights, of law and of motivation to and deliberation about action. The notion that the will, whether of a superior or of a contracting party, or of the individual acting person, could be the core of an explanation of morality, the moral ought, or of moral obligation (or, for that matter, legal obligation) is quite foreign to Aquinas. And for good reason: it is a notion that cannot withstand critical questions (see Section 3 above).

Acts of will take their place in the *second* premise of certain practical syllogisms about governance for common good. The first premises of those syllogisms are about what is needed to attain great goods such as a community living in peace, justice and prosperity rather than in anarchy, general poverty, unchecked injustices, and/or tyranny. For, generally speaking, those great goods cannot be had without laws, property, and contracts; so we need laws and fidelity to laws; and we need systems (legal or conventional) of allocating and upholding property rights, and of promising and respecting promises. So when those with authority to do so choose (will) to enact laws or exchange promises, propositions recounting those facts serve as the second-premise bridges to conclusions that we ought to judge that those laws and/or promises are obligatory (binding, authoritative) in our own one-by-one decision-making. Only in this sort of way (here sketched without any of the refinements which circumstances, *contingentia*, may call for) can it make sense to ascribe to the will of the legislators or contracting parties any normative significance. If the acts of will were accompanied, explicitly or contextually, by threats of sanctions for non-compliance, they may count in an entirely different practical syllogism rooted in the subject's self-interest in avoiding the unpleasant

[50] *S.T.* I-II q. 99 a. 1.

or the damaging. The conclusion of that sort of syllogism will concern, not obligation, but being obliged (much as the threats of muggers may oblige one to surrender one's wallet) (Section 3).

Of course, in a developed legal system maintained partly by threats of sanctions, the threats may be attached to commands that express their demands as *legal obligations*. But such formulae can do no more than certify the existence of a set of facts (past, present and contingently future), and cannot make those facts, or the demands or commands, actually obligatory. No *Is* suffices to establish an *Ought*. What renders certified legal obligations obligatory in practical reason is their place in a means-to-ends schema whose first and normative premise(s) identifies and directs towards fulfilling the need for a social condition (state of affairs) of peace and justice according to law.

And there are further, supplementary but important bases for judging law to be presumptively obligatory in conscientious judgement as well as in law's technical vocabulary or terminology. Hart and Rawls rightly pointed to the main consideration: I cannot be one who is rationally impartial (fair) unless I take the burdens of the practice of citizenship under the Rule of Law as well as its benefits – the burdens of complying with the law as well as the benefits that flow to me from others' willingness to comply with it.[51] The same sort of consideration can also be framed in terms of gratitude for the past benefits that have accrued to me from other persons' compliance with and upholding of the law. The sheer unreasonableness of free-riding on the Rule of Law is part of the core of law's more than nominal obligatoriness. And these backward-looking elements in the reasonableness of acknowledgement of and compliance with law's obligation are important, not least because law is the primary instrument that a community has for regulating its present and future *in line with the past* in which constitutions and laws and contracts were made and relied upon, injuries inflicted and entitlement to compensation crystallized, and so forth. As Aquinas notes, the obligations of adult children to their parents can be more weighty than many of their other debts.[52] Such obligations, like obligations to compensate in general, are highly intelligible even though they have no relation at all to anybody's acts of will directed to imposing them.

[51] Rawls 1971: secs 18 and 52; Hart 1983: 119. [52] II-II q. 189 a. 6 obj. 3, c, & ad 3.

In general, then, normativity is an inference from, or implication of, *need*. In the domain of law as a third-order (see Section 4), morally significant human enterprise, the need that grounds and informs normativity is the complex need for peace, justice (including compensatory, retributive and corrective justice) and the avoidance of anarchy and tyranny. That complex of needs itself can be traced to its roots in the needs that are identified as normatively significant in the first principles of practical reason directing us to the basic human goods (Section 1 above).

Lex injusta: Aquinas's position on the relation between a law's obligation and its justice has three elements. (1) The first has just been indicated: within a by-and-large just legal system, every intra-systemically valid law that imposes an intra-systemically legal obligation presumptively entails a moral obligation (which I have often called a legal-moral obligation) of the same extent/content as its intra-systemic obligation, even when it could reasonably and perhaps more fittingly have been significantly and incompatibly different. (2) But this presumptive legal-moral obligatoriness is defeated by any significant injustice in the law's motivation or in the fairness of the burdens it imposes on different sets of subjects. This element differs significantly from the 'Radbruch formula' thesis that a law's legal validity (both intra-systemic and legal-moral) is negated by its injustice above a high threshold of injustice (below which its validity and obligatoriness is unimpaired by even significant injustice). Aquinas's position is less tolerant of injustice than Radbruch's.[53]

(3) The third element in Aquinas's position is that laws and decisions deprived of legal-moral obligatoriness by their injustice may nonetheless be such that in some or many particular situations, or in relation to some of those whom they address, they should be applied/complied with, while in some or many situations, or in relation to others whom they address, they should not or need not be. The collateral (*per accidens)* obligation to comply with/apply them arises when knowledge of one's disobedience would give rise to 'disorder or demoralization' (*turbatio*) or give *scandalum*, the kind of 'example' that leads others into wrongdoing.[54] Aquinas does

[53] It approximated to the position adopted by Robert Alexy (a defender of Radbruch's position) in 2013, when he stated that significant injustice falling below the Radbruch threshold of severe or intolerable injustice renders intra-systemically valid laws 'legally defective'. See Finnis 2014: 100–109.

[54] I-II q. 96 a. 4c and ad 3; II-II q. 104 a. 6 ad 3.

not say enough about this (as I call it) collateral moral obligation. But presumably its measure – the degree of risk of disorder or moral corruption – is an assessment by reference to the same kinds of moral principle and consideration as regulate the legitimacy or wrongness of one's causing of side effects: among these considerations, primary is the Golden Rule of fairness, but there will be others such as one's commitments and other standing responsibilities. Clearly, there is here no algorithm or bright line. And this is one of the significant reasons for having just positive law – laws which can provide reasonably reliable guides for everyone's decision-making, and greatly reduce the directly moral hazards of unfairness (especially free-riding) and the social (and indirectly moral) hazards of a drift towards anarchy.[55]

8. Natural Law Reasoning in Applied Ethics

Practical reasoning is 'natural law reasoning' to the extent that it proceeds explicitly or implicitly from practical reason's first principles and their specification (making more specific) to morally (= ethically) significant *kinds* of action. As so specified, the first principles ground more or less specific moral norms (= precepts, rules), some affirmative (stating what kinds of act should be chosen), some negative (stating what kinds of action should not be chosen). Ethics is fully applied when these moral rules are brought to bear in the circumstances of some particular situation requiring or inviting a choice (to act, or not to act). A concrete choice is always of a particular (not merely specific) action (or forbearance), but moral judgements about the permissibility or impermissibility of a choice are always specific rather than particular: they retain always some generality (= universality), though the species in question may be *very* 'specific' to certain rare kinds of circumstances.

Aquinas is very clear that no affirmative precept can be exceptionlessly true; its rational applicability must always be conditional on the circumstances of a particular choice (where 'circumstances' includes

[55] Not least, that element connoted by Aquinas's term *turbatio* which I have rendered as 'demoralization'.

foreseen consequences/risks). Only negative precepts can rationally be exceptionless – that is, hold good and be applicable *whatever the circumstances* – and there are some exceptionless moral precepts. These positions he articulates in the traditional tag/slogan: such negative precepts apply *semper et ad semper*, but affirmative precepts all hold *semper sed non ad semper*: that is, they are always [*semper*] relevant and potentially applicable, but [*sed*] not applicable in/for every situation [*ad semper*; = *pro semper*], whereas the negative moral absolutes bind always and in every situation. One always has the responsibility of feeding one's own children, but that affirmative responsibility need not and morally must not be fulfilled when the only sustenance available for them is the flesh of (say) another child.

When speaking in theoretical generalities, Aquinas says that practical principles or precepts are more subject to override (exceptions) the more closely one approaches particulars.[56] But this is only a generalization, and is subject to exception/override; for he also holds, firmly, that there are some moral rules which are fully applicable and subject to no override, all the way to particular circumstances.[57] These rules are not very large in number, but they give applied ethics, and indeed our historic law, its backbone; they make possible the sincere affirmation of – and adherence to full respect for – some absolute human rights (not to be lied to or framed, tortured, raped, intentionally killed. . .). Each of these exceptionless negative precepts of morality picks out a kind of act which must never be chosen. The kinds of act are specified which are neither morally loaded (i.e. presuppose terms prior moral judgements: e.g. 'wrongfully', 'unjust[ly]', 'without justification', 'immoderately') nor refer only to types of movement specifiable without reference to intentionality. Instead, the kinds of act are specified by their 'object', by which Aquinas (and the tradition following him) means the intention with which the acting person selects the *means* to his further purposes. There is, indeed, as Aquinas makes clear, an asymmetry between right choosing and wrong choosing. A choice cannot be right (morally good) unless the acting person has right purposes/ends ('right intent(ion)') and chooses right (not wrongful) means to them, and does so in circumstances that do not make the action inappropriate. But a choice will be wrongful if, though the means adopted are morally permissible in

[56] *ST* I-II q. 94 a. 4c; Finnis 1998: 163–164. [57] Finnis 1998: 16–70.

themselves (say, charitable giving), they are chosen with a wrongful purpose/motive (say, of seducing the beneficiary, or the electorate), *or* in inappropriate circumstances (the moneys given are owed to others as wages). *Bonum ex integra causa, malum ex quocumque defectu.*[58]

To identify what object one's own act or proposed act has, one must distinguish between what one intends and what one does not intend but does foresee as a certain or likely or possible side effect of one's choice/action. One intends everything that figures in one's deliberation (in which one shapes proposals for adoption by choice, including the proposal to do the act in question) either as an end/purpose or as a means to such end(s)/purpose(s). The proper description of the intention(s) is given not by some moralized, rationalizing or apologetic/self-justificatory redescription, but by the description under which the act is attractive (and seems choice-worthy) to one as an end or a means – the description under which it, so to speak, *does the job.*[59] What is not part of one's intention but is foreseen as a certain, likely or possible consequence of one's act is a side effect.

What one intends is morally evaluated according to the moral norms applicable to the act so intended, including, first of all, any applicable exceptionless negative precept. Side effects, in the sense just defined, are morally evaluated not according to those norms but according to the moral principles and rules applicable to side effects – especially the Golden Rule of fairness. That is to say, one is morally responsible for the foreseen or reasonably foreseeable effects of one's acts, but the measure of one's responsibility is not any exceptionless moral norm/precept, but the more flexible, circumstance-relative moral standards of fairness, appropriate fidelity to undertakings, and so forth. To some extent, such standards of fairness, etc., are relative to the conventions or other reasonably accepted standards of one's community.

Aquinas chooses to expound morality, in his *Summa Theologiae*, in terms of virtues and vices. But his arguments differentiating between particular virtues and the corresponding vices are virtually all arguments justifying and/or deploying propositional moral standards we call the norms (precepts) of the natural moral law.

[58] *ST* I-II q. 18 a. 4 ad 3; Finnis 1998: 148 n. 73.

[59] See e.g. Finnis, responses to Gormally (and Anscombe) and Kenny, in 2013: 480–489, and the works there cited.

9. Law as an Idea We Live By

Law, as Aquinas speaks of it, in its central case[60] – human positive law – is propositional: a matter of *ideas*. The rules or norms and principles of political communities governed by systems of law cannot meet the need we have for them unless they are *facts*. And they can be facts only if they are first ideas in the minds of those who make them (posit them), or whose practices are the source of purely customary laws. These ideas become efficacious social facts only by being adopted – thought of as relevant reasons for action – in the deliberations and consequent choices and actions of those to whom they were addressed, the laws' subjects. Those social facts are human realities that cannot be accurately understood – whether by participants in the society, reflecting on or deliberating about its actual situation and prospects, or by historians, sociologists or other observers – unless the ideas (propositions) those facts embody are first understood precisely as they were understood in the deliberations of law-positers and of the persons their laws were made to guide. All the facts about laws are primarily facts in the realm of spirit – of that dimension of human reality in which ideas, meanings, propositions, valid argumentation and properties such as truth, falsity and logical soundness, not to mention aspirations, aversions and intentions, can all leap (not without material support at each end) from mind to mind and thereby, both immediately and mediately, change the world.

No understanding and no philosophical account of the nature of law as a distinct kind of social institution is satisfactory unless, in it, the idea of *both rulers and ruled* being governed by law is understood and presented as a moral idea, and unless the reality of being ruled by law is presented as an instance, sound or defective, of moral association. The Rule of Law (see Section 15) is not a mere ideal distinct from the social fact, and the nature, of Law. Rather, in relation to central cases of human law, that idea which, as an aspiration, can be called an ideal is, as an adopted and executed choice, at the heart of the law's nature and its social reality. But the moral idea of a community ruled by law is best understood not so much as an

[60] Terms with meanings (concepts) fit for employment in the 'philosophy of human affairs', of which legal philosophy is part, are terms and concepts at once both wide and narrow because they apply focally to the (narrow range of) central instances of law or friendship or constitutionality or citizenship, etc., and non-focally (*secundum quid*) to the (wider range of) instances that are deviant, marginal, secondary, undeveloped, etc.

ideal or an aspiration as, rather, a stringent moral duty or cluster of duties of justice. Every free people[61] has the moral duty to arrange as best it can to institute legislators, courts and executive authorities to establish, identify, enforce and maintain those laws for the sake of establishing and maintaining justice in the relations between all the members of the community, in tandem with peace, worthwhile culture and prosperity in a sustainable common life respectful of the natural (human) rights of individuals and families.

10. Law and its Moral Impact

Having presented law (in its central form) as, in shape and content, a response to human need, and having explicated that need in terms of all the human goods at stake, including the good of practical reasonableness (the ground of justice and all the other virtues), Aquinas draws the conclusions mentioned above (secs. 7 and 8) – that each legal obligation presumptively entails a moral obligation that is of the same content (though not of the uniform strength that legal obligations have), though the presumption can be defeated in a variety of ways by unjust motives or content. But he also points to other qualifications made unavoidable by the complexity of human affairs. Law achieves its third-domain moral purposes by its enactment and maintenance as a very complex fourth-domain art-cum-technique. The technique, taught in law schools and in apprenticeship to practitioners, is detachable from its moral justifications, and can be deployed with factual success in the pursuit of other objectives of many amoral or immoral kinds. Even when it is being deployed, by all concerned, with ripest good faith and virtuous motivations, the occurrence of misperceptions and cross-purposes, and of unforeseen side effects of innumerable kinds, often results in situations where intra-systemic legal obligation, legal-moral obligation and other kinds and sources of moral obligation pull apart from each other.

Among the kinds of dispersal of law's moral impact that are discussed by Aquinas are (i) cases where application of reasonable rules of evidence or procedure results in condemnation of the innocent or exculpation of the

[61] I-II q. 58 a. 2c; Finnis 1998: 258–266.

dangerously guilty;[62] (ii) cases where a law's plain and intended propositional content extends to circumstances such that, had the legislature envisaged them it would have limited or otherwise changed or even abandoned that propositional content;[63] (iii) cases where violations of a law are so extensive and unchecked that it can be fair to acknowledge the deviations as not merely a fact but a custom of the kind that – arguably – might reasonably be accepted as amending the law or at least its legal-moral obligation-imposing content;[64] (iv) cases of laws just in themselves but enacted by law-makers who rule with far-reaching injustice.[65] The controversial or at least discussable character of the solutions proposed by Aquinas for all or some of these categories shows how far it is inappropriate to deny the 'conceptual' link between positive law and justice, but equally is inappropriate to simply equate positivity and intra-systemic legal obligation with moral impact.

11. Law's 'Real' and 'Ideal' Dimensions

The whole set of elements and features that cluster together in the central case(s) of law would not so cluster and belong together but for the morally significant *need* people know we have for law of this kind. One can call a people's responsiveness to that need – the responsiveness that results in their setting up and maintaining a legal system – their 'idealism', though Aquinas would perhaps more appropriately call it their virtue, in particular their justice and practical reasonableness (*prudentia*). But once a legal system has come into being as a result of such idealism or virtue (or as a result of efforts to feign such idealism or virtue), it can be described as a social fact, a 'reality'. The description will not be very realistic unless it conveys an understanding of the ideas that shape and more or less control

[62] II-II q. 67 a. 2; q. 64 a. 6 ad 3: judges must in all cases proceed only on evidence legally admissible before them, and never on their private knowledge (even when that is certain and would entitle someone accused of a capital offence to be acquitted; the judge in such a case should, however, make exceptional efforts to obtain admissible evidence entitling the accused to acquittal).

[63] I-II q. 96 a. 6 ad 2; II-II q. 60 a. 5 ad 2; equity is a matter of acting on this hypothetical intention rather than 'the words' or form of the law: ibid.; see also II-II q. 120 a. 1; q. 157 a. 3 ad 1; Finnis 1998: 272n, 257 n. 19.

[64] I-II q. 97 a. 3c & ad 2 & ad 3; a. 2c & ad 3; Finnis 1998: 270.

[65] See Finnis 1998: 289 n. 85.

the system, including ideas of validity and of at least procedural justice, judging according to law rather than to private biases, and so forth. ('Realist' theories of law that reduce it to regularities of predictable behaviour are notoriously unrealistic.) Still, the reality of a working system can certainly be described without endorsing the ideal, or perhaps any ideal.

Aquinas, like his philosophical predecessors, was alive to this duality of viewpoints, and takes care to exemplify them near the beginning of his treatise on law. Arguing that it is part of the point of law that it intend to help make its subjects good people, he confronts the objection that some laws are tyrannical and wicked:

> A tyrannical law, since it lacks [full] reasonableness, is not law without qualification [= not a central case of law], but is more a perversion of law. Nevertheless, in so far as it does have something of the character of law, even a law of this kind intends that its subjects be good. For it has the character of law in this respect, that it is a dictate of ruler to ruled; and so it intends that the latter become good; not good without qualification, but good relative to that regime.[66]

Say, good Nazis. But it remains that both the realities of a social coordination system, and even a descriptive social *theorist*'s understanding, will fall short of the central concept of law unless at least the system's architects are working in line with the human need for laws that are just in content and procedures, and the theorist sees the point of such an ideal, aspiration or moral responsiveness to that need. Aquinas shares Aristotle's fundamental principle of political theorizing: 'In all such matters, pertaining to human activities, it seems that the truth about them is whatever seems to the virtuous person (who judges rightly about such matters) to be the case'.[67] Aquinas gets beyond the threat of circularity here by carrying the enquiry into the *principles* of the virtuous person's practical understanding.[68]

[66] I-II q. 92 a. 1 ad 4. So likewise there can be 'honour' [*fides*] among thieves, and if so their gang has a 'juridical order' [*ordo iuris*, a system of law/right(s)] and 'a kind of justice' [*aliquam formam iustitiae*]: Aquinas, II *Sent.* d. 6 a. 4 ad 3. But one does not understand fidelity, law, right, justice or human society most adequately by understanding these concepts, and the corresponding realities, as they are understood and lived out in the Mafia. Finnis 1998: 42–47.

[67] Aquinas, *Commentary on Aristotle's Ethics* X. 8 n. 13; Finnis 1998: 48; Finnis 2011a: 15n, 102, 128–9, 366.

[68] See Finnis 1998: 47–51.

12. How to Think About the Nature of Law

Recent work in philosophy of law includes many discussions of human law's 'nature or essence', understood as those properties of law that are necessary, or at least important and typical or characteristic of 'law as such, wherever it may be found'[69] (or that help explain how and why human law can be considered a *kind*, and laws or legal systems its *instances* or instantiations).[70] Some hold that law has no nature; only natural objects have a nature, and human law is artefactual, not natural. Others reply that there are *kinds* of artefacts: paper clips differ in nature from printer drivers, and being a soft cheese blob excludes being a paper clip – excludes being something of that kind or nature. Attention is shifting promisingly to paradigms of artefact more relevant to law than paper clips are: assertions, for example.

Obviously, such discussions need a better inventory of kinds and paradigms of description(s), explanation(s) and *kind(s)*, such as the inventory (still improvable) with which Aquinas began his *Commentary on Aristotle's Ethics* identifying (Section 2 above) four kinds, or domains, of pattern (*ordo*) and correspondingly of explanatory (analytical and synthesizing) description (*scientia*), each irreducibly distinct though all found in the life and nature of human persons and their groups. Each of the terms 'nature' ('of this nature'), 'essence' (essentially...), 'kind' ('of a different kind'), 'identity' ('identical', 'similar'...) and so forth is correctly usable in each of the four domains. But the precise meaning of each shifts, more or less systematically, as its use shifts between domains: they are **analogical** terms, neither univocal nor merely equivocal.

Law (human law, matching 'legal/legally'), belongs within each of the four domains:[71] thought about its nature must attend to this complexity and avoid describing and explaining law *reductively*, as if it pertained essentially to only one (or two, or three) of them. The properties

[69] See Gardner's 'Law in General' in Gardner 2012: 270, 279, 301.

[70] Exemplars besides Gardner include Raz, 'The Problem about the Nature of Law' in Raz 1994; Raz, 'On the Nature of Law' and 'About Morality and the Nature of Law' in Raz 2009; Alexy 2007; Schauer 2012; Leiter 2012; essays by Murphy, Flores and Marmor in Waluchow and Sciaraffa 2013; Murphy 2015; and Burazin 2016.

[71] Finnis 2017.

necessary – needed – to constitute law and fully instantiate its nature include properties in each of the four domains. Deficiencies in a property in (say) one domain but not the others need not entail that the law or legal order is so deficient that it is simply not law: just as citizenship conferring rights to vote but not to be elected is citizenship, but not a **central case** of that reality nor the **focal meaning** of 'citizen(ship)', so deficient, mutant, borderline instances leave intact the theses that law has a nature, which theories of law describe and explain, correctly or deficiently and more or less erroneously. Theories should focus on the central (kinds of) cases of law, which embody its nature most fully or adequately, and should locate non-central cases in the subject-matter's analogical structure, a location settled not by *statistical* 'typicality', but by each relevant domain's criteria of good (true) explanation.

What best explains the features law has, taking all four domains together, is its (third-domain) character as a response to human communities' morally significant need for the kind of access to justice that only law systematically provides. The third-domain reasons which give law its characteristic shape and nature are reasons for making it have the character it has as participating in the first, second and fourth domains of explanation, as a natural reality governing natural realities (human persons), as a logical-propositional realm of validity and correlativities of duty, power and right, and as a complex artefact and technique of signs, institutions and activities – a *positing* yielding *positive* law.

For central to law's nature is that law links – because a society needs, in justice, to link – present decisions not simply to achieving future benefits (as any rational plan does) but also to doing so by honouring *past* commitments, both public *and private*. Legislation is a form of public commitment: to deal with certain matters *henceforth* in the way that *was* specified in the law-making act (constitution, statute, etc.). Adjudication by application of law is a complex, thorough public acknowledgement (and following through) of those and comparable (customary, precedential) commitments. Private acts of undertaking obligations are commitments to act in the ambulatory present with fidelity to those past acts even when one's future well-being might in other respects be enhanced by neglecting those commitments.

So law and the Rule of Law[72] cannot be reduced to the model of planning.[73] For that model includes, perhaps paradigmatically, the activities of soldiers, architects and engineers, whose sole concern quite reasonably is future wellbeing as it may be enhanced or protected *starting from now* with what *now* lies to hand. Law is planning in (reformable) fidelity to past enactments and other historical ('social-fact') *sources* of law and obligation or entitlement (acquired rights); the plan was adopted *then*, and is (presumptively) to be applied *now* not so much for its promise of benefit as for its validity as positive (posited) law (and therefore as political commitment of the community). The fully reasonable premise for acknowledging positive law as a reason for action now (as judge, administrator or other subject) is a moral premise: justice as a fundamental aspect of promoting the common good of my political community presumptively requires me, in reason, to respect the commitments articulated in the rules, and by the institutions, of our law.

The principles directing this needed willingness (or summons) to act justly are what the millennial tradition followed by Aquinas called natural law (synonymously, 'natural right'). Principles of natural law – that is, of practical reasonableness uncorrupted by sub-rational bias or inattention – direct us not only to make all our choices consistent with various specific principles and norms of justice, but also to promote and protect these by establishing positive laws and law, and then by recognizing, maintaining and applying the rules of this positive law according to their tenor – that is, in the meaning established by their own content and by the content of rules of validity and principles of interpretation and requirements of coherence with other positive rules of the system considered as a whole that ought (according to the same foundational, natural-law principles of justice) to be coherent, capable of application and compliance (and so not retroactive), relatively stable, intelligible to those whom they concern, and actually adhered to by those whom this legal system designates as its officers. Where a legal system's

[72] Unfortunately, Aquinas discontinued his commentary on Aristotle's *Politics* shortly before the extensive discussion of the Rule of Law and why it is generally preferable to the legally unregulated rule of persons, even just persons. But his treatment of law in *ST* I-II qq. 90–105 tacitly presupposes that thesis, and incorporates all or almost all its features (see Section 15 below).

[73] Cf Shapiro 2011: 194: 'the law is simply a sophisticated apparatus for planning in very complex, contentious, and arbitrary communal settings'.

rules, institutions and practices conform sufficiently to these morally desirable structural/procedural features, the political community[74] they govern can be said (in the wake of Aristotle's debate about the matter) to instantiate the Rule of Law.[75]

13. Authority, Law and Common Good

Aquinas uses the term *auctoritas* with the full range of meanings of our word 'authority'. As there is the theoretical authority of great scientists, mathematicians and other scholars, so there is the *auctoritas* of Aristotle as scientist and philosopher, or of the great and saintly scholars of the early Church. As there is the practical authority of coaches, captains, parents, judges and legislators, so there is the *auctoritas* of such personages in Aquinas's thought about human affairs. A free people has the authority to appoint its own rulers, legislative and executive, and even to override the authority of these rulers by its own deliberate customs.[76] Going to war will not be just unless a *legitima auctoritas* authorizes it,[77] and the public *auctoritas* of a ruler or judge can make permissible lethal acts that are morally excluded from the deliberation and choice of private persons.[78] Adoption of children is *auctoritate principis*, lawful only when sufficiently authorized by the supreme ruler or legislature.[79]

As these few examples among many suggest, authority and obligation do not have the same scope. Authority is capacity to change the juridical (moral and/or legal) position of another or others (or indeed of oneself), and the change may be by granting a permission that cancels duty, or by conferring a power (authority) or status, or by directly or indirectly imposing an obligation. Moreover, many if not all of these changes in juridical position may occur otherwise than as the result of an exercise of authority, but rather by changes of circumstances that make it reasonable

[74] A non-state community can have a legal system in a near focal sense. So Pope Paul III's commission of inquiry under Cardinal Contarini into the Reformation's causes reported that some popes (mis-advised by ecclesiastical lawyers) ruled like private owners rule over their property, setting aside the Rule of Law commended in Aristotle's *Politics*, and governing the Church *just as they pleased*, whence emerged (as from a Trojan horse) the desperate illnesses infecting the Church of 1537: *Consilium de Emendanda Ecclesia*: [Rome, 1538] Aii-iv.

[75] See Simmonds 2007: s.v. 'rule of law'; Finnis 2010: 247, 250. [76] I-II q. 97 a. 3 ad 3.

[77] II-II q. 40 a. 1. [78] II-II q. 64 aa. 3, 7. [79] IV *Sent.* d. 42 q. 2 a. 1 ad 1.

and legitimate to judge that powers have arisen, or obligations been nullified or created, just by virtue of the new configuration of circumstances (that is, new relationships, e.g. of dependence, between persons). Examples of these various kinds of juridical capacity and change can readily be found across Aquinas's works.

Where the channel whereby someone's juridical position can legitimately be changed involves an *auctoritas* conferred upon or attributed to some person or group, the exercise and juridical effect of the authority is hedged about by conditions, always by moral conditions and very often by legal ones. Aquinas sometimes calls these conditions 'limits'.[80] As noted in Section 8 above, the moral conditions are multiple and demanding, and they include the legal limits: the *ultra vires/ultra potestatem* character of some exercise of rule-making authority presumptively renders it so far forth unjust, illegitimate and deprived of legal-moral authority/obligatoriness.[81] There often remains a residual collateral moral obligation, but it may sometimes entail the attribution *pro tanto* of a collateral, *de facto* moral authority to the rulers who have acted illegitimately, but who ought not to be treated as deprived of all standing, if so treating them would be unjust, all things considered.

Intention to promote, and compatibility with, the common good of a complete community is an essential element in the definition of law,[82] and thus in recognizing a central case of human law. In the secular sphere, to say of a community that it is 'complete' is to say that it is a political community, that is, a state. The rulers of a state need to have a morally sound conception of the all-round good of individuals, families and other groups, and need to favour the promotion and defence of this, so far as it falls within their jurisdiction. But their jurisdiction to impose coercive legal obligations is limited, according to Aquinas, to a (large) *sub*set of the common good: the *public* good of justice and peace in the relations between persons in the state.[83] Public good concerns the inter-personal, external conduct of persons, and so does not include everything that contributes to or harms the true flourishing of individuals and groups.

[80] See Finnis 1998: 258–66. [81] I-II q. 96 a. 4c. [82] See Section 6 at n. 44.
[83] See I-II q. 96 a. 3c; q. 98 a. 1c; q. 100 a. 2c; Finnis 1998: 222–254, especially 223–226, 230.

14. Constitutional Theory

Though he perhaps lacks[84] a term securely translatable as 'constitution' or 'constitutional', Aquinas has in mind two main elements of the concept we express with those words: (1) the idea of rules defining the tenure of offices of state, the jurisdiction of such offices, and the conditions for election or appointment to them; and (2) the idea that the jurisdiction of state government and law is appropriately *limited*, both by moral principles and rules (including some exceptionless negative norms), and by positive-law rules. While there can be just (non-tyrannical/despotic) government with 'plenary' authority – governance he calls 'regal' – there is another kind of government, one that he calls 'political' and for most situations seems to have preferred, in which the authority of even the supreme ruler(s) is limited by laws made for the purposes of imposing such limitation on and regulation of governance.[85]

His promotion of this distinction had significant historical impact. The influential English judge and political theorist of the late fifteenth century, Sir John Fortescue, popularized the distinction – precisely as Thomas Aquinas's – by praising English governance as political rather than (like the less fortunate French) regal. The early seventeenth-century establishing of our constitutional separation of legislative, executive and judicial power claimed the patronage of, among others, Fortescue (and thus, tacitly, took some guidance from Aquinas).[86]

15. Aquinas and Lon Fuller

With admirable frankness, Lon Fuller acknowledged[87] that the main elements of the Rule of Law (Section 12 above) are pointed out in Aquinas's discussion of law. Explicitly, Aquinas points to promulgation (publication),[88] clarity,[89] generality,[90] stability[91] and practicability[92]; implicitly, he points also to law's need for prospectivity and coherence.

[84] But perhaps not: he speaks of 'certain precepts about the *institutio* [establishment and appointment] of the rulers and [establishment] of their responsibilities': I-II q. 104 a. 4c; q. 105 a. 1 obj. 1; *Aquinas* 262–263.

[85] *S.T.* I q. 108 a. 2; I-II q. 105 a. 1c; II-II q. 183 a. 2 ad 3; Finnis 1998: 259–263.

[86] See Finnis 2013: 560–561. [87] Fuller 1969: 242. [88] I-II q. 90 a. 4c.

[89] I-II q. 95 a. 3c. [90] I-II q. 96 a. 1. [91] I-II q. 97 a. 2c. [92] I-II q. 95 a. 3c.

In Aquinas's discussion of governance and law can also be found the idea of (the desirability of) a free people willingly cooperating in governance by laws,[93] and the idea that the supreme rulers, though not (for reasons of practicability) subject to law's coercive force, are nonetheless subject to its legal-moral authority and obligatoriness, its *vis directiva* (directive force).[94] This need for reciprocal subjection[95] (of both rulers and ruled alike) to the law is what, above all the other elements listed by Fuller, makes the Rule of Law a *moral* idea, a morality of (governance by) law, and clarifies the true basis for a whole set of elements.[96] Fuller thus explicitated an idea launched into political and juristic reflection by Aristotle, developed a little by Aquinas, and more or less completed by the modern work that Fuller inspired and thoroughly informed.[97]

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[93] I-II q. 93 a. 5c; q. 98 a. 6c; q. 107 a. 1c. [94] I-II q. 96 a. 5 ad 5; Finnis 1998: 259–260.

[95] Finnis: 260–261, 265–266.

[96] See Finnis 2011a: 270–274: the Rule of Law secures 'the dignity of self-direction and freedom from certain forms of manipulation', and respects 'the dignity of [persons'] being responsible agents . . . not made to live their lives for the convenience of others but . . . allowed and assisted to create a subsisting identity . . .'; 'the Rule of Law is thus among the requirements of justice and fairness'.

[97] See n. 75 above.

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Natural Law, God and Human Dignity 3

Robert P. George

Knowledge of Natural Law

One's knowledge of natural law, like all knowledge, begins with experience, but it does not end or even tarry there. Knowing is an activity – an intellectual activity, to be sure, but an activity nonetheless. We all have the experience of knowing. But to know is not merely to experience. Knowing is a complex and dynamic activity. The role of experience in the activity of knowing is to supply data on which the inquiring intellect works in the cause of achieving understanding. Insights are insights into data. They are, as Bernard Lonergan brilliantly demonstrated by inviting readers to observe and reflect on their own ordinary intellectual operations, the fruit of a dynamic and integrated process of experiencing, understanding and judging.[1]

So what are the data supplied by experience that are at the foundation of practical judgements – that is to say, insights – that constitute knowledge of natural law? They are the objects of intelligibly choice-worthy possibilities – possibilities that, inasmuch as they provide reasons for action of a certain sort (that is, more than merely instrumental reasons) – we grasp as *opportunities*.

In our experience of true friendship, for example, we grasp by what is ordinarily an effortless exercise of what Aristotle called 'practical reason' the intelligible point of having and being a friend. We understand that friendship is desirable not merely for instrumental reasons – indeed, a purely instrumental friendship would be no friendship at all – but above all for its own sake. Because we grasp the intelligible point of having and being a friend, and we understand that the fundamental point of friendship is friendship itself, and certainly not goals extrinsic to friendship to which the activity of friendship is merely a means, we reasonably judge

[1] See Lonergan 1955.

that friendship is intrinsically valuable. We know that friendship is a constitutive and irreducible aspect of human well-being and fulfilment, and that – *precisely as such* – friendship provides a reason for action of the sort that requires for its intelligibility as a reason no further or deeper reason or sub-rational motivating factor to which it is a means.

The same is true if we shift our focus to our experience of the activity of knowing itself. In our experience of wonder and curiosity, of raising questions and devising strategies for obtaining correct answers, of executing those strategies by carrying out lines of inquiry, of achieving insights, we grasp (by what is again for most people in most circumstances an effortless exercise of practical reason) the intelligible point of searching for truth and finding it. We understand that knowledge, though it may have tremendous instrumental value, is intrinsically valuable as well. To be attentive, informed, thoughtful, clear-headed, careful, critical and judicious in one's thinking and judging is to be inherently enriched in a key dimension of human life. We reasonably judge the activity of knowing, then, to be an intrinsic (or 'basic') human good – a constitutive and irreducible aspect of our flourishing as human beings. Like friendship and a number of other types of activity, knowledge provides a reason for choice and action that requires for its intelligibility as a reason no further or deeper reason or sub-rational source of motivation to which it is a means.

Knowledge of natural law, then, is not innate. It does not swing free of experience or of the data provided by experience. Even when it is easily achieved, practical knowledge (i.e. knowledge of natural law) is an achievement. It is the fruit of insights which, like all insights, are insights into data: data which are supplied by experience. The insight – the knowledge – that friendship or knowledge itself is intrinsically humanly fulfilling is ultimately rooted in our elementary experiences of the activities of friendship and knowing. Apart from those experiences, there would be no data on which practical reason could work to yield understanding of the *intelligible point* (and, thus, of the value) of friendship or knowledge and the judgement that these activities are intrinsic fulfilments of the human person and, as such, objects of the primary principles of practical reason and basic precepts of natural law.

Of course, not all practical knowledge is, strictly speaking, moral knowledge (that is, knowledge of moral norms or their correct applications), though all moral knowledge is practical knowledge – it is (or centrally

includes) knowledge of principles for the direction and guidance of action.[2] Yet knowledge of the most fundamental practical principles directing action towards the basic human goods and away from their privations, though not strictly speaking knowledge of moral norms, is foundational to the generation and identification of such norms. That is because moral norms are principles that guide our actions in line with the primary practical principles integrally conceived. Norms of morality are specifications of the integral directiveness or prescriptivity of the various aspects of human well-being and fulfilment that together constitute the ideal of integral human flourishing. So, if the first principle of practical reason is, as Aquinas says, 'the good is to be done and pursued, and the bad is to be avoided',[3] then the first principle of morality is that 'one ought always to choose and otherwise will in a way that is compatible with a will towards integral human fulfilment'.[4] And just as the first principle of practical reason is specified, as Aquinas makes clear, by identifying the various irreducible aspects of human well-being and fulfilment (namely, friendship, knowledge, aesthetic appreciation, skilful performance, religion and so forth), so too the first principle of morality is specified by identifying the norms of conduct that are entailed by an open-hearted love of the human good (that is, the good of human persons) taken as a whole.

Natural Law and Human Rights

A natural law theory is a critical reflective account of the constitutive aspects of the well-being and fulfilment of human persons and the communities they form. Such a theory will propose to identify principles of right action – moral principles – specifying the first and most general principle of morality: namely, that one should choose and act in ways that are compatible with a will towards integral human fulfilment. Among these principles are respect for rights people possess simply by virtue of

[2] Inasmuch as the first and most basic practical principle directing human choosing towards what is intelligibly worthwhile and away from its privations is foundational to the identification of moral knowledge, there is a sense in which knowledge of those principles is *incipiently* moral knowledge.

[3] St Thomas Aquinas, *Summa Theologiae*, I–II, Q. 94, A. 2

[4] On the first principle of morality and its specifications, see Finnis, Boyle and Grisez 1987: 281–287.

their humanity – rights which, as a matter of justice, others are bound to respect, and governments are bound not only to respect but, to whatever extent possible, also to protect.

Natural law theorists of my ilk understand human fulfilment – the human good – as variegated. There are many irreducible dimensions of human well-being. This is not to deny that human nature is determinate. It is to affirm that our nature, though determinate, is complex. We are animals, but rational. Our integral good includes our bodily well-being, but also our intellectual, moral and spiritual well-being. We are individuals, but friendship and sociability are constitutive aspects of our flourishing.

By reflecting on the basic goods of human nature, especially those most immediately pertaining to social and political life, natural law theorists propose to arrive at a sound understanding of principles of justice, including those principles we call human rights. In light of what I have already said about how natural law theorists understand human nature and the human good, it should be no surprise to learn that natural law theorists typically reject both strict individualism and collectivism. Individualism overlooks the intrinsic value of human sociability and tends mistakenly to view human beings atomistically. It fails to account for the *intrinsic* value of friendship and other aspects of human sociability, reducing all relationships to *means* by which the partners collaborate with a view to more fully or efficiently achieving their individual goals and objectives. Collectivism compromises the dignity of human beings by tending to instrumentalize and subordinate them and their well-being to the interests of larger social units – the community, the state, the *Volk*, the fatherland, the *Führer*, the future communist utopia. Individualists and collectivists both have theories of justice and human rights, but they are, as I see it, highly unsatisfactory. They are rooted in important misunderstandings of human nature and the human good. Neither can do justice to the concept of a human *person* – that is, a rational animal who is a locus of intrinsic value (and, as such, an *end in himself* who may never legitimately treat himself or be treated by others as a mere *means*) but whose well-being intrinsically includes relationships with others and membership in communities (beginning with the family) in which he or she has, as a matter of justice, both rights and responsibilities.

Human rights exist (or obtain) if it is the case that there are principles of practical reason directing us to act or abstain from acting in certain ways

out of respect for the well-being and the dignity of persons whose legitimate interests may be affected by what we do. I certainly believe that there are such principles. They cannot be overridden by considerations of utility. At a very general level, they direct us, in Kant's phrase, to treat human beings always as ends and never as means only. When we begin to specify this general norm, we identify important negative duties, such as the duty to refrain from enslaving people. Although we need not put the matter in terms of 'rights', it is perfectly reasonable, and I believe helpful, to speak of a *right* against being enslaved, and to speak of slavery as a violation of human *rights*. It is a right that people have, not by virtue of being members of a certain race, sex, class or ethnic group, but simply by virtue of our humanity.[5] In that sense, it is a *human* right. But there are, in addition to negative duties and their corresponding rights, certain positive duties. And these, too, can be articulated and discussed in the language of rights, though here it is especially important that we be clear about by whom and how a given right is to be honoured.

Sometimes it is said, for example, that education or healthcare is a human right. It is certainly not unreasonable to speak this way; but much more needs to be said if it is to be a meaningful statement. Who is supposed to provide education or healthcare to whom? Why should those persons or institutions be the providers? What place should the provision of education or healthcare occupy on the list of social and political priorities? Is it better for education and healthcare to be provided by governments under socialized systems, or by private providers in markets? These questions go beyond the application of moral principles. They require prudential judgement in light of the contingent circumstances people face in a given society at a given point in time. Often, there is not a single, uniquely correct answer. The answer to each question can lead to further questions, and the problems can be extremely complex: far more complex than the issue of slavery, where once a right has been identified its

[5] By the phrase 'our humanity', I refer more precisely to the nature of humans as rational beings. The nature of human beings is a rational nature. So, in virtue of our human nature, we human beings possess a profound and inherent dignity. The same would be true, however, of beings other than humans whose nature is a rational nature, if indeed there are such beings. In the case of humans, even individuals who have not yet acquired the immediately exercisable capacities for conceptual thought and other rational acts – and even those who have temporarily or permanently lost them, and, indeed, even those who do not possess them, never possessed them, and (short of a miracle) never will possess them – possess a rational nature.

universality and the basic terms of its application are fairly clear. Everybody has a moral right not to be enslaved, and everybody an obligation as a matter of strict justice to refrain from enslaving others; governments have a moral obligation to respect and protect the right and, correspondingly, to enforce the obligation.[6]

What I have said so far will provide a pretty good idea of how I think we ought to go about identifying what are human rights. But in each case the argument must be made, and in many cases there are complexities to the argument. One basic human right that almost all natural law theorists would say belongs in the set is the right of an innocent person not to be directly killed or maimed. This is a right that is violated when someone makes the death or injury of another person the precise object of his action. It is the right that grounds the norm against targeting non-combatants, even in justified wars, and against abortion, euthanasia, the killing of hostages, and so forth. Of course, in the case of abortion, some people argue that human beings in the embryonic or fetal stages of development do not yet qualify as persons and so do not possess human rights; and in the case of euthanasia, some argue that permanently comatose or severely retarded or demented people do not (or no longer) qualify as rights-bearers. I think that these claims are mistaken, but I won't here go into my reasons for holding that the moral status of a human being does not depend on his or her age, size, stage of development or condition of dependency. I have presented this argument in great detail in numerous places, including my recent book *Embryo: A Defense of Human Life* (with Christopher Tollefsen).[7] Here I will say only that people who do not share with me the conviction that human beings in early stages of development and in

[6] Having said this, I do not want to suggest a sharper difference than can be justified between positive and negative rights. Even in the case of negative rights, it is sometimes relevant to ask how a right should be honoured and who, if anyone, has particular responsibility for protecting it. Moreover, it can be the case that there is not a uniquely correct answer to questions about what place the protection of the right should occupy on the list of social priorities. Consider, for example, the right not to be subjected to assault or battery. While it is obvious that individuals have the obligation to respect this right, and equally obvious that governments have an obligation to protect persons within their jurisdiction from those who would violate it, different communities reasonably differ not only as to the means or mix of means that are used to protect persons from assault and battery, but also as to the level of resources they allocate to protect people against violations of the right. I am grateful to Allen Buchanan for this point.

[7] George and Tollefsen 2011.

severely debilitated conditions are rights-bearers, may nevertheless agree that *whoever* qualifies as a person is protected by the norm against direct killing of the innocent.

Human Dignity

The natural law understanding of human rights that I am here sketching is connected with a particular account of human dignity. Under that account, the natural human capacities for reason and freedom are fundamental to the dignity of human beings – the dignity that is protected by human rights. The basic goods of human nature are the goods of a rational creature – a creature who, unless impaired or prevented from doing so, naturally develops and exercises capacities for deliberation, judgement and choice. These capacities are God-like – albeit, of course, in a limited way. In fact, from the theological vantage point they constitute a certain sharing – limited, to be sure, but real – in divine power. This is what is meant, I believe, by the otherwise extraordinarily puzzling Biblical teaching that man is made in the very image and likeness of God. But whether or not one recognizes Biblical authority or believes in a personal God, it is true that human beings possess a power traditionally ascribed to divinity: namely, the power of an agent to cause what the agent is not caused to cause. This is the power to envisage a possible reality or state of affairs that does not now exist or obtain; to grasp the intelligible point – the value – of bringing it into being, and then to act by choice (and not merely by impulse or instinct, as a brute animal might) to bring it into being. That state of affairs may be anything from the development of an intellectual skill, or the attainment of an item of knowledge, to the creation or critical appreciation of a work of art, to the establishment of marital communion. Its moral or cultural significance may be great or, far more commonly, comparatively minor. What matters for the point I am now making is that it is a product of human reason and freedom. It is the fruit of deliberation, judgement and choice.

Of course, a further question will present itself to the mind of anyone who recognizes the God-likeness of our capacities for rationality and freedom: capacities that are immaterial and spiritual in nature. That question is whether beings capable of such powers could exist apart from

a divine source and ground of their being. So one finds in the affirmation of these powers a decisive ground for the rejection of materialism, and one discerns the basis of an openness to, and even the roots of an argument for, theism. But more on that point later.

Now, what about the authority for this view of human nature, the human good, human dignity and human rights? Natural law theorists are interested in the intelligible *reasons* people have for their choices and actions. We are particularly interested in reasons that can be identified without appeal to any authority apart from the authority of reason itself. This is not to deny that it is often reasonable to recognize and submit to religious or secular (e.g. legal) authority in deciding what to do and not do. Indeed, natural law theorists have made important contributions to understanding why and how people can sometimes be morally bound to submit to, and be guided in their actions by, authority of various types. Think, for example, of Yves Simon's work[8] and that of John Finnis.[9] But even here, the special concern of natural law theorists is with the *reasons* people have for recognizing and honouring claims to authority. We do not simply appeal to authority to justify authority.

One might then ask whether human beings are in fact rational in anything more than an instrumental sense. Can we discern any intelligible reasons for human choices and actions? Everybody recognizes that some ends or purposes pursued through human action are intelligible at least insofar as they provide means to other ends. For example, people work to earn money, and their doing so is perfectly rational. Money is a valuable means to a great many important ends. No-one doubts its instrumental value. The question is whether some ends or purposes are intelligible as providing *more than merely instrumental* reasons for acting. Are there intrinsic, as well as instrumental, goods? Sceptics deny that there are intelligible ends or purposes that make possible rationally *motivated* action. Natural law theorists, by contrast, hold that friendship, knowledge, critical aesthetic appreciation and certain other ends or purposes are intrinsically valuable. They are intelligibly 'choice-worthy', not simply as means to other ends, but as ends in themselves. They cannot be reduced to, nor can their intelligible appeal be accounted for exclusively in terms of, emotion, feeling, desire or other sub-rational motivating factors. These basic human goods are constitutive aspects of the well-being and

[8] See Simon 1962. [9] See Finnis 2011a: 231–252.

fulfilment of human persons and the communities they form, and they thereby provide the foundations of moral judgements, including our judgements pertaining to justice and human rights.

Of course, there are plenty of people today who embrace philosophical or ideological doctrines that deny the human capacities that I maintain are at the core of human dignity. They adopt a purely instrumental and essentially non-cognitivist view of practical reason (e.g. Hume's view that reason is nothing more than 'the slave of the passions'[10]) and argue that the human experience of deliberation, judgement and choice is illusory. The ends people pursue, they insist, are ultimately given by non-rational motivating factors, such as feeling, emotion or desire. 'The thoughts are to the desires', Hobbes has taught them to suppose, 'as scouts and spies, to range abroad and find the way to the thing desired'.[11] Truly rationally motivated action is impossible for creatures like us. There are no 'more than merely instrumental' reasons for action – no basic human goods. Now, if proponents of this non-cognitivist and subjectivist view of human action are right, then it seems to me that the entire business of ethics is a charade, and human dignity is a myth. But I don't think they are right. Indeed, I don't think that they can give any account of the norms of rationality to which they must appeal in making the case against reason and freedom that is consistent with the denial that people are capable of more than merely instrumental rationality and true freedom of choice. I do not deny that emotion figures in human action – obviously it does, and on many occasions it (or other sub-rational factors) does the main work of motivation. But I maintain that people can have, and often do have, basic reasons for their actions – reasons provided by ends they understand as humanly fulfilling, and desire precisely as such. These ends, too, figure in motivation.[12]

Human Imperfection and Moral Failing

Now, if I and other natural law theorists are correct in affirming that human reason can identify human rights as genuine grounds of obligation

[10] Hume 1888: bk. II, pt. III, §III, at 415. [11] Hobbes 1994: 41.

[12] I offer a detailed critique of Humean scepticism, and a defense of my own view of the relationship of reason to feeling, emotion and the like, in George 1999 chapter 1. See also Finnis 2011b chapter 1.

to others, how can we explain or understand widespread failures to recognize and respect human rights and other moral principles? As human beings, we are rational animals; but we are imperfectly rational. We are prone to making intellectual and moral mistakes and are capable of behaving grossly unreasonably – especially when deflected by powerful emotions that run contrary to the demands of reasonableness. Christians have a name for this: sin. And another name: fallenness. We suffer weakness of will and darkness of intellect. Even when following our consciences, as we are morally bound to do, we can go wrong. A conscientious judgement may nevertheless be erroneous. Of course, sometimes people fail to recognize and respect human rights because they have self-interested motives for doing so. In most cases of exploitation, for example, the fundamental failing is moral, not intellectual. In some cases, though, intellectual and moral failures are closely connected. Selfishness, prejudice, partisanship, vanity, avarice, lust, ill-will and other moral delinquencies can, in ways that are sometimes quite subtle, impede sound ethical judgements, including judgements pertaining to human rights. Whole cultures or subcultures can be infected with moral failings that blind large numbers of people to truths about justice and human rights; and ideologies hostile to these truths will almost always be both causes and effects of these failings. Consider, for example, the case of slavery in the antebellum American south. The ideology of white supremacy was both a cause of many people's blindness to the wickedness of slavery and an effect of the exploitation and degradation of its victims.

Natural Law and God

Let us turn now to the question of God and religious faith in natural law theory. Most, but not all, natural law theorists are theists. They believe that the moral order, like every other order in human experience, is what it is because God creates and sustains it as such. In accounting for the intelligibility of the created order, they infer the existence of a free and creative intelligence – a personal God. Indeed, they typically argue that God's creative free choice provides the only ultimately satisfactory account of the existence of the intelligibilities humans grasp in every domain of inquiry.[13]

[13] See e.g. Finnis 2011c, especially chapter 1.

Natural law theorists do not deny that God can reveal moral truths, and most believe that God has chosen to reveal many such truths. However, natural law theorists also affirm that many moral truths, including some that are revealed, can also be grasped by ethical reflection apart from revelation. They assert, with St Paul, that there is a law 'written on the hearts' even of the Gentiles who did not know the law of Moses – a law the knowledge of which is sufficient for moral accountability. So the basic norms against murder and theft, for example, though revealed in the Decalogue, are knowable even apart from God's special revelation.[14] The natural law can be known by us, and we can conform our conduct to its terms, by virtue of our natural human capacities for deliberation, judgement and choice. The absence of a divine source of the natural law would be a puzzling thing, just as the absence of a divine source of any and every other intelligible order in human experience would be a puzzling thing. An atheist's puzzlement might well cause him to reconsider the idea that there is no divine source of the order we perceive and understand in the universe. It is far less likely, I think, to cause someone to conclude that our perception is illusory or that our understanding is a sham, though that is certainly logically possible.

The question then arises: can natural law – assuming that there truly are principles of natural law – provide some measure of common moral and even political ground for people who do not agree on the existence or the nature of God and the role of God in human affairs? In my view, anybody who acknowledges the human capacities for reason and freedom has good grounds for affirming human dignity and basic human rights. These grounds remain in place whether or not one adverts to the question: 'Is there a divine source of the moral order whose tenets we discern in inquiry regarding natural law and natural rights?' I happen to think that the answer to this question is 'yes', and that we should be open to the possibility that God has revealed himself in ways that reinforce and supplement what can be known by unaided reason. But we do not need agreement on the answer, so long as we agree about the truths that give rise to the question: namely, that human beings, possessing the God-like (literally *awesome*) powers of reason and freedom, are bearers of a profound dignity that is protected by certain basic rights.

[14] See St Thomas Aquinas, *Summa Theologiae* I–II, Q. 91, art. 2, Q. 100, art. 1, at 997.

So, if there is a set of moral norms, including norms of justice and human rights, that can be known by rational inquiry, understanding and judgement even apart from any special revelation, then these norms of natural law can provide the basis for a common understanding of human rights – an understanding that can be shared even in the absence of religious agreement. Of course, we should not expect consensus. There are moral sceptics who deny that there are moral truths. There are religious fideists who hold that moral truths cannot be known apart from God's special revelation. And even among those who believe in natural law, there will be differences of opinion about its precise content and implications for certain issues. So it is, I believe, our permanent condition to discuss and debate these issues, both as a matter of abstract philosophy and as a matter of practical politics.

Challenges to Natural Law Philosophy

It is sometimes regarded as an embarrassment to natural law thinking that some great ancient and medieval figures in the natural law tradition failed to recognize – and indeed have even denied – human rights that are affirmed by contemporary natural law theorists, and even regarded as fundamental. Consider, for example, the basic human right to religious liberty. This right was not widely acknowledged in the past, and was even denied by some prominent natural law theorists. As Finnis has observed, they wrongly believed that a wide conception of liberty in matters of faith presupposed religious relativism or indifferentism, or entailed that religious vows were immoral or non-binding, or the comprehensive subservience of ecclesial communities to the state.[15] It is interesting that when the Catholic Church put itself on record firmly in support of the right to religious freedom in the document *Dignitatis Humanae* of the Second Vatican Council, it presented both a natural law argument and an argument from specifically theological sources. The natural law argument for religious liberty is founded on the obligation of each person to pursue the truth about religious matters and to live in conformity with his conscientious judgements.[16] This obligation is, in turn, rooted in the

[15] See Finnis 1991: 26 & n.50.
[16] *Dignitatis Humanae* §2–3 (1965) reprinted in 1988: 800–801.

proposition that religion – considered as conscientious truth-seeking regarding the ultimate sources of meaning and value – is a crucial dimension of human well-being and fulfilment. It is among the basic human goods that provide rational motivation for our choosing. The right to religious liberty follows from the dignity of man as a conscientious truth-seeker.

This and other human rights are denied and attacked today from various quarters, and in many parts of the world are routinely violated. The ideological justification for their denial and violation can be religious or secular. In some parts of the world, religious freedom and other basic human rights are denied in the name of theological truth. In other parts of the world, the threats are from secularist ideologies. Where secularist ideologies are liberal in form, claims to an overarching right to autonomy (or a corrupted version of the true right to have one's equal dignity respected) are often asserted to justify choices, actions and policies that natural law theorists believe are unjust and undermine the common good. If the natural law view of these matters is correct, then it is moral failings conspiring with intellectual errors that sustain ideologies that compromise human rights. In a certain sense, the failings are at opposite poles. Yet, from a natural law vantage point, partisans of the competing ideologies make valid criticisms of each other. Radical Islamists, for example, harshly condemn the decadent features of cultures in which the 'me-generation' ideology of 'if it feels good, do it' flourishes. On the other side, ideological liberals denounce the subjugation of women and the oppression of religious dissenters where fundamentalist Islam holds sway.

As natural law theorists see it, threats to human dignity and human rights exist because all of us, as human beings, are imperfectly reasonable and imperfectly moral. To put it in Christian terms, we are fallen creatures, sinners. At the same time, hope exists because we really do possess the capacities for reasonableness and virtue; truth – including moral truth – is accessible to us and has its own splendour and powerful appeal. We will never, in this vale of tears, grasp the truth completely or in a way that is entirely free from errors. Nor will we fully live up to the moral truths we grasp. But just as we made progress by abolishing the evil of slavery, by ending legally sanctioned racial segregation in my own country and elsewhere, by recognizing the right to religious freedom, and by turning away from the eugenics policies once favoured by so many

respectable people, natural law theorists hope that we can make progress and reverse declines in other areas, including in the defence of human life against abortion, embryo-destructive research and euthanasia, and in the protection and revitalization of the marriage culture, beginning with the preservation of marriage as the conjugal union of husband and wife.

Of course, people who reject the natural law understanding of human dignity and human rights will differ from natural law theorists on questions of what constitutes progress and decline. From a radical Islamist point of view, the type of religious freedom defended by natural law theorists will be regarded as licensing heresy and religious irresponsibility. Natural law ideas will be seen as just a rhetorically toned-down form of Western liberal secularism. By contrast, from a liberal secularist point of view, natural law ideas about abortion, sexuality and other hot-button moral issues will be regarded as intolerant and oppressive – a philosophically gussied-up form of religious fundamentalism. In the end, though, natural law ideas – like radical Islamist or liberal secularist ideas – will have to stand or fall on their merits. Anyone who wonders whether they are sound or unsound will have to consider the arguments offered in their support and the counterarguments advanced by their critics.

The 'New' Natural Law Theory

As I observed in the introduction to this chapter, there are competing accounts of natural law and natural rights among people who are, or have been regarded as, or who regard themselves as, natural law theorists. I have in various writings associated myself with what is sometimes called the 'new natural law theory' of Germain Grisez and John Finnis. But whether there is anything much that is really *new* in our approach is questionable. The core of what Grisez, Finnis and I say at the level of fundamental moral theory is present, at least implicitly, in the writings of Aristotle, Thomas Aquinas and other ancient, medieval and early modern thinkers. Some commentators have insisted that what we say is fundamentally new (and, from the point of view of our critics within the natural law camp, wrong-headed) because we are resolute about respecting the distinction between description and prescription and avoiding the fallacy

(as we see it) of proposing to derive normative judgements from *purely* factual premises *describing* human nature. An example of the fallacy is the putative inference of the value of knowledge from the fact that human beings are naturally curious and desire to know. But here we are being faithful to the methodological insights and strictures of Aquinas. Contrary to what is sometimes supposed, he recognized that what would later come to be called 'the naturalistic fallacy' is indeed a fallacy, and was far stricter about avoiding it even than was David Hume, who is sometimes credited with 'discovering' it.[17]

If, standing on the shoulders of Aristotle and Aquinas, we have been able to contribute something significant to the tradition of natural law theorizing, it is founded on Grisez's work showing how what he calls 'modes of responsibility' follow as implications of the integral directiveness of the most basic principles of practical reason – principles that direct human action towards basic human goods and away from their privations. The modes of responsibility are intermediate in their generality between the first and most general principle of morality ('always choose in ways that are compatible with a will towards integral human fulfilment') and fully specified moral norms that govern particular choices. The modes include the Golden Rule of fairness and the Pauline Principle that acts that are in themselves evil (*mala in se*) may not be done, even for the sake of good consequences. They begin to specify what it means to act (or to fail to act) in ways that are compatible with a will oriented positively (or, at least, not negatively) towards the well-being of all human beings in all the respects in which human beings can flourish – integral human fulfilment.

Our account of the modes of responsibility helps to make clear the ways that natural law theories are both like and unlike utilitarian (and other consequentialist) approaches to morality, on the one hand, and Kantian (or 'deontological') approaches on the other. Like utilitarian approaches, and unlike Kantian ones, natural law theories are fundamentally concerned with human well-being and fulfilment and, indeed, identifying principles directing our choosing towards basic human goods, and away from their privations, as the starting points of ethical reflection. Unlike utilitarian approaches, however, they understand the

[17] See Finnis 2011a: 33–48.

basic forms of human good (as they figure in options for morally significant choosing) as incommensurable in ways that render senseless the utilitarian strategy of choosing the option that overall and in the long run promises to conduce to the net best proportion of benefit to harm (however 'benefit' and 'harm' may be understood and defined). Natural law theorists share with Kantians the rejection of aggregative accounts of morality that regard the achievement of sufficiently good consequences, or the avoidance of sufficiently bad ones, as justifying choices that would be excluded by application of moral principles in ordinary circumstances. Unlike Kantians, however, they do not believe that moral norms can be identified and justified apart from a consideration of the integral directiveness of the principles of practical reason directing human choice and action towards what is humanly fulfilling and away from what is contrary to human well-being. Natural law theorists do not believe in purely 'deontological' moral norms. Practical reasoning is reasoning about *both* the 'right' and the 'good', and the two are connected. The content of the human good shapes moral norms inasmuch as such norms are entailments of the basic aspects of human well-being and fulfilment considered integrally.

Such a view presupposes, of course, the possibility of free choice – that is, choosing which is the pure product neither of external forces nor internal but sub-rational motivating factors, such as sheer desire. So a complete theory of natural law will include an account of principles of practical reason, including moral norms, as principles for the rational guidance of free choices, and a defence of free choice as a genuine possibility. This entails the rejection of strict rationalism, according to which all phenomena are viewed as caused. It understands human beings – some human beings, at least sometimes – as capable of causing realities that they bring into existence *for reasons by free choices*. On the natural law account of human action, freedom and reason are mutually entailed. If people were not really free to choose among options – free in the sense that nothing but the choosing itself settles what option gets chosen – truly rationally motivated action would not be possible. Conversely, if rationally motivated action were not possible, the experience we have of choosing freely would be illusory.[18]

[18] In defence of freedom of choice (or freedom of the will), as described here, see Boyle, Grisez and Tollefsen 1976.

Another feature of the natural law account of human action that is stressed by those of us who are regarded as 'new' natural law theorists is the set of distinctions between various modes of voluntariness. We understand morality as fundamentally a matter of rectitude in willing. In sound moral judgements and upright choices and actions, the will of the agent is oriented positively towards the human good, integrally conceived. In choosing and acting, one is not, of course, pursuing every human good – that is not possible – but one is pursuing at least one basic human good well, and if one is choosing and acting in a morally upright way, one is respecting the others. Yet, is it not obvious that many upright choices – choices of good ends sought by morally good means – have some bad consequences? For example, do we not know with moral certainty that by constructing a system of highways on which drivers of automobiles are authorized to drive at a speed of, say, 65 miles per hour we are permitting a circumstance to exist in which several thousand people each year will be killed in driving accidents? Indeed, we do. But according to the natural law understanding of human action, there is a real and sometimes morally critical distinction between *intending* harm to a basic human good (and thus to a person, since human goods are not mere abstractions, but are aspects of the well-being of flesh-and-blood human beings) and accepting foreseen harm as a *side effect* of an otherwise morally justified choice. One can intend harm in two different ways: as an end in itself or as a means to some other end. One intends harm as an end when, for example, one seeks to injure or kill someone out of hatred, anger or some similarly powerful emotion. One intends harm as a means when, for example, one seeks to kill a person in order to recover on the victim's life insurance policy. The key thing to see is that intending death (whether as end or means) is distinct from accepting death as a side effect (even if the side effect is clearly foreseen, as we foresee, for example, the deaths of motorists and passengers on the highways in ordinary accidents).[19]

[19] Although the distinction between intending, on the one hand, and accepting, on the other, bad side effects is often pertinent to moral evaluation on a natural law account, one should not suppose that it is impossible to violate moral norms in accepting side effects. On the contrary, one may behave *unjustly*, for example, in accepting bad side effects, even where one has not run afoul of the norm against intending, say, the death or injury of an innocent human being. See e.g. George 2011: 106.

Natural Law and Moral Virtue

Let me conclude with one more proposition stressed by natural law theorists, namely the fact (or, in any event, what we believe to be the fact) that by our choices and actions we not only alter states of affairs in the world external to us, but also at the same time determine and constitute ourselves – for better or worse – as persons with a certain character.[20] Recognition of this self-shaping or 'intransitive' quality of morally significant choosing leads to a focus on virtues as habits born of upright choosing that orient and dispose us to further upright choosing – especially in the face of temptations to behave immorally. People sometimes ask: is natural law about rules or virtues? The answer from the point of view of the 'new natural law' theory is that it is about *both*. A complete theory of natural law identifies norms for distinguishing right from wrong as well as habits or traits of character whose cultivation disposes people to choose in conformity with the norms and thus compatibly with what we might call, borrowing a phrase from Kant, a good will, viz. a will towards integral human fulfilment.

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[20] See e.g. *Nicomachean Ethics* at 1113b5–13.

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4 Early Modern Natural Law Theories

Knud Haakonssen

Early modern natural law presents the student with a paradoxical situation. In the eyes of philosophers it has often appeared as an amorphous group of ideas, many of them in obvious conflict with each other. Especially those whose idea of natural law has been formed by scholasticism see the early modern version as nothing but a pale, incoherent derivative. At the same time, a wide variety of human rights protagonists in search of a tradition to sustain their cause see early modern natural law, especially in the Enlightenment, as a seedbed. The present chapter is an attempt to ameliorate the feeling of paradox by understanding early modern natural law in its own right. Even if it was anything but a coherent 'school of philosophy', it had a remarkable historical identity that lasted for at least a couple of centuries, and we have to understand why. Even if it made eclectic use of a range of scholastic ideas, this only heightens its interest: how could old ideas be put to use in a way that was so widely seen as novel, first in Protestant lands but also relatively soon in Catholic realms? And even if natural law did *not* have much to do with twentieth- and twenty-first-century ideas of human rights – and it did not – it is still there as a lengthy chapter in the history of philosophy to be understood by us.

The Historical Identity of Natural Law

In the most general perspective, the loss of Christian unity and the subsequent religiously based strife was an important spur to the search for a community of values that was not dependent upon any particular religious confession. This has often led to the characterization of early modern natural law as 'secular', but this is a misleading simplification inasmuch as most of the theories in question remained within some sort of religious framework. It is here necessary to distinguish between the contemporary

intention and meaning and the long-term effects of natural law. In addition to internal disunity within Christianity, the increasing commercial and colonial contacts with parts of the world outside the Christian orbit made the possibility of a natural law attractive, as it had done long before the Reformation.

Above all else, the ever-deepening territorialization of political authority demanded a source of political legitimacy that was independent of the metaphysically based hierarchy of authority in the universal Church. This was the root cause of the institutionalization of natural law that took place first in Protestant countries. There had of course been an intensive cultivation of natural law in the institutions of the Catholic Church of the Middle Ages, and this continued to be the case also after the Reformation. However, scholastic natural law was philosophically imbedded in a religious metaphysics that was anathema to much – though by no means all – Protestant natural law. And, more importantly, scholastic natural law was academically and institutionally part of the traditional philosophy curriculum and of theology (eventually moral theology). Protestant natural law was made an independent discipline through the establishment of professorial chairs devoted to the subject, and a great deal of the history of early modern natural law is concerned with the conflicts over the control of the subject through these positions. Within the universities it was a triangular contest between philosophy, law and theology, while externally it was a matter of the influence of political and religious authorities. In short, natural law had functions within a wide spectrum of contexts, ranging from the geo-political and pan-European to domestic politics and institution building, and this lent the subject an indisputable identity as an historical phenomenon of considerable importance.

The first teaching positions in natural law were instituted in Germany and Sweden, with that in Heidelberg in 1661 being of particular importance. During the next half-century, a string of German universities followed suit, so that by the first quarter of the eighteenth century all of the fourteen Lutheran and nine Calvinist universities operating in the states of the Holy Roman Empire of German Nation had formal tuition in natural law in at least one of the relevant faculties, and most of them had new professorships dedicated to the subject. A similar development took place in the rest of the Protestant world, Calvinist as well as Lutheran, and including the North American colonies. Several Catholic universities

reacted early to the developments in Protestant Europe by also founding separate chairs in natural law, such as Freiburg im Breisgau (1716) and Salzburg (1717). In this they were followed by modernizers in several other institutions across Catholic Europe during the next decades. Natural law became a central feature of the intellectual, political and juridical culture of Enlightenment Europe, and in some places, notably Germany and Scandinavia, it remained important until well into the nineteenth century.

As a course in the 'lower' philosophical faculty, natural law had a basic pedagogical task, namely, to instruct young men in elementary social ideas, a kind of pre-modern 'civics'. This accounts for the fact that we find natural law ideas in all kinds of intellectual endeavour in the Enlightenment, for virtually everyone who had even the rudiments of advanced education would have been exposed to it in some form. In the hands of the 'higher' faculty of law (and in some cases still theology) and in university consistoria it was a distinct legal doctrine and hence a juridical resource separate from the multitude of domestic laws. But, first of all, natural law was politically important by supplying a systematic theory of social and political life. These functions as a civic ethics, a legal doctrine and juridical reserve power and a socio-political theory were not, however, united by one particular philosophical theory. To the contrary, the intellectual rationale for how to fulfil the functions was an object of intense contestation. The institutional and functional identity of early modern natural law must not mislead us into believing that it was also an intellectually coherent movement or school. It was not, for there was a multitude of theoretical endeavours going on within the institutional setup. In fact, natural law in this period may usefully be characterized as 'a clearing house . . . for a wide array of theological, jurisprudential and philosophical disciplines'.[1]

The lack of doctrinal coherence is further obscured by the fact that natural law of all sorts shared a distinctive idiom, including a wide range of examples and cases, that were eclectically created using Roman law with its commentaries, ancient philosophy (especially stoicism), history and literature, scholastic natural law and humanist scholarship of the widest sort. Relatively quickly, especially with Samuel Pufendorf, it acquired a systematic arrangement that became standard. And because of its

[1] Hunter 2014: 561.

academic existence, it was dominated by the appropriate literary forms, namely, the treatise with layers of commentaries, the textbook and the dissertation. A veritable canon emerged, and from such sources and from their use in the class room the ideas spread to less academic literature and to non-academic activity, such as judicial reform and political argument.

In sum, early modern natural law was first of all an academic discipline institutionalized for political reasons to discharge social, juridical and political functions. It commanded a distinctive language, a literary style or genre, a canon of defining works, and it had a clear conception of its own history as something new and in that sense modern. Within this framework it harboured fundamentally different philosophies, which means that it is difficult to approach purely with the means of the modern historian of philosophy, who tends to look for system and coherence and, not least, for 'contributions' to philosophical theory conceived in trans-historical universality. For this reason, philosophers with either a Thomist or a post-Kantian background have had little appreciation of early modern natural law, or at least the non-metaphysical strands of it, and have thereby tended to make a significant chapter in the history of philosophy more or less incomprehensible. The challenge is to understand why more or less everyone at the time, irrespective of philosophical or confessional standpoint, thought that something new and distinctively modern had been introduced that was worth fighting over from quite different points of view and for widely different purposes. The scholarly confusion over this theoretical and practical pluralism has been increased by the fact that some of the main natural law thinkers in our period were not philosophers in anything like the modern sense of the term. This problem begins with the author who in historical terms was the defining figure for early modern natural law, Hugo Grotius.[2]

Hugo Grotius

Considered in a philosophical light, Hugo Grotius (1583–1645) has often been seen as an epigone, if not simply a plagiarist, of leading scholastic natural lawyers. However, if we take up the task not of tracing original

[2] The following discussions of Grotius, Pufendorf, Thomasius and Wolff are partly derived from my contributions to a jointly authored article, Haakonssen and Seidler 2016: 377–401.

formulations of, or contributions to, ideas considered trans-historically, but of understanding what Grotius was trying to do in his time and place with whatever ideas he had available, then his historical standing becomes intelligible. In this respect, Grotius must be acknowledged as the defining initiator of modern natural law, for that was how he was viewed during most of the seventeenth and eighteenth centuries. He was not a philosopher, nor did he claim to be one. He was primarily a humanist scholar, a lawyer and legal and political advisor, and the basic consideration in his writings was how to make cases for individuals, whether natural persons maintaining rights of private belief against religious authority or corporate persons, such as the Dutch East-India Company, asserting rights on the open sea. Of course Grotius also presented philosophical ideas, but these were materials for the making of arguments, not building blocks for scholastic and similar philosophical constructions.

In his major work, *De Iure Belli ac Pacis* (1625)[3], Grotius adopts a variety of approaches or methods in arguing the case for the rights of particular persons. It has been shown that Grotius in developing these ideas was drawing significantly on Cicero's version of Stoicism.[4] Both abstract consideration of human nature – his 'a priori' method – and historical and social observation – his 'a posteriori' method – show that people have a basic moral ability that can be understood as the mutual making and granting of claims, or rights, in their dealings with each other. Human nature exhibits certain first principles, especially the attraction to what will satisfy basic needs, and it is able to judge rationally whether any particular satisfaction of needs is compatible with the sociability of humanity without which there would be no humanity. The demands arising from need are morally indifferent in themselves, but they become questions of justice, namely the maintenance of rights, once related to sociability. This idea of natural justice harmonized with the Arminianism of the Remonstrants in the Dutch Reformed Church, who denied Calvinist claims about humanity's total loss of moral power through original sin. Grotius undergirded this argument by means of his 'a posteriori' method which was a wide range of humanistic learning in history and literature, both ancient and modern, to document the historical presence of justice among humanity. This was aimed at countering ancient sceptics who had rejected the

[3] Grotius 2005. Cf. Tuck 1999: chapter 3. [4] Straumann 2015.

reality of natural justice by pointing out the rich historical evidence to the contrary. Grotius wanted to meet such arguments on their own ground.

The outcome of these two kinds of reflection on human experience is a concept of rights (*iura*) as the moral ability (or warrant) of persons to claim something for themselves (a *suum*) and to do so rightly (*iuste, recte*), where 'rightly' is determined by whatever laws can be invoked by the individuals involved in a given situation of claiming something. Natural law, in turn, is one of the resources for settling the lines between conflicting rights claims, and it specifies that certain rights are so essential for social life that they should be enforced by power, while other rights are matters of convenience and choice, at various levels. This juridical reworking of an Aristotelian distinction (*facultas* & *aptitudo*) became the locus classicus for the later standard distinction between perfect and imperfect rights and the correlative concepts of perfect and imperfect duties. But for Grotius himself this abstract consideration of the law of nature was only one source for identifying and regulating humanity's rights. In general it was necessary to draw also on empirical, historical sources such as contracts, treatises and common practices in and among nations.

Irrespective of how it was gained, the relevant moral and legal knowledge would be available to anyone with a common human interest in a peaceful life and irrespective of their religion. It was in that basic sense 'valid' even if we assumed (*etiamsi daremus*) that there is no divinity. This endlessly discussed statement was hardly meant as a philosophical reflection on obligation – from which perspective it seems unfinished and weak – but as a summary of the central issue for Grotius, that *de facto* natural law for the settlement of concrete disputes about rights did not require derivation from or embedding in a system of divine (eternal) law, as was the case with the natural law of mainstream scholasticism. Indeed, it had nothing to do with the grand questions of God's existence and humanity's ultimate moral obligation, but was precisely an attempt to avoid such questions. Of course, this claim was in itself a major provocation. By some thinkers at the time, it was taken as evidence that Grotius retained a scholastic notion of transcendent values independent of divine will. Later the *etiamsi* statement was a seedbed for the opposition between 'secular' natural law and various forms of theological orthodoxy within Protestantism.

In the Grotian conception, rights are moral powers to claim something as one's own, and such rights are themselves disposable property. One person's claims to the things of the world can be transferred by contract to others; a person's rights over his own person can be partly or wholly transferred to another for labour, including servitude, or for governance. Whenever such relations obtain, they must be understood as based upon the contractual transfer of rights by individuals of free will and competent moral judgement. In this way contract became the basic concept for analysing moral and social relations in post-Grotian natural law, though it would be endlessly adapted to quite different conceptions of moral agency according to the circumstances.

Grotius developed these ideas in order to meet both international and domestic concerns. From the beginning of his career, he sought ways to regulate rights outside of the sovereign polity, and especially to establish the juridical standing of a breakaway republic, such as the United Provinces in their conflict with the imperial power of Spain, and of private corporate bodies, such as the Dutch East-India Company in its trade with non-Christians and its rivalry with sovereign countries. In order to do this, he drew the elaborate analogy between natural and corporate persons that is basic to his work, and thus established the modern trend of including *ius gentium* in the dissociation of natural law from confessional religion. In the domestic sphere, Grotius's main aim was to oppose the theocracy that was being promoted by the orthodox Calvinists in the Dutch Reformed Church. These would base government on a covenant between God and the elect, securing rule by the latter through the organs of the Presbyterian church. By insisting on the individual as the owner of rights, Grotius based government on the personal surrender of sufficient rights to such authority as would protect the individual's remaining rights, and he thought that absolute sovereignty was preferable in that regard.

From Grotius to Pufendorf

By his focus on individual rights, Grotius put into circulation a concept that would be taken up in very different circumstances over the following centuries, and in the process the idea itself was profoundly transformed. One episode, or string of episodes, of particular importance was the

immediate reception of Grotian ideas in England, by Thomas Hobbes (1588–1679), by the group of prominent Arminians commonly known as the Great Tew Circle and by John Locke (1632–1704). While rights for Grotius were 'subjective' in the sense of belonging to the individual person, personhood according to him involved minimal sociability. Such Stoic, as well as Aristotelian, assumptions about moral agency and natural sociability were rejected by Hobbes in favour of a more or less Epicurean, deterministic conception of personhood, natural unsociability, and a much more radical demand for the surrender of all rights (except for spontaneous self-defence *in extremis*) in order to make sovereignty intelligible. It is a standing issue in the history of political thought to relate this important shift to the very different situations of the two thinkers, one of them faced with external challenges to the sovereignty of a republic, the other with civil war in a monarchy, though both with a theologically divided church.

In the seventeenth and eighteenth centuries, Hobbes was seen as one of the founders of modern natural law along with Grotius, the Anglican divine Richard Cumberland (1632–1718) and the Saxon lawyer and historian Samuel Pufendorf (1632–94). In addition to his provocative formulation of a sharply subjective notion of rights and the associated divorce of natural law from theology – which he was always assumed to have made – Hobbes's historical role in natural law was not least due to his systematic, but ruthlessly anti-metaphysical, treatment of the subject. Grotius's large treatise, while not without its own systematic concerns, was to many readers a sprawling collection of materials. Hobbes's *De Cive* (1642) and early parts of *Leviathan* (1651) concentrated more or less on the core issues pertaining to human nature, the state of nature, social contract, sovereignty and citizenship and organized the material into a clear system. Grotius's was originally a work for lawyers and their political clients, Hobbes's was for sovereigns, or would-be sovereigns, and their advisors.

The path from Grotius to Locke was very different. Grotius saw God as a supreme legislator and humanity as subjects negotiating about their rights by means of divine and human laws, and other means of conflict resolution. Locke saw God as the proprietor of creation, including humanity. The qualities defining our personhood, our basic rights, were therefore not ours to give away, but only to protect through accommodations such as private property and political governance. One right in particular was of

central importance for theological reasons, namely the right to a free conscience. The basis for government was therefore the creation of a fiduciary or trust relationship whereby governors were entrusted with the protection of the rights of citizens, and it ultimately lay in the judgement of the people whether the trust was being fulfilled. Locke's transformation of the notion of rights and its political implications is likely to have happened under the influence of Socinians, their engagement with Grotius, and their influence among the Levellers. But whatever its provenance, Locke's theory would be taken up repeatedly in the political debates of England and Scotland, then of Great Britain, and eventually of North America. Its presence in natural law as a European genre was in great part secured by its use in the revisionist commentaries of the Huguenot scholar Jean Barbeyrac (1674–1744), in his French translations of Grotius and of Samuel Pufendorf.

The late seventeenth century saw a significant change in the culture of natural law, and this was not least due to Pufendorf. Grotius, Hobbes and Locke were scholar-advisors for political grandees, and protagonists for their political causes, and Cumberland was a learned bishop who promoted a latitudinarian conception of state and church. But as universities and professors in many places gradually assumed some of the functions of the humanist scholars as 'specialists' and combined these roles with their pedagogic tasks, the pursuit of learning in general assumed a more academic nature. This was also the case with the new natural law, whose academic transformation for a long time was dominated by lectures and textbooks presented as commentaries on Grotius's main work. The specific content and the local function of these academic appropriations of natural law changed significantly from Grotius and Hobbes to the end of the eighteenth century and, in several places, to the middle of the nineteenth century.

Pufendorf, Thomasius and their Opponents

Despite his importance, Grotius was by no means the only early source of what would become an institution. The idea of a natural law independent of theology – if not of religion – was met with fierce opposition, especially within orthodox Lutheranism. Here the scholastic idea of natural law as an earthly reflection of a divine eternal law was important, and it was

prevalent in theology faculties and university consistories. At the core of this doctrine was the assertion that only a specially trained mind could achieve insight into the source of natural law, and its practitioners could therefore claim a distinct intellectual and civil authority for theology and its institutions. This was the line of argument that was refined into a philosophy by a new wave of neo-scholastics, particularly Gottfried Wilhelm Leibniz (1646–1716)[5] and Christian Wolff (1679–1754). Both theologically and philosophically, their metaphysical natural law became the antipode to the development of the subject deriving from Grotius and Hobbes, though in practice the two lines of argument often, and confusedly, intermingled.

The most important heir to Grotius and Hobbes, and the most influential figure in the academic institutionalization of natural law, was undoubtedly Samuel Pufendorf, who personified the transitional relationship between the roles of humanist advisor and academic. He became immensely influential both philosophically and in institutional terms through the quality of his writings on natural law. He set out his ideas in a large treatise, *De Jure Naturae et Gentium* (1672), which he then abbreviated to a textbook, *De Officio Hominis et Civis* (1673).[6] They were the leading presentations of natural law for several generations. Both were widely translated (the textbook into a dozen languages) and received extensive commentaries, and hundreds of dissertations and polemical tracts were written with reference to them. Particularly influential were the profusely annotated French editions by Jean Barbeyrac, which were used throughout the European world. Pufendorf's arrangement of natural law was sometimes adopted by thinkers of fundamentally different intellectual outlook from himself and used in circumstances that would have been unrecognizable to him.

Pufendorf's main concern was to keep worldly learning and especially natural law separate from theology.[7] As a convinced Lutheran he put the rational inaccessibility of God's mind at the centre of his thought. This entailed that claims about revealed intentions for humanity were inadmissible as guides for social life, particularly in inter-confessional or de-confessionalized contexts. Deprived of such insight (or, in Grotian and Hobbesian terms, in view of multiple, incompatible claims to insight),

[5] Leibniz 1988. For Wolff see note 11. [6] Pufendorf 1749, 1991 and 2003.
[7] Cf. Hunter 2001: chapter 4; Seidler 2015.

humanity had to rely on empirical observation of the world, and this yielded no more than the providential idea of a mighty, purposeful and generally benevolent creator. Consequently, human beings with understanding and free will had to seek purpose in their lives themselves, and expect eventually to be called to account for their performance in that regard. Since purposes encompassing all of a human life could not be realized by isolated individuals, we were led to infer a basic law of nature to the effect that we have to live sociably with others. However, what this meant for particular people depended upon their circumstances. In other words, the specific content of natural law must be supplied by empirical and historical information.

As in Hobbes, there is in Pufendorf no assumption of a special moral insight nor of Grotius's residual natural sociability. Hence moral and social relations must be willed into existence by humans needing sufficient peace to make the pursuit of their ends – whatever they might be – successful. In the philosophical discussion of natural law this has led to an analytical opposition between Pufendorfian 'voluntarism' and a 'rationalism' exemplified by Leibniz and Wolff, and to the search for precursors and successors to these lines of thought. For the historical understanding of Pufendorf's own concerns, however, it is more important to appreciate that his denial of special moral powers was the necessary basis for rejecting the claims to spiritual and social authority by the established orthodox clergy. At the same time, his insistence on the exertion of will as the source of moral phenomena was a presupposition for the Hobbesian argument that only *effective* manifestations of such behaviour could bring order into the social world; in other words, that peace required power. The moral and political task mandated to humanity by the law of nature was therefore to create effective power, and in the historical experience of mankind this meant political authority.

For Pufendorf the central concepts are law and duty, which arise from a common understanding of elementary necessity (scarcity, security). Since all moral categories and distinctions arise from human initiative, there is an absolute presumption of the natural equality of people, not as in Hobbes a merely probabilistic assessment of equal strength. Equality is a fact *about* nature that we must *assume*, since all moral (as distinct from natural) differences are introduced by human interference *in* nature. If we live in inequality, it is the effect of human interference in nature and can only be counteracted by more human interference. Our various claims to

equality – and to inequality – cannot meaningfully be made in the name or on the *basis* of nature; rather, by the circumstance that they are human claims, they are an interference in, or an 'imposition' *on*, nature. Strictly speaking there cannot be a *natural right* to equality, or to anything else, for rights are but human responses in a social setting. A right to natural equality is meaningless, since the equality that humans can establish of necessity cannot be that of nature as an independent entity. Thus nature is, like God, a limiting concept in moral argument. This deprives neither of them of rhetorical force, and they remain a sort of common coinage whereby we negotiate. They lend their force to so-called laws of nature, especially the basic law of sociability, that regulate our impositions, especially in the form of duties to live in peaceful social relations. Rights are, therefore, human inventions dependent upon the requirements, the duties, entailed by the law of sociability.

This line of argument provided the basis for a systematic account of the duties that natural law imposes on humanity, where duties mean the offices or roles that people adopt in order to make social life possible. It is a typology that has much in common with traditional Lutheran conceptions. Each person has duties to self, to God and to others, where the duty to acknowledge the god of natural religion in fact is an aspect of our duty to develop and maintain ourselves as human agents. Duties to others are divided into those of the family and household and those of civil society. The whole scheme is an elaborate demonstration of what Pufendorf meant by his basic suggestion that the moral and social life of humanity is a network of conventions or institutions, and that there is no transcendent foundation within reach of human reason. This exhaustively argued and exemplified position contributed significantly to the opening up of a conceptual space for ideas of how to think about morality and society in the absence of such foundations. Into this space we may place much of the Enlightenment's science of human nature and society, and Pufendorf has often been regarded as a precursor of such ideas as the natural sociability of humanity. Ironically, though, such readings tend to distort Pufendorf's own concern, which was to show that whatever spontaneous manifestations of sociability history might exhibit, they were always insufficient to secure peace unless they were backed by power.

Pufendorf provoked a storm of controversy across Europe, where theologians, philosophers and jurists clearly discerned how close he was to Hobbes's Epicureanism in his basic view of human nature, how his

bracketing of religion from politics undermined the role of theologians in public affairs and undergirded his strongly Erastian idea of the church, and how his view of law as a direct tool of sovereign power reduced the independent status of the legal profession. In all these respects Pufendorf was strongly supported by his main disciple, the influential Christian Thomasius (1655–1728). At the same time, there are important differences between the two thinkers which arise from differences in their circumstances and roles. Pufendorf was first of all the theorist of sovereign power and its exercise through legislation that turned natural law into regulations for the territorial state. Thomasius was an academic throughout his career, and the stage on which he worked to achieve goals similar to those of his master was the university. He sought to counteract the domination of education by orthodox Lutherans in the faculties of theology and philosophy by developing a natural law that was to be taught in the law faculties. This should produce servants of the state who understood the unchallenged sovereignty of the prince in all worldly matters, including the governance of the church, as the foundation of civil peace and the key to a modern society. His specific target in this endeavour was the orthodox university establishment in the confessional state of Saxony with the professor of theology, Valentin Alberti (1635–1697), as its main protagonist.

Alberti, who had been one of the main opponents of Pufendorf, taught a Christian natural law with many similarities to scholastic, Thomist ideas.[8] The central claim was that original sin had deprived humanity of the moral clarity of the state of innocence, and that only the special insight of trained theologians could convey enough of God's law of nature for fallen man to make earthly peace possible. Thomasius agreed with the starting point, the degradation of humanity's moral capacity; in fact, he stressed this point in a fashion similar to contemporary Pietism. But he denied that any person could acquire insight into the divine mind. What we could attain was understanding of our need to obey those with power to make peace among us by their rules. There were two kinds of such powers and rules. One was the natural law of seeking peace through subjection to political authority, which we learn by observation of social life. The other was the positive law of God that was revealed to us in

[8] Alberti 1678. Cf. Osterhorn 1962.

Scripture, and which points to the same authority of enforcement as secular natural law. Natural law is the same as in Pufendorf, but the adoption of divine positive law is surprising. Thomasius's point was that by treating scripturally revealed law as the proper command of a sovereign, it would be subject to the same worldly understanding as other positive law, and this would be clear practical denial of the need for special theological insight. Since divine positive law was part of civil law in matters of family and inheritance, and guided controversial issues of social behaviour such as heresy and witchcraft, Thomasius was in effect claiming jurisdiction in such areas for the professional lawyers and civil courts that served sovereign authority.

This was the core of Thomasius campaign against confessionalism in Saxony, which he articulated in numerous works, the main one being his *Institutiones Jurisprudentiae Divinae* (1688).[9] He lost that campaign and was in fact forced into exile in the neighbouring state of Brandenburg, where he helped make the new University of Halle one of the most important centres for the development of the new natural law. In a particularly striking but by no means unique case of the parochial use of the general ideas of natural law, Thomasius's change of situation helped change his theory. In Brandenburg the law had already been de-confessionalized in the relevant respects, so Thomasius simply bracketed divine positive law from his theory. What is more, in Halle the theological situation was different due to the prominence of the new Pietism with its emphasis on the passionate sinfulness of humanity and the propagation of spiritual regeneration through inwardness in the search for society with God. Thomasius agreed with much of the diagnosis, but he thought that the Pietist cure was particularly ill-suited for social life and lent theological counsellors an authority incompatible with the supremacy of secular rule. So in his *Fundamenta Iuris Naturae et Gentium* (1705)[10] and other works he developed an elaborate alternative theory of the passions and their control through a pedagogy of balancing acts at three levels, known as the virtues of justice (control by law and the fear of force), decorum (control by social pressure) and morality (complete self-control as a wise person).

[9] Thomasius 2011. Cf. Ahnert 2006; Hunter 2007. [10] See note 9.

Wolff

The consequences of Thomasius's revised natural law were twofold. With its emphasis on social factors, such as civic law, public opinion and moral exemplars, it reinforced the anti-metaphysical and empirical standpoint of his earlier Pufendorfian theory, and this line of argument strongly supported the cultivation of civil and legal history, especially within law faculties, in the German Enlightenment. At the same time, the turn towards the passions was in harmony with a similar movement in this direction within moral philosophy. In other words, there was a tendency for natural law in the Pufendorfian-Thomasian tradition to lose some of its strictly juridical aspect in favour of either history or moral philosophy. At the same time, Thomasius and his followers were being opposed by a philosophy of a very different sort: that of Christian Wolff, which offered an alternative view of private and public life that proved to be successful with both rulers and subjects in the German-speaking world. Thomasius's natural law had offered an ethics of damage control, that of containing our destructive passions, and a politics of limitation, that of restricting the central purpose of government to securing civic peace. In both regards the emphasis was on common experience. In contrast, Wolff's natural law offered an ethics of perfectibility and a politics without limits. Both were based upon his philosophical training of the mind, and he thus refurbished the role for philosophers as sage advisors. In writing he did so in an extensive *oeuvre* still under revision to the end of his life, here especially *Ius Naturae, Methodo Scientifica Pertractatum* (Natural Law Treated According to Scientific Method, 1740–1748); *Jus Gentium, Methodo Scientifica Pertractatum* (1750)[11]; and *Grundsätze des Natur- und Völckerrechts* (Principles of the Law of Nature and Nations, 1754).

The natural law theory in question was essentially a neo-scholastic metaphysics positing a teleological vision of human life, individual as well as collective, according to which humanity's natural destiny was perfectibility, in sharp contrast to Pufendorf's willed sociability. The driving force in the pursuit of perfection is rational insight into the human condition and its place in the general system of nature as designed by the divinity. Our moral freedom to be obliged by natural law consists simply in this rational understanding; only intellectual deficiency or

[11] Wolff 2016. Cf. Hochstrasser 2000, chapter 5; Stipperger 1984.

irrational (passionate) wilfulness will make us unfree and incapable of obligation. Wolff's strongly intellectualist account of perfection, happiness, moral freedom and obligation to the law of nature both describes and prescribes the way to our natural goal: seeing is believing, and understanding leads to action. The original sin is false belief.

According to Wolff, each individual has a natural inalienable right to pursue perfection according to personal insight; this right is entailed by the natural duty to seek such perfection. However, the insight may include a preference for not *exercising* the natural right and instead rely on the insight of some other person(s). The former situation is the 'original state' of natural liberty; the latter condition is an adventitious state, i.e. a condition with relations of governance. When an adventitious state is the best means of maximizing perfection and happiness, natural law prescribes that people exercise their natural liberty to give up the future exercise of that liberty. This is Wolff's basic idea of the contract as the foundation of all governance. The point of it is not a genetic, quasi-historical justification; it is a conceptual clarification: relations of governance *mean* that those who govern are judges of the perfectibility of the collective.

While civil society or the state, historically speaking, was the highest form of social organization in the service of perfectibility, Wolff saw the full implication of his natural law theory to be a universal society that encompassed humanity as a whole. He called it *civitas maxima*, the greatest society. It is the basic natural law of perfectibility that ties all forms of human life together, from family-society, through feudal and corporate institutions, to civil society and humanity in general. In its natural potential, or ideally, this entire system of the moral creation is perfectly well ordered, so that all instances of the pursuit of perfection-cum-happiness by individuals or collectives play some role in bringing about total happiness or beatitude. Because they are rational, such relations are also logically necessary according to Wolff, following Leibniz in this respect. Objectively speaking, there is always one right way of acting; in conflicts, one party or the other is in the right. However, in fact, each individual person or specific society is subject to historical contingency, arising from ignorance and passion. So we have a familiar dualism of social relations that are 'necessary' according to natural law, and the actual contracts that individuals have entered into, wisely or not, but creating the historical societies where natural law now has to be honoured. This accommodation between

metaphysically based natural law and historically given laws and societies became particularly important when Wolff applied it to relations among sovereign states. His *ius gentium* was influential both in itself and, not least, when adopted in the eclectic manual *Droit des Gens, ou Principes de la Loi Naturelle* (1758)[12] by Emer de Vattel (1714–1767).

Rights Theories

Early-modern natural law had begun with Grotius's lawyerly search for an argumentatively effective notion of individual rights, but both in Pufendorf's and Thomasius's positivism and in Leibniz's and Wolff's metaphysics, rights had become embedded in a system of law and duty. There were, however, other strains of natural law thinking in the early Enlightenment in which rights had a more prominent role, and, as with their predecessors in the seventeenth century, nearly all of them occurred within the Reformed parts of the Protestant world. There was an interesting exception, or apparent exception, to this pattern, namely the theory of the Lutheran Samuel von Cocceji (1679–1755), who, however, had close connections with the Reformed world, including in the administration of the Prussian kings where he topped his career as Frederic II's Great Chancellor and would-be legal reformer.[13] In a throwback to an earlier debate about the foundations of natural law, Cocceji formulated a comprehensive theocratic structure of rights. God had universal rights in his creation and bestowed individual rights on the rational parts of the creation as a means of maintaining the structure. Accordingly, humanity lives in a web of rightful relations in which the basic criterion of justice is respect for each other's rights when people pursue their individual goals, such respect being a way of honouring God's rights in each of us. But though people have divinely endowed individual rights, they do not therefore have the right to defend these rights. Defence is provided for in a patriarchal chain, first from God to the *pater familias*, then, when political society comes about, from God via the contracting heads of families to the sovereign, in all cases absolute and in the service of the right of God to govern all.

[12] Vattel 2008. Cf. Hunter 2012: 1–33. [13] Cocceji 1740. Cf. Haakonssen 1996: 135–145.

As if to illustrate how many-sided early modern natural law was, and how chameleon-like the concept of 'rights' can be, we find thinkers of the same generation and a little younger who develop rights theories of diametrically opposite use to that of Cocceji. We may point first to Jean Barbeyrac.[14] As a member of the refugee community that was spread across Protestant Europe after the expulsion of the Huguenots from France, the central issue for Barbeyrac was that of freedom of conscience. Adopting ideas from Locke and Jean Leclerc, among others, he formulated a theory of conscience as the moral power that enabled people to live in society. This was a gift of God and could therefore not be alienated: it was not only a right but a duty to exercise our conscience ourselves. Therefore, while government was based upon the contractual agreement of the people, the contract could not extend to the surrender of this right. In fact, the protection of the right was the fundamental rationale for government. Barbeyrac contributed considerably to making these Lockean ideas part of natural law in the Enlightenment and thereby to their availability for redeployment in political situations very different from those that led to his adoption of them. At the same time, he presented his theory mainly in commentaries on Pufendorf's law-centred work, and developed a theory of natural law that encompassed a so-called permissive law, from which natural rights were derived. This was an attempt to combine rights as spheres of moral liberty with the law's requirement to use such liberty rightly.[15]

Half a generation after Barbeyrac, the Grotian idea of rights was taken up by Francis Hutcheson (1694–1747) in a very different context within the Reformed world, namely Scotland. Here the idea was caught up in a new moral theory, namely the sentimentalism that Hutcheson developed with strained reference to Shaftesbury,[16] who had focussed on the passions at the same time as Thomasius. However, for Hutcheson the inspiration was Stoic, not Epicurean. Hutcheson attempted to show that virtue was a natural feature of humanity, and that it was based on a moral sense that

[14] Barbeyrac's natural law ideas are mainly put forward in very extensive commentaries to his popular French editions of the works of Grotius, Pufendorf and Cumberland and in a history of ethics prefaced the edition of Pufendorf's *De Jure*. These commentaries and the historical survey were included in the early English translations and are maintained in the recent re-editions of these works; see notes 3 and 6 for Grotius and Pufendorf, and cf. Cumberland 2005; Hochstrasser 1993: 289–308.

[15] Tierney 2014, chapter 14; Bisset 2015: 541–562.

[16] Cf. Grote 2006: 159–172.

both perceived the morality of actions and motivated to moral behaviour, unless it was perverted. When we perceive that an action, by ourselves or others, is good, then we may also say that the agent has a right to perform that act. However, like the other senses, the moral sense may be mistaken, and what at first sight appears good may not be so in a wider perspective. So our prima facie rights are subject to correction by a concern for the general or common good, which is commanded by the law of nature. From a very different angle Hutcheson thus arrived at a balance of right and law not unlike that of Barbeyrac, and around this simple conceptual structure he built a theory of the appropriate political custodianship of the common good and the moral standing of (the) people when their rights were oppressed.[17]

The combination of moral philosophy and natural law, or the use of natural law as moral philosophy, became a common feature of the Enlightenment in Scotland as it did in many parts of Germany. It was used as a broad civic education with, in modern parlance, inter-disciplinary dimensions, the best known of which is political economy.[18] At the same time, this form of natural law conveyed a collection of concepts that could acquire practical potency under new political circumstances. Thus in America the Protestant natural law jurisprudence was one of the tributaries to a new revolutionary politics and soon fed into the emerging constitutionalism. In Europe the Swiss Jean Jacques Burlamaqui (1694–1748)[19] and Emer de Vattel, drawing on Barbeyrac, had a significant impact on the use of natural law for the purposes of the law of nations, while their countryman Jean Jacques Rousseau (1712–1778) and Denis Diderot (1713–1784) brought natural law ideas to bear on French political thought.[20]

Kantianism

As a form of jurisprudence it was, however, in Germany that natural law played out the final act of its early modern appearance and handed it on to the nineteenth century. Natural law became part of Immanuel

[17] Hutcheson 2007; Hutcheson forthcoming. Cf. Haakonssen 2013: 183–200; Moore 2006: 291–316.
[18] Haakonssen 2012: 258–277.
[19] Burlamaqui 1747, 1751 and 2006. Cf. Haakonssen 2002: 27–42.
[20] Rosenblatt 1997; Silvestrini 2010: 280–301; Wokler 1994: 373–402.

Kant's (1724–1804) dramatic reform of philosophy as a whole, and the change has been seen as so significant that Kant rarely is discussed as part of the history of early modern natural law. It is, however, clear that Kant's theory of law was formulated by means of ideas derived from earlier natural law theories and as a direct answer to the problems that he perceived in these theories.[21] Indeed he lectured on a standard textbook in natural law for many years while working out his own ideas. Kant's theory of law may be seen as an attempt to defend the kind of metaphysical natural law found in Leibniz and Wolff by means of a reformulation based upon Kant's new metaphysics. The opponent in this development was a combination of Enlightenment historicism and philosophical anthropology. The former questioned the idea that a state of nature and an original contract were real or logical presuppositions for society, while the new sciences of human nature by emphasizing the role of the passions rejected the rationalist reduction of the active powers of the human mind to an intellectual love of perfection brought about by purely cognitive activity. These historicist and empiricist lines of argument were too heterogeneous to be called a movement, but they were a clear target for renewed metaphysical efforts centering around Kant and his followers. The basic move was to accept the focus on the individual agent but to replace empirical study with a metaphysical reconstruction of agency. Instead of seeing the state of nature as a collective condition in which individuals displayed their natural dispositions, the natural condition was seen as inherent in individuals and the characteristics of that condition as the natural qualities of the human person. Natural liberty, or rights, was not an external condition to be given up, or profoundly modified, in order to have society, but the natural equipment with which individuals had to make society and which legitimized society, a thought that easily combined with the older religious idea of the inalienable right to a free conscience.

This form of rights argument, which had already been attempted by Rousseau and was now being developed by, among others, Johann Gottlieb Fichte (1762–1814),[22] laid it near to hand to take natural liberty as somehow definitive of human personality and thus beyond the touch of empirical theories of human action.[23] The problem was that such an

[21] Schneewind 1993: 53–74. [22] Fichte 2000.

[23] For an overview over the historical background to Kant's mature theory of law with further references, see Haakonssen 2006: 279–283. The following presentation of Kant is based on that article: 283–286.

individualized liberty made it difficult to understand how social relations were possible. How could the liberties of autonomous individuals harmonize with each other sufficiently for them to live together? This was the question that the followers of Kant addressed most intensively, while waiting for his own solution. Kant had published his moral theory in *Grundlegung zur Metaphysik der Sitten* (1785) and *Kritik der praktischen Vernunft* (1788)[24] and there laid it down that the exercise of moral freedom meant acting according to the categorical imperative. This divided the moral world into those actions that were permitted because their maxims were universalizable and those that were prohibited because their maxims were not universalizable. But this only told us something definite about our negative duty, what not to do, while positive duties were left indefinite (for example, the duty to be charitable at most entails the vague injunction to consider giving something sometime to some charitable purpose). All the rest of human behaviour consisted of that which was permissible, and for some thinkers, such as Fichte in his early work, this wide field was that of rights. But since the harmonizing of rights was the task, and since a purely prudential, political and historically contingent harmony (a la Hobbes and Pufendorf) was unacceptable, the conclusion had to be that the categorical imperative could not function as the basic law of nature.

The starting point for Kant's moral theory was an appeal to common moral experience, and it was his assertion that it necessarily was one of freedom. However, this seemed eminently disputable in view of the multiple influences on moral decisions, so the experience in question had to be purified to be one of true freedom. This procedure is not unproblematic since the criterion of pure experience is that one is free of 'sensuous' influences in one's decision-making. Indeed, *The Groundwork* can be seen, not as an argument, but as a spiritual exercise to inculcate in the mind the experience of genuine freedom.[25] Irrespective of how we achieve it, the experience of moral freedom entails that we are free while yet subject to ordinary causal influences. Our noumenal self is part of a realm outside of time, space and causation, while our empirical self is in the world of the senses. The self that was capable of such experience was free or autonomous, i.e. self-legislating. This was the core of Kant's revision of the metaphysical natural law tradition, to make the law of nature internal to the moral agent and a matter of each agent's self-legislation.

[24] Kant 1996: 41–108 and 137–271. [25] Hunter 2002: 908–929.

As indicated, the moral law – the categorical imperative – did not suffice to function as the basic law of nature. According to the moral law, 'a rational being must always regard himself as lawgiving in a kingdom of ends possible through freedom of the will, whether as a member or as sovereign'.[26] But what is required of a rational being's legislation when this kingdom of ends is embodied in a world of empirical phenomena where people have an unknowable variety of goals ('ends')? Kant divides this into two questions. First, what can reason tell us about the pursuit of our goals in abstraction from what those goals actually are? And, secondly, are there any goals that are ends in themselves ('categorical')? The former of these practical questions is addressed in the 'Metaphysical First Principles of the Doctrine of Right', the latter in the 'Metaphysical First Principles of the Doctrine of Virtue', the two parts of *Metaphysik der Sitten* (1797).[27]

Kant insists that the embodied person, as a matter of rational necessity, has a right to freedom.[28] This is the right to have possession (as distinct from property) in one's self, in one's actions and in the positions in time and space that are entailed by being an embodied self in action – the ground one stands on, the space one takes up, the air one breathes, and so on. Unless this right is honoured, one cannot be a moral person at all, but this does not mean that one has a right to be at any particular place in the world for any particular span of time, holding on to any particular thing. Where, when and how a person is in the world are entirely contingent matters. As a matter of abstract principle (in 'pure reason'), any constellation of things and events in time and space is a possibility for any person. Furthermore, in abstraction from the de facto circumstances, it is possible that any person may have desires for another position in the world than that which he or she happens to have. Finally, we must assume as an empirical fact that the world is finite. We may be able to go elsewhere at any particular time, but in abstraction from the particular situation of specific individuals, humanity as a whole in its life-tenure of the world must divide it up. The historically given divisions – where one happens to find oneself – are not matters of rational necessity: it might all have been entirely different 'with as much reason'. In other words, the empirical links

[26] Kant 1996: 83.
[27] Kant 1996: 363–603. Cf. Gregor 1963; Byrd and Hruschka 2010; Hunter 2001: chapter 6.
[28] Kant 1996: 393–394. For the following, see 401–411.

between persons and the things in the world have no rational standing and need replacement by the purely ideal links of reason.

There is a purely natural justification for defending one's person and its immediate sphere, since otherwise one's elementary personhood would be denied, as we have seen. But anything beyond this immediate sphere may only be defended against others if the defender is justified in interfering in the attacker's immediate sphere, namely by using force. The defender has to be justly exempt from the ban on interfering with exactly that sphere of the others. This exemption is the *Erlaubnisgesetz*, the law of permission. When this law allows one to use force to prevent any other person from interfering in the relationship between oneself and an object of one's choice, then that object is one's property.[29] The moral life of humanity considered only as occupiers of the empirical ('phenomenal') world is to seek ways of implementing the law of permission. The principle for this endeavour is the principle of right; the method is the institution of the state and, ultimately, the universal society of the world.

The principle of right has to be related to the principle of virtue. The former regulates our actions, the latter the 'maxims' of our actions. When we deal with people considered as members of the realm of freedom, reason demands that we respect the humanity of all, including ourselves, equally as an end of inherent value. The maxims upon which we act must, therefore, be equally applicable to all for they must be maxims of the respect for humanity. These fall into two broad categories of duties of virtue, namely the duty to self-perfection and the duty to seek the happiness of others. When we deal with people considered only as joint occupiers of the world, we abstract from maxims and ends. Reason then demands that the exercises of our freedom in action be mutually compatible, which, more specifically, means that we are only permitted to use force against others when this could become a universal law. Just as the categorical imperative in its ethical or virtue-aspect is a principle of reciprocity in the maxims we adopt, so in its juridical or rights-aspect it is a principle of reciprocity in the actions we take. Those are the basic thoughts behind Kant's division of the moral world into ethics or the doctrine of virtue and law or the doctrine of right; between what is not enforceable and what is; between internal and external.

[29] Brandt 1982: 233–285; Szymkowiak 2009: 567–600.

A world in which the law of permission on every occasion of its use was truly universalizable would be a world without any conflict between people's claims on the things of the world, and this would constitute complete justice in the distribution of those things. This is a utopian, limiting concept for humanity's moral striving; the most significant milestone on the way is the state. The rationale for the state is to ensure laws of permission that are universal for its members so that their takings from the world can be secured by being mutually compatible. Kant expresses this by saying that without the state – in the state of nature – all 'property' is merely *provisional*; the state makes it *peremptory* (though true finality would in fact only be achieved in the universal society). In other words, Kant's philosophy of law is the basis for his political philosophy.

Through his two-world doctrine of human nature Kant's transformed the metaphysical form of natural law, leaving an impression of its representatives – Wolff and his followers – as at best inept precursors. At the same time, he rejected the historical and empirical approaches to natural law developed by Pufendorf, Thomasius and their followers as being hardly philosophy at all. The fact that these critiques themselves were formulated as moves in a local and historically contingent dispute has often been obscured by the recurring appeal of Kant's postulates of trans-historical rationality and transcendent liberty (See Hunter 2001, ch. 6). As a consequence, it has been difficult to understand the complexity and historical role of early modern natural law. One of the ironies of the success of Kant's polemical efforts is that it is only in recent scholarship that it has become quite clear that his own work in the philosophy of law extended the life of natural law as a genre and an academic discipline well into the nineteenth century, and hence beyond the scope of this chapter.[30]

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Metaphysical Foundations of Natural Law Theories 5

Jonathan Crowe

The natural law outlook (as defended in the work of the 'new natural law theorists', such as Germain Grisez, John Finnis and Joseph M. Boyle[1]) involves a range of distinctive positions in ethics, political philosophy and jurisprudence. Specifically, it consists of an ethical theory that combines the incommensurability of the basic forms of good with the logical priority of the good over the right; a political theory that holds that all agents have a duty to promote the common good; and a legal theory that combines a normative account of law as social coordination with the ontological claim that law is necessarily a rational standard for conduct.[2]

This chapter explores the metaphysical foundations of these aspects of the natural law position. I will focus particularly on the metaphysical issues raised by the natural law outlook in ethics and jurisprudence. The emphasis placed in natural law ethics on the basic forms of good raises questions about the nature of the goods and their relationship to other sorts of entities. Similarly, the central claim of natural law jurisprudence – that law is necessarily a rational standard for conduct – raises fundamental questions about the nature of law. Natural law authors have adopted some characteristic positions on these issues, but there is significant debate about the details.

Natural Law and Human Nature

Natural law ethics (in the version outlined by the new natural law theorists) holds that practical rationality consists in engaging in non-defective ways

[1] See, for example, Finnis 2011; Grisez 1983; Grisez, Boyle and Finnis 1987a; Grisez, Boyle and Finnis 1987b.

[2] For further discussion of the core claims of the natural law outlook, see Crowe 2011a.

with a range of fundamental goods.[3] The idea that the natural law – understood as encompassing the basic forms of good and requirements of practical reasoning – is somehow grounded in human nature is central to the natural law tradition.[4] However, there is significant debate among natural law authors as to how this claim should be understood. Finnis puts the connection between natural law and human nature relatively weakly: for him, the basic goods reflect human nature insofar as they represent 'what is good for human beings with the nature they have'.[5] Russell Hittinger, by contrast, argues that a genuine natural law theory must 'interrelate systematically practical reason with a philosophy of nature' and treat 'nature as in some way normative'.[6] Other theorists have also criticized the new natural law authors for not sufficiently grounding their ethical theories in an underlying natural order.[7]

Finnis's relatively weak view of the connection between the natural law and human nature is at least partly motivated by his desire to avoid traditional criticisms of natural law ethics for failing to honour the Humean distinction between fact and value.[8] Finnis is at pains to deny that natural law theorists, properly understood, have ever tried to derive moral principles solely from factual premises.[9] Rather, he argues, natural law ethics relies on basic values that are not derived from anything. These fundamental values are self-evident, indemonstrable and underived.[10] They are presupposed by anyone who seriously engages in practical reasoning. Practical reasoning, for Finnis, is to be sharply distinguished from speculative reasoning (in which he includes the natural sciences).[11] It is through the former mode of reasoning, not the latter, that we come to grasp the natural law.

A naturalistic theory of value (as the term is used in contemporary meta-ethics) takes values to be identical to or grounded in natural

[3] A number of lists of these basic goods have been offered. Finnis, for example, identifies seven basic goods: life, knowledge, play, aesthetic experience, friendship, spirituality and practical reasonableness. See Finnis 2011: ch. 3–4. He also treats marriage as a basic good in more recent work: Finnis 2011: 447. For other views, see Grisez 1983: 121–125; Chappell 1998: 37–45; Chartier 2009: 7–13; Gómez-Lobo 2002: ch. 2; Murphy 2001: ch. 3.

[4] Compare Murphy 2001: 14; Hittinger 1987: 8; Veatch 1981: 252.

[5] Finnis 2011: 34.

[6] Hittinger 1987: 8.

[7] See, for example, McInerny 1982: 48–56; Fortin 1982; Veatch 1981. For a response, see George 1988.

[8] Finnis 2011: 33–36. For discussion, see Crowe 2005.

[9] Finnis 2011: 33.

[10] Finnis 2011: 33–34.

[11] Finnis 2011: 34; Finnis 1983: 10–17.

facts – roughly, facts that can be analysed by the physical sciences.[12] A non-naturalistic theory denies this. It is not entirely clear whether Finnis and the new natural law theorists subscribe to a naturalistic or non-naturalistic viewpoint, but Finnis's emphasis on practical over speculative reason has a distinctively non-naturalistic flavour. This suggests that he sees values as either grounded in some species of non-natural facts – such as, perhaps, facts about God – or ontologically basic (not grounded in anything). However, his precise view on this issue is never made explicit. This lack of a clear meta-ethics leads Jean Porter to accuse Finnis of making the basic values appear metaphysically mysterious.[13] Finnis's view also sits uneasily with the traditional focus of natural law ethical theories on connecting the basic forms of value with the proper ends and functions of humans as a species. This suggests – even if it does not necessarily entail – a naturalistic way of thinking about value.

Finnis presents his emphasis on practical reasoning as the mode of access to the basic goods as a faithful interpretation of Thomas Aquinas.[14] Aquinas views the basic forms of good as the objects of natural human inclinations [*inclinationes*]. The things to which humans are naturally inclined, he explains, are those identified by our capacity for reason as being good.[15] He further associates these inclinations with human nature: humans have inclinations that reflect their nature as substances (such as the inclination towards self-preservation), as animals (such as the inclination towards sexual intercourse) and as rational beings (such as the inclination to live in community). It is this last category that contains the natural law. Finnis interprets Aquinas as holding that humans can identify the basic forms of good by means of reasoned reflection upon their practical ends. These values are not good, for Finnis, because humans are inclined to them; rather, the fact that humans are inclined to them provides evidence of their intrinsic goodness.[16]

It is also possible, however, to read Aquinas as proposing a grounding relation between the basic forms of good and a natural property of humans: namely, their characteristic inclination to pursue and value certain ends. This would result in a picture of natural law that resembles what contemporary meta-ethicists would term a *dispositional theory of value*.[17] On one

[12] Compare Burge 1992: 31–32. [13] Porter 1993. [14] Finnis 2011: 33–36.
[15] Aquinas 1948: I-II, q. 94, art. 2. [16] Finnis 2011: 33–34; Finnis 1998: 29–34.
[17] Compare Lewis 1989. A similar suggestion has been made by Anthony Lisska. See, for example, Lisska 1996. However, Lisska's account of dispositions and their role in natural law ethics differs significantly from the view presented here.

version of this view, which I have proposed in detail elsewhere,[18] natural law accounts of the basic goods seek to capture those objectives humans are characteristically disposed to pursue and value for their own sake, while natural law theories of practical rationality describe the principles that would govern engagement with the basic goods under certain idealized conditions.

Normative Inclinations

We can begin unpacking this view by looking generally at *human dispositions*: the characteristic tendencies of humans to respond in certain ways to specific types of situations. Human dispositions take many forms, but we can usefully understand them as falling along two broad continuums. The first continuum concerns the extent to which they are *learned*. Some human dispositions are innate. The disposition to withdraw from painful stimuli, for example, is typically present at birth.[19] Others are acquired gradually over time. Most adult humans, for instance, have a disposition to grasp a cup in a way that orients it for drinking. Infants, however, must learn how to do this; at first, they often hold cups awkwardly and spill the contents. It is tempting to describe all human dispositions as either learned or innate. However, there is a range of possibilities between these two descriptions. Innate dispositions, for instance, may change over time in response to experiences.[20]

The second continuum we can use to classify human dispositions concerns their *resistibility*. Some human dispositions are automatic, hard-wired responses that it is impossible to resist under normal conditions. Others incline us to behave in particular ways, but are routinely overridden by other considerations. We can describe dispositions as relatively strong or weak, depending on where they fall on this continuum. Imagine, for example, that I am at a party and my host offers me a slice of cake. It looks delicious; I am tempted to eat the whole thing. However, this disposition is relatively weak: just because I am tempted to eat the cake does not mean I have to do it.

We can use the two continuums described above to distinguish three types of characteristic human dispositions. All animals, including

[18] Crowe 2015. [19] Vernon 1969: 14–15. [20] Vernon 1969: 15–16.

humans, have dispositions known as *reflexes*. A reflex is an automatic physiological response to stimuli. If I accidentally touch a hot stovetop, my automatic response is to withdraw my hand from the hot surface. This reaction takes place at a purely pre-reflective level: it is typically neither necessary nor possible to deliberate before performing the action. Reflexes are innate, rather than learned; as noted above, the withdrawal reflex is present at birth. The resistibility of reflexes is low. Most people cannot resist the withdrawal reflex; it requires intensive, specialized training to do so.

A second type of human disposition involves what we might call *instincts*. An instinct resembles a reflex in that it involves a pre-reflective physiological response. However, it differs from a reflex in both the extent to which it is learned and its resistibility. Instincts reflect innate biological drives, such as hunger or a desire for positive affect. However, their exact form is typically learned. The replacement of the infant's sucking reflex by regularly timed meals is an example. Instincts are also more resistible than reflexes. They are typically capable of being modified or overridden, either through conscious deliberation or by competing pre-reflective motivations. I am disposed to eat regular meals and seek pleasure, but I do not have to do so. Some people choose to fast or lead an ascetic lifestyle. Almost everyone pre-reflectively moderates and resists at least some of their desires.

The third type of human disposition involves what we might call *inclinations*. These are both learned and resistible. Examples include complex motor skills such as grasping a cup or typing a line of text. Language skills and comprehension abilities, such as recognizing different types of everyday objects, also fall into this category. These abilities are not innate, although humans characteristically possess the capacity to acquire them. They must be built up gradually over time. Humans do not have to follow their inclinations; as with instincts, they may be overridden either consciously or pre-reflectively. For most adults, for example, it becomes second nature to grasp a cup so that it is oriented appropriately for drinking. However, even adults with full command of this skill do not have to hold a cup in that way. They can override their inclination and hold it awkwardly, if they wish to do so.

I wish to suggest that the basic forms of good for humans can be understood as reflecting a species of inclination. That is, the basic goods reflect complex human dispositions that are both learned and resistible.

This, I suspect, is part of Aquinas's point in distinguishing inclinations from other characteristic human drives, such as emotions and instincts.[21] We might call human dispositions of the kind reflected in the basic goods *normative inclinations*. These dispositions are normative in two distinct senses. First, they produce judgements by reference to which humans are characteristically disposed to evaluate both their own actions and those of other people. They therefore play a normative role in social discourse. Second, the dispositions play a central role in broader normative theories of human flourishing.

What distinguishes normative inclinations from other kinds of learned and resistible dispositions? Here is one possibility. Reflexes, instincts and inclinations are all dispositions to act or not act in certain ways. Normative inclinations, however, have an additional component. They involve both a disposition to *act* in a specific way and a disposition to *believe* that the action is worthwhile or required.[22] Consider, once again, my inclination to decline the cake offered by my host. Suppose I decline the cake because it is unhealthy. I am disposed to decline the cake, but I am also disposed to believe that declining the cake is a worthwhile thing to do.

The Pre-Moral Thesis

What, then, is the relationship between these normative inclinations and the basic goods that provide the foundations for the natural law? It is useful to turn here to Grisez and Finnis's description of the basic goods as 'pre-moral'.[23] This idea can be broken into two parts. In the first place, it can be understood as capturing the *pre-reflective* nature of the basic goods.[24] The goods are not the product of moral deliberation; rather, they are in place prior to any reflective engagement. The basic goods, in other words, provide the inescapable background context within which the capacity for moral reflection is exercised. They differ from any substantive

[21] See, for example, Aquinas 1948: I-II, q. 24. For helpful discussion on this point, see Lumb 1959: 207–210.

[22] This account of normative inclinations mirrors, very roughly, the theory of normative reasons outlined in Smith 1994.

[23] See, for example, Finnis 2011: 34; Grisez, Boyle and Finnis 1987b: 126.

[24] For further discussion, see Crowe 2011b.

principles one might formulate after reflecting upon the demands of practical rationality.

Finnis and Grisez's description of the basic goods as pre-moral also conveys something about their normative character. The basic goods do not, in and of themselves, reveal specific actions as morally right or wrong.[25] They are concerned not with the moral correctness of human actions, but rather with their *intelligibility*. An action that is not directed at one or more basic goods is not necessarily morally wrong, but rather irrational or incoherent. The converse is, of course, also true: an action that is directed at one or more basic goods is not, by that fact, morally permissible. Wrongful actions may nonetheless be intelligible; they may, for example, pursue a worthwhile human end by morally impermissible means. A complete theory of practical rationality must therefore supplement the basic goods with an account of what Finnis calls 'principles of practical reasonableness'[26] in order to explain why particular ways of pursuing the goods are morally right or wrong.

Let us call this view of the basic goods the *pre-moral thesis*. The thesis raises a number of questions for a natural law theory of practical rationality. One such question (discussed, as we have seen, by Finnis) concerns the relationship between the basic goods and speculative knowledge. The pre-moral thesis entails that our understanding of the basic goods is primarily practical, rather than propositional; it is a form of 'knowing how', rather than 'knowing that'. However, speculative enquiry nonetheless plays an important role in practical deliberation. It is through reasoned reflection on fundamental human ends that we come to a more perfect understanding of not only the basic forms of good themselves, but also the various principles of practical reasonableness. Finnis recognizes the important role of this kind of reflection in developing our understanding of the natural law.[27]

There is also another possible role for speculative reason in advancing our understanding of the basic goods: we can use speculative reason not to discover the goods, but to explain their relationship to our natural properties. For example, we can usefully recast the pre-moral thesis in terms of the analysis of normative inclinations outlined above. Humans are characteristically disposed to both pursue the basic goods and believe that

[25] For useful discussion of this point, see George 1988. [26] Finnis 2011: ch. 5.
[27] Finnis 1983: 11–12.

the goods are worth pursuing for their own sake. The basic goods therefore reflect a form of normative inclination. Furthermore, the normative inclinations of human agents characteristically have one or more of the basic forms of good as their ultimate end. I choose to reject the cake offered by my host ultimately because I value my physical health. This reflects the human inclination both to pursue health and to believe that health is worth pursuing in its own right.

Humans do not always properly grasp the object of their normative inclinations and, even when they do, this is no guarantee they will act reasonably. It follows that an account of the basic goods as the object of normative inclinations is not yet a complete theory of practical rationality. An account of the basic goods is, rather, a claim about the fundamental structure of the human experience of practical choice. Human action is directed at certain basic ends. A theory of the basic goods seeks to describe these characteristic human ends, in the same way that psychologists have sought to describe other human dispositions, such as reflexes and instincts.[28] An account of the basic goods therefore seeks to advance our understanding of human nature, in the same way as other theories of human motivation. Natural law ethics builds on this analysis of normative dispositions to provide a theory of practical reasoning.

A full account of the role of normative inclinations in practical rationality, then, will outline the intelligibility and correctness conditions of practical choices, while also allowing for the possibility of both unintelligibility and error in actual decision-making processes. In other words, it will provide a way of distinguishing cases where our normative inclinations reflect an adequate grasp of the basic forms of good for humans from cases where they go astray. The various attempts by natural law authors to provide theories of the principles of practical reasonableness can usefully be understood in this way. They are attempts to present the normative inclinations of humans in their best normative and philosophical light.

How are we to understand the nature of this exercise? My suggestion is that we can make sense of natural law accounts of practical rationality by viewing them as attempts to capture the normative inclinations humans would hold under certain idealized conditions. Specifically, we might view

[28] See, for example, Vernon 1969; Maslow 1943; Bastick 1982.

them as attempts to capture the normative inclinations we would hold under conditions of *full imaginative immersion*.[29] Full imaginative immersion consists in a rich understanding of what it would be like to pursue or not pursue a basic good across a range of contexts of practical choice; what it would mean in those contexts to treat the good as holding inherent rather than merely instrumental value; what difference it would make to one's own and other people's lives to experience fullness or privation of the good; and what the world would be like if that good was or was not accessible to all.

There are limits to human imagination. Humans often have difficulty imagining states of affairs outside their personal experience. This hinders their efforts to place themselves imaginatively in other people's shoes, particularly when those people have significantly different life plans, face different opportunities and hardships or come from different social and cultural backgrounds. Full imaginative acquaintance with a basic good would involve overcoming these barriers to imagine fullness or privation of the value in a variety of contexts. Imaginative acquaintance can be understood as fullness of human ethical experience. The point of imagination, of course, is to transcend the limits of experience; at the same time, however, a fullness of experience enhances the vividness and realism of one's imagination. The link between practical rationality and ethical experience is emphasized by Finnis, who summarizes the various principles of practical reasonableness as requiring one to act 'in accordance with one's conscience' or, in other words, never to do something that one judges, all things considered, ought not to be done.[30]

In a similar vein, we might say that imaginative acquaintance involves carefully reflecting on the basic forms of human good; considering the role of these basic goods in one's experiences of practical choice; extrapolating those experiences to a range of other contexts, considering what it would be like to both participate freely in the good and to experience its privation; and considering what it would mean, in diverse circumstances, to treat the good as inherently valuable both for oneself and for others. This type of process may be expected to yield a fuller understanding of the basic goods themselves and, when extended to the role that the goods play in various

[29] For two related responses, see Lewis 1989: 121–126; Smith 1994: ch. 5.
[30] Finnis 2011: 125–126.

situations of practical choice, the principles that govern non-defective engagement with those values.

The Grounding Thesis

We are now in a position to return to the relationship between natural law and human nature. Let us call the claim that the natural law is somehow grounded in human nature the *grounding thesis*.[31] It is useful to distinguish four different ways the grounding thesis may be understood. First, it might be taken as holding that the basic goods are *logically dependent* on human nature: the goods are logically derived from facts about the natural properties of humans. The new natural law theory of Grisez and Finnis denies this strong version of the thesis, as does the dispositional theory outlined above. The pre-moral thesis entails that the basic goods are grasped non-inferentially, prior to any reflective engagement. They are therefore not the product of any speculative analysis of human nature. They are the start, not the middle or the end, of reflective enquiry into practical rationality: a theory of natural law is an attempt to elucidate and understand the goods, not to derive them.

The second interpretation of the grounding thesis holds that the basic goods are *counterfactually dependent* on human nature: if human nature were sufficiently different, the goods would also be different. Finnis seems to endorse this reading of the thesis in his comment that the basic goods are 'what is good for human beings with the nature they have'.[32] The third, somewhat stronger reading of the thesis holds that the basic goods are *causally dependent* on human nature: if human nature were sufficiently different, the goods would also be different *as a direct consequence* of the change in the natural properties of humans. It is less clear to me whether Finnis would endorse this position. It seems at least possible that, on his view, the basic goods correspond to human nature not due to any direct causal relation between them, but due to their respective roles in God's overall plan for human flourishing.

The dispositional account of natural law outlined above, by contrast, supports both the counterfactual and causal interpretations of the grounding thesis. The normative inclinations that constitute the basic goods are

[31] I take this term from Murphy 2001: 13–17. [32] Finnis 2011: 34.

plausibly a product of human evolution, both biological and social.[33] They reflect both the biological predispositions of humans and their experiences of practical reasoning in a social environment. The biological and social dispositions of humans are surely at least part of what we mean by human nature. Human nature is, on this view, contingent: biological and social facts about humans could have turned out in different ways. If humans had evolved sufficiently differently, their nature would be different and there would be different basic goods. It follows that the basic goods causally depend on human nature.

The fourth possible interpretation of the grounding thesis holds that the basic goods are *explanatorily dependent* on human nature: facts about human nature – specifically, about the characteristic biological and social dispositions of humans – explain not only where our grasp of the basic goods comes from, but how it is that they are good. This seems like an interpretation of the thesis that Grisez and Finnis could accept; it is also consistent with the dispositional theory outlined above. In order to flesh out this claim, it is necessary to look more closely at the notion of explanation. One sense in which facts about human nature could explain the basic goods would be if the basic goods were logically or causally dependent on them;[34] however, as indicated previously, this is not what I have in mind. Rather, the idea is that facts about human nature play an integral role in an *explanatory theory* of the basic goods: a theory that explains how it is or could be possible that they are good.[35]

Grisez and Finnis both provide the outlines of such a theory in their discussions of the various basic goods and their roles in human flourishing.[36] These accounts aim to link the basic goods with facts about human nature and thereby explain why they do and should line up with human desires. The dispositional account outlined above also helps to provide such an explanatory theory. On this view, the basic goods reflect both the natural drives of humans and the social conditions in which they find themselves. They are the product of a diachronic process whereby human dispositions are refined and adapted over time. It is not surprising that the normative inclinations arising

[33] For further discussion, see Crowe 2015: 61–63. [34] Murphy 2001: 16–17.
[35] Compare Nozick 1981: 1–24; Nozick 1974: 6–8.
[36] Grisez 1983: ch. 5; Finnis 2011: ch. 3–4. Compare Murphy 2001: 94–95.

from this process in discrete social contexts would tend to pick out those values that tend to contribute to fulfilling human lives. This evolutionary perspective may well not provide a complete explanation of the basic goods – one might, for instance, wish to include facts about God's causal and providential role in the universe – but it is an important part of such a theory.

The basic goods, then, are valuable precisely because they capture what objectives are worthwhile and fulfilling for humans, given their biological and social properties. It is not that the basic goods are valuable because humans are disposed to value them; rather, the fact that humans are disposed to value the goods helps explain their value. As Grisez observes, practical reason must be appropriate to the material of humanity; as such, it reflects 'the possibilities suggested by [human] experience'.[37] A theory of natural law ethics represents the result of systematic reflection upon the forms of life that human communities recognize as holding inherent value. There is room for debate on whether this kind of dispositional view of natural law passes Hittinger's test of treating 'nature as in some way normative'.[38] However, it certainly entails that normativity is in some way natural.

Natural Law and the Nature of Law

We have so far been concerned with the metaphysical foundations of natural law ethics. The remainder of this chapter considers metaphysical issues in natural law jurisprudence. Natural law perspectives in jurisprudence, as noted above, are united by the claim that law is necessarily a rational standard for conduct. Let us call this the *natural law thesis*.[39] This thesis comes in strong and weak versions.[40] The *strong natural law view* interprets the natural law thesis as stating an existence condition for law. Law is a rational standard for conduct in the same way that a square is a shape with four sides: anything that fails this standard fails to qualify as law. The *weak natural law view*, by contrast, interprets the claim as stating a non-defectiveness condition for law. Law, on this view, is a rational

[37] Grisez 1965: 179. [38] Hittinger 1987: 8.
[39] Compare Murphy 2003. For further discussion, see Crowe 2016; Crowe 2012.
[40] Murphy 2006: ch. 1; Crowe 2012: 164–166.

standard for conduct in the same way that an alarm clock is a device that wakes people up in the morning: anything that fails this standard either fails to qualify as law or is defective as law.

Natural law theorists have offered a variety of arguments for their preferred versions of the thesis. The most prominent arguments can be placed into three categories. The first line of argument presents law as a *hermeneutic* concept: its role is to explain and justify normative social practices, which it can only do if we assign the concept normative weight. This kind of argument is famously advanced by Finnis in the opening chapter of *Natural Law and Natural Rights*.[41] Finnis contrasts two methodologies one might use to define law. One approach would be to examine every law or legal system that ever existed throughout history and try to identify the characteristics they have in common. If this were possible, it would result in a very broad definition. It would appeal to the lowest common denominator of all laws.

A more fruitful methodology, Finnis argues, would be to focus on identifying a perspective from which we can distinguish central and peripheral cases of law. We can identify such a perspective by paying attention to law's practical point. The *central case* of law will be one that is fully engaged with human reason. It will be directed to the common good of the community – that is, to creating an environment where all members can pursue the basic goods.[42] Actual laws or legal systems will resemble the central case of law to a greater or lesser extent. Finnis calls the definition of law we get by identifying the features of the central case the *focal meaning* of law. We can then say that a law or legal system that possesses all the characteristics of the central case is law in the focal sense. There might also be laws or legal systems that possess some, but not all, of the features of the central case. We might describe these as laws 'in a manner of speaking' or in a 'qualified sense'.[43]

The second kind of natural law argument treats law as a *functional* concept or kind: law's function is to direct action through a particular method or towards a specific end, so anything that fails in that function fails as law. Versions of the functional argument for natural law can be found in the work of Michael Moore,[44] Lon L. Fuller[45] and Murphy,[46] as

[41] Finnis 2011: ch. 1. [42] Finnis 2011: 276–277.
[43] Finnis 2011: 10–11. For critical discussion, see Murphy 2011: 50–51.
[44] Moore 1992; 2001. [45] Fuller 1969. [46] Murphy 2006: 29–36; 2011; 2013.

well as my own work on this issue.[47] The arguments give different accounts of law's function. Moore argues that law's function is to coordinate action in the name of some distinctive good,[48] while Fuller contends that law's function is to direct human action in accordance with rules.[49] Murphy claims that one of law's functions is providing dictates backed by decisive reasons,[50] while I will suggest below that law's function is to serve as a deontic marker by creating a sense of social obligation.[51] All these authors agree, however, that the function of law is to direct action in some specified way. A putative legal norm that is unsuited to engage rational agency in the way appropriate to law is legally defective.

The third class of argument for the natural law thesis treats law as a form of *speech act*, which is defective unless it lives up to the claims it presents to addressees. The speech act argument appears in different forms in the work of Robert Alexy[52] and Murphy.[53] Alexy argues that all legal systems necessarily claim moral correctness; a norm or system that fails to make good on this claim is therefore either invalid or defective as law, depending on the extent of the rational defect.[54] Murphy, by contrast, argues that mandatory legal norms can be understood as demands issued by the law to those within its jurisdiction.[55] He contends that a demand that a person A perform some action ϕ is defective as a speech act unless there are decisive reasons for A to ϕ. It follows that, if mandatory laws are a species of demand, then a law of this type that is not backed by decisive reasons is defective as law. Murphy extends a similar argument to other legal norms by identifying them with illocutionary acts such as declarations or commitments.

Law as an Artefact Kind

Each of the three lines of natural law argument discussed above has its own metaphysical commitments. I will focus in what follows on functional arguments for natural law (partly because I regard this as the most promising route to the natural law thesis). The very idea of ascribing a

[47] Crowe 2014. [48] Moore 1992: 223–224. [49] Fuller 1969: 96.
[50] Murphy 2006: 32–36. [51] For further discussion, see Crowe 2014.
[52] Alexy 2008; 2010a; 2010b. [53] Murphy 2006: 37–56; 2013.
[54] Alexy 2010b: 177; 2008: 287–288. [55] Murphy 2006: 44–47.

distinctive function to law is controversial.[56] What does it mean, after all, to say that law has a function? How is that function to be identified? These questions – difficult as they are – do not exhaust the queries that a functional theory of law must answer if it is to provide a foundation for the natural law thesis. A theory of this sort must go on to explain why a putative law that fails in its distinctive function should be regarded as invalid or defective as law. This calls for an account of the circumstances in which an entity that fails in its function thereby counts as an unsuccessful or defective example of its kind.

A promising way to explore the idea that law has a function is to analyse law as a class of human artefact. The claim that law is an artefact is widely accepted by legal theorists, although it is rarely subjected to close scrutiny.[57] There are two main views of artefacts in the philosophical literature. The orthodox position is that artefact categories like *chair* and *boat*, unlike natural kinds such as *water* and *gold*, have no essential properties.[58] Rather, they are conventional groupings based on family resemblances. However, this orthodox view has recently been challenged by authors who argue that artefact categories are real kinds possessing essential attributes.[59] The philosophical support for essentialism about artefacts has been mirrored in psychology. A number of cognitive psychologists have suggested that artefact categories are better explained as reflecting judgements about the essential properties of objects, rather than as employing cluster concepts.[60]

How might an attempt to capture the essential properties of artefact kinds proceed? The obvious starting point is the idea that classes of artefacts are related by their function.[61] However, the essential features of an artefact kind cannot be identified simply by reference to its causal role or its functional capacities. The function of a chair is to support those

[56] For a helpful overview, see Ehrenberg 2013.

[57] See, for example, Coleman and Simchen 2003; Leiter 2011: 666; Gardner 2004; Shiner 2010; Macklem 2013.

[58] For the orthodox view, see Wiggins 1980; Wiggins 2001; Van Inwagen 1990. See also Leiter 2011: 666–667.

[59] See, for example, Baker 2004; Baker 2007; Elder 2004: ch. 7; Elder 2007; Hilpinen 1993; Levinson 1979; Levinson 2007; Millikan 1984; Thomasson 2003; Thomasson 2006; Thomasson 2007a; Thomasson 2007b.

[60] Bloom 1996; Barton and Komatsu 1989. For a contrary view, see Sloman and Malt 2002.

[61] Compare Kornblith 1980: 112. See also Ehrenberg 2009; Ehrenberg 2013.

who sit, but there are many objects with the role or capacity of supporting those who sit, but which are not chairs. Tables, floors and car bonnets are a few examples. Furthermore, such an analysis would entail that defective or broken chairs are not members of the kind. The literature has therefore moved away from the actual functions of artefact kinds to their *intended* functions. On this view, something is a chair not because people do or can sit on it, but because it was created with that function in mind. This yields the claim that, roughly, something counts as an artefact of kind K only if it is successfully created with the intention that it be a K.[62] Let us call this the *intention theory* of artefact kinds.[63]

The first question that arises in relation to the intention theory concerns the content of the required intention. What does it mean for an author to create something with the intention that it be, say, a chair? Does it mean that the author must be thinking of other chairs and intending to make something of the same kind? There is some support for this view.[64] However, it would mean that every author of an artefact would be required to have a previous example in mind.[65] This produces a vicious regress. Furthermore, many artefacts developed independently in different cultures, but are nonetheless the same type of thing. Early chairs created independently in Egypt, Greece and China, for example, are members of the same kind.

The better view seems to be that the author must have some concept of a chair and intend to produce something that conforms to that concept. The intention necessary to make a chair, in other words, should be understood as reflecting the intension of the term 'chair', rather than its extension. It follows that the successful creator of an artefact must have some level of understanding of the kind to which their creation belongs. However, it would be wrong to apply this condition too strictly. A person may successfully create a particular type of artefact without being able to supply an exhaustive list of defining properties pertaining to the kind. It seems more appropriate to frame the condition in terms of a list of characteristic features. The creator must have in mind a sufficient list of

[62] For variations on this position, see Bloom 1996; Baker 2007; Levinson 2007; Hilpinen 1993; Thomasson 2003; Thomasson 2007.

[63] The intention theory requires modification to deal with artefacts that are not intentionally created. I outline a suitably modified version in Crowe 2014.

[64] Bloom 1996: 23–24. [65] Compare Thomasson 2003: 595–596.

such features to count as a concept of the artefact and intend their creation largely to comply with it.

There is reason to think that not all characteristic features of artefacts are equally salient in this context. We saw previously that functional properties seem to be particularly important.[66] We might therefore frame the intention required to successfully create an artefact in terms of what I will call a *function+* concept:[67] that is, a concept comprising the characteristic function of the artefact plus other features salient to that kind. These other features might include characteristic properties related to matters such as appearance, structure, method of creation and mode of operation. The creator of a chair, then, must have in mind a list of salient features of a chair that includes both its function (providing support for one or two people to sit) and other properties such as structure (having a seat and raised back) and appearance. The creator must intend to create something that substantially complies with this concept.

Functional Attributes

It will be useful at this point to look more closely at the concept of a function as applied to artefact kinds. Let us call K's function as an artefact the *K-function*. The K-function can plausibly be understood as a *characteristic causal attribute* of members of the kind. It is part of the concept of a function that an artefact of a given kind typically plays a certain causal role. However, not all the causal attributes of an artefact relate to its function. Some of them are merely incidental. It is tempting to say that the function of an intentionally created artefact reflects the causal role its creator *intends* it to play, but a subtler account is needed to distinguish the function of an artefact from foreseen or intended side effects. The designer of a pistol foresees that it will expel spent bullet casings, but the expulsion of spent shells is not part of the function of the pistol. The function of a pistol is, rather, to project bullets towards a target. The expulsion of spent shells is merely incidental to that function.

[66] This intuition is borne out by a psychological study showing that functional attributes are regarded as far more salient than physical and structural features in classifying objects as members of artefact categories, while the opposite result holds for natural kinds. See Barton and Komatsu 1989.

[67] Carrara and Vermaas 2009.

The function of an artefact, then, does not simply reflect the item's actual or intended causal role.[68] It seems more illuminating to say that an artefact's function itself plays a particular causal role in both our *explanations* of the artefact's kind membership and our *evaluations* of its success or failure. I suggested above that something counts as an artefact of kind K only if its creator holds a function+ concept of K and intends the item to largely fulfil that concept. The intention that is necessary to give rise to a K is therefore partly defined by reference to the K-function. More broadly, the K-function plays a crucial role in explaining why particular items will be generally regarded as members of that kind by competent users of the concept.

Artefact functions also play an evaluative role. They are not, of course, the only standards by which artefacts are evaluated. The function of a pistol is to direct bullets towards a target, but a pistol that shoots accurately is nonetheless deficient if it discharges spent shell casings directly into the shooter's face. Artefact functions, however, play a particularly *fundamental* evaluative role, insofar as they enable artefacts to be placed on a continuum ranging all the way from complete failures to paradigmatic examples. Furthermore, evaluations of artefacts based on their functions tend to play a particularly *salient* role in conditional evaluative descriptions such as 'an excellent chair', 'a poor pistol' and so forth. A pistol that is wildly inaccurate over ten yards is a poor pistol, even if it has many other desirable attributes. However, a pistol that ejects spent shells directly into the shooter's face, but is nonetheless very accurate at fifty yards seems to be a good pistol with a flaw.

The function of an artefact of kind K, then, is a characteristic causal attribute of Ks which is both: (a) an essential component of any adequate explanation of why a K counts as a member of the kind; and (b) a fundamental evaluative standard for judging a K as a more or less successful example of the kind. The function of a chair, for example, is to be sat upon. This is a characteristic causal feature of chairs that plays a central role in both explaining why something is a chair and evaluating something as a good or bad chair. The importance of functional attributes in constituting artefact kinds helps us distinguish central from peripheral cases of the kind. It also enables us to explain cases of authorial failure, where a person has the required intention create an artefact of a particular kind, but ultimately fails to do so.

[68] Contrast Raz 1979: 165.

An appropriate authorial intention is a necessary condition for artefact kind membership on the intention theory. However, it is not sufficient. A person may have the intention to produce a chair and attempt to put this intention into action, but nonetheless fail to produce an object of the requisite kind. One way this might happen is if their creation is constitutively incapable of performing the characteristic function of members of that kind. This condition is not meant to rule out the possibility of defective examples of a kind. There will be good and bad examples of any artefact kind, but some things are not even in the ballpark. Consider the following example:

Air Chair: I decide to invent a new type of chair. My plan is to create a small but powerful fan that will produce a cushion of air sufficiently stable to support a seated person. After a great deal of effort, I make a device I believe will function as planned. However, when I switch it on, the air stream is nowhere near stable enough to support somebody's weight.

It seems that I had the appropriate intention for creating a chair. If I had succeeded in my plan, my invention would have counted as a chair, even though it would have borne little resemblance to most existing chairs. However, I failed so badly that I did not even produce a defective chair. I therefore ultimately produced no chair at all.

It is not a necessary condition of chairhood that something either plays or is intended to play the chair-function. A decorative chair, which is not intended to be sat upon, is nonetheless a chair. It counts as a chair because its creator had in mind an appropriate function+ concept of a chair and intended to create something that largely complied with that concept. However, even a decorative chair must meet the minimum conditions for chairhood. It must be constitutively capable of performing the chair-function. An item with the appearance of a chair that is so fragile it would collapse if sat upon by even the lightest person is not a chair. Rather, we would call it a model chair. The word *model* in this context is an alienans. A model chair is really no chair at all.

Legal Failures

We are now in a position to begin applying the preceding discussion to law. The concept of law in a particular community, on the view outlined,

will be like other artefact concepts in comprising a characteristic function and a range of other typical (but not necessary or sufficient) qualities. The typical features incorporated into the concept of law might cover such diverse matters as form and structure, origins and sources, normative weight, scope of application, claims to authority and modes of promulgation and enforcement. Something will then count as law if it is successfully created with the intention that it fulfil this concept.[69] However, the act of lawmaking may fail if it produces something incapable of performing law's function.

What, then, is the function of law as an artefact? I want to suggest that law's function is to serve as a deontic marker: it marks the boundaries of permissible social conduct. Furthermore, law fulfils this function in a characteristic way: namely, by creating a sense of social obligation. We might begin by considering John Searle's example of a tribe that builds a wall around its territory.[70] The wall initially serves as a boundary by imposing a physical barrier to movement. However, over time the wall erodes until all that is left is a line of stones. Nonetheless, local inhabitants continue to treat the stones as marking a boundary and modify their behaviour accordingly. The wall, Searle notes, has evolved from a physical barrier into a symbolic barrier. However, it is still able to play its original function as a boundary, provided that it continues to be socially recognized as performing that role.

Searle's example illustrates two ways that law might mark the boundaries of acceptable social conduct. One way is through coercion or threats. Law, understood on this model, would be like the original wall constructed by the tribe. It would serve as a physical barrier to transgressive conduct. This model of law resembles that found in the work of John Austin.[71] However, it was famously criticized by H.L.A. Hart. Hart identifies 'the primary function of the law' as 'guiding the action of its subjects'.[72] However, he notes that law fulfils this function not primarily through threats of force, but rather by creating a sense of obligation.[73] This point has important implications for the mechanisms by which law guides behaviour. Laws aim not only to set boundaries on human conduct, but also to serve as 'standards of criticism of

[69] The account can be extended to accommodate laws that are not intentionally created, such as customary laws. See Crowe 2014.
[70] Searle 1995: 39–40. [71] Austin 1995. [72] Hart 1994: 249. [73] Hart 1994: 57.

such conduct'.[74] People view laws as giving them genuine obligations to act in specific ways, not merely as forcing or manipulating them to do so.[75]

I therefore propose that *law's function as an artefact is to serve as a deontic marker by creating a sense of social obligation*. The view that law's function is to serve as a deontic marker helps to explain the popular understanding of law as holding generic authority.[76] We evaluate something as a law based partly on whether it is generally accepted in the community as placing restrictions on conduct. This analysis also provides a plausible standard for evaluating good and bad examples of law. A law that is generally accepted as a guide for conduct is, *ipso facto*, a better law than one that does not. The concept of law, then, contains an internal standard by which we can evaluate examples as better or worse at fulfilling their function. The preceding analysis of law's function also enables us to identify the success conditions for law. A putative law will be constitutively incapable of fulfilling its function if it is incapable of being generally accepted as binding by the community.

What sorts of features might render a putative law incapable of being generally accepted as binding, such that it becomes no law at all? We can begin by focusing on the formal attributes of law. Consider a putative legal enactment that is incomprehensible, imposes contradictory requirements or is otherwise impossible to follow.[77] An enactment of this type indicates no clear course of action and therefore cannot create a sense of social obligation. Imagine that the boundary markers in Searle's example decayed to such an extent that they could not be identified. They would then be incapable of shaping social behaviour by serving as a symbolic boundary. A similar analysis applies to standards that are incapable of being followed. They will be unable to impose deontic restrictions on social behaviour. A putative law of this kind cannot play the law-function and is therefore incapable of counting as law.[78]

[74] Hart 1994: 249. [75] Hart 1994: 82–83.

[76] Compare Raz 1979: ch. 2; Crowe 2016: 93–94. [77] Compare Fuller 1969: ch. 2.

[78] The argument advanced here therefore vindicates Lon Fuller's well-known claim that a putative law that fails to respect certain minimal procedural standards is unable to play the function of subjecting human conduct to rules and should therefore be regarded as legally invalid. See Fuller 1969: 38–39.

A putative law could also be incapable of creating a general sense of social obligation due to its content. Consider this example:

Eldest Child Act: The legislature passes an enactment that requires all parents to immediately kill their eldest child or pay a nominal fine.

The people to whom this legislation is directed will have strong independent reasons (both moral and prudential) not to comply with it. It seems plausible that a law of this kind is so contrary to ordinary human motivations that it would be incapable of gaining the status of a social rule. A law that is so unjust or unreasonable that it is incapable of engaging human motivations to the extent necessary to become generally accepted as binding will therefore be incapable of performing law's function as an artefact.

Defective Laws

I argued above that a putative member of an artefact kind K that is not constitutively capable of performing the K-function is no K at all. However, this is still a fairly minimal requirement. There are plenty of artefacts that perform their functions only poorly, but which still qualify as members of the relevant kind. A broken alarm clock is still an alarm clock; a book that is very hard to decipher is still a book.[79] Any account of artefact kind membership needs to leave room for defective cases, as well as examples falling at various points along the continuum between defectiveness and excellence.

Let us say that an artefact is defective if it is *not minimally adapted* to performing its function. Artefacts can be defective in at least two different ways. Some artefacts are defective because they perform their functions only inconsistently. Examples might include an alarm clock that only goes off about half the time or a tennis racquet that is so misshapen that it regularly fails to produce an accurate shot. Other artefacts are defective because they perform their functions consistently, but do so in a manner that calls into question their fitness for the purpose. Consider, for example, a bucket with holes in the bottom or a book where the print is so blurred that it is almost impossible to read. These kinds of artefacts are flawed in

[79] See, for example, Hegel 1977.

such a fundamental way that their basic suitability for their role is undermined.

Artefacts, then, can be viewed as lying along a continuum in terms of how reliably and effectively they play their function. At one extreme, there are putative artefacts that are not even the right kind of thing to fulfil their role. I have argued that these fail to qualify as members of the relevant kind. Next, there are artefacts that qualify as members of the kind, but are not minimally adapted to performing their function, because they are unreliable or otherwise badly deficient. These are defective examples of the kind in question. Once we move beyond the category of defective artefacts, there are a variety of cases that fulfil their function more or less well. Some are poor examples, others are good and some are excellent. Finally, there are paradigmatic cases of artefact kinds, which fulfil their function in an exemplary fashion. These are held up as setting a standard by which other examples of the kind may be judged and which future creators should seek to emulate.

How does this account of defectiveness in artefacts apply to the case of law? I argued above that a putative law that is not capable of being generally accepted as binding is not the right kind of thing to play the law-function. It is therefore no law at all. Some laws may fulfil this basic requirement, but are nonetheless poorly adapted to creating a sense of social obligation. This may be for reasons of form: consider a law that is so badly drafted that it is extremely difficult to follow. It may also be for reasons of content. I argued previously that a deeply unjust standard, such as the *Eldest Child Act*, may be incapable of gaining acceptance and is therefore the wrong kind of thing to count as law. Moderately or mildly unjust laws, by contrast, may not be incapable of creating a sense of obligation, but their level of injustice will nonetheless be salient in evaluating their suitability for that role.

Some laws give their subjects positive reasons to comply with them: let us say they are *backed by reasons*. A normative standard may come to be backed by reasons because it tells people to do something they have independent reason to do or, alternatively, because it gives people reasons that they would not otherwise have. Laws will generally be better suited to perform their function as artefacts if they are backed by reasons in one or both of these ways, since this will assist them in gaining a sense of obligation. There is therefore a sense in which a law backed by reasons is a better law than one that is not. This is an evaluative standard internal to the concept of law.

Some laws, on the other hand, present their subjects with positive reasons *not* to comply with them. Let us say these laws are *opposed by reasons*. This, too, might happen in two distinct ways, mirroring the categories introduced above. A normative standard may come to be opposed by reasons because it instructs people to do something they have independent reason not to do or, alternatively, because it supplies its own internal reasons for non-compliance. Laws will generally be less well suited to perform their function if they are opposed by reasons of one or both kinds, since this will hinder them in gaining a sense of obligation. There is, then, a sense in which a law that is opposed by weighty reasons is a worse law than one that is not.

Let us say a law is *unreasonable* when the balance of reasons favours non-compliance. An unreasonable law, thus defined, is not necessarily incapable of creating a general sense of obligation. It is, however, poorly adapted to do so. Such a law is poorly suited to serve as a deontic marker, since in order to become accepted it must overcome the reasons people have not to comply with it. The fact that it requires people to act contrary to reason is an inbuilt barrier to fulfilling its role. Compare a bucket with large holes in the bottom which are covered over with duct tape. The bucket may carry water, but it does so in spite of a structural defect that undermines its suitability for the purpose. An unreasonable law is flawed in an analogous way. A law of this kind may ultimately succeed in fulfilling its function as an artefact, but it will do so in spite of being fundamentally maladapted to that role. It is, in this sense, properly viewed as a defective example of law.

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Part II

Practical Reason, Normativity and Ethics

Natural Law, Basic Goods and Practical Reason 6

Christopher Tollefsen

I. Practical Reason and Reasons for Action

It is well known that modern philosophy from Hobbes onward showed a general unwillingness to permit reason anything but an instrumental role in human action. Reason's domain was exclusively limited to what *is* the case[1]. The motivational springs of human action were to be found, thought Hobbes, Hume and others, solely in the passions, appetites or desires. Reason could show whether a passion could be satisfied, but it played no essential role in guiding action as regards the ends pursued. Thus, Hume claimed, 'Reason is, and ought only to be, the slave of the passions, and can never pretend to any other office than to serve and obey them'.[2]

By contrast, the natural law tradition begins with the idea that human action is at its foundations the work of reason. Right away in his *Treatise on Law*, in Question 90 of *Summa Theologica*, Aquinas identifies reason as 'the first principle of human acts', and as the 'rule and measure' of those acts.[3] But reason operating as a principle, and hence as a rule and measure, of human action, is, in fact, a description of law; so human practical reason *is* the natural law.[4] In Question 91, Thomas goes on to identify this natural

[1] Kant is an important, though qualified, exception to this. Kant believes that reason can be self-legislating and thus practical; but this requires that practical reason be 'pure', and abstracted from any concern with material ends, or objects, of the will. Where such ends are concerned, Kant is, like Hobbes and Hume, sceptical. See Kant 1985.

[2] Hume 1739/2000: Bk. 2, Pt. 3, Sec. 3. This generally sceptical attitude towards the idea of practical reason prevailed until well into the twentieth century, and is displayed, for example, in Foot 1972: 305–316. But the meta-ethical work of thinkers of the past few decades has shown more sympathy for the possibility of a genuinely practical *reason*, and of practical *truth*, and *knowledge*; the work of G.E.M. Anscombe, John McDowell, David Wiggins, and others, including Foot herself, has been essential to this development.

[3] St Thomas Aquinas, *Summa Theologica*, II-II, Q. 90, a. 1.

[4] 'Such like universal propositions of the practical intellect that are directed to actions have the nature of law', *ST*, II-II, Q. 90, a. 1, r. 2.

law as a 'participation' in the Divine reason; so the first principle of human action is not only reason, *pace* Hume et. al., but is indeed human reason participating in the divine reason that is the Eternal Law.[5]

And reason operating as the first principle of human action is reason operating *practically*. In Question 94, article 2, Aquinas contrasts theoretical reason and its work with practical reason and its operation, looking for the first principles of practical reason and holding that such principles are themselves foundational for practical reason's work and thus are also themselves the first principles of the natural law.[6]

What, then, is this work of practical reason that distinguishes it from theoretical reason, and which has its own first principles, its own rational starting points? As noted above, theoretical reason seeks to grasp how the world is; as Germain Grisez writes, in his important commentary on Question 94 article 2, in theoretical reason 'the mind must conform to facts and the world calls the turn'.[7] But practical reason is reason directed towards action, towards what is not yet, but could be, through our actions. Thus, in practical reason, it is reason itself that calls the turn, seeking to make the world to be in such and such a way.

It is natural at this point to ask what the nature of a practical cognition must be if it is to at the same time be directed or directive towards action. What can practical reason grasp or know such that the apprehension itself offers the agent direction for action?

The answer begins with the recognition that action itself is always directed towards an end, and that the *ratio* of an end, its intelligibility, is that it be *good*. Human action thus makes sense only as it involves an apprehension on the part of the agent of some possibility as desirable and hence as to be done or to be pursued. The starting points of practical reason are thus to be found in practical reason's grasp of the good, or, more accurately, of goods: intelligible benefits rationally desirable to human agents because offering some aspect or dimension of human flourishing to the agent or to another being relevantly like the agent. Thus, Aquinas's account of basic goods provides contemporary natural law theory with its bedrock understanding of reasons for action: all reasons for action are grounded in one way or another on the appeal of one or more basic goods,

[5] St Thomas Aquinas, *ST*, II-II, Q. 91, a. 2. [6] St Thomas Aquinas, *ST*, II-II, Q. 94, a. 2.
[7] Grisez 1965: 176.

which are thus themselves the most fundamental reasons for action. I will return to the issue of reasons for action below.

Aquinas endeavours to say something more concrete than this about the form of the foundational judgements of practical reason; about the content of the goods recognized by practical reason in these judgements; and about the way in which these goods come to be apprehended, specifically, about the data through which they are apprehended. I will consider each of these issues in turn.

By 'form' of the judgement, I refer to the nature of the copula of a practical judgement.[8] This is that good *is to be done or pursued*; and evil, understood as the absence of good, *is to be avoided*. The 'is-to-be' nature of the copula is essential, and indicates practical reason operating in its directive mode, by contrast with the 'is' copula that characterizes the judgements of theoretical reason.

As to content, Aquinas identifies a number of propositions that he holds to be *per se nota*, known in themselves and not through the mediation of some further proposition. Such propositions can be said to be self-evidently known, not because knowledge of them is innate, or because they are immediately known with certitude, but because reason, operating practically, recognizes the desirability, and hence actionability, the to-be-done-ness, of the goods immediately upon a true apprehension of the nature of those goods.

So Aquinas includes among those goods that we could consider 'basic' the preservation of human life; the conjunction of man and woman (a good we could call 'marriage'); knowledge of God; and life in society.[9] In the succeeding article, Aquinas goes on to identify as well a 'natural inclination to act according to reason', that is, 'to act according to virtue'.[10] I will return to this last claim in Section III of this paper.

Working from Aquinas's master list, contemporary natural law theorists have attempted to clarify and sharpen the account of reason's practical

[8] Perhaps it would be more apt to speak here of the *mood* of the judgement, as suggested by Stephen L. Brock in his discussion of Grisez's interpretation of St Thomas, though Brock himself does not interpret Aquinas in this way. See Brock 2015: 303–329. As Brock points out, Grisez focuses on the 'is-to-be' nature of the copula to distinguish practical judgements from indicatives and imperatives.

[9] For defense of the claim that the '*coniunctio maris et feminae, et education liberorum, et similia*' in Q. 94, a. 2 identifies a single, albeit multifaceted, good, marriage, see Finnis 1998: 82.

[10] St Thomas Aquinas, *ST*, II-II, Q. 94, a. 3.

starting points, i.e. of the basic goods.[11] The accounts differ in details from thinker to thinker, but there is agreement among many that the list should include life and health, knowledge, work and play, friendship, religion, some form or forms of personal integrity; with Aquinas, some theorists also include marriage. Each good serves as a foundation for reason in its practical activity. Apprehension of an opportunity for action as promising to realize some aspect of a basic good serves as a foundational reason for action: a consideration in light of which action is intelligibly desirable for its own sake.

Finally, as regards the way in which practical reason comes to its awareness of the goodness of the goods, Aquinas makes claims that are as controversial as they are suggestive. Aquinas writes

> Since, however, good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance. Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law.[12]

And Aquinas goes on to link each of the goods mentioned above with an inclination proper to some aspect of human nature.

It seems clear, though it is disputed, that Aquinas could not intend the inclinations, or propositions about them, to provide premises for deductive arguments, since, as already discussed, the first principles of practical reason are *per se nota*. But neither does it seem that Aquinas intended only to draw attention to a correlation between inclinations and goods[13]. Thus Grisez argued in his commentary that the inclinations serve as data, orienting agents towards the goods for those agents who then practically grasp those goods as to be pursued in an act of practical intellect that is neither an intuition (for not without data) nor an inference. Two points may be added here.

First, it is the orientating work done by the inclinations that matters; the role of inclinations as data should not be conceived of in the 'incorrigibly

[11] Theorists committed to a goods-based natural law theory include Germain Grisez, Joseph Boyle, John Finnis and their various collaborators; Mark Murphy, Alphonso Gomez-Lobo and Timothy Chappell.

[12] St Thomas Aquinas, *ST*, II-II, Q. 94, a. 2.

[13] Nor is it at all Aquinas's view that every desire or passion one finds 'innate' or 'natural' to one thereby has a straightforward correlative good; 'natural' for Aquinas in this context always means 'according to reason', and not 'innate'.

contemplative' mode noted by G.E.M. Anscombe. They are not, as it were, noticed from 'sideways on' with a view to then inferring, abstracting, or hypothesizing from their existence.[14] Rather, they are directive towards the goods that reason apprehends practically; but as in any cognition in which reason moves from sensory experience as its starting point, what reason grasps goes beyond what is presented by sense. So while inclinations direct us towards particular aspects of basic goods, reason is necessary to apprehend and direct persons towards goods, understood as intelligibilities, desirable to all agents of the relevantly same sorts.

Second, there is room to wonder about the deeply specified character of the inclinations as presented by Aquinas and discussed by his interpreters. We are accustomed to think of 'curiosity' as the name of an inclination that orients us towards the good of knowledge. But is it true that there is a discrete inclination that orients us and provides data for our understanding of, for example, the good of religion or the good of marriage? Some agents report that they find no such inclination in the case of this or that good; and some claim practical knowledge of a good without anything phenomenologically identifiable as an inclination towards it. Moreover, two other elements seem to open the field of human goods up to us cognitively. First, there is one's experience of a good prior to choice, as when a child experiences the difference between sickness and health, or between being well or ill-treated by its friends. Second, there is one's awareness of opportunities for action, as when we realize that an answer to this question is possible. So perhaps it is an improvement on Aquinas's view to say that a variety of inclinations and orientations, as well as a variety of experiences and opportunities, are available as data for agents to come to a recognition of some or all of the basic goods.

This natural law account of practical reason and human goods has the potential to engage with several difficulties prominent in contemporary meta-ethics, of which I here mention three. First, since Hume, but dominantly in early twentieth-century moral philosophy, some philosophers have denied that 'ought' can be derived from 'is', or have, alternately, identified a 'naturalistic fallacy', as involved in the attempt to define

[14] The phrase 'sideways on' comes from McDowell 1994. I discuss the first-personal and practical orientation of the desires in Tollefsen 2016: 95–114.

prescriptive terms by descriptive ones.[15] A considerable strand of natural law ethics disputes this denial, arguing that human nature alone can serve as the ground for normative claims, and thus asserting that ought can indeed be derived from is. The view dates back at least to Suarez, and many claim to find it in Aquinas.[16]

The so-called 'New', or 'New Classical Natural Law' (NCNL) theory's treatment of this issue, by contrast, begins by distinguishing between practicality and moral normativity.[17] The relevant forms of the second presuppose the first, which is a wider notion. The judgement that a good such as health is to be pursued is practical, and can motivate action; but it is not yet fully morally normative. It does not indicate what *must* be done all things considered (though it might, in fact, *not* be done). Nevertheless, a morally normative judgement must be practical, if the normativity is to be of the right sort. It should not involve the normativity of 'These trees ought to be flowering now', which does not bear on human action; nor the normativity of 'the conclusion follows from the premises, which you accept, so you ought to accept it as well', which does not bear on choice; nor even the normativity of 'if you want the chair to set straight, you ought to level off the feet a bit more', which is merely about technique and therefore is not categorical. Rather, its normativity should be that of 'You ought to pay back what you have borrowed now, while you have it', which requires choice and action, and is not a merely technical means for bringing about a fixed end. Such normativity expresses what must, but might not be, if the one on whom the normativity has its bearing chooses wrongly, and its force cannot be avoided simply by changing one's goal. The sources of both the necessity and the contingency characteristic of moral normativity will be addressed later in this essay.

If morally normative 'oughts' are derivable from 'is' statements, then so must practical judgements be derivable from theoretical claims. But the

[15] Hume's discussion occurs in the *Treatise*, Book; G.E. Moore coined the term 'naturalistic fallacy' in his *Principia Ethica*, but it is doubtful that it refers to the same error that Hume has been taken by many to have identified.

[16] John Finnis helpfully addresses the history of this view in 2011a Chapter Two. The NCNL view has been criticized by many. An early critic is Veatch 1990. A more recent critic is Feser 2009. A recent response to critics may be found in Girgis 2016: 63–88.

[17] See Grisez, Boyle, and Finnis 1987: 99–151. Sections I–VI concern the practical domain and Sections VII–IX concern the moral. See also the discussion in Grisez 1983. 178. The distinction has been vigorously challenged by Brock 2015.

NCNL theory asserts, both as an interpretation of Aquinas, and in its own right, that the foundations of practical reason are just that: foundations, irreducible and underivable from any further theoretical truths. Theoretical truth is necessary for practical thought: were we not to know of certain human possibilities, for example, we would be unable to grasp the practical benefit to be had in them. But the grasping of the benefit to be had through action, both here and now, and in general, is the work of practical, not theoretical reason. It follows that moral normativity – the fully moral 'ought' – is likewise not derived from 'is', since moral normativity is a form of practicality, which has its own irreducible starting points.

The second topic of contemporary meta-ethics concerns the nature of reasons. In his recent work, T.M. Scanlon has held that reasons are 'considerations that count in favour of doing something'.[18] Scanlon holds that 'is a reason for' is a four-place relation between a fact, an agent, a set of conditions or circumstances, and an act (or attitude), and he argues for a view he describes as 'reasons fundamentalism', the view that reasons are not reducible to or identifiable with truths about the natural world; and that they cannot be explained in terms of notions of rationality or rational agency that don't themselves depend upon claims about reasons for action.[19] In these respects his account overlaps in certain ways with the 'New' natural law account of reasons for action. As noted, the basic goods are not reducible to, nor are propositions about them inferable from, any naturalistic set of facts. It follows that reasons for action are likewise neither identifiable with, nor grounded in, independently identifiable desires or facts about desires.

Neither does a natural law view hold that reasons are explained by facts about rational agency in the manner identified by, for example Christine Korsgaard.[20] For while Korsgaard denies that desires are themselves reasons for action, she nevertheless holds that reasons for action emerge from the rational activity of commitment, in which value is *conferred* through choice, and character, or one's self, is constituted. Natural law views, by contrast, all see reasons for action for us as related *in some way* to our nature; even theorists, such as the NCNL thinkers, who do not think that knowledge of human nature is necessary for knowledge of the natural law, nevertheless hold that basic goods are

[18] Scanlon 2014. [19] Ibid. [20] See, for example, Korsgaard 2009.

reasons for beings with *our* nature, and indeed, as perfections of that nature.[21]

And this, in turn, is why they depart from a further way in which Scanlon believes his view is 'fundamentalist': that it holds reasons to be 'the only fundamental elements in the normative domain, other normative notions such as good or ought being analyzable in terms of reasons'.[22] As Scanlon notes, this view is controversial, and I do not think it characterizes the natural law view, for which the notion of reasons for action makes little sense except in terms of what is good for an agent. Natural law accounts of reasons for action, including the NCNL account, are thus fundamentally Aristotelian in their nature.

Scanlon's account of reasons raises questions about the metaphysical status of reasons for action. Naturalists see talk of objective 'reasons' as irresponsible, introducing entities that are unnecessary for a respectable ontology.[23] But what would be an adequate metaphysics of reason? What especially would such a metaphysics be for natural law ethics, in which it is goods that provide basic reasons for action?

I suggest that the answer proposed by natural law theory progresses in two steps. First, when theorists in the broadly Aristotelian tradition in which Aquinas worked ask what something is, they often turn in answering to an investigation of the function of the thing. And goods-as-reasons do indeed play a functional role, one picked out rather well by Scanlon's description: they function as that which provides considerations for action, or in favour of doing something by their promise of that which contributes to human flourishing.

Second, one may then situate the entity under investigation within a broader metaphysical framework. St Thomas provides just such a framework in the prologue to his commentary on Aristotle's *Nichomachean Ethics*.[24] Reason, he notes, is related to four different types of order. There is first the order of nature, found but not made, and known by reason; second, there is the order introduced into thought by reason, the order studied by logic. Third there is the order reason introduces into the will, which is the domain of practical reason, normativity and ethics. Finally,

[21] E.g. Finnis 2011b: 5. '[I]in identifying flourishing, well-being, fulfillment, one is implicitly identifying the nature of the being which is (or might in propitious circumstances be) flourishing.'

[22] Scanlon 2014. [23] The urtext for this accusation is Mackie 1977.

[24] St Thomas Aquinas 1964: 6.

there is the order reason introduces into material nature, the order of artefacts.

Reasons for action are pre-eminently entities within the third order, the order that reason introduces into the acts of the will. The good of play, for example, for example, is a reason for action – a consideration in light of which action is intelligible – precisely insofar as practical reason proposes it to the will as actionable, as choice-worthy. Reasons for action thus in an important sense to do not have the kind of mind-independent reality possessed by entities in the first order.

The basic reasons for action provided by human goods are not the entirety of the third order, for reason must, as we will see in the third section, navigate the demands of competing options for action in order to arrive at the order that normatively should be realized in the acts of the will. Reason's directives at the end of deliberation also are reasons for action. But reasons for action in the form of basic goods are pre-eminently within, and indeed constitutive of the third order, since the directiveness of *reason* deliberating about how to respond to a multiplicity of human goods is ultimately the directiveness of those *reasons* for action.

Like most, and perhaps all, human realities, however, reasons for action have an existence that transcends any one order and encompasses all four. Thus, a spoken word exists as a sound, in the first order, is heard as an intelligibility introduced into thought in the second, is chosen for utterance in the third, and exists as part of language – an artefact – in the fourth order. Reasons for action likewise have an existence that transcends their third order nature. First, as noted above, reasons for action depend crucially upon the nature of the beings for whom they are reasons (even if they are not known on the basis of that nature), and as so dependent, their existence is in an important sense objective, even if their objectivity is not that of entirely mind-independent objects existing in space and time. Moreover, reasons as operative for action for an agent, here and now, depend upon what opportunities the world makes present to an agent. So the first of Aquinas's orders is bound up with the existence and nature of a reason for action.

Reasons for action also stand in conceptual relations to other concepts, practical and theoretical, and the propositions identifying reasons stand in inferential relations to other propositions, practical and theoretical. There could be no practical thought otherwise. So the cognitive apprehension and consideration of reasons operates in the second of Aquinas's orders.

Finally, reasons are articulated in language, and learned and specified in culture and pursued and realized within social forms and practices. Our understanding of reasons is thus mediated by the artefactual, the fourth of Aquinas's orders. As an example of reason's existence in this fourth order, consider the role of the positive law, which provides reasons by way of the artefact of posited enactment.[25] Such reasons as these are not divorced, of course, from the more basic reasons provided by the basic goods, or the reasons emerging from moral deliberation. But the reasons given by law are the most vivid instance of the intersection of reasons for action with Aquinas's fourth order.

Thus, the metaphysics of reasons is primarily, but not exclusively, a matter of Aquinas's third order. But one who has first articulated (and there is more to be said than I have here) the way in which reasons for action operate – as considerations for action – and then the nature and existence of reasons across the four orders, has thereby provided a metaphysics of reasons; there is no further ontological inquiry to be undertaken.

In consequence, and this is the third meta-ethical question to be engaged, we can see that there is nothing particularly 'queer' about a reason for action any more than there is about a word. Like a word with its meaning, and its existence as intended – chosen – to convey meaning, and as part of a structure of language created from material stuff (sound) yet capable of infinite variety of use, reasons for action will be simply baffling to an inquirer who restricts his investigations to first-order realities alone.[26] But a metaphysics that is so restricted is itself radically deficient and ultimately unreasonable: insufficiently attentive to the requirements that the basic good of truth makes upon inquirers. However, to make this point is to get ahead of ourselves, bringing on board as it does, the problem of normativity.

Let us return, in concluding this section, to the question of practical knowledge, and its correlate, practical truth. The truth we are familiar with in the theoretical domain is the adequation of mind to thing, and knowledge involves the justified acquisition of truth. But what is the

[25] The law's ability to offer reasons through positive enactment is a theme of John Finnis's work. See e.g. 'The Truth in Legal Positivism', in Finnis 2011c: 174–188.

[26] For similar reflections, see John Finnis's comments on Mackie's 'argument from queerness' in Finnis 1983.

adequation that is constitutive of truth in the practical domain, since it cannot be the adequation of mind to world? The relevant adequation is that of the world as it comes to be through action to the practical thought that set the agent on the way to that action. That thought was to the effect that such and such was *a good to be pursued*, and that it *offered some avenue to human fulfilment*. Did that practical thought adequately anticipate the fulfilment that was to be brought about through action? If so, then the agent was in possession of practical truth, and had practical knowledge. How that practical knowledge and truth is related to moral knowledge and truth is a further question, one which parallels the earlier distinction between practicality and moral normativity, and I will return to it below.

II. Incommensurability and Free Choice

There is a multiplicity of kinds of basic goods, hence of kinds of foundational reasons for action. How are these categories of reasons related to one another? And how are the various options for action that are generated by the basic goods related to one another? Answers to these questions are central, as we will see, to the question of the nature and existence of human free choice; and thence ultimately to the question of the nature of normativity.

As with the question of the relationship of practical reason to theoretical, and of ought to is, the question of the relationship of the categories of goods to one another is the occasion for controversy between competing camps of natural law theorists. When Aquinas identifies the correlation between inclinations and goods in q. 94.2, he asserts as well that the inclinations are related to various aspects of human nature: the inclination to live is part of human nature that is common to all living things; but for example the inclination to know is part of human nature common only to rational beings. To some it has seemed that, as with Aristotle in Book I of the *Nicomachean Ethics*, the ordering of inclinations and aspects of nature is intended to indicate a hierarchy among the different goods: the inclinations of reason seemingly belong to a higher part of human nature, and thus the good of knowledge might be thought to be a higher good than the various other goods.[27]

[27] John Bowlin discusses the hierarchizing approaches of Jean Porter and Ralph McInerny in Bowlin 1999: 107–114.

Followers of Aquinas are more likely to hold that the good of religion holds the highest place among goods, rather than simply the good of knowledge. Understanding that good, with Aquinas, as having God as its object, they hold that God, or the apprehension of God, is a good such as to satisfy all desires; this would justify the claim that this good is the highest.[28] Moreover, accepting this claim, many traditional Thomists conclude that adherence to the highest good provides the standard for morality: what is most conducive to, or in accord with, this good, is what is morally required of an agent.

Defenders of the NCNL theory deny that there is a hierarchy within the categories of basic human goods. This denial of hierarchy follows from several associated claims. First, the existence of a hierarchy would be possible only if (a) the categories of the goods were either reducible to some further good, or (b) to one of the goods on the list, or (c) if all but one good were in some way instrumental to some one good which in turn was not instrumental to others. But as regards (a) and (b), reducibility is ruled out by the *per se nota* nature of the goods. Only if the goodness of one were known through the goodness of another could the goodness of the first reduce to that of the second. And as regards (c), any one of the goods can be pursued for the sake of another; but each can also be pursued for its own sake and not for the sake of another. It seems no part of the nature of any good that it be instrumentally ordered to some one highest good.

The point can be seen practically by considering the appeal of the various goods to us as agents: the opportunity for play appeals to us independently of what we might learn from it, or how it might benefit us health-wise, or whether we are playing alone or with others. We could choose to play even if none of these other goods were anticipated through our playing; but similarly, we could choose to pursue knowledge even if no other good were anticipated from that pursuit. So play and knowledge are irreducibly different, and make different, and independent, appeals to us as agents: appeals intelligible in themselves.

The denial of hierarchy has implications for how we should understand the notion of 'good'. G.E. Moore thought that 'good' signifies a property,

[28] Aquinas defends these claims in the first five Questions of *ST* II-II.

possessed by every good thing.[29] But as Aristotle pointed out, 'good' appears in every category, and there seems to be no shared *property* between a good bat, a good hit, and a good game.[30] And even at the level of basic goods there is less univocity than might be expected. What the various basic goods have in common is simply that each promises some form of fulfilment to an agent who is considering possible states of affairs that could be brought about through their agency. There is no further feature essential to the predication of good. So 'good' is predicated by analogy across the different incommensurable categories of good.

Denial of hierarchy also has consequences for normative ethics. As noted above, were religion the greatest or highest good, then the demands of that good relative to all other goods would be the demands of morality. The absence of hierarchy therefore creates special problems for the NCNL analogous to the problem to be detailed below that accompanies the denial of commensurability of options. Absent a commensuration of goods, how is choice to be rationally or reasonably settled?[31]

The incommensurability between the kinds of goods is related but not identical to a second kind of incommensurability: that which exists between options for action. Consider, for example, options for choice that appeal to different goods – one to play, for example, and one to knowledge. Since the appeal of each good is irreducible to the appeal of the other, or to any third good, there seems to be no way of saying that one of the two options offers *more* good than the other, or is *more desirable* than the other, just as such. For there is no one thing present for there to be more of in one case than the other.

Yet the incommensurability of options is not limited to options involving different classes of good. Consider instead the agent who must decide whether to pursue a career as a philosopher, or as an historian. Here, the same good – knowledge – is at stake in each option; yet each option nevertheless offers something appealing that is not offered by the other. And even *within* one of these two domains – history, say – the agent will be

[29] Moore 1903/1994: Chapter One. [30] *Nicomachean Ethics*, 1096a23.

[31] See e.g. Hittinger 1987: 74–49. Robert P. George has responded to the criticisms of Hittinger and others, such as R. George Wright, in 'Recent Criticism of Natural Law Theory', and 'Does the "Incommensurability Thesis" Imperil Common Sense Moral Judgments?' See George 1999: 31–82 and 92–101 respectively.

faced with options as to whether to pursue this branch of history or that, work on this important problem or that.

Mark Murphy has argued that the phenomenon of 'not unreasonable regret' is best understood as a consequence of option incommensurability.[32] Where there are two genuine but incommensurable options and both cannot be pursued, then some good will be foregone whatever one does and regret is reasonable. By contrast, were the goods genuinely commensurable as goods, then there could be no rational place for regret: the good adopted would give everything offered by the first good and more.

The remainder of this section will address two issues that arise from the discussion of incommensurable options. The first concerns the relation between such options and free choice. I will argue that incommensurable options are necessary for free choice. The second returns to question of the consequences of incommensurability for the task of choosing: how is choosing to be carried out in the absence of commensurability?

Following Aquinas, most defenders of natural law theory also defend the reality of free choice, understood in a libertarian sense.[33] Free choice is choice between options in which what option is chosen is determined ultimately only by the making of the choice itself. This does not mean that free choice is irrational: options for action are underwritten by the basic goods, which promise the benefits to be found in the realization of this or that option. But there is a limit to the explanation of choice that can be given when this, rather than that, is chosen: for free choices, the principle of sufficient reason does not hold.

But neither, if choice is to be free, could the options be commensurated in terms of goodness. If they were – that is, if one option offered all the goodness of another plus more – then it could not be rational to pursue the lesser option. Such a 'choice' would not be free, but irrational. So incommensurability of options is necessary for free choice.[34]

This argument shows neither that options *are* incommensurable, nor that choices are free. The argument for the latter proposition has been put forth by several natural law theorists. In brief, it holds that the assertion that there are no free choices is performatively self-defeating, and thus

[32] Murphy 2001: 182–187. [33] See St Thomas Aquinas, *ST*, I, Q. 83, a. 1.
[34] For elaboration and defense of these claims, see Boyle 2002: 123–14 and 2005: 139–163.

self-refuting.[35] That is, the performance involved in intelligible assertion of a proposition whose denial is not a contradiction, or in some other way obviously false, takes for granted the difference between reasonable and unreasonable assertion. For the assertion to have a point, the agent asserting must hold that their assertion is *reasonable*, and hence that the agent has, as between the options of being guided by truth and truth-indicative considerations, and being guided by epistemically deficient considerations, *opted for*, hence *chosen*, the former path. For if the agent does not take for granted this difference, and put forth the assertion as reasonable and responsible in this way, then there is neither reason to make, nor reason to accept it. Moreover, the point of asserting as part of a philosophical dialectic about free choice is to offer to one's interlocutors the opportunity to likewise be reasonable in assessing evidence and coming to make a judgement. So free choice cannot be denied save in a way that presupposes its truth. That agents can make free choices is thus reasonably asserted, and thus also that the options seeming to make free choices necessary are real, and incommensurable.

The denial of commensurability of options is important in the dialectic between natural law theory and consequentialism, surely the most influential contemporary moral theory. A consequentialist who believes that options can be commensurated in terms of goodness has an intuitively obvious and attractive standard present to hand to guide choice: choice should be for that which promises the most, or the greatest goodness. To many, this seems obvious: the only other option apparently would be to choose the lesser good.

Both the obviousness and attractiveness are illusory. As noted above, there can be no choice where options are commensurable. So consequentialist moralities, all of which require commensuration of options, cannot really offer a standard *for choice*: agents presented with an unequivocally greater good can, must and will opt for it. Consequentialism thus cannot be action guiding as can a theory that acknowledges incommensurable options.[36]

Incommensurability of options is linked to a further aspect of the dialectic between natural law ethics and consequentialism, viz., the difference the two approaches take to the question of whether there are moral absolutes. If all options are commensurable in terms of goodness,

[35] Boyle, Grisez and Tollefsen 1976. [36] See Finnis, Boyle and Grisez 1987: 254–260.

then, the consequentialist will say, not only is there always one option which must be chosen, there are also no kinds of action that can be in principle ruled out as never to be chosen. For any such action type, it is always possible to imagine a situation in which the greatest good would be brought about by doing the forbidden action. Thus consequentialism is committed, in Shelly Kagan's words, to a denial of *constraints*.[37] Natural law ethics, by contrast, in denying the commensurability of options, rules out the most plausible grounds for thinking that it could be reasonable to intend damage to a basic good, namely, that one would thereby bring about a greater good, for there is no greater good in the relevant sense: if one seeks to kill one to save three, the second option is incommensurable with, and not three times as good as, the other.[38]

Supposing that this is the case, then the intentional damaging of a basic good for the sake of some further good would be, just on its own, unreasonable, as, just on its own, it is directed not at a good but at the privation of a good. The instrumental directedness of the means to the end would not vitiate this fact, for the means and the end, in cases of this sort, are separate, and the means is not constitutive of the end. While a means that involved destruction of a basic good could be intelligible, in virtue of its relationship to the end, it could never, considered in itself, be reasonable, because not good-directed.[39]

The argument of the previous paragraph is but a sketch, and it might be thought to give rise to a larger problem. We saw earlier that in the absence of a highest good to commensurate choices, it becomes difficult to see how choices may be reasonably made. A similar difficulty is raised by the denial of commensurable options: if the standard for choice is not to be provided by goodness in those options, where is it to be found? It is important here to note a potential ambiguity. Grant that the standard by which choice should be made is not the goodness of the options; thus commensuration by goodness is not available as a way to determine choice. But if there is some other way for choice to be guided, some other standard, then that standard may be said to be a commensurating standard. It will not commensurate in the manner of a 'greatest goodness' or even of a 'highest

[37] Kagan 1989.

[38] My discussion here prescinds from questions about the considerations, such as fairness, that govern the allowance of side effects.

[39] For elaboration of this argument, see Grisez, Boyle, Finnis and May 1988: 365–366.

end' standard, but it will nevertheless commensurate. So the denial of 'commensurability of options' or 'commensurability of kinds' is not a denial of commensurability *tout court*. The next section addresses this question of commensurability, and its relation to the problem of normativity.

III. Normativity

The phenomenon of options for choice raises a practical question that is foundational for discussions of practical normativity: How should free choice between incommensurable options be guided? In the absence of genuine options for choice, and given a will oriented towards the good, an agent will simply pursue the good available. There is no real normativity here, for there is no intelligible way in which an agent could fail to pursue the good that was within their grasp. It is only when the agent is presented with options that deliberation is now possible, and with deliberation, the possibility that deliberation or subsequent choice might go wrong.

One way to approach this question, suggested by Germain Grisez, is to ask: what would it be for a free choice to be *good in its kind*.[40] Free choices are, after all, the paradigm locus of morality: it is in choosing that agents become good or bad. But choice is the act of the will, and the nature of the will is, on a natural law account, to be responsive to reason.[41] Natural law theories thus are radically differentiated from those contemporary theories that take choice, autonomy, or radical self-constitution as free-standing starting points for ethics, as natural law theories were similarly radically differentiated in the past from overly voluntarist conceptions of the foundations of morality[42]. Choice is an act of the will, but the will is a disposition in human persons precisely to be moved to what reason proposes as good; therefore, the goodness of choice is to be found in its choosing in accordance with reason.

Emphasis on the will is important on this view, for natural law accounts typically, though not always, converge on the anti-rationalist claim that an

[40] Grisez raises this question in an unpublished paper, 'Sketch of a Complete, Systematic, Philosophical Ethics', that was the basis for two days of intensive discussion among participants in the NCNL project, held at Princeton University in August of 2015.

[41] See the discussion of this point in Finnis 1998: 62–71.

[42] See the discussion in George and Tollefsen 2013.

agent's reasoned awareness of the good just on its own is insufficient to account for the reality of human action.[43] Free choice may not be an experiential given (though it does seem on occasion possible to be experientially aware of it); but the existence of a capacity to respond to the varying prescriptions or suggestions of reason seems necessary to explain how reason's deliverances can give rise to action. So both reason and will are essential to the natural law picture.

To return to the thought articulated above: a free choice is specified – that is, given its nature as *this* free choice – by the instantiation of goods in oneself and others that are taken into account in the practical reasoning that gives rise to that choice by proposing some possible course of action. Accordingly, the difference in the practical reasoning that specifies a choice must be the difference between the goodness or evil of the choice. So a good choice is one specified by, animated by or informed by sound practical reasoning, and a bad choice is one whose animating principle, so to speak, is unsound practical reasoning. I will return to this thought below, in the discussion of normativity.

First, however, it is necessary to address head on the very natural question: what constitutes soundness of practical reasoning, such that a commensurating standard for the will's choices may be identified?

Our practical apprehension of the basic goods identifies not merely one good, but a multiplicity of goods; and it identifies them as goods not simply for ourselves, but for all beings relevantly like us. Accordingly, reason's most general deliverance in considering the goods in deliberating about options is that we, as agents, should be *open* to *all* those goods in *all* their possible instantiations, including their possible instantiations in other persons. The work of practical ethics accordingly is working out the implications of this most general prescription or norm.

The idea that there is such a most general prescription of reason in assessing options for choice is the idea of a fundamental moral principle, a principle of reason that should guide *all* choice. Those natural law thinkers who have adopted the basic goods approach have attempted various formulations of such a first principle.[44] Three formulations are of

[43] Joseph Raz rightly describes this view as the 'classical' account of human agency, by contrast with the rationalist. Raz 2002: 47.

[44] For further discussion of these three formulations of the first principle, see Boyle 2013: 56–72.

special importance. One identifies, in a sense, the ideal object of a choice, or, better, choices, that are entirely informed by reason. Such choices would be oriented only to basic goods, and their realization in all persons who could be benefited by those goods. But the goods of persons are constitutive aspects of their fulfilment and well-being. So an upright will, choosing entirely in accordance with right reason, would 'choose and otherwise will those and only those possibilities whose willing is compatible with integral human, or communal, fulfilment'.[45]

The second approach asks how reason, in specifying the acts of the will, goes wrong or right. Practical reason going right – 'right reason', as it is called in the natural law tradition – is practical reason *unfettered* by anything which might render the agent less than wholly responsive to the goodness of the goods in all persons. Paradigmatically, those factors that do so fetter reason are desires, emotions and passions, motivating forces that, by providing appealing goals to us but not intelligible goods, lead agents to choose in ways not fully open to all the goods in all persons. Action motivated by such emotions, passions, etc. can be insufficiently attentive to the goods of others, to some relevant but not emotionally attractive goods, or to richer and more fulfilling aspects of goods that, under the influence of the passions, are less attractive than are partial or distorted aspects of human goods.

Such passions, emotions and desires can be said to fetter reason, in leading reason to present to the will options in one or another way deficient, and thus the first principle of morality may be formulated: never choose or otherwise will except in accordance with unfettered reason.[46] This formulation looks in two directions: forward, to the integral fulfilment that is sought in upright choosing, but also backwards to the integral directiveness of reason.

This, then, provides the subject of a third formulation of the first principle: choose, and otherwise will, only in accordance with practical reason's integral directiveness. This principle has the same sense as the principle traditionally held by theorists in the natural law tradition to be primary: that agents should act only in accordance with right reason. It has

[45] 'Communal' fulfillment is introduced by Germain Grisez in Grisez 2008: 38–61.

[46] Grisez, Boyle and Finnis indicate this direction of thought about the first principle in 1987 at page 21, while eventually settling on a formulation that makes reference to integral human fulfilment.

a kind of priority to both the other versions of the first principle; the principle referencing fettered reason is an articulation of what it means for reason's directiveness to be integral; the integral fulfilment formulation is an articulation of an ideal state of affairs willed in willing in accordance with integral, and hence unfettered, reason.

The idea of the integral directiveness of reason that is central to this most foundational principle of morality provides the key to understanding the nature of moral truth, for reason's integral directiveness just is constitutive of moral truth.[47] There is no possibility in the domain of practical reason for truth to be a matter of correspondence of the mind to what is the case; we have seen this in the discussion of is and ought. Truth is rather to be found in the way that reason anticipates genuine human flourishing in its deliverances. If there is correspondence, it is between the reality brought into existence through human action with the directiveness of practical reason. Truth is the adequacy of reason in prescribing what is for the sake of that fulfilment. But reason is *fully* adequate in this way only when it prescribes integrally, in a way unfettered by competing factors. This gives rise, in the work of Grisez, Finnis and Boyle, to the claim that in the practical domain, truth is, as Hegel said, 'the whole'.[48]

Reason's grasp of the first principle of morality in the face of options is of some theoretical interest.[49] Natural law theories are committed to the idea that morality is not a domain of expertise. Aquinas holds, for example, that the first principles, and those principles derivable from the first principles with but little consideration, are naturally and widely known, though even the most obvious derived principles can become distorted.[50] Ordinary people thus must have some grasp of the first principle of morality. But that grasp need not be such that ordinary people are capable of clearly articulating what it is that they grasp, and the attempt itself to articulate what is grasped can be an act that goes astray. Indeed, the attempt to articulate the first principle, as an act, is one guided by one's prior awareness of that principle. So, for example, an attempt to *articulate* the first principle of morality can itself be an act in which reason is allowed by the agent to be fettered by desire.

[47] See Boyle 2013: 57. [48] Grisez, Boyle, and Finnis 1987: 126.

[49] Thanks to Joseph Boyle for a helpful discussion that led to my consideration of this issue.

[50] St Thomas Aquinas, *ST*, II-II, Q. 94, a. 4.

But the *grasp* of the first principle itself cannot be an action in this sense, for actions are the domain governed by that principle, and agents cannot draw upon their knowledge of the principle in coming to know it. Rather, the cognitive awareness of the first principle seems to be *just* an agent's rational grasp of the goodness of all the goods. An agent in whom reason grasps the first principle is thus one with a sufficient awareness of practical reasons; the appeal of those reasons just is, in some sense, the content of the first principle of morality, known by the agent without deliberation, and thus without choice.

What, then, is morality and moral normativity? Morality should be understood as the goodness of a will that is specified by reason's integral directiveness. Morality is not, therefore, best understood as the domain of a particular kind of reason, for example. On the other hand, morality is not *simply* defined as the goodness of the good will; for the goodness of the good will is the goodness of a will specified by reason's integral directiveness to the fullness of basic human goods. Similarly, morality cannot in an unqualified sense be said to be something merely instrumental to human flourishing; yet it is not detached from human flourishing either, since the goods are constitutive elements of human flourishing.

However, as is clear, agents choose and otherwise will frequently in such a way that their will is *not* specified by reason's integral directiveness, and hence not by moral truth. In their deliberations, agents are guided, explicitly, or without full awareness, by the variety of emotions, passions and desires that can and do fetter reason; in their choices, agents acquiesce in the fruits of such deliberations, and accordingly, their willing is not good: it fails to be a good instance of its kind. It is precisely here, in the gap between what a will good of its kind *would* and *should* be, and what a will is in choosing in accordance with fettered, or less than fully integral, reason, that moral normativity is to be found, the *ought* that indicates the path that the agents must, but might not, take.

The previous discussion suggests that there is a difference between the following two questions: *what is* morality, and *why be* moral. The account just given of moral normativity, and of a will whose willing, and paradigmatically whose choosing, is good of its kind is an account of what morality *is*: it is the goodness of a good will specified by reason's integral directiveness. And in response to the question, why be moral, one might wish to make reference to the same idea, by suggesting that it is the

goodness of morality that makes morality desirable. Something along the lines of such a possible answer seems present in Aquinas's thought, and some recent natural law theorists have made use of Aquinas's claim. I will briefly discuss that approach, and then indicate why I think it is mistaken, before identifying what I take to be a superior answer to the question: why be moral?

In article 2 of Question 94, Aquinas identifies, as discussed above, a number of objects of inclinations that comprise the first principles of the natural law, known as *per se nota* truths, and directive towards action. To the list of 94.2, however, is apparently added a further basic good in 94.3. There Aquinas claims that 'since the rational soul is the proper form of man, there is in every man a natural inclination to act according to reason: and this is to act according to virtue. Consequently, considered thus, all acts of virtue are prescribed by the natural law'.[51] Clearly this substantive addition to the list of basic goods *also* provides an answer to the question 'Why be moral', for morality itself – virtue – is identified as a self-evident good, which must, if Aquinas's earlier account of what it means for practical principles to be *per se nota* is true, be recognized as desirable and to be pursued if it is properly understood by a human agent.

Some natural law theorists have adopted Aquinas's claim into their updated account. Thus, John Finnis, for example, cites 'practical reasonableness' as a basic good along with goods such as life and friendship; Mark Murphy also identifies this as a basic good.[52] But in recent years, other natural law theorists have argued that practical reasonableness, understood as meaning 'virtue' or 'morality', cannot be a basic good. Two reasons have figured in Germain Grisez's work; I will mention a third possible objection as well.

First, Grisez argues that if there were a basic good of virtue, it would require a natural inclination of the person as a whole; but a person with an inclination to moral goodness in their whole person *is* morally virtuous. Thus if moral virtue were a basic good, then people would be morally virtuous by nature. Second, every basic good underwrites the possibility of both morally upright and immoral action. But this could not be the case of

[51] St Thomas Aquinas, *ST*, II-II, Q. 94, a. 3.

[52] Finnis discusses the nature of practical reasonableness as an architectonic good, and its role in his *Natural Law and Natural Rights* in his recent essay Finnis 2015: Section II. 'Practical reasonableness' is a component of the good of 'excellence of agency' in Murphy 2001: 114.

'morality' as a basic good for it could not underwrite the possibility of immoral action.[53]

Both objections seem plausible. But perhaps more fundamental is this: our apprehension of the first principle of morality is, I claimed earlier, made possible and indeed constituted in our full awareness of the range of basic goods and their integral directiveness. But how could a good whose substantive content made reference to morality, virtue, or indeed any normative standard for commensurating choices, precede the awareness of the deliberative context and the commensurating standard – the first principle of morality – that arises from fully reasonable consideration within the deliberative context? Put more simply: to know the first principle of morality, one must first know the goods, so as to be faced with the problem of deliberation; but if one such good is the good *of morality*, then knowledge of the first principle of morality presupposes knowledge of itself. Identifying 'practical reasonableness' as a basic good thus seems to require a problematic circularity that should be avoided.

Its avoidance *is* possible. One might be motivated, in positing practical reasonableness as a basic good, by the need to provide a reason for agents to seek practical truth and guide choice. They could be motivated by the good of practical reasonableness. But that good is not necessary for that purpose: *truth* is a good, and one that encompasses both the theoretical and practical domains. Agents can be motivated by truth in pursuing the practical truth about basic goods, and about the way reason should direct the will in its pursuit of those goods.

One could alternatively, or additionally, be motivated, in positing practical reasonableness as a basic good, by the need to answer the question 'Why be moral?' But that question can be answered by noting the openness of the good will – the will specified by the integral directiveness of practical reason – to real human goods, and by noting the way that a will specified by anything other or less than practical reason's integral directiveness is inevitably closed off to the fullness of what constitutes genuine human flourishing. Morality may not be a guarantee of a flourishing life, in this world marked by tragedy, betrayal, death and loss, but failures of morality are failures in the realm of precisely that which is constitutive of well-being and flourishing. That seems a good reason to 'be moral'.

[53] Grisez 2001: notes 8 and 9.

It should be recognized, of course, that this answer is somewhat limited in its power. Those faced *in concreto* with life's tragedy, betrayal, loss and death will be sorely tempted to do what can be done to avoid (or ignore) life's ills, even if this involves giving short shrift to some good, or some person, or even if it involves violation or destruction of some good or person, including, in the limit case of an agent undergoing profound suffering, the destruction of that agent. And this raises a further question: *how* can one be moral under such circumstances?[54]

One possible answer to this question again serves to distinguish two different strands of natural law theory. The tradition of inquiry into the principles of natural law has frequently included within it inquiry into the nature of 'man's ultimate end'. For Aquinas, that ultimate end was beatitude, perfect fulfilment, to be found only in the beatific vision, a form of intellectual union with the Divine Creator.[55] Agreeing with Aquinas, many, perhaps most natural law theorists have believed that the ultimate standard for moral choice was provided by this conception of the ultimate end: what was in conformity with, or conducive to, achievement of the last end is what is demanded by morality.

By contrast, in Grisez's recent work, the ultimate end of human persons is the Kingdom of Heaven; that this is the ultimate end is not something knowable without revelation, but its constitutive materials are precisely the goods and persons which are the foundational principles for morality.[56] *That* such goods may be realized by human persons in an eternal form of community with one another and with all other persons, including divine persons, is a truth which does not, however, serve as a principle generating content for morality (rather, one's inquiry into that possibility is itself a demand of reason and morality); rather, it is a truth which can serve to motivate morally upright willing under the adverse conditions of this fallen world. Put in other words, the Kingdom is the answer to the question: How is it possible to be moral?

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[54] For further discussion of this issue see Tollefsen 2015: 104–117.
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Practical Reason in the Context of Law 7
What Kind of Mistake Does a Citizen Make When She Violates Legal Rules?

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1. Introduction

It is recognized by theorists and laymen that law is a social practice. However, if social practices are constituted by human actions then the following question arises: 'What is the sound characterization of human action that enables us to provide a satisfactory explanation of the production of authoritative legal rules and directives?' The key feature of legal rules and directives is that they guide the behaviour of citizens and have a normative force on the addressees of legal rules and directives. It is, however, puzzling how human beings are able through their actions to produce such a complex state of affairs, i.e. a legal rule that is authoritative and intervenes in the reasoning and actions of the addressees of the rule.

Let us suppose that we explain human action as merely an empirical phenomenon, i.e. a set of regular patterns produced by the reason-beliefs or acceptance-beliefs of the participants, which are construed as mental states.[1] Within this framework of explanation, the authoritative character of the legal rules, their guiding role and normative force are utterly mysterious. For example, let us think about the legal rule that demands that citizens stop at red traffic lights and also about citizen 'c' who does this numerous times every morning when driving to work. Following the empirical model of human action, the empiricist will say that citizen c's action is explained by the fact that 'there is a rule that is grounded on

[1] According to the empirical account of intentional action, the acceptance of legal rules provides reasons for actions in the context of the law. For a full explanation of the empirical account of action in the context of the law and its criticism, see Rodríguez-Blanco (2014b), Chapter 5. I argue that the empirical account of intentional action is parasitic on the 'guise of the good' explanation of intentional action.

reasons that respond to what everyone does';[2] or, rather, 'there is a rule that is grounded on our accepted reason-beliefs towards such a rule or accepted reason-beliefs towards a second-order rule about such a rule';[3] or, even more, 'there is a rule that is the result of deep conventions, which are the result of social practices, responsive to our social and psychological needs, arbitrary, grounded on a reason-belief to follow them, instantiated in superficial conventions and resistant to codification'.[4]

We feel, however, that there is something fundamentally missing in this purely empirical portrait of human action. It seems to imply that if one day citizen 'c' decides not to do what everyone does or accepts, and decides instead *not* to stop at the red traffic lights, and consequently her vehicle collides with a number of other vehicles and she kills a child, then (following the empiricist explanation of human action) the only mistake she made in *her reasoning* that led her to the catastrophic action is that she did not accept what everyone accepted, or rather she did not have the appropriate reason-belief as mental state to follow the rule. This is a strange understanding of her reasoning, though it follows logically from an explanation of human action in terms of purely empirical features, i.e. social facts, beliefs or intentions as mental states, and reasons explained in terms of beliefs and therefore mental states.

The explanation of the reasoning of the agent in empirical terms is equally unintelligible in examples where what is at stake is the life, dignity or another fundamental value that we human beings care about. Let us scrutinize the following example. If an official aims to enforce the court decision that has established that citizen 'p' has violated the physical integrity of another citizen and therefore should be punished with imprisonment and we ask for an explanation of the official's coercive action, it would be puzzling to hear the following response: 'Citizen "p" has violated a constitutional rule which is grounded on our acceptance-belief or reason-belief which lies behind the constitutional rule.' This value-free or value-neutral response cannot *truly* explain why citizen 'p' has to go to prison according to a court decision. Does it mean that if citizen 'p' escapes from the coercion of the official and manages to leave the country, then the only mistake in her reasoning that leads her to flee the country is her disagreement with either the acceptance-belief that there is a valid

[2] See Lewis 1969. [3] See Hart 2012.

[4] See Marmor 2007. For a criticism of this view see Rodríguez-Blanco (2016).

constitution or secondary rule, or her disagreement with the acceptance-belief towards the constitutional rule and penal code that protects the physical integrity of all citizens? Thus, it is not that she disagrees with the value that is the content of the acceptance-belief or reason-belief, rather she disagrees *with the acceptance-belief or reason-belief*. The disagreement is just about beliefs, and therefore, according to the empirical account, the parties in disagreement are in different mental states. This is an equally strange and puzzling diagnosis of our disagreements.

When we characterize what legislators, judges, officials and citizens do in terms of actions as empirical phenomena, we seem to miss something fundamental. Worse, the empirical account of action cannot satisfactorily explain the guiding role of the law.[5]

Let us go back to our first example. Citizen 'c' is a law-abiding citizen who aims to follow and be guided by the law, and on her journey to work she knows there is a legal rule that states she ought to stop at red traffic lights. According to the empirical characterization of human action, she stops at red traffic lights because she has the acceptance-belief or reason-belief that there is such a rule and this acceptance-belief or reason-belief causes her to press the brake pedal on each relevant occasion. If she were asked *why* she presses the brake pedal she will reply, 'because there is a red traffic light', and if she were asked, 'why do you stop at the red traffic light?' she would reply, 'because there is a secondary rule that is accepted by the majority of the population and this establishes the validity of the rule 'citizens ought to stop at red traffic lights'. Alternatively, she might reply, 'I stop at the red traffic light because of the rule', but now the mystery is '*why* do you act according to the rule?', to which she might answer, 'because rules give me reasons for actions'. The empirical account explains reasons in terms of beliefs/desires as mental states,[6] and then it seems that it is the mental state that is causing the action. This is a problematic picture

[5] Arguably, Raz's explanation of how legal rules intervene in our reasoning is non-empirical since he has emphasized that a reason for action should not simply be understood as beliefs as mental states. See Raz 1979, 1986, 1999. However, in Rodríguez-Blanco (2014b, chapter 8), I argue that Raz's explanation of legal authority is a theoretical explanation of our reasoning capacities, i.e. when we explain how legal directives and rules intervene in the citizen's practical reasoning from the third-person perspective. His explanation ignores the first-person or deliberative point of view of the citizen who follows legal rules.

[6] See Davidson 1980.

because it supposes that for each action I need to 'remember' my belief/desire so that I am able to be in the *right* mental state so that I can stop at the red traffic light. However, we stop at red traffic lights even when we are tired or when we do not 'remember'[7] that we ought to stop at red traffic lights, and therefore we somehow just 'know how to go around' and stop at red traffic lights. Furthermore, the predominant empirical picture of human intentional action cannot explain the diachronic structure of intentional action. That is, we stop at red traffic lights over a prolonged period of time and even though the relevant mental state might be absent, we still continue doing it and it seems that we do it for a 'reason' that tracks values or good-making characteristics.

Imagine that there is an emergency. Citizen 'c' needs to bring her neighbour to the hospital because he is dying and consequently she decides not to stop at a red traffic light. Does this mean, if we follow the empirical account of human action, that in order to explain her action we need to say that she surely needed to 'forget' that she had the relevant belief as mental state of 'stopping at red traffic lights', or perhaps she decided 'to get rid' of her acceptance-belief concerning the rule 'we ought to stop at red traffic lights'? Or, perhaps, she 'decided to suspend' her beliefs about the rule 'we ought to stop at red traffic lights'. In the two latter possibilities we cannot say that it is not only a 'belief' that plays a role in action, but rather the 'will' of the rule-follower. She has used the words 'get rid of' and 'decided to suspend'. It seems that there is something else going on. Imagine that we ask her, 'why did you *not* stop at the red traffic light?' The empirical answer, 'because I do not have the acceptance-belief or reason-belief towards the rule *now* for this *specific* instance', would be an odd one. Citizen 'c' is more likely to say, 'Don't you see it? My neighbour is dying and I want to save his life'. Furthermore, if reasons for actions are belief-acceptance or if they give me a reason for action and this reason is merely a mental state, how can I be guided by rules and principles? If the empirical explanation of action is the sound characterization, then the guidance of rules and principles is effective because I am in the *correct mental state*. The entire work is done by *my mental states* as long as I am in the supposedly *correct mental state*. The deliberation of the legislator or judge and/or my *own* deliberation plays no role in the execution of my action of rule-following or principle-following. The content of the legal

[7] See Wittgenstein 1953: Section 645.

rule is irrelevant as long as the majority of the citizens are in the allegedly *correct mental state*.

Arguably, we need to resort to values in the form of good-making characteristics that are relevant to the specific form of life that is ours and that reflect *what* we care about individually and collectively. We need to understand human action in its naïve or fundamental form and this understanding, I argue, sheds light on the kind of things we produce, including human institutions such as law. Thus, if someone asks citizen 'c' why she stops at the red traffic light on her way to work, there is a *naïve* explanation of her action that seems to be more primary than any other explanation. Thus, she might respond, 'because I do not wish to collide with other vehicles and kill pedestrians'. If we ask her, 'why do you not wish to collide with other vehicles and kill pedestrians?', she most is likely to reply, 'because I value my property, other people's property, and life' and if we keep asking, 'why do you value property and life?', she will respond, 'because property and life are goods'.

We have learned that a mistaken conception of human action can take us down misleading routes in our understanding of the nature of law and, more specifically, its pervasive, authoritative, normative, and guiding role in our lives. Thus, the argumentative strategy of this paper will be to focus on developing and defending a sound explanation of human action, under the presupposition that this explanation of human action will illuminate how human beings produce law and will also shed light on the authoritative and normative features of law. In Section 2 I explain and defend a conception of human action that diverges from the standard empirical conception. In Section 3 I scrutinize the consequences of this conception of human action for our understanding of the nature of law and its authoritative and normative character.

2. Intentional Human Action Under the Guise of the Good

We will now concentrate on intentional human action as the paradigmatic[8] example of human action to shed light on the making

[8] For a defense of a conception of paradigms as the best methodology to understand social and human concepts see Rodríguez-Blanco 2003.

of law by legislators and judges and the character of legal rule-following.[9]

In her book *Intention* (1957) Elisabeth Anscombe engages with the task of explaining intentional action along the lines of the philosophical tradition of Aristotle and Aquinas and identifies a number of key features that characterize intentional action. These features include:

a) The former stages of an intentional action are 'swallowed up' by later stages

Intentional action is composed of a number of stages or series of actions. For example, if I intend to make a cup of tea, I first put on the kettle *in order* to boil water, I boil water *in order* to pour it into a cup of tea. Because my action of making tea is intentional, I impose an order on the chaos of the world and this order is the order of reasons. Thus I put on the kettle *in order* to boil water and I boil water *in order to* pour it into a cup. This is how I understand the sequence of happenings in the world that I, as an agent, *produce or make happen*. But, arguably, there could be an infinite number of series of actions; there could be a continuous infinite, or ceaseless, seamless web of actions. The question 'Why?' can always be prompted: 'Why are you making tea?' and the agent might reply, 'Because it gives me comfort in the morning'. There is, however, an end to the 'Why?' series of questions and the end comes when the agent provides a characterization of the end or *telos* as a good-making characteristic. The action becomes intelligible and there is no need to ask 'Why?' again. The end as the last stage of the 'Why?' series of questions swallows up the former stages of the action and makes a complete unity of the action. Intentional actions are not fine-grained, they are not divisible into parts. Thus, parts of series of actions are only intelligible because they belong to an order that finds unity in the whole.

b) Intentional action is something actually done, brought about according to the order conceived or imagined by the agent

Intentional action is not an action that is done in a certain way, mood or style.[10] Thus, it is not an action plus 'something else', i.e. a will or desire

[9] I am using the term 'rule-following' but the same explanation applies to principle-following. See Rodríguez-Blanco 2012 and 2014a.

[10] Anscombe 1957: Section 20.

that is directed towards an action. Intention is not an additional element; e.g. an interior thought or state of mind, it is rather something that is *done* or *brought about* according to the order of reasons that has been conceived by the agent. Consequently, if the question 'Why?' has application to the action in question, we can assert that the action is intentional. The prompting of the question 'Why?' is the mechanism that enables us to identify whether there is an intentional action. Intentional action is neither the mere movements of our body nor the simple result of transformations of the basic materials upon which agency is exercised, e.g. the tea leaves, kettle, boiling water. It is a doing or bringing about that is manifested by the expression of a future state of affairs and the fact that the agent is *actually* doing something or bringing it about according to the order of reasons as conceived or imagined by the agent.[11]

c) Intentional action involves knowledge that is non-observational, but it might be aided by observation

What is the distinction between practical and theoretical knowledge? Let us take a modified version of the example provided by Anscombe in *Intention*.[12] A man is asked by his wife to go to the supermarket with a list of products to buy. A detective is following him and makes notes of his actions. The man reads in the list 'butter', but chooses margarine. The detective writes in his report that the man has bought margarine. The detective gives an account of the man's actions in terms of the evidence he himself has. By contrast, the man gives an account of his actions in terms of the reasons for actions that he *himself* has. However, the man knows his intentions or reasons for actions not on the basis of evidence that he has *of* himself. His reasons for actions or intentions are self-intimating or self-verifying. He acts from the deliberative or first-person perspective. There is an action according to reasons or an intention *in doing* something if there is an answer to the question *why*. It is in terms of his own description of his action that we can grasp the reasons for the man's actions. In reply to the question '*why* did you buy margarine instead of butter?', the man might answer that he did so because it is better for his health. This answer, following Aristotle's theory of action[13] and its

[11] Anscombe 1957: Sections 21–22. [12] Anscombe 1957: Section 32.

[13] Aristotle 1934. *Nicomachean Ethics* I. i. 2; III. V. 18–21. See also Aquinas, Summa Theologiæ. I-II, q8, a1; Kenny 1979, Pasnau 2002 and Finnis 1998: 62–71 and 79–90.

contemporary interpretations advanced by Anscombe provides a reason for action as a desirability or good-making characteristic. According to Anscombe, the answer is intelligible to us and inquiries as to *why* the action has been committed stops. However, in the case of the detective when we ask *why* did you write in the report that the man bought margarine, the answer is that it is the truth about the man's actions. In the case of the detective, the knowledge is theoretical, the detective reports the man's actions in terms of the evidence he has of it. In the case of the man, the knowledge is practical. The reasons for action are self-verifying for the agent. He or she does not need to have evidence of his own reasons for actions. This self-intimating or self-verifying understanding of our own actions from the deliberative or practical viewpoint is part of the general condition of access to our own mental states that is called the 'transparency condition'.[14] It can be formulated as follows:

(TC for reasons for actions) 'I can report on my own reasons for actions, not by considering my own mental states or theoretical evidence about them, but by considering the reasons themselves which I am immediately aware of'.

The direction of fit in theoretical and practical knowledge is also different. In the former case, my assertions need to fit the world whereas in the latter, the world needs to fit my assertions. The detective needs to give an account of what the world looks like, including human actions in the world. He relies on the observational evidence he has. The detective's description of the action is tested against the tribunal of empirical evidence. If he reports that the man bought butter instead of margarine, then his description is false. The man, by contrast, might say that he intended to buy butter and instead bought margarine. He changed his mind and asserts that margarine is healthier. There is no mistake here.

The idea that we accept from the internal point of view primary or secondary legal rules[15] presupposes an inward-looking approach to action as opposed to an outward-looking approach. The latter examines intentional actions as a series of actions that are justified in terms of other actions and in view of the purpose or end of the intentional action as a good-making characteristic, e.g. to put the kettle on in order to boil the

[14] See Evans 1982: 225 and Edgeley 1969. The most extensive and careful contemporary treatment of the 'transparency condition' is in Moran 2001.

[15] See Hart 2012.

water, in order to make tea *because* it is pleasant to drink tea. The former examines the mental states that rationalize the actions; however, at the ontological level, arguably, it is mental states that cause the actions. The mental states consist of the belief/pro-attitude towards the action. If the 'acceptance thesis' is the correct interpretation of Hart's central idea concerning the internal point of view towards legal rules, then criticisms that are levelled against inward-looking approaches of intentional actions also apply to the 'acceptance thesis'.[16] The main criticism that has been raised against the idea that the belief/pro-attitude pairing can explain intentional actions is the view that it cannot explain deviations from the causal chain[17] between mental states and actions. Let us suppose that you intend to kill your enemy by running over him with your vehicle this afternoon when you will meet him at his house. Some hours before you intend to kill your enemy, you drive to the supermarket, you see your enemy walking on the pavement and you suffer a nervous spasm that causes you to suddenly turn the wheel and run over your enemy. In this example, according to the belief/pro-attitude view, there is an intentional action if you desire to kill your enemy and you believe that the action of killing your enemy, under a certain description, has that property. Ontologically, the theory would establish that you had both the desire to kill your enemy and the belief that this action has the property 'killing your enemy'. Thus, this mental state has caused the action and there is an intentional action. The problem with this view is that it needs to specify the 'appropriate causal route'. Davidson has made much effort to specify the 'attitudes that cause the action if they are to rationalize the action'.[18] In the following paragraph, Davidson seems to fear that the idea of attitudes causing action might lead to *infinite regress:*

> A climber might want to rid himself of the weight and danger of holding another man on a rope, and he might know that by loosening his hold on the rope he could rid himself of the weight and danger. This belief and want might so unnerve him as to cause him to lose his hold, and yet it might be the case that he never *chose* to loosen his hold, nor did he do it intentionally. It will not help, I think, to add that the belief and the want must combine to cause him to want to loosen his hold, for there will remain the *two* questions how the belief and the

[16] Hart 2012. [17] The first person to discuss deviant causal chains was Chisholm 1976.
[18] Davidson 1980: 79.

want caused the second want, and how wanting to loosen his hold caused him to loosen his hold.

Here we see Davidson struggling with his own proposal.[19] He asks *how attitudes must cause actions if they are to rationalize actions*. Davidson's model of intentional action does not help us to determine whether there is an intentional action, it only helps us to determine the *conditions* that would explain the existence of an intentional action. The intentional action is already *given*. A similar criticism is applicable to the 'acceptance thesis' and to this we now turn.

Let us suppose that I intend to go to the park in my car however I read a sign at the entrance of the park that states 'Vehicles are not allowed to park in the park', I turn the wheel of my vehicle, reverse it and park a few streets away. You ask me why I turned the wheel of my vehicle, reversed and parked a few streets away from the park; I answer that I carried out these actions because there is a rule that states 'Vehicles are not allowed to park in the park'. According to the 'acceptance thesis', my desire to follow the pattern of behaviour indicated by the rule and my belief that turning the wheel of my vehicle, reversing it and not parking in the park is the type of action or pattern of behaviour indicated by the rule. However, let us suppose that I desire to avoid parking in the park and have the respective belief. In other words, I accept 'not parking in the park'. On my way to the park, however, while following directions to the park, I take a wrong turning and end up parking just outside the park entrance. Even though the two criteria of the 'acceptance thesis' have been met, this was not a case of following the legal rule by acceptance since I comply with the rule by accident.

The problem with the 'acceptance thesis' is that it does not consider the action from the deliberative point of view, i.e. as it is seen from the point of view of the agent or deliberator. When the agent explains his actions he does not examine his own mental actions, rather he looks outwards to the vehicle, the park, the sign and so on. The reasons for actions, i.e. turning the wheel to reverse the vehicle, then parking outside the park to follow the rule, are self-evident or *transparent* to him. But then, an objector might advance, what is the good-making characteristic of a rule that, as in the example of the shopper who intends to buy margarine because is healthier,

[19] For an illuminating discussion of this point see Vogler 2007.

is the goal of the action of avoiding parking in the park. My reply is as follows. When the driver is asked why he or she is turning the wheel and reversing the vehicle, his answer will be 'because it is the rule'. But this is still not completely *intelligible* unless we *assume* or *know* that the driver is a law-abiding citizen or that he believes in the general fairness of legal rules, etc. We can still ask him, 'Why, because of the rule, do you do this?' His answer would need to be in terms of reasons as good-making characteristics for him, in order to make intelligible his intentional action. He will probably reply that he has reasons to follow the legal rule because it is the best way of preserving the peace of the park, or that he has reasons to follow legal rules in general because it is the best way of preserving coordination[20] among the members of a community. In a nutshell, the agent or deliberator needs to provide the reasons for the action in terms of good-making characteristics and the end or reason of the action provides the *intelligible form of the action*. This explanation of action has also been called a *naïve* explanation of action as opposed to a more sophisticated explanation of action, i.e. in terms of mental states.

If I am an agent that acts in an intentional way, I know that I am bringing about something and I know this without the need to observe every single step of my series of actions to verify that (effectively) I am acting.[21] In performing my action I might be aided by observation, but I know *what* is the order of the series of actions and *why*. This is the essence of practical knowledge. You do not need a theoretical stance towards yourself, a verification and observation of the movements of your body to know that you are performing an intentional action and bringing about *something*. Following the previous example, you do not need to observe that 'you are making tea' to know that you intend to 'make tea' and that you are bringing this about. You put on the kettle and boil the water, you do not ask yourself, 'let me see what my body is up to, let me observe what I am doing', and then infer from the movements of your body that you are actually bringing about 'making tea'. Of course you can be aided by observation, you need your sight to put the kettle in the right position and to pour the boiling water without spilling it. But you do not use your observation and inferences from the observational data to know that you are making tea.

[20] See Anscombe 1981 for an argument of authority as practical necessity.
[21] Anscombe 1957: Sections 28–29.

The state of affairs that you intend to bring about is at a distance, it might not be within your sight.[22] Imagine a painter who intends to make a painting. He has an idea about what the painting will look like, e.g. how the colours will be distributed across the canvas, and what topics and concepts will be at work in the painting. The painting is at a distance and the painter does not need to observe the movements of his body and the motion of the brushes to know *what* he is painting and *why* he is painting what he is painting. Certainly, his sight will help him to find the adequate colour at the correct time and to shape the figures at the right angle, but his intentional action is not what he observes; it is not the result of his painting but what he is actually doing. We do what happens.

d) In acting intentionally, we exercise our practical knowledge. We can understand practical knowledge if we understand the structure of practical reasoning

Intentional action is not in the mind; it is not primarily a mental state; it is not an internal thought.[23] Rather, it manifests itself publicly and within the public reasons that we share as creatures with certain constitutions and belonging to a particular time and place. For example, we eat healthy food because it is good to survive; we look after our family because we love them; we avoid harm because we aim to enjoy pleasant things and so on. Similarly, we know that to make a cake you need flour, sugar, eggs and milk. If I see you mixing grass and earth and you tell me that you are making a cake, then I can assert, if I consider that you are in sound mind (your full capacities), that there might be a mistake in your performance or that you do not understand what it is 'to make a cake'.

According to Anscombe, Aristotle establishes a strong analogy between practical and theoretical syllogism and this has led to misinterpretations about what practical syllogism is.[24] Like theoretical syllogism, practical syllogism is often systematized by Aristotelian interpreters as having two premises, i.e. major and minor, and a conclusion. It is said that, as in the

[22] Anscombe 1957: Sections 29–30.
[23] Anscombe 1957: Sections 21–22, Section 25, Sections 27–28.
[24] Anscombe 1957: Section 33, Sections 33–34.

case of theoretical syllogism, the practical syllogism is a proof or demonstration. The typical form might be as follows:

Vitamin X is good for all men over 60
Pig's tripe is full of vitamin X
I am a man over 60
Here is pig's tripe

But in this case nothing seems to follow about doing anything. Furthermore, the practical syllogism is sometimes interpreted as having an ethical or moral character and establishing a way to prove what we ought to do. Following the previous example, the conclusion might be, 'I should eat pig's tripe'. Anscombe rejects this view since Aristotle's examples are not in ethical contexts, i.e. 'dried food is healthy', 'tasting things that are sweet' that are pleasant. Additionally, the word 'should' (*dei*) as it appears in the Aristotelian texts has an unlimited number of applications and does not necessarily refer to the ethical or moral context.[25]

Aristotle insists that the starting point of any intentional action is the state of affairs or something that the agent wants and is wanted because it is presented to the agent as having good-making characteristics or as being valuable. For example, the man wants to have vitamin X because it is healthy. Furthermore, the practical syllogism is not limited to two premises and a conclusion; there can be many intermediate instances that are part of the syllogism. After a close analysis, the analogy between practical and theoretical syllogism breaks. Unlike theoretical syllogism, practical syllogism is not a proof or demonstration of a true proposition, nor is it a proof or demonstration of what ought to be done or what we ought to do. It is a form of *how* and *why* we are bringing something about when we are *actually* bringing it about.

Anscombe presents us with an alternative analysis to the practical syllogism and a different way to understand practical reasoning. Thus, the series of responses to the question 'Why?' manifests or reveals the practical reasoning of the agent and enables us to identify whether the action that the agent is performing is intentional or not. However, she warns us, the why-question methodology is as 'artificial' as the Aristotelian methodology of practical syllogism.[26] When we act

[25] Anscombe 1957: Section 35. [26] Anscombe 1957: Sections 41–42.

intentionally, we are exercising a kind of reasoning which is not theoretical and which is grounded on a desire for that which seems to the agent to be constituted by good-making characteristics. You know the thing or state of affairs that you are bringing about because you desire the thing or state of affairs that you are bringing about, and you are able to desire the thing or state of affairs that you are bringing about because you know *practically* the state of affairs. Your desire arises because you represent the thing or the state of affairs to be brought about as valuable or good. Volition and knowledge do not fall apart.[27] For example, if you are a painter, you know how and why the shapes and colours on the canvas are what they are, it is because you desire and value the painting you will produce that it should be such and such a colour and shape. But it is also true that because you desire and value *this* and *not that* arrangement of colours and shapes, that you are able to know it *practically*. Consequently, moral approbation is irrelevant for practical reasoning and for our practical engagement with the world.[28] This does not mean that there are no instances of objectively justified reasons for actions. On the contrary, we aim at getting it right and finding the genuine good-making characteristics that will provide meaning and intelligibility to the movement of our bodies. Therefore, the possibility of hitting the target of genuine good-making characteristics resides in our good characters and capacities. But to understand the basic structure of practical reason and the different scopes of agency, we do not need to begin from fully justified and objective values.[29]

Whatever strategy we follow to show the structure of intentional action, whether we take the Aristotelian practical syllogism or the Anscombian series of actions revealed by the question 'Why?', we are able to grasp the mechanism of practical reasoning in its different manifestations.

In this section I will argue that if Anscombe is right and both strategies are 'artificial' ways of understanding,[30] then a deeper and more 'natural' way of understanding practical reasoning is by grasping the nature of

[27] Anscombe 1957: Section 36. [28] Anscombe 1957: Sections 37–38.

[29] In Chapter 9 of Rodríguez-Blanco 2014b I show that robust value realism is indispensable to making sense of our actions, practices and first-order deliberative phenomenology. See Chapter 3 for a full defense of the 'guise of the good model'. See also Grisez's interpretation of Aquinas's precepts of natural law in Grisez 1969: 368.

[30] Anscombe 1957: Sections 41–42.

the capacity that is exercised by the agent. *In other words, the answers to the 'Why?' questions show a capacity that the agent is exercising when acting.* In the next section, I will show that the Aristotelian potentiality/actuality distinction sheds light on understanding the exercise and nature of our practical reasoning capacities. Furthermore, the potentiality/actuality distinction illuminates each of the key features of intentional action (a, b, c and d) and their interplay as identified by Anscombe.

2.1 Aristotle's Distinction Between Actuality and Potentiality

Contra Parmenides, who argued that motion is impossible since something cannot come from nothing, Aristotle advances the idea that motion or change is possible if there is an underlying nature or constant feature that does not change. To explain this, Aristotle resorts to the distinction between potentiality and actuality. In *Metaphysics*, book Θ, Aristotle uses the analogical method to show that particular instances of the scheme or idea of potentiality and actuality[31] have a pattern.[32] Thus he begins with the particular instances of capacity/change and matter/form to explain the common patterns that will illuminate the general scheme of potentiality/actuality. However, since our purpose is to elucidate the character of practical reasoning which is a power or capacity, and I have argued that the general scheme of potentiality/actuality will help us to clarify the nature of practical reason, it is circular to resort now to a particular instance of capacity/change to explain potentiality/actuality. I will, therefore amend the Aristotelian argumentative strategy and explain the general scheme of potentiality/actuality. I will then proceed to explain the particular instance of exercising our practical capacities as the actuality of a potentiality.

It is difficult to capture what 'motion' is and many definitions of 'motion' tend to use terms that presuppose motion (for example, 'a going-out from potency to act which is not sudden', but 'going-out' presupposes motion

[31] I use this term as Kosman and Coope interpret it from Aristotle's *Physics, Books III and IV*. This means, the change that acts upon something else so that this something else becomes F, i.e. the fulfillment of a potentiality. For example, the building of a house by a builder so that the house becomes built. See Kosman 1969 and Coope 2009.

[32] I follow the interpretation of Aristotle's *Metaphysics*, book Θ advanced by Frede 1994 and Makin. See Aristotle 2006. *Metaphysics* book Θ: 133). Cf. Ross 1995.

and 'sudden' is defined in terms of time which is also defined in terms of motion). Therefore, this kind of definition is discarded by Aristotle for being circular and unhelpful. Nor can we define motion in terms of pure potency, because if we say that 'bronze is potentially a statue', we are merely referring to the piece of bronze which has not yet been changed and therefore there is no motion. You can neither refer to motion nor to change as what is actual. For instance, you cannot refer to what has been built or transformed, e.g. a building or statue, because it is not being moved, but has *already* moved. In the example of a building, the bricks, wood, clay, cement of the building have been already moved; and in the case of a statue, the bronze has already been transformed. Thus, Aristotle defines motion as a kind of actuality which is hard to grasp. In other words, *the actuality of what exists potentially, in so far as it exists potentially.*[33] Motion is an actuality that is incomplete. It is hard to grasp and the tendency is to say that motion is the actuality. In the example of the house, it is the house that has been built. The other tendency is to say that motion is the privation of something, i.e. the going from nothing to something; from not being a house to being a house. Finally, the tendency is also to think that motion is what exists before *potentiality*, e.g. the bricks, steel, wood, cement and so on. Contrary to these tendencies, Aristotle insists that motion is what happens exactly at the *midpoint*, neither *before* when nothing has been moved and is mere potentiality, and neither *after* when something *has* been moved. Furthermore, motion is not privation, it is rather constitutive actuality. For example, if the baby has not learned to speak English, we say that the baby is potentially a speaker of English, when a man knows how to speak English and is in silence, he is also potentially a speaker of English, and finally when the man is speaking English, we say that he is actually an English speaker speaking English. However, the potentiality of the baby (p1) is different from the potentiality of the man in silence (p2), and motion is located in the second potentiality (p2), when the man is in silence, but begins to pronounce a sentence to speak English. Motion is midway and is not privative, but rather constitutive. We do not say that the man speaking English went from being a non-speaker of English to a speaker of English, we say that he spoke English from being in silence (he knew how to speak English, but did not exercise his capacities).

[33] Aristotle 1983. *Physics*: III.1.201a9–11.

The previous example locates us in the domain of the particular instance of capacity and change as exemplified by the potentiality/actuality distinction. Aristotle argues that there are many different types of capacity, i.e. active/passive, non-rational/rational, innate/acquired, acquired by learning/acquired by practice, and one way/two way capacities. Two way capacities are connected to rational capacities, whereas one way capacities are linked to non-rational capacities. For example, bees have a natural capacity to pollinate a foxglove flower in normal circumstances,[34] ('normal' circumstances might include a healthy bee in an adequate foxglove, and the absence of preventive circumstances). In the case of two way capacities there ought to be an element of *choice or desire* to act, and the rational being can exercise her capacity by producing or bringing about 'p'. Furthermore, she also knows how to produce or bring about 'non-p'. The paradigmatic example used by Aristotle is medical skill. The doctor knows how to make the patient healthy (p) and how to provoke disease or illness (non-p). Therefore, the doctor can bring about two opposite effects.[35] For Aristotle, to have a rational capacity is to have an intellectual understanding of the form that will be transmitted to the object of change or motion. Thus, the doctor will have an understanding of what it means to be healthy and without illness, but also of what it means to be ill. Let us suppose that a doctor is producing illness in the enemies through prescribed drugs. She needs to understand the order of the series of actions that will result in sickness for the enemies and she needs to possess knowledge about the necessary drugs to make the enemies to collapse. Her action will be directed to produce illness. But the doctor can choose otherwise, e.g. she can choose to make the enemy healthy.

In the exercise of practical reason, we choose to act[36] and this choosing activates the action and directs the capacity towards the series of actions that will be performed. By contrast, a non-rational capacity is non self-activating; its acts are necessary. If the bee is in good health and there are no obstacles, it will pollinate the foxglove flower. By contrast, rational agents need to *choose or decide* to act to produce a result.

[34] See Makin's commentaries at Aristotle 2006: 43.
[35] Aristotle 2006. *Metaphysics Book Θ* 1046b 4–5, 6–7.
[36] Aristotle 2006. *Metaphysics Book Θ* book Θ 5, 1048 a10–11.

When we say that the medical doctor has the rational capacity to change the unwell patient into a healthy human being, we say that she has the 'origin of change'. She is curing the patient and therefore she is in motion because she actualizes her practical reasoning capacities to bring about the result as she understands it. She has an order of reasons that connects a series of actions and knowledge of how to produce changes.

She is the origin of change because her medical knowhow explains why certain changes occur in situations involving that object, e.g. the patient who suffers chickenpox has fewer spots and less fever. For example, when a teacher intends to teach and starts to say some sentences on the topic of 'Jurisprudence' to her pupils, we say that she is teaching. She is the origin of change in the pupils who are the objects of change. Thus, the students begin to understand the topic and have a grasp of the basic concepts.[37] Similarly, when legislators create the law and judges decide cases, they establish rules, directives and principles and these rules, directives and principles can be found in statutes and case reports. Can we say that legislators and judges have reached the end of the process? No, we cannot: statutes and case reports do not represent the end of the process since citizens need to comply with the legal rules and directives and perform the actions as intended by the legislators and judges. We say that legislators and judges are the origin of change because they know how and have an order of reasons that enables citizens to comply with legal rules and directives. The order or reasons as good-making characteristics ground the rules, decisions and legal directives. In parallel to the situation of the teacher, I cannot say that I am teaching unless my pupils begin to understand the topic that I am teaching. Thus, the legislator cannot say that she is legislating and the judge cannot say that she is judging, in paradigmatic cases, unless there is some performance of their actions by the addressees as they intend.

The distinction between potentiality/actuality clarifies the structure of practical reason as a capacity that is actualized when we act intentionally. We can now understand that the features of an intentional action identified by Anscombe can be illuminated by the potentiality/actuality distinction. The idea that the former stages of an intentional action are swallowed up by

[37] Makin argues that the teacher analogy is intended to show that the teleological perspective is equally appropriate for other-directed capacities and self-directed capacity. See Aristotle 2006: 198.

the later stages is explained by the idea that motion is constitutive and not privative. It is not that when I begin to act I do so as an irrational or a-rational being, and that I when finish acting I am a rational being, or that I go from non-intentional to intentional action, but rather that I go from being a rational being and *potentially* intentional action to being a rational being and *actual* intentional action. Later stages begin to actualize something that was potentially there. My practical reason was always there *potentially* and the intentional action actualizes an order of ideas provided by my practical reason. For Anscombe, intentional action is something *actually* done, brought about according to the order conceived or imagined by the agent. If practical capacity is understood in the light of the general scheme of actuality/potentiality, then intentional action involves knowledge that is non-observational, but it might be aided by observation. In acting intentionally, I am exercising my practical reasoning capacity and this capacity is in motion. This motion is represented at the midpoint; *after* I potentially have an intention to act and *before* I have reached the result of my intentional action. It is not that the forming of an intention from nothing to something is a *magical* process. *It is rather that I potentially have the power to intend which in appropriate circumstances can be exercised.* As being in motion, I am the agent who knows *what* she is doing and *why* she is doing what she is doing, but if I observe myself doing the action, then I have stopped the action. There is no action. There is no more motion and no exercise of my capacities. Finally, Anscombe asserts that in acting intentionally, we exercise our practical knowledge. Because we are the kind of creatures that we are, we can *choose* or *decide to bring about* a state of affairs in the world and we do this according to our order of reasons. Practical knowledge is potentially in all human beings and when we decide to bring about a situation or do certain things, then we actualize this potentiality. We can direct our actions to produce either of two opposing results, e.g. health or illness, ignorance or knowledge, as opposed to non-rational creatures who can only produce one result under normal circumstances and with no impeding conditions e.g. the bee pollinating the foxglove. It should be noted that to have an actual capacity, such as practical reasoning and the capacity to act intentionally, does not mean that A can Φ, nor that A will Φ if there are normal conditions and no impending elements. Instead it means that *A will Φ unless she is stopped or prevented*. Thus, once our practical reasoning capacity begins to be actualized, it will strive to produce or do what A (she) has conceived. Once A (she) decides or chooses to act, then a certain state of affairs will be

produced unless she is prevented or stopped. Intentional action and practical reasoning are not dispositions like being fragile or elastic, nor are they possibilities that something will be done. They are powers.

Now that we have grasped the idea of potentiality/actuality as the general scheme for explaining the structure of practical reason, we can turn to the rule-compliance phenomenon and the creation of legal rules by legislators and judges, which raises a different set of difficulties that will be dealt with in the next section.

3. Law and *Energeia*: How Do Citizens Comply with Legal Rules?

So far we have argued that an intentional action is the bringing about of things or states of affairs in the world. We can argue, too, that there are different kinds of bringing about. Human beings can produce houses, clocks, tables, tea cups and so on, but we can also produce rules of etiquette, rules for games, and legal directives, rules, and principles. Legislators create legal rules and directives and judges create decisions according to underlying principles and rules. These legal rules and directives are directed to citizens for them to comply with. They are meant to be used in specific ways. When a legislator creates a rule or a judge reaches a decision that involves rules and principles, she creates them exercising her practical capacities with the intention that the citizens comply with them. But how is this compliance possible? How do legislators and judges create legal rules and directives that have the core purpose of directing others' intentional actions and of enabling them to engage in bringing about things and states of affairs in the world? In other words, how do other-directed capacities operate? This is the question that we aim to explore in this section.

Let us give two examples of authoritative commands to highlight the distinction between different kinds of authoritative rules:

Scenario 1 (REGISTRATION): you are asked by a legal authority to fill in a form that will register you on the electorate roll.

Scenario 2 (ASSISTANCE AT A CAR ACCIDENT): you are asked by an official to assist the paramedics in a car accident, e.g. to help by transporting the injured from the site of the accident to the

ambulance, to assist by putting bandages on the victims, to keep the injured calm and so on.

Arguably, the performance required by the addressee is more complex in the latter example than in the former since the latter requires the engagement of the will and the performance of a series of actions over a certain period of time, and it requires that the addressee should circumvent obstacles to achieve the result according to what has been ordered. It requires that the addressee exercises her rational capacity in choosing *this* way rather than *that* way of proceeding. While the addressee executes the order she needs to make judgements about how to do *this or that*. Successful performance as intended entails knowledge about how to proceed at each step in order to perform the series of actions that are constitutive of what has been commanded. This cannot be done unless our practical reasoning and intentional action are involved in the performance. In other words, the successful execution of the order requires the engagement of practical reasoning and therefore of our intentions. Furthermore, it requires an understanding of the *telos* or end as a good-making characteristic of what has been commanded. In the case of ASSISTANCE AT A CAR ACCIDENT, it requires engagement with the health and well-being of the victims of the accident. Thus, the addressee needs to know that the bandage ought to be applied in *this way* and not *that way in order* to stop the bleeding, and she knows that she needs to stop the bleeding *in order* for the victim to have the right volume of blood in his body. The victim needs a certain volume of blood in his body in order to be healthy and being 'healthy' is something good and to be secured.

Because our practical reasoning capacity is a two-way capacity the agent needs to *decide or choose* to actualize this capacity which, prior to actuality, is mere potentiality. As in our example in Section 2.1, the speaker needs to *decide or choose* to speak in order to actualize their potentiality of speaking English. Then the exercise of their capacity to speak actualizes according to a certain underlying practical knowledge, e.g. the order of the sentences, grammar, style and so on. It is not the case that as a bee pollinates a foxglove without any decision or choice by the bee, the agent will speak English and actualize their potential capacity to speak. In the case of legal rules, the question that emerges is how a legislator or judge can produce or bring about something that will engage the citizens' intentions so that they comply with legal rules or

directives that are constituted by a complex series of actions. The core argument is that legislators and judges intend that citizens comply with legal directives and rules, and this intention is not merely a mental state that represents accepted reasons or reason-beliefs. On the contrary, for the legislators' and judges' intentions (i.e. to engage the citizens' practical reasoning) to be successful, they need to exercise their own practical reason. It is not that they interpret or construct the citizens' mental states and interior thoughts so that their values and desires can constitute the ground that enables legislators, judges and officials to construct the best possible rules, directives or legal decisions according to the citizens' values as represented in their beliefs. On the contrary, they will look outward to *what* is of value and *why* certain states of affairs and doings are valuable (see the discussion on practical knowledge as non-observational Section 2, c). Reasons for actions as values and goods that are the grounds of legal rules and directives will engage others' practical reason. Therefore, the citizens' practical reasoning power or capacity become an *actuality*. If, as I have argued, our intentional actions become *actuality* by an order of reasons in actions and for actions that are ultimately grounded on good-making characteristics, then legislators and judges need to conceive the order of reasons as good-making characteristics that will ground their legal rules, legal directives and decisions. Judges and legislators would hence take the first-person deliberative stance as the privileged position of practical reasoning to disentangle *what* good is required and *why* it is required. In other words, if as judge or legislator you intend that your legal rule or directive is to be followed by the addressees and, *arguendo*, because these legal rules and directives are grounded on an order of reasons, then you cannot bring about this state of affairs, i.e. rule-compliance, without thinking and representing to yourself the underlying order of reasons. Let me give a simple example. You are writing an instruction manual on how to operate a coffee machine. You need to represent to yourself a series of actions and the underlying order of reasons to guide the manual's users. If you are a person of certain expertise, e.g. a manufacturer of coffee machines, then the practical knowledge that entails the underlying order of reasons is actualized without much learning and thinking. The required operating instructions are actualized as a native English speaker speaks English, after being in silence. By contrast, if you have only just learned to write instruction manuals

for coffee machines, then you need to ask yourself 'Why do it this way'? at each required action to make the machine to function. This process guarantees understanding of the *know how* to operate the machine, and the success of the manual is measured by the fact that future buyers of the coffee machine are able to operate it. When legislators and judges create legal directives and legal rules they operate like the writers of instruction manuals, though at a more complex level. They need to ensure that the addressees will decide or choose to act intentionally to comply with the legal rules or directives and thereby bring about the intended state of affairs. But they also need to ensure that the order of reasons is the correct one so that the intended state of affairs will be brought about by the addressees. We have learned that the early stages of an intentional action are 'swallowed up' by the later stages and ultimately by the reason as a good-making characteristic that unifies the series of actions. Thus, for addressees with certain rational capacities and in paradigmatic cases, understanding the grounding reasons as good-making characteristics of the legal rules and legal directives will enable them to decide or choose to comply with the rule and will guide them through the different series of actions that are required for compliance with the rules and directives.

Legal rules and directives do not exist like houses, chairs, tables or cups of tea. We need to follow them for them to exist. But we create legal rules and directives as we create houses, chairs, tables. We bring these things about by exercising our practical capacity and we are responsive to an order of reasons as good-making characteristics that we, as creators, formulate and understand. Thus, builders create houses that are either majestic or simple, elegant or practical, affordable or luxurious. To achieve the intended features of a house, builders need to select specific materials and designs, hire skilled workers and so on. Similarly, legislators, officials and judges create legal directives and rules to pursue a variety of goods, e.g. to achieve safety, justice, the protection of rights and so on. Legislators, officials and judges actualize their practical reasoning by creating an order of reasons in actions that will ground rules so that we are able to comply with them because we actualize our practical reasoning. Like builders, legislators, officials and judges need to choose values, goods and rights that will be fostered or protected by their rules or directives. Likewise, they need to formulate legal rules and directives that will have appropriate sanctions, are clearly phrased and follow procedures for their

publicity. Arguably, what is at stake is not the mere publicity of a rule, but the publicity of the values that are embedded in the set of legal rules and principles. In this way, judges make the addressee of a directive choose or decide to actualize their potential practical reasoning capacity to comply with legal rules and directives. The addressees of a legal directive or rule are not like bees, who without decision and, given normal conditions and the absence of impediments, will pollinate the foxglove. As addressees of legal directive and legal rules, we need to choose or decide to bring about a state of affairs or things which are intended by the legislator, official or judge. This can be summarized as the idea that legal authority operates under the guise of an ethical-political account since it needs to present legal rules and directives as grounded on reasons for action as good-making characteristics.

As rational creatures, we are responsive to reasons as grounded in good-making characteristics, but if this is truly the case, how do mere expressions of doing as brute facts, such as 'because I said so', or beliefs, intentions or reasons construed as *mere* mental states make possible the *actuality* of our practical reason? In fact, this is only possible if 'because I said so' involves reasons in action that are grounded in good-making characteristics, e.g. 'I am the authority and compliance with the authority has good-making characteristics'. For example, compliance with authority is a secure way that some goods – apparent or genuine – will be achieved. The potentiality/actuality and capacity/change discussion shows that as intellectual and rational beings, we need to apprehend the 'form' that underlies the brute fact 'because I said so', so that we are able to comply with legal directives and rules. As theoreticians, we now understand the limits of the empirical explanation of action, i.e. it has no 'form' that makes intelligible the actuality of our practical reason and explains the dynamic reality of our intentional actions. Of course, we can decide that there is no such a thing as practical reason and that it is perfectly reducible to theoretical reason[38], but then the price we pay for this simple approach is too high: it leaves a set of human actions and the phenomenology of our first-order or deliberative stance in the mists of mystery.

[38] See Enoch 2011 for a recent defense of the reductive approach. See Rodríguez-Blanco 2012 for a criticism of his position.

The 'form' takes the shape of goods and values that are intended to be achieved by legislators, officials and judges. If it were a matter of mental or social facts, and we were able to apprehend the brute fact 'because I said so' by our senses, or access legislators' and judges' reasons and values via our mental states *only*, without directly engaging with values and reasons, then how could we control and direct the doings and bringing about that are intended by legislators and judges? Some stages of the action will *seem* this and other stages will *seem* that. There is no way to bring about *this* and not *that*. Let us take the example of ASSISTANCE AT THE CAR ACCIDENT. I assist the official at the car accident *because he has said* so. I have no reason to assist him at the car accident; my action is only *caused* by my fear of sanction, i.e. a psychological impulse in me. But now as I am merely guided by my senses, it *seems* to me that I need to put the bandage on in this way rather than that way, but my sight alone cannot guide me on this. Since I am guided by my eyes and other senses, I do not know *why* I should apply the bandage or *how* I should apply the bandage. Furthermore, how can we attribute responsibility as we cannot be blamed for not 'seeing' or 'hearing' appropriately? By analogy, mere scribbles on the board by the teacher cannot make the pupil understand the topic that the teacher is teaching. The teacher needs to make transparent the premises and conclusions of her arguments so that the pupils can 'grasp' the form of the argument and can *themselves* infer its conclusion.

Let us return to our initial example. Citizen 'c' stops at the red traffic lights on her way to work. If we ask her 'why are you stopping at the red traffic lights?' and we are satisfied with the empirical explanation which is, 'because there is a secondary rule that is accepted by the majority of the population and this establishes the validity of the rule "citizens ought to stop at red traffic light"', then how can we attribute responsibility to citizen 'c', who just happen to have certain mental states? How can citizen 'c' produce the required action just by remembering her mental state? By contrast, within the framework of the notion of practical reason that we have defended in this article, she will *naïvely* reply, 'because the legal rules say so', and to reach intelligibility we could continue by asking, 'why do you follow what the legal rules say?'. She could then *naïvely* reply, 'because I do not wish to damage my vehicle or other vehicles and I do not wish to kill other people'. We can try to reach yet further intelligibility of her actions and ask, 'why do you not wish to damage other people's

vehicles or kill people?', and her reply will be, 'because property and life are valuable'.

We are now in a position to understand that citizen 'c's answers have a structure which is the structure of practical reason, where reasons are connected to other reasons, whose chain has a finality. The finality is provided by the agent from the first-person or deliberative perspective when she advances a value or good-making characteristic that swallows the earlier stages of the action and provides intelligibility to the movements of 'c's body. This explanation seems primary and more fundamental than the explanation in terms of acceptance-beliefs, reason-beliefs as a mental state of either primary or secondary rules of the legal system or exclusionary reasons.[39]

If citizen 'c' decides not to stop at the red traffic light because she is driving her neighbour to the hospital, who is dying, then to the question 'why are you not stopping at the red traffic light?', she might reply, 'don't you see it? My neighbour is dying and I need to get to the hospital as soon as possible'. And to the question, 'why do you need to bring him to the hospital as soon as possible?' she might reply, 'because I want to save his life'; in response to the question 'why do you want to save his life?', the answer will be, 'because life is valuable'. This set of answers will give intelligibility to her actions, which includes the movements of her body and what she produces, i.e. a vehicle moving in the direction of the hospital, and will also explain why she did not stop at red traffic lights. Thus, she went through the red traffic light not because of her belief that on this occasion there was no valid legal rule, nor because of her belief that the rule of 'stopping at red traffic lights' does not protect or ensure values such as property or life. Her mistake lies, arguably, in *not* 'perceiving' that the life of her neighbour is as valuable as the lives of pedestrians and the drivers of other vehicles. Her mistake lies in her understanding of the goods or values at conflict in the particular situation.

The classical model of practical reasoning and intentional action laid out the view that for an action to be controlled and guided by the agent the reasons need to be *in the action* and therefore transparent to the agent (see Section 2, c). The answers to the question 'Why'? provide the order of reasons that guarantees successful compliance with the legal rules and

[39] Raz's exclusionary reasons account (Raz 1999) privileges the theoretical point of view. See also footnote 5 above.

directives by the agent. They are the *reasons in action* that the agent has together with the values or good-making characteristics that the legislator and or judges aim to promote and want the citizens to 'grasp' as the grounding of their actions. The transparency condition of practical reason warrants that the citizen is able to engage with the good-making characteristics that ground legal rules. But if the order of reasons is opaque, how can there be an action as intended by the legislator or judge as an order of reasons that has as a finality a value or good-making characteristics? If the reasons are opaque and you do something 'because someone says so' you do not know 'why' you are performing the action and therefore the action is not intentional. Furthermore, one might assert, the legislator, judge or official is not the origin of change and the origins of change are in external empirical factors, e.g. the fear *mechanism* that acts within the agent, psychological processes in the agent, mental states such as beliefs, acceptance-belief or reasons-belief and so on.

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Hume, Virtue and Natural Law 8

Thomas Pink

1. The Idea of Natural Law

Natural law is moral normativity in the form of law – in a form that, in moral obligation, directs us in a way that is recognizably legal by imposing demands on how we act. These directive demands apply to us, and we are responsible for meeting them, not just as contingently subject to a particular jurisdiction or authority, but as subject to morality itself. This moral normativity of law applies to and directs us just in virtue of our human nature.

A normativity of law is distinct from the normativity of reason in its general form.[1] The normativity of law is demanding in a way that ordinary standards of reason are not; and it is directive only of action and omission and what depends on these, as ordinary standards of reason are not. This is because there are capacities in human nature that go beyond the mere capacity for reason, and that are of ethical significance; and natural law presupposes and directs these capacities, and not the exercise of reason alone. Beyond reason, natural law presupposes and directs a capacity for self-determination – a power to determine our actions for ourselves, which bases a special, moral responsibility for how we act. Natural law also directs the exercise of a particular capacity for what Hume termed *merit* – for personal admirability or being good as opposed to bad. Natural law is a law that it is bad – morally bad – of us to disregard. It is merit or personal admirability and its significance for moral theory that is to be our subject here.

Modern virtue theory has often taken the morality of moral admirability – of virtue and vice – to be quite different from the morality of obligation or duty. On this virtue-theoretic view, moral obligation is

[1] For a general discussion of the idea of a normativity of law, see Pink 2014.

supposed to involve various features taken from positive law which seem inessential or even alien to a morality of virtue and vice. Moral obligations are thought to come with forms of enforcing sanction or pressure, as an informal analogue of punishment under positive law, and as standards of moral admirability need not.[2] Or moral obligation is alleged to address the voluntary – actions that depend on our will or motivation so to act – whereas virtue has to do with motivations (of love or concern for others, courage and the like) that we cannot adopt or abandon at will, such as just in order to avoid sanctions.[3] Or moral obligations are thought to presuppose a moral law-giver such as God.[4] The morality of obligation or duty is sometimes supposed to be so distinct and separate from the morality of virtue and vice that the idea of moral obligation could sensibly be given up, while the ideas of virtue or vice were still retained.

Hume opposed such attempts to model moral obligations on obligations under positive law. Moral obligation for Hume was not separate from the morality of virtue and vice, but part of it. Moral obligation, for Hume, is a standard that it is bad of us to breach, a standard that primarily applies to motivations that are non-voluntary and not to voluntary actions at all. Hume did further deny that moral obligation is any form of law at all – even a form of law that is natural rather than positive. But his view that moral obligation comes as part of a more general morality of virtue and vice, and is not a detached and quite separate part of morality, was still one he shared with the medieval and early modern natural law tradition.

According to this tradition moral law is indeed part of a more general morality of virtue and vice – of personal admirability in moral terms. Moral law is the morality of virtue and vice in legal form, as directing a capacity for freedom or control – a capacity exercised in and through action and omission. Moral obligations are directives that, through our freedom, we have a special, moral responsibility to meet – and that it is morally bad of us to breach. Moral law can perfectly well exist in this form – as directives that it is bad to breach – without any of the apparatus of legal positivity, such as legal officials and enforcement through sanctions. For many natural lawyers, moral law could even

[2] See Williams 1985: 174–196. [3] See again Williams 1985: 174–196.
[4] Anscombe 1997: 26–44

exist without legislation by a moral law-giver, such as commands of God:

> Since even if God never gave any command about the matter, it would still be bad to kill a human being without reason, to show contempt for one's superiors, or to expose oneself to clear danger of death, therefore even if natural law did not do so by way of any particular commandment given by God, natural law would still forbid such actions.[5]

In particular natural law was certainly not restricted to direction of the voluntary. Our admirability in moral terms does indeed depend on motivations, such as concern for others, that we cannot form or abandon at will to suit our purposes – such as in order to gain rewards or avoid sanctions. But, the natural lawyers supposed, we do still control these motivations, as dispositions of the will itself, through the exercise of self-determination as freedom. It is of course a puzzle how freedom and control is possible of motivations that are not voluntary – that we cannot form or remove from ourselves at will.[6] Hume certainly did not believe in a power of freedom exercised over motivations that are non-voluntary, which is one reason why he did not believe in natural law. In his view, moral obligation governed motivation, not as a demand directive of free will or free decision, but as a standard of admirability on mere passion – of motivation conceived in entirely passive form. But Hume did still share with natural lawyers one important view – that moral obligation is a standard of merit or admirability, and that this is fundamental to the normativity which moral obligation involves. The normativity of obligation takes the form of a call on us to be good rather than bad. Sidelining all the issues and puzzles about self-determination, it is this shared view of moral normativity as concerned with merit – with being good or bad – that we must now consider.

Hume's conception of morality and the normativity it involves has been the object of much criticism. Especially controversial is his denial that the call of morality on us is the call of reason. Hume denied that breach of moral obligation is unreasonable. Reason, for Hume, had nothing to do with morality's call on us to be good rather than bad.[7] Controversial too is

[5] Punch 1639: 857–877

[6] The nature of freedom as a form of self-determination and its relation to voluntariness are discussed in Pink 2014: 5–8 and Pink 2016.

[7] Hume 1978: 458

his claim that the distinction between virtue and talent is merely verbal – his assimilation of moral admirability to admirability in relation to non-moral arts and skills.[8]

I shall agree that both these Humean doctrines are exaggerated. Moral normativity does involve reason in some form; and the distinction between virtue and talent is not wholly verbal. But nevertheless there is much to be learnt from Hume's account of moral normativity. Hume was right to see that moral normativity is fundamentally a normativity of merit or personal admirability. And he was also right that virtue and talent have much in common, and that this is vital to understanding moral normativity. In particular, as we shall see, virtue and talent equally involve capacities for self-realization, and as such are subject to appraisal in the same way. Though Hume denied the existence of law in moral form, his insight that moral admirability is like admirability in respect of arts and skills is in fact essential to explaining how moral law is possible. Merit in its moral form can constitute a normativity of law only because just as much as merit in relation to arts and skills, moral merit likewise has to do with self-realization.

2. Normative Direction and the Role of Merit

Standards that are normative make a call on us to meet them, and serve as a basis of criticism of those who ignore this call and breach the standards. In contemporary philosophy it is often assumed that the call is that of reason:

> Aspects of the world are normative in as much as they or their existence constitute reasons for persons, that is, grounds which make certain beliefs, moods, emotions, intentions, or actions appropriate or inappropriate.[9]

Hume, by contrast, denied an identity between normativity and reason by appealing instead, in the practical sphere, to good and bad. Where motivations and actions and standards on these are concerned, the call of normativity is not to be reasonable, but to be good or admirable. Key to the normativity of standards on motivation and action, moral standards included, is not that the person who breaches them is unreasonable, but

[8] Hume 1975: appendix iv, 322. [9] Raz 1999: 66.

that the person who breaches them is contemptible or bad. Normativity in the practical sphere is to be identified not with reason but with merit – with standards of personal admirability.

People can of course be admired for qualities that are other than moral, and that, on any view, are clearly not a function of the exercise of their reason. They can be admired as great singers, or for their ability to charm or for their sporting prowess. Hume's theory of merit claims that moral appraisal of the person is just one form of such appraisal of people for their capacities – an appraisal that extends beyond the moral and beyond the exercise of reason. In respect of their normativity, moral standards are just the same as standards of good and bad that arise outside morality, and that arise in relation to capacities other than the capacity for reason. As far as the theory of normativity is concerned, virtue or moral goodness is only verbally distinct from general talent.

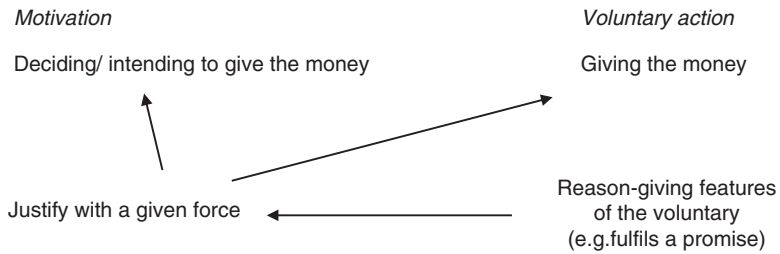
Modern theories of normativity have generally ignored Hume's project of replacing reason with merit. There is an obvious reason for this. Hume's appeal to merit notably fails to provide any account of something essential to normativity in the moral sphere at least – normative direction.

Moral standards certainly are used as a basis of appraisal of people and their actions as good or bad in moral terms, and this is central to Hume's understanding of them. But moral standards also direct, pointing us to and supporting some attitudes and actions and opposing others, and in so doing they address a capacity on our part to respond to that direction. Essential to our being answerable to moral standards is a genuine capacity on our part to understand and respond to them as providing us with directive guidance – a guidance that we are to follow. Any credible theory of moral normativity must therefore provide us with a theory of how moral standards direct us, and of the nature of our capacity to respond to that direction.

A theory of normativity as reason seems to supply the needed theory of direction. In fact, a theory of direction appears to be the very first thing that such a theory provides. Rational standards give us direction in the form of justifications – justifications which immediately attach to objects of thought, and which support or oppose us forming various attitudes towards those objects of thought. Actions that are voluntary, that depend on a motivation or will on our part to perform them, such as crossing the road or giving money, are no exception. They are responsive to normative direction because they are motivated by attitudes of decision and

intention – attitudes by which we respond to the thought of their performance as desirable, or as goals to be attained.

It is objects of thought specifying options by way of voluntary action that we consider when deliberating prior to deciding what to do. One such option might be giving money to someone else; another that we keep the money ourselves. These voluntary actions may contain features that are reason-giving – that justify so acting. Thus handing the money over might fulfil a promise, and this feature of it might justify handing the money over. But if so, then the feature will also provide the same justification and support for becoming motivated to hand the money over – for deciding so to act.



For our immediate response to justifications for voluntary action is at the point of motivation, when we decide or become motivated to perform the voluntary action justified. Unless justifications for voluntary actions also give the same support for the motivation to perform those actions, they can hardly move us to act as they justify. In the practical sphere as much as any other, the directive force of reason comes from objects of thought, and immediately justifies the formation of attitudes directed at those objects.

It seems that without this theory of reason and the capacity to respond to it, we lack any theory of normative direction. Certainly Hume failed to provide an alternative form of such a theory. It is part of Hume's attack on the appeal to a practical or motivation- and action-governing reason in normative theory that motivations are not directed at justification-bearing objects of thought (as the appeal to practical reason so crucially assumes they are). Motivations are simply contentless feelings.[10] They can be caused in us, as they can themselves have effects, and they can be described, as if they were object-directed, in terms of these causes and effects. But a motivation being caused in

[10] Hume 1978: 415

us is not the same as its being formed in response to some normative call on us to form it. For that we need a theory not of efficient causation, but of normative direction, and of how our motivations are responsive to that direction. And that seems to demand a theory of objects of thought as bearing justifications and of those justifications moving the formation of attitudes directed at them.

Ethical rationalism is a doctrine about normativity that is opposite to Hume's reason-scepticism. Ethical rationalism claims that moral normativity can be understood just in terms of a general normativity of rational direction provided by justifications; and that the capacity addressed by such justifications can similarly be understood simply as a general capacity for reason – a capacity to respond to such direction through the formation of psychological attitudes. Moral appraisal of people is just another case of the general appraisal of people as reasonable or unreasonable – as disposed to respond to rational justifications or disregard them.

But this seems insufficient account of moral normativity and our capacity to respond to it. For morality contains moral obligations or duties. Now moral obligations certainly are directive. They direct us to do what is right, and to avoid doing what is wrong. But the particular way that moral obligations are directive cannot easily be explained just in terms of the general idea of rational direction and of a capacity to respond to that direction.

One problem, which I have already mentioned and that I have discussed elsewhere, has to do with the distinctive, moral responsibility that we have for meeting moral obligations – a responsibility that presupposes a capacity for self-determining freedom as mere rational accountability does not.[11] But this is not our subject here. Our subject is another problem for ethical rationalism and is to do with the direction provided by obligations. This direction is distinctively demanding. If an action is obligatory we *must* perform the action; its performance is mandatory.

Now rational direction in general takes a rather different form. Take evidence that justifies belief. Rational direction to believe one thing and not another involves what we might term the force of recommendation or advice – the force that it is sensible to respond to, foolish or less

[11] For the importance of self-determination to normative theory, and for Hobbes's attack on the natural law tradition's appeal to self-determination, see Pink 2014: 23–24

than sensible to disregard. It is sensible to hold beliefs that are supported by the evidence, foolish to hold beliefs that the evidence opposes. The practical sphere is little different. Outside specifically moral contexts justifications for action similarly recommend or advise. It is sensible to act in ways supported by reason, foolish to act in ways that reason opposes.

But the directive demand that moral obligation involves certainly does not come to the obligatory action's performance being markedly advisable, the failure to perform it foolish. For much wrong-doing is not obviously foolish at all. We are all familiar with courses of action that are clearly foolish or less than sensible – that reason opposes with the force of recommendation. For example, we know what it is for an action to be self-defeating – to be clearly liable to frustrate the goal it aims at. Or consider actions in which effort and resources are applied, perhaps even altruistically applied, but without any prospect of proportionate benefit to anyone, the agent or another. Intuitive folly can take a variety of forms: including straightforward practical inconsistency, simple choice of ineffective means, various forms of imprudence and rashness, the charmingly or tragically Quixotic, and of course the failure to aim at any intelligible or worthwhile good at all. But actions that are clearly wrong need not be like this. These actions may involve well-chosen means, and aim at ends involving clear benefit to the agent or another, whatever costs might be imposed on third parties. The agent's performance of them may make perfect sense as foolish action by its nature does not, while still being evidently wrong. Of course it is easy to think of deeds that are foolish or stupid as well as wrong. But such a combination is just that – a coming together of distinct characteristics that can perfectly well be exemplified apart.

The difference between obligatoriness and advisability, even advisability that is overwhelming, is not to do with normative direction alone. To point out that an action is obligatory is directively to support the performance of that action and oppose any other. But the same is true of pointing out that an action is the only sensible option. In both cases we are subject to serious criticism if we disregard the direction provided. The difference lies in the nature of the criticism, with the involvement in the case of obligation of a distinctive form of negative evaluation – the criticism made in moral blame. We are criticized not as foolish or as less than sensible, but as bad. Blame for breach of obligation expresses disesteem for the person and what they have done that parallels disesteem

for people and their defective performances in relation to non-moral arts and skills. Morality is a practice that comes with standards of good and bad, and in this it resembles other practices that depend on talent, and that also distinguish good from bad. In both cases criticism takes the form of a negative evaluation of the person and their performance.

Hume claimed that 'Laudable or blameable ... are not the same with reasonable or unreasonable'.[12] This is obviously true of merit in the general case. Many admirable talents or their lack have nothing to do with reason or deficiencies in reason. But even in relation to morality it seems that moral blameability cannot be reduced to unreasonableness of a general kind. If breach of moral obligation involves a criticizable failure to respond to justifications, and in that respect constitutes a failure of reason – a form of unreasonableness – the nature of the failure cannot be further specified without appeal to a peculiarly moral demerit. It is a failure to respond to justifications for which one counts not as foolish or less than sensible, but as morally bad.

To make sense of the normative direction provided by moral standards, and specifically by moral obligation, we have to appeal, it seems, to a form of reason – to direction given through justificatory features attaching to voluntary actions as objects of our thought. But there is a distinctive force attaching to the justification provided. At the heart of moral normativity, just as Hume supposed, is a normativity of personal merit. We are called to help others and not harm them in that it would be good of us to help others, bad of us to harm them. And this justificatory force of merit applies to motivations too, and that is how it moves us. Just as it would be good of us to help and bad of us to harm, so it would be good of us to be motivated to help, bad of us to be motivated to harm.

3. Moral Goodness and the Voluntary

The obligatory, then, is what is justified with a distinctively moral force – the force of merit and demerit. As we have just noted, like the force of any justification the force of merit applies at two points. It applies at the point of voluntary action, to the performance of which, in virtue of its reason-giving features, we are normatively directed. And it applies to our

[12] Hume 1978: 458.

motivations – to the attitudes on the basis of which we act voluntarily, and through which we respond to the voluntary action's performance as a desirable goal. Hence that familiar aspect of moral obligation as it is conceived in the natural law tradition. Moral obligations apply to and bind not only voluntary action but also the motivation so to act – a motivation that in so far as obligation is action-governing law, must itself arise through action, through a self-determined decision to act. To explain a natural law of obligation on motivation, we need a very distinctive view of motivation as a locus of self-determined agency – as constituting a free will.[13]

But basing obligation on a normativity of merit also puts constraints on our conception of merit, and in a way that involves problems of an opposite kind – problems that have to do not with obligations on motivation but with obligations on the voluntary. We are not simply obligated not to intend harming others. We are obligated not to harm them; and it is only because we are obligated not to harm them that we have the same justification for not being motivated to harm them. Now the force of obligation is that of merit – we are obligated to do what it would be bad of us not to do. But if what we are obligated to, fundamentally, is the performance or omission of voluntary action, how we act voluntarily must be relevant to our admirability in moral terms. Our admirability in moral terms must depend not just on our motivations, but also on what we do at the point of the voluntary. Over and above being motivated to harm others, actually harming them must involve moral demerit. Indeed, it is only because the voluntary action of actually harming someone brings demerit with it that simply being motivated to harm them brings demerit with it too.

But here we meet a problem. Many moral theories reject the claim that moral admirability has anything to do with what we do voluntarily. All moral admirability lies in motivation or character alone. It is unaffected by what voluntary actions we perform and what outcomes we produce on the basis of that motivation. We find this view in Kant, as the moral worth of the good will:

> A good will is not good because of what it effects or accomplishes, because of its fitness to attain some proposed end, but only because of its volition, that is, it is

[13] See Pink 2004: 159–186

good in itself and, regarded for itself, is to be valued incomparably higher than all that could merely be brought about by it in favor of some inclination and, indeed, if you will, of the sum of all inclinations. Even if, by a special disfavour of fortune or by the niggardly provision of a stepmotherly nature, this will should wholly lack the power to carry out its purpose – if by its greatest efforts it should yet achieve nothing, and only the good will were left (not, of course, as a mere wish, but as the summoning of all means insofar as they are in our control) – then, like a jewel, it would still shine by itself, as something which has its full worth in itself.[14]

But we find the view in many other writers too. And this sometimes impels theories that explain moral obligation as a kind of merit standard to deny the existence of moral obligations on voluntary action itself, or to deny at any rate that such obligations are in any way distinct from and explanatory of obligations on prior motivation. We can find cases of this denial in the natural law tradition. In Abelard's *Ethica*, for instance, we have a notorious example: a reconstruction of the Decalogue into a set of obligations exclusively on the will. We are no longer under an obligation not to kill, but only under an obligation not to decide or intend to kill.

If we carefully consider also all the occasions where actions seem to come under a commandment or a prohibition, these must be taken to be the will or consent to actions rather than to the actions themselves, otherwise nothing related to merit would be put under a commandment . . .[15]

We also find the denial of distinct moral obligations or duties on the voluntary in Hume. Duties to care for children are really to be understood as duties to have affection for them, for it is that affection that determines our moral admirability. Voluntary action itself is irrelevant to merit.

If any *action* be either virtuous or vicious, 'tis only as a sign of some quality or character . . . Actions themselves, not proceeding from any constant principle, have no influence on love or hatred, pride or humility; and consequently are never consider'd in morality.[16]

So the duty is to possess a motivation of affection for children – a motivation that is expressed when the occasion requires, and no morally irrelevant obstacle prevents, in voluntary actions that are caring of them, but which involve no further merit or obligation of their own.[17]

[14] Kant 1996: 50. [15] Abelard 1971: 25 [16] Hume 1978: 575. [17] Hume 1978: 478.

It has been very common to internalize moral admirability completely, detaching it from voluntary actions and outcomes. Such a conception of moral merit makes it hard to explain moral obligations on the voluntary in terms of merit. Such obligations are denied, or turned into a mere way of speaking about the only true obligations, which are on motivation. But there is another effect too. Moral admirability is left looking very unlike admirability in relation to non-moral arts and skills. So the internalizing view of moral merit, though defended by Hume himself, casts doubt on his more fundamental conviction that there is indeed a general appraisive normativity of merit that unites virtue and talent – that unites admirability in relation to morality with admirability in relation to non-moral arts and skills.

It may initially look as though moral admirability really does have nothing to do with voluntary actions and outcomes. Take Mary, who is both philanthropically motivated and financially capable of helping others. She uses her great wealth to relieve great poverty. It is very plausible to suppose that had she had the same motivation, but without the wealth, so that she was still as willing to help others, but unable actually to do so, she would have been just as good a person morally. It is Mary's altruistic motivation that makes her the morally good person that she is. The state of her bank account and what depends on that is, by contrast, morally irrelevant. It does then look as though moral admirability lies wholly in a form of inner potential, that provided by motivations to act, and not in what that motivation is a potential for, which is the performance of voluntary action.

Contrast forms of potential outside the will – talents or capacities. Just as virtuous motivations are forms of potential actualized in moral practice, in the successful performance of voluntary actions, so talents are forms of potential actualized in the successful practice of arts or skills, in various forms of achievement. But no-one would locate admirability in relation to an art or skill in talent alone. It is just not plausible to claim that Tolstoy's admirability in literary terms has to do simply with his literary potential – that we are to admire Tolstoy simply for his talent, and not for what, on the basis of that talent, he actually wrote. That Tolstoy wrote *War and Peace* is not something that merely evidences what we really admire him for – which is simply possessing the capacity to write such a work. It is not as if Tolstoy would have been as great in literary terms as he actually was, even if he had not actually had the

opportunity to write the books he did, but merely possessed, like some 'undiscover'd Milton' the ability to write such works. What we now admire Tolstoy for, and what makes him a great writer, is that he actually wrote *War and Peace* and other famous works.

Moral admirability is left looking very unlike admirability in relation to arts and skills. Moral admirability seems entirely to do with a form of potential, and not with its actualization. But admirability in relation to arts and skills, it very much appears, is rather the opposite. It has to do not so much with potential just in itself, but rather with its actualization.

In fact, the two forms of admirability are not so dissimilar as might initially appear. For morality is not concerned simply with an inner disposition of will to the exclusion of any concern with outcomes. Common sense does really take moral worth – personal admirability in moral terms – to be just as much outcome-dependent as admirability in relation to arts and skill. The case rests on what it is about agents that we admire and esteem, or think less of them, *for*. It is clear that we find agents admirable or contemptible for their voluntary actions and the outcomes they manage intentionally to produce on the basis of a motivation or will to do so, as well as for the motivations and dispositions which explain those actions.

Hume thought that the performance of voluntary actions – the deliberate production of outcomes – simply made salient to us what we really admire or disesteem people for, the potential or motivation to produce those outcomes.[18] In Hume's view, where murder is concerned, the murderous outcome simply engages our attention, just as would its spatio-temporal proximity. It is really the murderous disposition that we think badly of the murderer for. But this is not plausible. It is perfectly true that when we feel outrage at the neighbourhood murderer of the moment, we are not outraged at them for committing murder *nearby* and *recently*. The spatio-temporal proximity of the murder does indeed simply make it salient, without having anything to do with what we morally evaluate the agent for. But the murder itself is quite different. We are definitely outraged at the murderer *for committing murder*. The murder is certainly part of what we are outraged about.

And this disesteem in which we hold murderers for having murdered is equally plainly moral. It involves and depends on our thinking of the

[18] See again Hume 1978: 575.

murderers as people who are morally bad. We are outraged at murderers not simply for having killed, but for having killed for their own ends, and in the knowledge that their actions would indeed be fatal. We are outraged at murderers, after all, for being murderers – and not simply for being active links in fatal causal chains. The low worth or disestimability of murderers is outcome-dependent. It comes from their actually having murdered. But it is a specifically moral disestimability too.

As for moral badness, so for moral goodness. We feel more admiration for Mary, who is a successful philanthropist and benefactor, than we do for Frieda who means to benefit others, but never has the resources and organizational talent to do so. But this is not simply a fact about our strength of feeling – something which can be explained by the mere fact that, thanks to her actually having benefitted many, we are more struck by Mary's virtue. For it cannot be true that in our considered judgement, Mary and Frieda are equally admirable. And that's because there is a property of Mary which we admire Mary for having, and which Frieda lacks – a property which must therefore make Mary the more admirable in our eyes. This is the property of having benefitted many people out of charity. Our greater admiration for Mary takes the form of admiring her, not simply for having a charitable disposition – a disposition which Frieda shares – but for having benefitted so many people. And this Frieda has not done.

Our admiration of Mary, then, is admiration of her for her performance of a voluntary action. It is admiration for what she has done. But this same admiration may also be unambiguously moral. Our admiration of Mary for what she has done can also involve and depend on our thinking of Mary as morally good. For example, we might well cease to admire Mary for helping so many if we learnt that her real motive for so doing had been entirely self-regarding – that her real motive for her charity had been to perpetuate the political dependence of the poor on the rich. In which case, for as long as we do admire Mary, we are admiring her, not simply for having benefitted so many people, but for having benefitted these people out of a genuine regard for their interests. In admiring Mary for what she has done, we are also admiring her as someone who is morally good.

We admire agents for their voluntary actions and the outcomes which those actions produce, as well as for their motivations. And this admiration can perfectly well be moral. It can perfectly well involve and depend

on our thinking of the agent as morally good. But, at the same time, it does appear, as we have already noted, that we also ignore voluntary actions and outcomes in our estimates of moral worth. Supposing the philanthropist Mary does actually benefit many. Won't we say that had she been bankrupted before she could actually help anyone, or if there had been no-one around actually needing help, she would still have been no worse morally as a person? Don't we think that how morally good Mary is can't depend on how rich she is? Mary's moral worth must, after all, be independent of whether or not she actually helps anyone.

There may appear, then, to be an inconsistency in our belief about moral worth. We both believe that people's moral worth depends on what voluntary actions they perform and what outcomes they produce; or at any rate we accord people moral esteem and admiration on a basis which implies such a dependence. Yet we also *say*, and presumably really believe, that how morally good someone is as a person is independent of factors such as their wealth or their strength – and so, it follows, must be independent of what outcomes they produce.

In his 'Moral luck' Thomas Nagel has suggested that our conceptions of moral admirability and worth do involve a contradiction – a contradiction that reveals an inconsistent commitment to a form of Kantianism about morals. In morality we treat the moral life as independent of luck – as if lived in a noumenal realm independent of features beyond our control. So, in particular, moral worth must be independent of what outcomes we actually manage to bring about. Yet at the same time we recognize that our moral life is radically dependent on luck, so that our worth in moral terms does after all reflect what we actually bring about, such as whether we actually save people or kill them. For as moral agents we live in a causally structured, spatio-temporal phenomenal world, where all that we are and do radically depends on luck.[19] Call this Nagel's *inconsistency thesis*.

[19] 'I believe that in a sense the problem has no solution, because something in the idea of agency is incompatible with actions being events, or people being things. But as the external determinants of what someone has done are gradually exposed, in their effect on consequences, character, and choice itself, it becomes gradually clear that actions are events and people things. Eventually nothing remains which can be ascribed to the responsible self, and we are left with nothing but a portion of the larger sequence of events, which can be deplored or celebrated, but not blamed or praised.' Nagel 1991: 37.

But our thinking about people in relation to outcomes need involve no inconsistency in our thought, still less one that peculiarly involves morality. To see this, consider how we evaluate people in terms of some non-moral art or skill, be it writing novels, doing mathematics or high wire walking. Whatever the art, the important point is that, when evaluated in terms of it, people's measure can be taken in two different ways. People can be found admirable for their talent in the art; or they can be found admirable for their achievement in it.

Take mathematics, for example. We might admire a child for its great mathematical talent. That admiration will generally be based on a successful performance of course – doing long division aged four, say. But that sort of performance interests us mainly as a sign or symptom of what we really admire the child for – possessing a talent for doing more. (If we didn't take what the child has done to be such a sign, then we should regard it very differently – rather as we might an idiot savant.) Or, by contrast, we might admire an older mathematician just for what she has done – for something valued as a genuine achievement, as a real contribution to mathematics. We might admire her for having made some important mathematical discovery.

Achievement within an art presupposes some degree of talent. But one's talents and one's achievements need not correspond. A can be a far more gifted mathematically than B. But it is B who applies himself to mathematics, and actually achieves great things in the discipline. Whether through choice or lack of opportunity to do otherwise, A becomes, instead, a beach bum. So not only are there two distinct dimensions in terms of which one can be evaluated in non-moral terms; but the value one has in terms of one dimension can be very different from one's value in terms of the other. And there is no obvious way of compounding the dimensions. Mathematics doesn't provide a single answer to the question of which is the more admirable in mathematical terms, the beach bum genius A or the more plodding but also more achieving B.

So one's worth as a mathematician, or in terms of any other non-moral art, can come in achievement-dependent and achievement-independent forms. The worth one has for what one has achieved is, trivially, a worth that one would not have had but for those achievements; it is of course achievement-dependent. Not so one's worth as a bearer of talent. For talent is a potential which explains achievement, but which can perfectly well be possessed in the absence of the actual achievement which

it explains. One's worth as a bearer of talent is worth in achievement-independent form.

It is of course true that, were it not for some kind of successful performance which someone's talent explains, we would not admire that person for being so talented. Were it not for the fact that, before our eyes the child has managed to do long division when only four years old, we would not be admiring it for its mathematical talent. But it is still going to be true that what we mainly admire the child for is the prodigious talent of which we take doing the long division at so young an age to be a sign. What we admire the child for is what we take to be its evident capacity to contribute to mathematical learning: a capacity which, given motivation, training and opportunity could well lead to such a contribution being made, and which the child would have possessed whether or not this occasion for doing long division had arisen. Whereas, by contrast, we admire Gauss as the actual discoverer of non-Euclidean geometry – for what he finally achieved – and not simply for possessing the talent which allowed him to make that discovery.

As for mathematics, so too for literature. There is a contrast between our admiration for a child's talent which has been brought to our attention by some precocious school essay, but whom we mainly admire as possessing the potential – given motivation and opportunity – for producing genuinely valuable literature in the future, and our admiration for Tolstoy, whom we do admire precisely for what he has written. We clearly admire Tolstoy for actually having written *War and Peace*, and not simply for possessing the talent which allowed him to write *War and Peace*.

Some people might be inclined to question whether we do really treat people's talents as a legitimate source of personal worth in themselves. People are admired for their talents, it might be suggested, only in the expectation of achievements arising. What really counts, at least in non-moral arts and skills, is achievement. But this is quite false. People can perfectly well be admired simply for being talented, whether or not their talents will ever be realized in any notable achievement. If someone is sufficiently widely talented, we know perfectly well that not all their talents can be realized in some corresponding achievement. But we find such people more and not less admirable for having so many and varied talents.

In both the mathematical and literary cases, then, we have a distinction between admirability or worth in achievement-independent form, where one is admired for a potential which may well have been evidenced by something one has done, but which one could still have possessed without having done it; and, on the other hand, worth that comes in achievement-dependent form, where one is admired precisely for what one has actually done.

Why can't morality provide an analogous case? Suppose we consider morality as a sort of art, in which virtuous voluntary actions count as achievements, and virtuous motivations or dispositions as a kind of potential for those achievements. The precise characterization of this morality art might be a matter of debate, and we shall be considering what the morality art involves later. The important point for the moment is that virtuous voluntary actions – helping people out of charity, and so forth – do constitute a form of achievement within the morality art, while the virtuous motivations to perform such actions are supposed to be the analogue in the morality art of non-moral talent. These are a form of potential which explains, but is independent of that action-based achievement.

Just as non-moral achievement is explained by some degree of non-moral talent, so too a virtuous voluntary action is explained by some virtuous disposition to such action. But beyond that, there may be a lack of correspondence between the virtue of one's actions and the virtue of one's dispositions. Frieda may be even more charitably motivated than Mary. Given equal organizational talent and resources, Frieda would give up more of her resources and time, and so help more people than Mary has ever helped. But it is Mary who has the greater resources and organizational talent – and who actually does help people out of her charity. It is Mary who is the great philanthropist.

Merit, personal admirability, has then to do with various kinds of potential, potential that we admire people both for possessing and for actualizing. Arts and skills that we value are bases of merit, but so too is morality. And in each case there is a similar structure. People can be found admirable along two dimensions – both for potential in the form of a capacity or a motivation and for its actualization in some form of achievement.

The dual structure of personal merit

	potential	actualization
non-moral arts & skills	*talent*	*non-moral achievement*
morality	*virtuous motivation*	*virtuous voluntary action*

We can see what is wrong with Nagel's inconsistency thesis. Just like merit in relation to arts and skills, moral worth can come in a form that is outcome-independent, but it can take outcome-dependent form as well. This no more involves a Kantian commitment to luck-independence in the moral case than it does with non-moral arts and skills. Merit is an appraisive normativity centred on self-realization that unites morality with non-moral arts and skills. In each case it involves forms of admirable potential the realization of which is admirable in turn.

This resolves the problem of how to accommodate moral obligations on the voluntary. In the moral case, each of the admirable potential and its admirable actualization involves states or events susceptible of rational justification – voluntary actions and the motivations to perform them. There can then be a force of justification applying both to potential and its actualization that depends on merit or personal admirability, and in a way that allows us to be subject to the same normative direction in both cases. Voluntary actions can be justified as ones that it would be good of us to perform, just as the motivations to perform them can be justified as ones that it would be good of us to hold.

4. The Distinctiveness of the Moral

Philippa Foot has argued that Hume was wrong to assimilate virtue to talent. Talents are capacities outside the will itself that we can deliberately refrain from exercising. But virtues by their very nature engage motivation or will. We cannot possess the virtue of justice while deliberately failing to exercise it – while deliberately acting unjustly.[20] But perhaps this distinction, while it holds, might not be that ethically significant. For virtue and talent both involve the same phenomenon – self-realization, taking admirable potential to some form of admirable actualization. In the one

[20] Foot 1978: 7–8.

case the potential is provided by motivation while in the other case it is not. But this distinction between them might not matter for ethical theory. Perhaps it is the common phenomenon of self-realization alone that is of ethical significance; or so the Humean might maintain.

Now there are some possible differences between virtue as motivation-involving and talent as motivation-independent that might matter ethically and that have to do with self-determination. Motivation, we have seen, can be conceived as a locus of self-determination as talent is clearly not. Talents seem in themselves to be passive characteristics. They are often described as *gifts* – features of us that we receive from God or circumstance. And this difference between motivation and talent could obviously matter greatly in moral terms. Hume's assimilation of virtue to talent was in part a rejection of the idea, so central to the natural law tradition, that motivation is a locus of self-determination. For Hume, motivation is as passive as talent. But here we are bypassing the issue of self-determination, and are considering things just at the level of merit, and the way standards of personal admirability apply and are understood in relation to self-realization. Are there ethically significant differences between virtue and talent that can be understood just at this level of merit and its distinction between good and bad?

There is another and contrasting problem, one that has to do not with unearthing real and ethically significant differences between moral and non-moral forms of merit, but with explaining away the illusion of even greater differences than there really are. Even if merit both within and outside morality has turned out to involve the same potential-actualization structure in each case, that is not how it initially seemed.

As we have already noted, no-one would naturally suggest that Tolstoy is admirable only for the talent which allowed him to write *War and Peace*, but not admirable for actually having written *War and Peace*. No-one would naturally suggest that one's admirability or worth in literary terms depends only on one's talent for writing novels, and can have nothing to do with what novels one actually writes. In fact, the bias is quite opposite – to seek to tie admirability in arts and skills not to talent but its actualization in achievement. But with morality there is the opposite bias, to seek to tie moral admirability to potential in a way that is independent of its actualization. We do indeed incline to *say* that moral goodness has everything to do with one's

motivations, and nothing to do with what voluntary actions one manages to perform. Do we not characteristically have motivations rather than voluntary actions in mind when we talk, explicitly, of 'how good someone is as a person'? Don't we immediately assent to the claim, of philanthropic Mary, that if she had been less rich, she would have been just as good a person?

In fact, I doubt that ordinary moral thinking does really share, at least whole-heartedly, the philosophical view that moral worth is never outcome-dependent. Perhaps it is true that when talking explicitly of someone's 'goodness as a person' we do tend to have dispositions in mind, and not voluntary actions. But there are other terms used to express what is clearly moral esteem for people as holders of virtuous dispositions, which we are equally ready to use to express what is no less overt moral esteem for them as producers of outcomes. These are virtue terms such as 'kindness', 'charity', 'courage' – terms which quite even-handedly straddle the disposition/voluntary action divide. In one context the most charitable person could be the person who has given the greatest benefit to others out of their charity; in another context, they could be the person with the most charitable disposition. By its use of such terms to express moral esteem, common sense clearly recognizes that moral worth can come in either of two forms. In any particular case of their use, only context will sort out which form we are tracking – moral worth in its outcome-dependent or outcome-independent form.

Still, there clearly are opposing biases in the non-moral and moral cases. When initially reflecting on how our intuitions stand, we do tend, as we have seen, to externalize non-moral merit, as if it lay in the actualization of potential alone. The true merit in arts and skills, we are so ready to say, lies in genuine achievement. Whereas moral merit tends, if anything to be internalized – to be seen as residing in an inner motivation or disposition of the will alone.

Consider first our tendency to externalize non-moral worth, placing it all in achievement, and excluding it from talent. Examining why this happens will shed light on an important difference between merit in its moral and non-moral forms. Consider some non-moral art or skill, such as mathematics. Mathematical talent and mathematical achievement are plainly two quite different things, and matter to us in quite different ways. Mathematical discovery is something which we value, both for its own sake and for its uses; and because we value mathematical discovery,

we also admire people for achieving it. Mathematical talent, by contrast, is something quite different from any achievement in mathematics. To possess mathematical talent is not itself to be achieving or discovering anything in mathematical terms; nor is it to be doing anything that matters to us in the same way as actual mathematical discovery. It is just a capacity or potential for mathematical achievement: it is simply that about someone which, given opportunity and motivation, would lead them to make mathematical discoveries. And it is only as such a capacity or potential that it has any significance for us.

So though we also admire people for having this capacity, and admire them for having it whether or not the capacity will ever be fully realized, the value of the capacity itself, though genuine, is nevertheless quite different from the value of achievement. Mathematical talent matters to us simply as something potentially productive of achievement – of mathematical discovery – and certainly not on the same terms as the achievement which it explains. And so for any other non-moral art or skill. Talent in any given art or skill is one thing, and achievement within that same art or skill quite another. The value or significance of the talent is to be explained simply in terms of its being potentially productive of the achievement, and in terms of the value which we attach to that achievement.

Talent is valued or matters to us simply as a capacity for achievement. The point of talent is to produce achievement. Hence, talent which fails to be realized in corresponding achievement is very naturally understood by us as talent which is *wasted*. What has happened to lead us to externalize non-moral merit is that, in what we explicitly say about non-moral merit, we tend to mistake what gives merit its point for what constitutes merit in its true form.

The phrase 'what really matters is achievement' helps explain part of what is going on. In one sense this phrase is true. The whole point of talent is to produce achievement. But it is easy to shift to believing that 'what really matters is achievement' in a second and false sense; as claiming that it is only their achievement that makes people admirable – that achievement is the only personal merit.

But there is no justification for the second belief. As we have seen, talent can still win its possessor admiration even if it will clearly never be realized, and is doomed to be wasted. Nor is there anything the slightest bit incoherent in this. Talents, after all, are admired precisely as capacities

for valuable achievement. But a capacity can be a perfectly genuine capacity, a capacity that an agent really does possess, even if it is clear that it will never be realized. Which is why we find the admirability of genius doomed to be snuffed out early particularly poignant. Genuine admirability is denied the realization which would have given it point. Human worth occurs in a form that strikes us as no less genuine than it is destined to frustration.

Moral theorists might be tempted to model morality on the same basis as non-moral arts and skills. The value or significance of the virtuous potential provided by a good motivation or will, on this view, is to be explained in the same terms as that of talent. Voluntary action and its outcomes, on this view, forms the business end of the morality art. Its performance is what morality is all about, just as mathematical knowledge and discovery is what mathematics is all about. We begin by according value to voluntary actions and outcomes – depending on our precise moral theory, whether as something intrinsically valuable in their own right, or as maximizing something else, such as welfare. The significance or value of a virtuous motivation or disposition would then lie, like that of talent, entirely in its constituting a potential productive of such action and its outcomes.

But this view of morality is fundamentally mistaken. A virtuous potential – a virtuous disposition or motivation – matters to us, but not simply as something productive of voluntary action and its outcomes. Rather, a virtuous potential has exactly the same kind of significance – matters to us in exactly the same way – as the voluntary action it explains.

Consider Mary, the great philanthropist, who has managed to help many people out of a genuine regard for their interests. Now Mary's successful philanthropy seems to provide a very clear example of what might count as the successful practice of virtue. If there is a moral analogue of successful achievement in mathematics or in other non-moral arts and skills, what Mary has managed to do seems to provide as clear and promising a case as any. Mary's success in moral terms involves, first, her actually managing to serve the interests of others. She has helped many people. But not only has she helped many people, she has also provided the help out of the right, virtuous motivation. Mary has helped many people out of a genuine concern for the people she has helped.

But notice that Mary's motivation is not simply a means to something else which is what really matters and which is quite distinct – people being benefitted. Mary's motivation is an important constituent of the benefit which she provides. True, part of the way in which Mary serves the interests of others is through the outcomes which her motivation effects. She actually brings others material benefits. But there is another way in which Mary serves the interests of others. And this is simply through possessing the charitable motivation which disposes her to help them. Mary also benefits others simply through her concern for them – through having adopted their good as her end.

For those whom Mary helps have an interest just in being objects of such concern. We each have an interest in living in a community in which some other people at least are genuinely concerned for us. This interest is as real as any interest which we might have in the voluntary actions and more material benefits such concern might occasionally motivate. It would be utterly desolating *in itself* to realize that no-one else had any concern at all for us – that there is simply no-one else at all to whom we count as anything more than a mere means to their own selfish ends.

Non-moral arts or skills are characterized by a sharp distinction of value or significance between achievement and talent: achievement has its value, and then talent matters as a potential productive of achievement. But morality is importantly different. Though, like any non-moral art or skill, it is a mode of evaluating people as agents, and though it likewise allows merit to be assigned along a dual structure – both for a virtuous potential, and for action which that potential explains – the potential and its realization matter to us in the same way.

If morality is a sort of art or skill, it is not, I suggest, just an art in which we perform desirable voluntary actions or produce beneficial outcomes. For people are not admired morally simply for the voluntary actions and outcomes their motivation brings about. They are admired for bringing the outcomes about out of appropriate motivations – motivations such as charity or a sense of justice that constitute due regard and respect for the interests of others. But the emphasis which morality places on virtuous motivation is not arbitrary. Motivation matters morally because it matters to others in the same way as the outcomes which it explains.

The morality art is the art of serving other people's interests, to the degree and in the ways that circumstances require, out of a regard for those other people. And that is an art we successfully practice at the level of

potential, simply by living among other people while being virtuously disposed towards them. For everyone has an interest in living among people who have virtuous dispositions – who have a genuine concern and respect for other people. Everyone has an interest in living among people who are genuinely loving and just. No-one's interests lie simply in the further benefits which, through their actions, loving and just people are motivated to provide.

A virtuous voluntary action is a morally admirable combination of motivation and outcome; a virtuous disposition is just what that motivation alone can provide, failing the occasion and outcome which the voluntary action requires. But thanks to that motivation alone, and even in the absence of the voluntary action which it would explain, we are still meeting the interests of others. Our virtuous dispositions ensure that others live in a community where, whatever else may happen, they are at least respected and loved.

The possession of a virtuous motivation itself has value – and has it in the same way as the voluntary action which it motivates. Unrealized talent is wasted. But a virtuous potential – such as a charitable motivation – is not wasted simply because no-one actually needs to be helped through charitable action. The virtuous potential is already serving its purpose in moral terms by being possessed by someone living in community with others. For virtue is already taking a form that is effective – that helps constitute a community whose members serve each other's interests out of genuine regard or concern for each other. Mary is a success in moral terms because, both through her motivations and her voluntary actions, she has played her part in realizing such a community. Mary's virtuous dispositions not only make her morally admirable just as do the virtuous actions which they explain; they matter or have significance on the same terms. Mary is already serving the interests of others through her charitable motivations alone.

The morality art is the art of realizing a genuinely moral community – a community whose members flourish through the motivations of others. It is the value or good of such a community which gives morality its point. And that good does not consist in voluntary actions and outcomes alone, but has the motivations which produce those outcomes as a direct constituent. The ends to which morality directs us involve certain motivations – those that leave us counting as morally good rather than bad – as a component, and not merely as a means.

There are then two distinct ways in which it is true that morality calls us to be good rather than bad. The first has to do with the force of moral justification, which is that of merit. To disregard moral justifications is to be bad rather than good. The second has to do with the goals or ends aimed at in moral practice, and to which morality directs us with the force of merit. These involve as constituents the very motivations that are essential to merit in its moral form. To disregard moral justifications is not just to lack motivations that would be instrumental to moral success. Such a disregard of moral justifications is itself constitutive of moral failure, just as to be moved by moral justifications is in itself to succeed in moral terms.

Consider now our tendency to internalize moral worth – our tendency to say that moral worth is determined by motivation alone and to the exclusion of outcomes. This has to do with the importantly different significance within morality of the distinction between merit and demerit – between good and bad. To be morally bad and to be bad at an art or skill are indeed forms of personal demerit. But they are forms of demerit with very different implications. And these very different implications are bound up with the fact that moral goodness or virtue has to do with the disposition of one's will. For with that disposition comes personal commitment – to a party or allegiance.

The evaluations which we use to convey the force of moral justification are also used by us to convey people's commitment. For in morality there is a real opposition between *good* and *bad*. The difference between good and bad is not just a difference between succeeding in moral terms and failing. It is a difference between two parties. It is a difference between two opposing allegiances. To be good is to be allied with those who respond to morality's demands, and who are even prepared to go beyond them. And to be bad is to be allied with those prepared to disregard and breach morality's demands.

To be bad at an ordinary art or skill is typically a way of not counting in the art's terms. One fails to contribute, and that detracts from one's significance as a player. But to be morally bad is quite different. To be morally bad is not to fall contemptibly off the moral map. One is not off the map, but fully on it – on the wrong side. To be bad is to be a significant ethical player, but in the party opposed to good. The difference between good and bad is a difference between two morally significant but contrary commitments. To be bad is not simply to fail, but to be committed to

a side – the wrong side. That is why, in the moral case, a certain kind of potential – the disposition of one's will – assumes such significance. For the direction and measure of one's commitment depends on that disposition of will.[21]

Alongside differences in outcomes there can be a shared moral commitment to good or bad. Murderers who succeed and aspirant murderers who fail share the same disregard of moral justifications on the side of bad. Hence we reserve a form of moral evaluation to communicate this fact. We observe that the successful murderer would have been 'no morally better as a person' if his attempt had failed. By this we mean that his moral allegiance or commitment would have been the same. He would have shown the same indifference to morality's demands.

Likewise, we resist the idea that successfully philanthropic Mary is a morally better person than Frieda, who is at least as motivated to help but lacks the resources to do anything. For Frieda is just as responsive to, indeed just as prepared to go beyond, what morality requires as Mary. As much as Mary, Frieda is just as motivated to help. In our explicit estimations of 'how good a person someone is', we attend simply to how far people's disposition of will leaves them sharing with others an allegiance to good.

It is our concern with moral commitment and allegiance which leads us to emphasize merit at the point of moral potential – at the point of motivation or will. In our explicit assertions of how morally good or bad people are in moral terms – as we sometimes put it, of how *moral* they are – we report moral admirability in the form which reflects that basic commitment to good or bad. So we internalize merit in its moral form – give preference to outcome-independent moral worth as the explicit measure of how *moral*, or *morally good* someone is – not because we exclude luck from morality, but because of our concern with moral allegiance. For it is moral worth in this wholly motivation-dependent form which determines someone's commitment to good or to bad.

[21] It may add to the significance of one's commitment or allegiance if it is self-determined – if the commitment arises as one's own free doing. But allegiance or commitment can be conceived as ethically significant apart from the issue of self-determination, just at the level of merit – as changing the terms in which the nature of badness and its distinction from goodness is understood. One can be allied to the bad, whether or not one has determined that commitment for oneself.

Let me emphasize that the idea of two parties, of good versus bad, does not imply that there is a single overall membership of one party or the other which each person has. Just as we saw that there may be no measure of how good or bad someone is overall, so that person may be allied to good in some of their actions, allied to bad in others; and in some matters, their allegiance may be undetermined and unclear. Many blanket condemnations of people as bad should really be understood as limited to a certain context. Someone is described by us as thoroughly bad – but only because they have cheated on a business-deal and we are business-people. It may only be in that area of their life that they have allied themselves with the bad. In other areas of their life they could be very much allied to the good, with no possibility of, or point to determining an overall commitment or allegiance.

5. Conclusion

Moral normativity is directive. But the way it is directive cannot be modelled by appeal to reason and rational directivity considered on their own and apart from any specifically moral form of appraisal of people and what they do. Hume was entirely right that moral normativity is in its foundation a normativity of personal merit. Had Hume only retained a serious theory of intentionality – of psychological attitudes with content, directed at justification-providing objects of thought – he could have done justice to normative direction without prejudice to the doctrine that it is merit that is fundamental. He could have characterized this normative direction as a form of reason, but carrying the force of merit. Hume's failure to leave room for normative direction should not discredit his essential insight – that the call of moral standards on us is fundamentally a call to be good rather than bad.

Hume also failed to understand that virtue, though sharing many features with talent, is still different in ways that are ethically significant. But these differences are differences within a shared framework of merit in relation both to potential and its realization – a shared framework that allows for reason to direct both motivation and voluntary action with the force of merit.

The differences have to do with the way the practice of morality comes with human nature itself. Participation in many arts and skills can be thrust

on us by circumstance, or it can similarly be blocked. It may also be left to our choice. Morality, by contrast, is an art or practice that we cannot avoid, but which involves us just through our living with and responding to other humans as our fellows. Successful moral practice consists in our being admirable as human beings, and involves our motivations as much as their expression in voluntary action. Motivation apart from voluntary action is not the same as talent on its own; it is not a form of potential disengaged from practice. Nor does moral demerit detach us from being significant participants in moral life. Morality is not a practice where being bad at it leaves us negligible in its terms. Badness involves us just as significantly in the moral life as does goodness. It leaves us committed to the side of wrong. And while we live among humans as our fellows, some such significant commitment, to good or to bad, is inevitable, along with participation in morality itself.

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9 Natural Law Reasoning in Applied Ethics
Four Paradigms

Jacqueline Laing

The natural law is one of the most enduring of philosophical traditions. By insisting that normativity is based on how things are in fact, the natural law tradition avoids the relativistic implications of the idea that morality is wholly based in features of man's making, whether consensus, feeling, emotion, social construction, convention, performative utterances or human methodology. It promises the possibility of arriving at moral truths by reference to truths of ontology and a metaphysics that is comprehensible to human reason. In this, the natural law tradition arguably offers a secure foundation for an understanding of right and wrong, good and evil, virtue and vice, and the common good. Although there are bound to be grey areas and borderline cases in the moral domain, the strength of the natural law approach is most evident where paradigms are concerned.

In this paper we consider four ethical paradigms: genocide, disproportionate punishment (e.g. capital punishment for misdemeanours), mass live-birth human cloning, and pathologies like bestiality, incest and consensual cannibalism. Ethical dialogue often repairs to clear cases like these when wholesale doubt threatens dominion. Such examples are typically used to sharpen moral concepts, locate ethical limits and explore moral reasoning.

Dealing with Clear Cases: Four Ethical Paradigms

Consider four paradigms of wrongdoing. I say these are paradigms of wrongdoing not because I want to presuppose the truth of what I am claiming but because these kinds of examples are typically the sort that might be raised in any meta-ethical dialogue. The examples explore the possibility of objectivity in moral reasoning, the rational limits on human freedom, the proper teleological understanding of humans and their place in the world, and a catalogue of other conceptual apparatus traditionally

regarded as part of the natural law tradition. Of course, we could multiply our examples of wrongdoing: rape, slavery, punishment for disability and so on. It should be pointed out, to those unfamiliar with the technique, that the use of paradigms is not intended as affirmation of the moral permissibility of genocide, mass human cloning, excessive punishment (e.g. capital punishment for thought crimes), bestiality or incest. On the contrary, the use of paradigms is intended to test the principles of practical ethics. Of course, there could be much discussion about ethical dilemmas, their identity and limits. But the man who stepped forward to announce his dedication to genocide, mass human cloning, disproportionate punishment, bestiality or incest would probably be treated with suspicion even by the most ardent moral relativist. Indeed, in moral argument, when clear cases like these arise, the relativist typically retreats, charging his interlocutor with the use of 'extreme' cases. But the examples are neither extreme nor unbalanced. On the contrary, they are straightforward. Identifying clear cases where there is widespread agreement can be a useful device for establishing the limits of conceptual discussion, after which moral reasoning becomes strained or impossible. Elizabeth Anscombe hinted at these limits when she said, 'But if someone really thinks, *in advance*, that it is open to question whether such an action as procuring the judicial execution of the innocent should be quite excluded from consideration - I do not want to argue with him; he shows a corrupt mind.'[1]

Paradigm 1: Genocide

Genocide is not merely a philosophical thought experiment but historical fact. As such it gives rise to understandable concern. It involves the systematic and deliberate elimination of all or most of a racial, ethnic, religious, cultural or national group of people. The twentieth century is littered with examples of genocide: the Armenian Genocide, the Holocaust, 1971 Bangladesh Genocide and the Rwandan Genocide, for example. Whether an historical instance of proposed genocide is an example of systematic elimination may be the subject of controversy. What is not generally contentious is the very wrongness of genocide itself.

[1] Anscombe 1958: 17.

The utilitarian may speculate that genocide may be necessary to prevent worse or more or greater harm but the inclusion of *ceteris paribus* clauses merely emphasizes the intrinsic wrongness of genocide. All things considered, genocide is a good example of wrongdoing. The idea that we can debate whether it would be right to commit genocide where failure to do so would bring about more death immediately takes us into the conceptual realm of the thought experiment and the ethical dilemma. Such speculations need not commit us to the permissibility of genocide but to the possibility that there is a conceptual space where the paradigm may be brought into doubt. Act utilitarians might suggest that more, worse or greater death justifies genocide while rule utilitarians might add the requirement that any proposed act of genocide take place in secret to be fully justified. The condition of secrecy, after all, circumvents any rule utilitarian concerns that genocide necessarily generates alarm, undermines respect for the rule and necessarily has long-term bad consequences. Opponents of both ethical theories might insist that genocide, qua intentional and deliberate activity, could never be sanctioned, the only licit killing being that which is unintended as a preventative. These are conceptual speculations with distinctive outcomes. What cannot be in doubt in either case is the idea that, all things considered, genocide is a good example of ethical wrongdoing. In this, it could be contrasted with ethically neutral or even ethically worthwhile activity, such as music composition, for example.

What, then, is wrong with genocide? And how would we answer this question?

Paradigm 2: Grossly Disproportionate Punishment

Disproportionate punishment is a clear and definitional case of wrongdoing because justice consists not merely in identifying and convicting wrongdoing, it involves imposing just and proportionate penalties. Suppose a society imposed the death penalty for entertaining certain kinds of thoughts. At first glance, this possibility sounds implausible. Take as an example, killing a man for his thoughts and ideas. Human history is replete with such examples. Death, even now, is still regarded an appropriate penalty for apostasy in many parts of the world. To avoid confusion and to help make the example clearer consider the paradigm of

a child killed for stealing an orange. This is a clear case of disproportionate punishment. A state that sought to impose these kinds of penalties generally (say in the name of deterrence), however successful the strategy, would be a system that had veered into the realm of the oppressive. Augustine's maxim, 'An unjust law is no law at all'[2] could truly be said to apply to so excessive a penalty and a state that generally imposed so rash a price for mere misdemeanours might properly be thought to be nothing other than totalitarian. What is systematic excessive punishment but hideous oppression writ large?

What, then, is wrong with grossly disproportionate punishment? And how would we answer this question?

Paradigm 3: Mass Human Cloning for Live Birth

Mass human cloning for live birth naturally elicits moral apprehension. The prospect of industrial production of human beings, entirely cloned for their characteristics and replicated thousands of times over conjures up a dystopian nightmare. The idea that treating human beings as if they were mere commodities to be produced and reproduced without concern for their identity, uniqueness, dignity and biological relationships, and indifferent to the illicit dominion exercised over these putative 'human commodities' rightly elicits outrage. But why? Of course, the act utilitarian might supply circumstances, hard to imagine but extreme in kind, to suggest that in certain circumstances mass human cloning might be necessary. The rule utilitarian might affirm that if this is to take place, it should do so with real data protection and secrecy safeguards so that it could not be undertaken by those who would undermine confidence in the system, creating alarm and undermining belief in the rules governing the moral order in question. Opponents of both ethical theories, act and rule utilitarianism, might insist that mass human cloning, qua intentional and deliberate activity could never be sanctioned because it creates humans in ways that exercise illicit dominion over future generations while, at the same time, undermining their dignity as individuals, identity, uniqueness, biological relationships, kinship and welfare. These are conceptual

[2] Augustine 1993: 8. See Aquinas on Augustine in *Summa Theologica*, I-II Q. 96, art. 4.

speculations involving different ethical theories with distinctive outcomes. What would be unusual would be to find any proponent of mass human cloning who did not also acknowledge that, all things being equal, mass human cloning is a good example of ethical wrongdoing. Their examples would involve alleged hard cases, special circumstances, the proposed justification of necessity, or culpability limitations like duress or involuntariness. It would be assumed that, all things considered, mass human cloning involved ethical wrongdoing.

What, then, is wrong with mass human cloning for live birth? And how would we answer this question?

Paradigm 4: Bestiality, Incest and Consensual Cannibalism

It is often thought that criminal justice consists in punishing harm done and cannot apply to activities of consenting adults. Indeed, it might be thought that Paradigm 3 highlights injustices suggestive of high oppression. Punishment for victimless crimes, it is standardly argued, where there is no immediate harm or all parties are consenting, is no crime at all. On this view, punishment should not attend victimless crimes where all parties are consenting. This idea is central to modern liberalism. It invites philosophical discussion of offences like bestiality and incest and such cases as Armin Meiwes, who met his consenting partner online to engage in sadomasochistic activity followed by consensual homicide and cannibalism. Since consent is the touchstone of liberalism, this kind of example tests its limits. Of course, there are grey areas. Barring certain liberal states, the prohibition on incest remains a recognized protection against abuse of power in the family. It is also a sensible encouragement to biodiversity and a natural preventative against disability arising from incestuous procreation. If we wish to hold on to the idea that bestiality, incest, or consensual cannibalism is contrary to animal welfare, the dignity of the family as a wholesome environment in which to rear children and allow them to flourish or simply a non-homicidal online environment, then there should be some principles upon which to recognize these cases as challenging the liberal ideal of moral value as given by principles of autonomy and self-expression.

What, then, is wrong with bestiality, incest and consensual cannibalism? And how would we answer this question?

The Question

These four examples supply some ad hoc paradigms of wrongdoing, injustice and vice. There are many others – rape, slavery, torture and child abuse, to name a few. The paradigms presented help us test the limits of relativism, liberalism and the consequentialist and instrumentalist dimensions of utilitarianism. If we wish to retain these as examples of wrongdoing at all, we are logically obliged to place limits on theories commonly regarded as presenting challenges to natural law ethical reasoning. But what is natural law thinking in applied ethics? In what follows, some of the essential characteristics of natural law thinking in applied ethics are analysed. We consider not only the implications of moral relativism, liberalism and utilitarianism but also the need for some version of objectivism, teleology, Socratic means-end reasoning and principles of limited autonomy, to support clear cases of wrongdoing. Hard and soft competing alternative theories are analysed and found to either incorporate some or other version of natural law reasoning or to be forced to absurd or implausible conclusions.

Natural Law Reasoning in Applied Ethics

Among the ideas that are a direct challenge to natural law reasoning in applied ethics is moral relativism whether personal or cultural, utilitarianism which insists that the best consequences justify any means used to achieve them, and hard liberalism – what I shall call autonomism to distinguish it from political liberalism.

1. Anti-Relativistic

Moral relativism in meta-ethics insists that disagreement about moral issues is fatal to the very idea of moral objectivity. Instead, morality, good and evil, right and wrong are relative to personal or subjective feelings, attitudes or convictions of individuals or cultures. These are

often called personal and cultural relativism. David Hume's emotivism[3] is often classified as a form of moral relativism just because it regards attitudes and feelings as the foundation of ethics. A.J. Ayer too is classified as a proponent of some version of moral relativism and, more particularly, personal relativism. Both thinkers in different ways agree that since there is no higher moral standard other than personal, subjective feeling or cultural practice, there can be no universal and atemporal judgement about the rightness or wrongness of acts and judgements.

Relativism, whether personal or cultural, insists that fundamental disagreement about what one should do is fatal to adjudication using some independent standard of evaluation. The standard is either personal or it is cultural and consensus based. There can be no other criteria for adjudicating between moral judgements or practices. These two versions of relativism, (personal and cultural) contrast with moral objectivism and universalism respectively. These hold in contrast that, even if there is moral disagreement, this is by no means fatal to moral realism. Some moral disputants may even be intransigent in their disagreement. There is, on this account, nonetheless, a real sense in which one act may be better than another. A life dedicated to composing music, for example is preferable to the life dedicated to genocide. Not only might moral disputants believe there *are* objective standards of evaluation independent of moral consensus. Moral consensus might *help* us to arrive at conclusions but it is not the arbiter of moral judgement. Subjective feeling can be misguided and consensus, misplaced.

Natural law theories of ethics are generally grounded in the nature of things rather than in the preferences of individuals or the customs and mores of societies. There are, of course, parts of the natural law that are

[3] David Hume 1751: Hume considered morality to be related to fact but 'determined by sentiment': 'In moral deliberations we must be acquainted beforehand with all the objects, and all their relations to each other; and from a comparison of the whole, fix our choice or approbation. . . . While we are ignorant whether a man were aggressor or not, how can we determine whether the person who killed him be criminal or innocent? But after every circumstance, every relation is known, the understanding has no further room to operate, nor any object on which it could employ itself. The approbation or blame which then ensues, cannot be the work of the judgement, but of the heart; and is not a speculative proposition or affirmation, but an active feeling or sentiment.' Cf Ayer 1952: 107. 'If now I generalize my previous statement and say, "Stealing money is wrong," I produce a sentence that has no factual meaning – that is, expresses no proposition that can be either true or false. . . . I am merely expressing certain moral sentiments.'

entirely built on human convention. No plausible meta ethic can fail to account for the fundamental reality of human convention in human activity, whether individual, social, national, regional or global. Indeed, most of human morality consists of matters of convention. Language, signs and symbols are largely a matter of convention. The coordination of human action is governed in part by human convention. But convention does not exhaust the foundations of political activity because existence (or the cosmos) precedes human reason and human activity.

Our paradigms of wrongdoing challenge the idea that personal feeling or cultural consensus could ever settle the matter of whether genocide, mass human cloning, disproportionate punishment and bestiality are wrong. Indeed, however overwhelming the personal feeling or consensus in favour of each of these programmes, we are obliged to ask more fundamental questions about the rightness or wrongness of these courses of action. The kind of arguments we would count as rational would be those that avoided appeals to consensus or strong feeling. Even if there were a 90 per cent consensus among proponents of genocide, agreement among peoples or strongly held beliefs are a poor form of reasoning. Indeed, the same would apply in respect of mass human cloning, disproportionate punishment, bestiality, incest and consensual human cannibalism. Consensus, strong feeling, and subjective belief remain precisely that: facts about human feeling and belief. They might constitute sociological or psychological evidence of beliefs and feelings, they might be a way avoiding conflict in arriving at political decisions. But they would not and could not amount to sound reason on the rightness or wrongness of these human endeavours.

Relativism fails to account for the competing reasons that explain changes of mind and alterations in consensus. Given that humans do experience changes of attitude, and given that both feeling and consensus alter, these cannot amount to persuasive reason for moral judgement or action. Consensus among Nazis or sadomasochistic cannibals or paedophiles is no persuasive reason for either genocide, sadomasochistic cannibalism or paedophilia.

One fundamental tenet of natural law reasoning in applied ethics is its objectivism and universalism. Accordingly, the fact that Nazis prefer genocide, or consenting cannibals prefer human flesh, is no reason either way to favour or reject these activities.

2. Teleological

The Aristotelian understanding of natural law is famous for its teleology. Of course, whether or not Aristotle is rightly classified a natural law theorist is controversial. This dispute aside, his teleological theory sees the universe as governed by laws, regularities and purposes. The universe is, at least in part, structured in such a way that things have within them both potentialities and capacities to achieve their ends. Not only that, creatures according to their kind may have distinctive ways in which they can be understood to achieve their inbuilt ends.

In its simplest form, for example, teleological explanation demonstrates how it is that when conditions are right, an acorn will develop into an oak tree; a tadpole into a frog. In its growth and change, the acorn and the tadpole are following 'the law of nature' each according to its own kind. It achieves its inbuilt ends to greater or lesser degrees. Humans have a corporeal nature, just as tadpoles do. In their own growth and development, they too follow a law of corporeal nature. Because humans have the capacity to reason and potentialities are only properly understood by reference to this capacity, the full development of human potentialities, the fulfilment of human potentiality or ends, requires that we follow the direction of the law of reason, as well as being subject to the laws of material human nature. Not only is reason a part of our potentiality, reason allows us to understand our ends and how to achieve them. In particular, reason directs us towards good in our actions, in our activities and in our very nature. It is impossible therefore to understand the world without investigating these laws, regularities and purposes.

The distinctively human capacity for reason allows us to understand the human good and this good structures human nature in the way that the acorn is structured to the oak and the tadpole to the frog. On this view, there are natural inclinations that are directed towards distinctively human goods. Thus, the good is that to which we are directed by our natural inclinations as both physical and rational creatures. Reason helps us every step of the way to understanding, not merely the techniques and strategies available to achieve our ends but also in determining what our goals are and showing us how we can achieve them. Reason helps us to understand that our good qua human being can be discovered by understanding our own human nature. In this sense, morality is anthropology, politics and personal development – with the proviso that

these are properly understood. Personal development strategies to achieve one's preferred end as a genocidal killer, unjust judge, mass human cloner, bestialist or sadomasochistic cannibal, is personal development gone awry.

Human ends are inherent in human nature in roughly the same way as an acorn's ends are built into the oak. In order to know how properly to treat it and how best to allow it to flourish, one needs to know the nature of the oak tree and how it best develops and matures. In this way inclination is not antithetical to human morality but an explication of it. We need to understand not merely the functions of our human abilities and very bodies, we need to know how best we can achieve our true ends. In this way, human nature, complete with inclinations, innate capacity for development and maturity, admits of ends not enjoyed by the acorn or the tadpole. These are ends specific to the human being precisely in virtue of being human. Humans as a kind (though not necessarily as individuals) are capable of understanding these ends, for it is in the nature of human beings to know and try to understand both others around them and themselves in that context.

How does teleology assist in any understanding of morality? Without presupposing the answer to our question, it might be suggested on the face of it that teleology is itself an insufficient brake on human potentiality. Not only does potentiality face Humean objections[4] of wrongly deriving an 'ought' from an 'is' or moral from factual statements, it is challenged by the evolving nature of reality, the very real possibility of transhumanism and human enhancement. After all, just because humans do in fact engage in murder or genocide, offer human sacrifice, engage in slavery, cannibalism, torture or mass human cloning, these facts alone do not justify any of those

[4] See Hume (1975): 'In every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary ways of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when all of a sudden I am surprised to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it should be observed and explained; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention would subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason.'

activities. So, how could teleology assist in deciding whether these activities are right or wrong? It merely begs the question, surely, of whether the inbuilt goals in human beings should be overridden by human artifice. After all, if genocide, unjust punishments, mass human cloning and bestiality are in the nature of man, why not engage in genocide, unjust punishments, mass human cloning, etc.? Why refrain from any activity on moral grounds at all? Not only are the ends of man mutable, there is (so the argument goes) no conceivable reason to prefer one activity over another. Likewise, if the functions and purposes of man's activity are entirely unlimited, teleology supplies no reason either way to prefer one activity over any other. On this view, our four paradigms of wrongdoing cannot be explained by reference to principles of human thriving or human potentiality.

Even this open teleology possibility contains oblique limits. Whether or not human nature is malleable by way of gene manipulation and improved use of bio- and information technology, the supposition that anything goes, morally speaking, is far from obvious. For if we accept that our four paradigms raise ethical limits outside the realm of human enhancement, there may well be ethical limits in other circumstances as well. In other words, the manipulation of nature, human or any other, does not raise the spectre of unmitigated relativism whether subjective or cultural. On the contrary, it suggests that even in the realm of human and other realms of artificial enhancement, there are ethical limits. The alternative to this outcome is the implausible conclusion that we cannot know how human beings flourish and achieve their potential at all.

The argument that teleological reasoning wrongly derives 'oughts' from 'is' statements is a significant question that enjoys much philosophical attention. Ours is not here to solve the question but merely to point out that if there are any right moral answers to questions raised by our four paradigms, then consensus, subjective feeling or cultural preference will be an inadequate response to the question. Part of the reason for the appeal of the Humean argument is precisely that it highlights the fact that personal feeling and cultural consensus alone cannot constitute any guarantee of the rightness or wrongness of the activities proposed by our four paradigms. If genocide is wrong, the fact that there is a consensus in favour of it would go no further to justifying the activity. Preferences in favour of genocide identify facts about feeling

and consensus about the activity. But these facts about feeling and consensus cannot supply any answer to the question of whether or not one ought to commit genocide. Facts about feeling and consensus cannot tell us what is right or wrong.

Secondly, with respect to the is–ought debate, any resort to personal and cultural preferences ipso facto involves one in the derivation of 'ought' statements from crude 'is' statements of the form 'Culture X believes genocide is permissible'. Even the limited appeal to cultural practice or subjective feeling involves us in the derivation of normative statements from facts about cultural practice or personal feeling. The appeal to these facts both breaches Hume's dichotomy itself *and* proposes an undeveloped and implausible answer to the question of how our paradigms are to be explained.

Teleology assists in the understanding of how it is human beings flourish both individually and collectively. It offers a way of understanding the goods necessary to the achievement of ends according to species. It allows enquiry into the functional needs of creatures and the biological features that explain well-being. As such, it logically ought to make an appearance in any developed applied ethic. If genocide undermines the lives and well-being of individuals living in societies, then a teleological ethical picture would be necessary to understanding what is wrong with genocide. It might also inform a proper understanding of the kinds of reasons why mass human (and other) cloning might well undermine the well-being of creatures manufactured. By understanding the functions, needs, potentialities and purposes of humans (and indeed other creatures) wrongful and exploitative attitudes may be identified and the limits of wrongdoing established. If a tree cannot discern the fact that it has been multiply cloned, to that extent ethical objections to the cloning of trees must be limited although perhaps subject to broader questions of sustainability. If a human can rationally discern his or her status as multiply cloned, human capacity for rationality must figure in the analysis of how mass human cloning wrongs individuals so created. Finally, the functions and purposes of the eye, for example, might explain how a human is to flourish (i.e. by not being deliberately blinded). Likewise, the elevation of the incestuous or cannibalistic sado-masochistic relationship for misplaced reasons of autonomism might well undermine the sexual well-being of its participants fostering addictions, pathologies, fixations and vices.

A developed teleology would allow this analysis avoiding the pitfalls of relativism and wholesale scepticism.[5]

3. The Socratic Ideal

Natural law reasoning in applied ethics not only rejects moral relativism, whether personal or cultural, or efforts to found morality on any social construction, it also recognizes the Socratic Principle. On this account 'It is better to suffer than to do evil'.[6] In Plato, this principle leads back to a sophisticated discussion of the permanence of the forms and the soul and the transience of matter and the body. In practical terms, however, it rejects the common view that the end justifies the means. When Socrates is asked to collaborate in the execution of the innocent Leon of Salamis, he outlines his philosophical opposition to the proposal:

> When the oligarchy was established, the Thirty summoned me to the Hall, along with four others, and ordered us to bring Leon from Salamis, that he might be executed. They gave many other orders to many people, in order to implicate as many as possible in their [i.e. the Thirty's] guilt. Then I showed again, not in words but in action, that, if it's not crude of me to say so, death is something I couldn't care less about, but that my whole concern is not to do anything unjust or impious. That government, as powerful as it was, did not frighten me into any wrongdoing. When we left the Hall, the other four went to Salamis and brought in Leon, but I went home. I might have been put to death for this, had not the government fallen shortly afterwards. (*Apology* 32 c–d)[7]

Socrates's very life and death at the hands of the unjust oligarchs, his execution for his pursuit of truth on trumped up charges of treason, blasphemy and corrupting the youth, is testimony to his rejection of hedonistic, sophistical and Thrasymachean (or social Darwinian) thinking. Modern utilitarianism generally denies any moral significance to the Socratic idea that the end does not justify the means. In essence, the

[5] Still one of the best available is that of Aristotle in the Nicomachean Ethics. Here he outlines a vision of the virtues as understood as the mean between two extremes – one the excess, the other the defect. Courage, for example, is seen as the mean between bravado and cowardice. A sensible understanding of virtue and vice might well be complemented by modern psychology, psychiatry and anthropology (properly, as distinct from falsely, understood) so that vices might be identified and willingly controlled.

[6] *Gorgias* (469a-479e) [7] *Apology* (32c–d)

Socratic ideal is anti-instrumentalist, anti-consequentialist, agent-centred and virtue-based.

Natural law reasoning is to be contrasted with the hard utilitarianism of such thinkers as Jeremy Bentham, which urges the maximization of good consequences. In his *Introduction to the Principles of Morals and Legislation*, Bentham holds that 'Nature has placed mankind under the governance of two sovereign masters, *pain*, and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do'.[8] Among those who have put the case for utilitarianism are Henry Sidgwick,[9] Richard Hare,[10] Jack Smart[11] and Peter Singer. Central to the analysis is the idea that consequences determine moral permissibility. Theorists disagree as to what it is that should be maximized, whether pleasure or social utility or long term beneficial rules or short term beneficial acts. A veritable philosophical industry has arisen examining how the happiness calculus is to be undertaken given doubt about its actual content, terms and parameters, and whether or not utilitarianism can be sustained given the manifest disagreements about the nature of the maximand and the minimand. The competing positions entail radical differences of moral outcome so these matters are not without conceptual significance.

It was Elizabeth Anscombe who, in 'Modern Moral Philosophy', classified utilitarianism's fascination with ends or consequences without reference to the morality of the act producing it, as 'consequentialist'. Her analysis highlighted the difficulty of arriving at answers to questions about the justice or injustice of acts on the basis of calculations of consequences. Questions about the standard to be applied to arrive at the right utilitarian answer to any particular practical question are now familiar. Arguments from incommensurability suggest that the very business of comparing and attaching values to goods like beauty, or culinary pleasure, or horticultural design, or swimming skill, or motoring speed and arriving at numerical values with which to arrive at conclusions about how and what to maximize suggests the calculus involves incommensurables and cannot be performed without profound presuppositions about the parameters one is to use. Arguments from arbitrariness are also familiar. Are we to maximize pleasure, happiness, utility, or moral goodness? And over what period of time and what conceptual grouping are we to apply? Why prefer

[8] Bentham 1789: I.1. [9] Sidgwick 1907. [10] Hare 1952. [11] Smart 1973.

the pleasure of the people in Group X over the pleasure of people in Group Y? Should we maximize the pleasure over the next ten minutes or the next ten years or the next hundred years? And if one of these possibilities, why? The results would achieve quite different outcomes and spatio-temporal arbitrariness bedevils the whole calculus. Given the fixation on consequences, there are serious arguments from contingency such as those of A.N. Prior. These suggest that the very business of calculation presupposes a freedom that must be logically impossible if the future is fully determinate. This is admittedly a general problem in philosophy but one that is particularly acute for those who want to base their ethics on consequences, insisting that there are determinable and calculable answers to moral questions based on a determinate future.[12]

These broader questions about arbitrariness, incommensurability and contingency aside, perhaps the most serious problem with utilitarianism is its instrumentalism. This argument is as old as the story of Socrates refusing to become complicit with the corrupt oligarchs in the execution of the innocent Leon. It is visible in Sophocles's *Antigone* where Antigone refuses to recognize as binding the unjust laws that denied her the right to bury her dead brother:

> Yea, for these laws were not ordained of Zeus, and she who sits enthroned with gods below, Justice, enacted not these human laws. Nor did I deem that thou, a mortal man, could'st by a breath annul and override the immutable unwritten laws of Heaven. They were not born today nor yesterday; they die not; and none knoweth whence they sprang. (Sophocles, 1912 p. 61)[13]

Bernard Williams's famous 'Jungle Jim' example, in which the bloodthirsty Pedro demands that Jim kill an innocent man in order to save the ten Indians he himself is threatening to kill, is an example designed to challenge the idea that it would be justifiable (still less, necessary) for a person to kill an innocent man to pacify the terrorist.[14] The end of saving the group by adopting the killer's homicidal intention would neither justify nor necessitate the means used. Furthermore, any refusal to adopt the homicidal design of the killer, could not amount to homicide of the group by omission. That act would remain the choice of the intentional killer. Only a false understanding of human responsibility and human

[12] On the argument from contingency, see Prior 1968: 47–48. [13] Sophocles 1912.

[14] Williams 1973. 'A Critique of Utilitarianism' in J.J.C. Smart and Bernard Williams, *Utilitarianism: For and Against*. Cambridge University Press.

integrity would ascribe to the refuser the homicide by omission of the group. Again, Anscombe's resistance to the award of Mr Truman's honorary degree[15] was framed in terms of her opposition to his ordering of the dropping of atomic bombs on cities of innocents at Hiroshima and Nagasaki. Her opposition is precisely to the instrumentalism which would entail killing the innocent to maximize the happiness of numerous others, in short, 'doing evil that good may come'.

To put the problem more starkly, the theory appears to imply that it would be necessary to kill one innocent homeless man to supply organs for ten others who needed them in order to survive. Ten, after all, trumps one. Indeed, two trumps one. And the socially desirable must, on any utilitarian analysis trump those widely classified as 'less desirable'. The best utilitarian answers to questions about why it would be wrong to kill the homeless man to distribute his organs to those who needed them to survive, propose such 'rule utilitarian' ideas as that it would erode trust and respect for the law, undermine attitudes of care for the weak and have long term bad consequences. These are among the answers given by rule utilitarians, Richard Brandt[16] and Brad Hooker.[17] Although the response appears plausible at first glance, it also raises the counter-objection that were the deed to be performed entirely in secret so that there was no threat to the rule, to public trust, and no public scandal, the act would somehow become morally acceptable! This answer is far from satisfactory. Killing the homeless man remains an injustice whether or not it is performed in secret. It is depraved whether or not it undermines public trust or undermines the rule of law. The confidentiality of the arrangement affects questions surrounding public scandal to be sure. However, it simply does not account for the fact that killing the homeless man is an evil in its own right independently of any associated issue of public scandal, social attitudes or public confidence. It is a grave injustice done to the homeless man both in his humanity and in his innocence.

In the final analysis, utilitarianism, both act- and rule-, is forced to admit that anything can be done if the outcome is for the better. And it is this

[15] Anscombe 1981 'Mr Truman's Degree: 62–71.

[16] See e.g. Brandt 1959. Prentice Hall. Brandt outlines a theory in which moral rules are considered in sets called 'moral codes'. He then goes on to propose a Kantian-style imperative so that a moral code is justified when it is the optimal code that would maximize *the public good* more than any alternative code would.

[17] See also Hooker 2000.

openness to injustice that is the central problem with utilitarianism. It is driven to affirm the justice of injustice, the good of evil, and the rectitude of what is obviously wrong. By insisting that failures to prevent evil amount to causing evil while glossing over the question of how this is to be achieved (e.g. by complicity with the oligarchs in the case of Socrates or with Pedro the terror militant in the case of Jungle Jim or with the organ harvesters in my case of the homeless man), the utilitarian is forced to morally implausible conclusions that cannot be accounted for without adopting a more Socratic approach to injustice, wrongdoing and vice. In short, it is necessary to resort to the agent-centred ethic favoured by Socrates and developed in the natural law tradition.

Among the moral principles and doctrines advancing the Socratic ideal of not doing evil that good may come are such doctrines that have application in certain classes of case of moral conflict. Moral conflicts arise when the performance of an action will produce both good and bad effects. On the basis of the good effect, our duty appears to require performance of the action; but on the basis of the bad effect, it seems our duty not to perform it. The principle of double effect (PDE) is a set of ethical criteria for evaluating the permissibility of acting when one's otherwise legitimate act – for example, relieving a terminally ill patient's pain – will also cause an effect one would normally be obliged to avoid – for example, the patient's death. Double-effect reasoning is to be found in the thought of Thomas Aquinas (in his discussion of self-defence in his *Summa Theologica*).[18] By outlining four requirements, the principle supplies a tool that allows the differentiation of moral cases in such realms as palliative care, self-defence, defence of third parties, and the just conduct of war. The four requirements, briefly and without labouring the matter, are that: the nature of the act is *itself* good, or at least morally neutral; the agent intends the good effect and not the bad (the evil effect must be a foreseen side effect not intended); the agent does not use the evil as a means to the good or as an end itself; the good effect outweighs the bad effect in circumstances sufficiently grave to justify causing the bad effect and the agent exercises due care to minimize the harm (or proportionality requirement). These very principles are among those necessary to distinguish between the acts of a terrorist and those of an

[18] Summa Theologica, II-II Q. 64, art. 7.

agent aiming at legitimate activity foreseeably involving death but legitimately undertaken.

On this view, while grossly disproportionate punishment could not be legitimately imposed even on a guilty party, proportionate punishment could be so imposed even if it had bad consequences, say, on the family of the accused person. This latter would be seen as a legitimate side effect of a licit and justifiable act of punishment. An act of imposing a grossly disproportionate act of punishment, by contrast would mean using an unjust means to achieve a putative good end (e.g. deterrence). This brief foray into the means–end, agent-centred Socratic thinking of the natural law tradition, of course, goes only some small way to explaining the armoury of conceptual machinery available in the natural law tradition. It does not profess to solve all its borderline cases and grey areas.[19]

4. Rational Autonomy

Autonomism (or hard ethical liberalism) insists that the autonomous decisions of adults, in particular, are their own business. Where no harm is done, they ought to be respected. Autonomy – or consent, provided that no harm is done, is regarded the touchstone of moral value both individual and social. On the strength of this doctrine, a raft of activities, from psychiatrically dangerous drug use to prostitution, are recommended as 'morally neutral' and sensibly left open to financial exploitation by those canny enough to create the industry. John Stuart Mill's Harm Principle is embedded in much legal and moral thinking in contemporary Western philosophy and favoured by many, if not, most, professional philosophers.[20] Autonomism (or hard liberalism) is to be contrasted with the *rational autonomy* recognized by theorists in the natural law tradition.

[19] There are, of course, sensible questions about whether the proportionality requirement in the PDE involves the presupposition that consequences are indeed commensurable after all, supplying a way out for the utilitarian. One possible reply is that if the proportionality requirement comes *after* an agent-centred, virtue-based and Socratic ethic, the all-out and parameter-free problems of incommensurability are partially mitigated.

[20] Mill 1861. See also Nozick, 1974: 58: 'My nonpaternalistic position holds that someone may choose (or permit another) to do to himself anything, unless he has acquired an obligation to some third party not to do or allow it.' Nozick's view would of course permit the very case of consensual cannibalism described, as would Mill's Harm Principle.

Rational autonomy is autonomy informed by practical reason and responsive to intelligible human goods and the human capacity for practical rationality. This rational limit on autonomy is one of the fundamental differences between autonomism – or hard liberalism – and the reasoning characteristic of the natural law tradition. Autonomism regards the autonomous decisions of adults, as essentially morally neutral. Famous for its harm-to-others principle, where no harm is done, expressions of individual autonomy must be respected.

In 'Heavy Petting', an article readily available online, Peter Singer[21] argues that we are animals and, in particular, not unlike great apes. This, he claims, implies that sex across the species barrier i.e. bestiality, is not an 'offence to our status and dignity as human beings'. He argues that sexual activities between humans and animals that result in harm to the animal should remain illegal, but that 'sex with animals does not always involve cruelty' so that 'mutually satisfying activities' might be enjoyed between humans and animals. These implausible conclusions are the direct result of Singer's adumbrated and conceptually limited brand of moral theory. In particular, they derive from his utilitarianism combined with a misguided understanding of human autonomy. It might be thought that the article is intended in jest and the ideas touted for their shock value, the mainstay of many an academic's scholarly renown. A careful reading will reveal, however, that he is perfectly serious. That he means what he says emerges, at least in part, by his careful elaboration of his own conceptual machinery to come to his provocative conclusion. It also emerges in virtue of his failure to consider the possibility of human addictions and pathologies in a fully developed account of morality, virtue and vice. But it becomes perfectly plain that he means what he says when we hear Marvin Olasky report that Singer believes necrophilia too is perfectly unproblematic and morally permissible.[22]

Since 'mutually satisfying' sexual activity can be conducted without pain to the animal and autonomously by both animal and human, Singer is logically driven to agree that the activity is therefore morally permissible and no offence to human dignity. After a discussion of the great apes, he

[21] Singer 2001.

[22] Says Olasky: 'For example, when I asked him . . . about necrophilia (what if two people make an agreement that whoever lives longest can have sexual relations with the corpse of the person who dies first?), he said, "There's no moral problem with that."' By Olasky, M. *Worldmag* Nov. 27, 2004. www.worldmag.com/2004/11/blue_state_philosopher

concludes by saying that '[t]his does not make sex across the species barrier normal, or natural, whatever those much-misused words may mean, but it does imply that it ceases to be an offence to our status and dignity as human beings'.[23] Because his theory is bereft of any sound teleology, Socratic means–end reasoning and principles of rational autonomy (incorporating principles of practical reason, and an understanding of the virtues and the common good), he is driven to these bizarre conclusions.

Singer avers that bestiality, is not 'an offence to our status and dignity as human beings'. The same could be said of sex with 'willing' children and infants, as Tom Regan[24] has rightly noted (pp. 63–4, 89). It could also be said of incest even in standard abuse of power contexts. Mass human cloning might also be thought to do no immediate harm and indeed only maximize happiness (where non-existence is the alternative). Necrophilia, as we have seen, is no problem for Singer. Consensual cannibalism too could be justified on utilitarian and autonomist grounds, and there are those only too ready to defend it in academic journals on autonomist grounds.[25] Given the available conceptual principle, there is no reason to regard it as morally problematic. Certainly, nothing in Singer's theory supplies the conceptual gap. Any insistence that bestiality might involve human vice or mental illness appears to him naturalistic fiat unsubstantiated by utilitarian and autonomist findings. In fact, the failure is indeed conceptual. But the deficiency derives not so much from his audience's tolerance-deficit as his own consequentialist and autonomist worldview.

Singer's moral legalism drives him to the view that bestiality is morally neutral and, possibly too, dignity-affirming because, on his analysis, there is no harm done. But what kind of harm was he looking for? Many kinds of fraud, tax offences, parking offences, employment rules, town planning

[23] Singer 2001. [24] Regan 2003: 63–4, 89.

[25] One paper that attempts to justify Armin Meiwes' cannibalism is by Wisnewski 2007: 11–21. Abstract: 'Recently, a man in Germany was put on trial for killing and consuming another German man. Disgust at this incident was exacerbated when the accused explained that he had placed an advertisement on the internet for someone to be slaughtered and eaten – and that his "victim" had answered this advertisement. In this paper, I will argue that this disturbing case should not be seen as morally problematic. I will defend this view by arguing that (1) the so-called "victim" of this cannibalization is not in fact a victim of murder, and that (2) there is nothing wrong with cannibalism.' I am grateful to Paul Bogdanor for referring me to this article and that of Olasky 2004.

regulations, drugs and deception offences might invite the question, 'Well, where's the harm in that?' There would indeed be no immediate harm and certainly no pain (qua 'brain firing'). Yet most would recognize these matters as raising ethical questions affecting life lived in society. Singer's autonomism, in virtue of its failure to regard these as worthy of moral accounting, is, to that extent, faulty. Never mind the implausibility of his 'personism' (Laing 1997, etc.),[26] his account seriously lacks the very conceptual apparatus that would allow a proper identification of vices, mental and physical ill health, anti-social behaviour, inter-generational loss, and failures of coordination of action for the common good.

If we are not free to park our cars in prohibited zones even though there is no immediate harm to others, how much more obvious should it be that internet predator cannibals should not be free to prey on the vulnerable, the mentally ill, the depressed, intoxicated, addicted and young. Furthermore, there is a public interest in ensuring that there be no burgeoning industry in homicide and violence, whether for reasons of sexual excess or for financial gain. While bestiality might appear unproblematic to utilitarians like Singer, it is not clear that it does not put both animals and other vulnerable victims in jeopardy. By normalizing excess, licensing distorted sexual activity (like necrophilia and bestiality) and praising it publically as 'morally unproblematic', the autonomist vision obfuscates reality. There are indeed rational limits to individual autonomy even when there is no immediate harm. This is especially obvious in other areas of social life.

In addition, any coherent moral theory must be able to discern pathologies and vices.[27] Singer's autonomism obliges us to occupy a space where we are capable of doing neither – largely for want of theoretical apparatus. There is no public interest in elevating pathologies and placing them on the same footing as the rational and worthwhile. So to do, particularly in the realm of ethics, involves misunderstanding and invites social disorder, endangering the vulnerable and undermining perfectly licit industry and political life. Many of the greatest tyrants in history have been men with pathological tendencies. To normalize bestiality, consenting cannibalism,

[26] This is to say nothing of the defects of Singer's 'personism': his theory that permits infanticide on the grounds that the very young lack rationality, autonomy and self-consciousness: Laing 2004: 184–216; Laing 2013: 336–340; and Laing 1997: 196–224.

[27] *Republic* 1998 (396a).

necrophilia and the like, is as much to bring the bestial into mainstream political life as to marginalize objectors. Pathologies then, must be seen for what they are. There is no public interest in regarding them as equal in kind to other human activities, in which society has an interest.

Bereft of the very conceptual framework offered by the natural law tradition – with its recognition of principles of practical rationality (a natural curb on irrational expressions of human autonomy), its contemplation of the virtues and vices,[28] its sensitivity to mental and physical pathologies, and its developed understanding of public interest and the common good – we are driven, on his analysis, to implausible practical conclusions. Instead of extolling vices, addictions and pathologies as 'dignified', and currying favour with bestialists, online cannibals and kleptomaniacs, we should, as Singer himself is fond of saying, 'rethink' this metaethic to avoid the philosophical dead ends into which he leads his unsuspecting disciples. Addictions and pathologies, whether bulimia, kleptomania, bestiality, necrophilia or consensual cannibalism, while in some cases failing to trigger the famous harm-to-others principle, need to be seen for what they are, namely, vices or ill health or both. These in turn may be antisocial or, in certain cases, dangerous. That they are a feature of our humanity is still no reason to think that they therefore fall into the hazy domain of the 'morally neutral'. Still less is it any moral justification.

Understanding our own habits, pathologies, addictions and weaknesses (a matter given detailed attention by Aristotle in his *Nicomachean Ethics*)[29] may lead to a proper sympathy for one another. Fellow feeling is especially necessary in a world that so easily views destructive addictions as a welcome opportunity for financial exploitation. For the families and friends of those addicted, the philosophical trap set by the autonomist is far from entertaining. Without access to that fuller understanding, we are not in any position to render serious moral analysis. A full and rational moral theory must operate with sufficient theoretical apparatus, a sound theory of human virtue and vice, a coherent model of mental and physical ill health, and a comprehensive model of the demands of social coordination and the common good. It must also be responsive to intelligible human goods and the capacity for practical reason. Unless it does so, it inevitably invites financial empires

[28] See e.g. MacIntyre 1984. [29] Aristotle, Nicomachean Ethics.

exploiting the hapless, poverty stricken, mentally ill and vulnerable. It also undermines the common good.

However intrepid and entertaining the autonomist ethic, a theory that cannot account for the rational limits of autonomy must be rejected. Autonomism, in the final analysis, is conceptually flawed, whether in the realm of human sexuality or in more mundane matters, like parking regulations and town planning. These defects, however, can readily be supplied by the wealth of principle proffered by the natural law tradition, steeped as it is in virtue theory, political theory and, when all is said and done, a more comprehensive metaphysics, one which is responsive to intelligible human goods and the capacity for 'practical rationality'.

Four Paradigms – Their Meaning and Explanation

Teleological reasoning, anti-relativism, Socratic means–end reasoning and the rational exercise of autonomy (complete with a true understanding of both the virtues and the common good) are fundamental to natural law reasoning in applied ethics. This essay has not sought to supply any exhaustive account of this ethical reasoning. Still less has it set out to solve hard cases and grey areas. Nor has it attempted to arbitrate between schools of thought in the natural law tradition (old versus new natural law theories).[30] What has been undertaken is an exploration of the *clear* cases of wrongdoing in any dialogue about practical ethics. What are the assumptions about ethical reasoning that would allow us to regard these kinds of case as examples of injustice, wrongdoing or human vice?

Martha Nussbaum[31] and Amartya Sen[32] have proposed a teleological or 'capabilities' approach to ethics. Without attempting to adjudicate between competing positions in the maelstrom of applied ethics, this is the kind of conceptual account that allows a move away from unacceptable and finally self-defeating forms of moral relativism, both personal and cultural. The analysis allows a discussion of the needs and potentialities of creatures in virtue of the kind to which they belong. In this way, we are able to begin

[30] See e.g. Hittinger 1989. Cf George 1999. [31] Nussbaum 2000.
[32] Sen 1985 and 2004 at 77–80.

to see why it is that genocide undermines not only natural human ends such as human life but also human life lived in a community. Mass human cloning erodes human uniqueness, individuality, often too, transparency, and honesty. It fundamentally destroys the environment of parental love, openness and trust that allows human flourishing. By involving technicians at the very inception of the child, the activity undermines the created person's understanding of himself as generated by the love of their biological parents as distinct from systems of manufacture with all their associated concepts of ownership, sale and destruction. In virtue of being products of human design, subject to contractual conditions and quality control requirements, it, like slavery, suggests illicit dominion over the very nature and qualities of the human being. To even begin to understand why mass human cloning is an unjust means of bringing children into the world, it is necessary to engage in modes of reasoning standardly prohibited by relativism, liberalism and utilitarianism.

Likewise, efforts to analyse the injustice of killing the innocent (or imposing grossly disproportionate punishments), invariably refer back to the question of the legitimacy of the means used to achieve the ends. In Aquinas, as in the natural law tradition, in the context of principles of proportionality, it matters what one is intending to do and what means one is using to achieve one's ends. In our homeless man example, no amount of act utilitarianism or rule utilitarianism can tell us why the organ redistribution is unjust and wrong. If we incorporate the requirement that we perform our misdeeds secretly, literally, anything goes. It is precisely this openness to injustice that is the central problem with utilitarianism. As, we have seen, it is logically obliged to affirm the justice of injustice, the good of evil, and the rectitude of that which is wrong, not merely in grey areas and borderline cases, but in clear cases as well. In short, it cannot be relied on to do any useful work.

Liberalism offers a seductive alternative to oppression and slavery. By emphasizing individual autonomy, it appears to allow a way out of the excesses of illicit dominion and unjustifiable control in other areas of practical ethics. But by failing to understand the rational limits of human autonomy, hard versions of the theory, what I have labelled 'autonomism', are driven implausibly to affirm the permissibility of bestiality, incest, necrophilia and consensual cannibalism. 'If it makes autonomous agents happy', goes the familiar, cheerful refrain, 'why ever not?' Natural law

reasoning allows an escape from the theory's improbable conclusions. In the case of bestiality, not only is the benighted animal's capacity for sexual well-being wholly misunderstood, the sexual functions of the human and beast's bodies are improperly perceived, thereby undermining the sexual and psychological wellbeing of human and accompanying animal. By understanding facets of human development, potentiality and maturity, by understanding human addictions and pathologies, virtues and vices, social coordination in the public interest and the common good, a more comprehensive theory is able to arrive at a sound understanding of human sexuality – and many other matters besides.

Conclusion

This paper has proceeded by way of an exploration of clear cases of wrongdoing, injustice and vice. Four ethical paradigms were considered: genocide, disproportionate punishment, mass live-birth human cloning and sexual vices like bestiality, incest and sado-masochistic cannibalism. Clear cases are useful when relativism, consequentialism, instrumentalism and unconstrained liberalism appear to drive us to irrational conclusions. The examples help to identify the forms of reasoning that allow us to see these precisely as examples of injustice, wrongdoing and vice. Without resort to a sensible teleology (or 'capabilities approach' if that language is preferred) we are compelled to assent to an unacceptable relativism, where individual feeling, consensus among Nazis and agreement among paedophiles is regarded as good as any other test of right and wrong, good and evil, virtue and vice. Without access to a sound understanding of teleology, Socratic means–end reasoning, the virtues and vices, public interest and the common good, we are obliged to deny that there could be anything at all wrong with one or all of our paradigms.

Modern moral philosophy often suffers from a dearth of conceptual apparatus. Grand but limited distinctions are set out at the foundation of the theory, and then predictably fail to perform the most basic functions demanded of a plausible applied ethic. It is precisely here that access to natural law reasoning is needed. Of course, it is always open to one's interlocutor to announce his ethical commitment to genocide, grossly disproportionate punishment, mass human cloning or bestiality, incest and consensual cannibalism. In the absence of the natural law principles

of the kind broadly outlined here, it is difficult to respond except perhaps by observing, with Anscombe, that if someone thinks, *in advance*, that these questions really are open, we do not want to argue with him; he shows a corrupt mind.[33]

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[33] Anscombe 1958: 17.

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Part III

Law

Law as an Idea We Live By 10

N.E. Simmonds

Three Puzzles

When we speak of law, we are sometimes referring to a complex assemblage of human activities that can be studied by empirical social scientists. Such activities can be observed, and could be described in varying levels of detail. They are to be found within many different communities. If we think only of this aspect of its use, we will conclude that the concept of 'law' serves as a general label that marks out a distinctive type of social institution. This suggests to some that it might be worth asking what general features link the diverse manifestations of law in diverse communities. They conclude that jurisprudential inquiry into the nature of law is a taxonomic adjunct to the empirical description of social institutions.

However, if we are to understand the way in which the concept of 'law' gives rise to philosophical problems, we must focus our attention upon the way in which the concept is used *within* the practices that constitute the social existence of law. For we speak of law not only when we *describe* social institutions but also when we act within them, making claims against others and deliberating upon our own actions.

'Law', therefore, is not an idea that simply classifies or describes a way to live: it is an idea we live by. Legislators, for example, do not see themselves as issuing commands or orders: they see themselves as enacting *laws*. And they take the status of their enactments (their status as laws) to be fundamental to the claim that those enactments have upon the conduct of the citizen. If a citizen were to ask a legislator why they should obey the legislator's enactments, the answer would probably be, 'Because it is the law!' Similarly, judges do not decide cases by reference to the rules and principles that they consider to be most wise or most just. Nor do they decide cases by reference to the rules that they and their colleagues happen

to accept. They decide cases by reference to *the law*.[1] When they treat a certain rule as dispositive of the case, they attach critical importance to the status of the rule as law. Citizens also attach great importance to the status of rules as law (the attitudes of judges and legislators, mentioned above, would make little sense if they did not). They invoke their legal rights and remind others of their legal duties, and they expect such appeals to command the respect of fellow citizens in a way that appeals to justice or moral rectitude might not.

The practices composing a legal order therefore involve constant reference to a certain abstract object called 'law'. But what is this object? We learn to participate in the relevant practices by immersion and habituation and we rarely reflect upon them. Reflective attention to those practices can reveal that our references to law involve certain rough-hewn assumptions about law's nature. Yet when we try to assemble these assumptions into a coherent picture of law's nature we find that they do not fit together smoothly. Indeed, it seems hard to see how these various assumptions could hold true of any coherent object of thought.

For example, we assume that laws are created by men and women. But we also tend to assume that such acts of law-creation must themselves be authorized by law (I cannot create law for you, because there is no law empowering me to do so). When we combine these two assumptions, we are faced by an infinite regress, where each law is created by a human act which is in turn authorized by a higher law (which is, in turn, created by a human act . . .). If the infinite regress is to be blocked, two options seem to present themselves.

On the one hand, we could abandon the assumption that all acts of law-creation must be legally authorized. Following this path, for example, we might say that the law-creating acts of subordinate lawmakers must be legally authorized, but that each legal system will include a supreme lawmaker whose acts of law creation need not themselves be authorized by law: perhaps the supreme lawmaker is enabled to create law in virtue of

[1] Not every standard that a judge ought to apply is itself a law. But it is an error to conclude from this fact that a judge necessarily requires a 'theory of adjudication' in addition to a theory of law. Judges apply standards other than law (whether they be principles of justice or principles of mathematics) when that is required by their duty of fidelity to the idea of law.

their ability[2] to secure the compliance of the bulk of the population. Thus, at the basis of law (on this account) we find no sort of authority or authorization, but simply the raw facts of power.

On the other hand, one might abandon the assumption that all laws are created by human acts. One could then say, with Immanuel Kant, that even a system of wholly posited laws (laws established by human decision) must contain at least one non-posited or natural law, in the law authorizing the supreme lawmaker.[3] On this account, the basis of law is not sheer factual power but a well-founded claim to moral legitimacy or authority. Since it will be useful to have a concise label, we may call the problem of infinite regress (and the tricky choice between various ways of resolving it) 'the problem of sources'.

A further puzzle may be called 'the problem of the ideality of law'. This problem arises because, while all competent lawyers know that the law's content depends upon materials such as statutes and cases, they also know that it is possible for expert lawyers to disagree in their statements of general legal doctrine even though they are equally familiar with all of the relevant materials. Thus, they appear to employ a concept of 'law' within which the law somehow depends upon the contents of statutes and cases but is not fully reducible to those contents. The question of how this is possible provides us with a second philosophical enigma.

Finally, we have a feature already adverted to: the fact that legislators, judges and citizens all seem to attach prescriptive or justificatory force to law. But how can this be? If laws are created by fallible men and women, why should the fact of a law's creation have some claim upon our conduct? How can the fact that certain people in the legislature behaved in such-and-such a way on such-and-such a date make a difference to my rights and duties? How can it offer a judge a good reason and justification for ordering a sanction against me? Any adequate theory of law needs to explain how the nature of law is such that the ascription of prescriptive or justificatory force to law is intelligible. We may call this, quite simply, 'the problem of justificatory force'.

[2] Such an ability might stem from diverse sources, whether coercive sanctions or a popular belief in the lawmaker's wisdom and goodness.

[3] Kant 1797: 6:224.

Many writers would be inclined to call this last problem the problem of 'normativity' rather than the problem of 'justificatory force'. But I prefer the latter term for a reason that is worth explaining at this point. To describe the problem as one of 'normativity' suggests that it is one of explaining how, and in what sense, the law can be said to *prescribe* our conduct, or give us reasons for action. But this conceives the problem in too general a way. Hart, for example, could offer a reasonably convincing explanation of how officials might have reasons of self-interest for guiding their conduct by the basic rule of recognition.[4] But he faces considerably more difficulty in explaining how officials who follow the law purely for reasons of self-interest could intelligibly invoke the law as a *justification* for inflicting sanctions on individual citizens.[5]

We would be begging the question against modern legal positivism were we to insist that an adequate theory of law must demonstrate that law actually *justifies* the imposition of sanctions: but this is not what is being required. Rather, the test which is being set is that an adequate theory of law must explain how law *can intelligibly be invoked as a justification*. And that is an appropriate requirement for a theory of law, because one of the most significant and important contexts in which laws are invoked is the context of judicial judgment: in that context the laws are invoked as reasons for the judicial decision, a decision which may involve the deployment of the state's coercive apparatus against individuals. Indeed, Hart himself would have to acknowledge the propriety of this requirement, for he rejects Austin's theory of law partly for its inability to explain how law can be invoked as a '*justification* for punishing'.[6]

One way of resolving the problem of justificatory force is, of course, by showing that the law does in fact offer a sound justification for the ordering of sanctions. But there are other ways of seeking to resolve the problem, which are more compatible with a sceptical view of law's moral claim upon us. Thus we might argue that the invocation of law as a justification is merely a technical and confined form of justification

[4] Hart 1961.

[5] Simmonds 2007: chapter 4. Confusion on this point is common: e.g. Mark Murphy rejects what he describes as Finnis's 'legal point of view' argument, but his rejection assumes that Hart only needs to explain how the legal rules can be treated as 'reasons or constituent parts of reasons for action'. See Murphy 2006: 27.

[6] Hart 1961: 11 (Hart's italics). See also 84.

that should not be equated with *moral* justification.[7] Or we might suggest that although, when they invoke the law as a justification, judges are assuming (or pretending to assume) that the law is morally binding, such judicial assumptions may well be erroneous.[8]

The problem of justificatory force seems in some ways to be the most fundamental of the three problems. It lies just beneath the surface of the problem of sources, for example. The seemingly plausible assumption that human acts can create law only if they are legally authorized appears itself to stem from our difficulty in seeing how someone's past actions can change my rights and duties. And the problem of the ideality of law is, at least in part, the problem of how the law's status as a body of prescriptions for conduct is related to its status as a body of human acts and practices. This is why the great theories of law offered by such figures as Aquinas, Hobbes and Kant tried to present the nature of law in such a way that their accounts would reveal the basis of the law's moral authority and obligatory force. In more recent times, many writers take it as obvious that the question of law's nature, and the question of whether law possesses any moral authority (and, if so, why) are entirely distinct. They find themselves puzzled by the contrary assumption in the older theories and conclude (as we shall see) that the assumption must spring either from confusion or from some perverse literary convention. These modern difficulties in understanding the writings of the past stem in large part from the error of thinking that the concept of 'law' is primarily a classificatory label, rather than an idea by which we live. In fact, it is an idea central to the structures of thought and practice through which we transform ourselves and our moral significance.

This centrality becomes more evident as our culture lends to our conceptions of morality an increasingly private and inward appearance.[9] The ethical realm comes to seem entangled with problematic notions of conscience and the inviolability of individual judgement in ways that are always liable to disrupt apparently straightforward appeals to moral right. To enter the domain of law, by contrast, is to enter a world of established rules and precepts, taught traditions and acknowledged experts. At any one time, much of the law will be settled for practical purposes. The law appears

[7] Hart 1982: 266. [8] Raz 1979: chapters 2 and 6.

[9] For explorations of this theme, see Schneewind 1998; Siedentop 2014. See also Simmonds 2013b.

to offer reasoned justifications and a heritage of scholarly commentary that is the fruit of detached analysis (often framed in contexts remote from both the pragmatic pressures of decision and the distorting features of the particular case). It issues forth in requirements that may be distinct from the prescriptions of morality, but which can often draw upon the convergent support of diverse moral outlooks. It holds out the promise of an enduring standard of right that can be sustained even in the face of considerable ethical diversity. A theory of law is, unavoidably, a reflection upon our form of moral association.

We are now in a position to see that the abstract object 'law', which is referred to within the practices composing a legal order, is a puzzle. It seems somehow to regulate its own creation, and to hover uncertainly above the materials on which it relies for its content. Meanwhile, we appear to ascribe to law a certain compelling claim upon our conduct, simply in virtue of its status as law. It is hardly surprising that both philosophers and lawyers have been puzzled. The solutions that they have pursued resemble various attempts to introduce coherence and order into a confused image by discovering a focal point from which the seemingly muddled features can be seen to fall into place. Within these various endeavours we can identify several different general trajectories.

One perennially attractive approach seeks to treat law as, fundamentally, a body of rules identified by their source (e.g. enactment by a legislature). That simple core idea aims to capture law's appearance of relative certainty, by contrast with the endlessly contested arena of moral debate. The picture that finally emerges, however, tends to distort, or straightforwardly to reject, those scholarly traditions of analysis occupying the important space between the promulgation of a decree and the determination of the decree's law-making effect. By contrast, another (more sophisticated) approach subtly links the *posited* character of law with its systematic and scholarly form by arguing that posited enactments derive their character as law from the way in which they serve to realize 'the conditions under which the choice of one can be united with the choice of another'.[10]

The most influential contemporary approaches try to maintain a coolly detached view of law, as a particular (and, largely, morally neutral) form in which power can be exercised. Here the endeavour is to

[10] Kant 1797: 6:230.

resolve the core problems purely by reference to mundanely observable features of the practices composing a legal order such as the orders issued by some determinate person or body of persons that is habitually obeyed by the bulk of the population;[11] or a fundamental rule accepted by certain 'officials'.[12] Law, on this account, is morally to be judged by reference to wholly independent values with which the law may or may not comply.

By contrast, there are also theories claiming that the idea of law cannot be rendered fully coherent without discerning its essential relationship to an abstract and perhaps less-than-fully-attainable ideal, so that at least some of the moral standards by which law is morally to be judged are themselves internal to the idea of law.[13]

There are many other options too. Given the puzzling set of features seemingly ascribed to law by our unreflective forms of discourse, it is not surprising that some theorists see law's apparent entanglement with the ideal as a ground for scepticism about the entire notion: perhaps the idea of law is simply a misleading ideological gloss upon the facts of power.[14] Others take the idea of law to be bound up with a dubious metaphysics, or even an 'incarnation' of the ideal within the real, and for that reason they propose a radical revision of our thinking about law.[15] And there are those who reject the picture of the law-governed community as some sort of (admittedly imperfect and partially fragmented) moral association centring upon law. They favour an account of society as an assemblage of differentiated systems (of which law is one) and they view the enterprise of jurisprudence as one of the mechanisms whereby the law-system maintains its own boundaries, distinguishing it from the other systems with which it interacts.[16]

Reflexivity: Beyond the Rule of Recognition?

To proceed, let us distinguish two seemingly distinct issues. On the one hand is a question that might be asked from the perspective of a sociologist

[11] Austin 1832. [12] Hart 1961.

[13] Fuller 1969; Finnis 2011; Murphy 2006; Simmonds 2007.

[14] See e.g. Thurman Arnold's (sceptical) observation that 'Jurisprudence is the shining but unfulfilled dream of a world governed by reason'. Arnold 1935: 58.

[15] Ross 1946. [16] Luhmann 2004.

studying different types of social ordering or forms of governance. Such a person might ask 'which forms of social order count as law (or legal systems)?' An answer might direct them to some set or cluster or family of features that mark out particular societies as possessing law. On the other hand are questions of the type frequently asked by lawyers, judges and citizens within particular legal systems: 'What is the law (on this or that topic)?' or 'Is this rule legally valid?'

Hart answers the first type of question by pointing to the presence, in legal systems, of a basic rule of recognition that provides the criteria for legal validity within that system. He proposes that questions of the second type are to be answered by applying the basic rule of recognition of the system in question.

Notice that, while Hart's approach offers neatly integrated answers to two distinguishable questions, it can also suggest a possibility that has been grasped with enthusiasm by some of Hart's successors, most prominently Joseph Raz. The possibility is that of a radical separation between jurisprudential questions concerning the nature of law and doctrinal questions concerning the content of *the* law within a particular legal system. Perhaps doctrinal legal thought depends not at all on jurisprudence. This is the possibility that is made visible by Hart and that is enthusiastically embraced (as we shall see) by Raz.

Clearly we have here two different questions. But it does not follow that they are entirely separable. For it seems more than possible that answers to the latter (doctrinal) question may depend upon answers to the former (jurisprudential) question.

Judges typically justify their decisions by appealing to the law. And they attach critical importance to the status of a rule as law. Even though judges must also, from time to time, apply standards that are not themselves part of the law (e.g. they might have to apply the principles of mathematics in working out an award of damages), they apply such non-legal standards only when that is required by their primary duty of fidelity to law. The fact that a rule applied by the judge is, in the judge's view, just or wise will not be regarded as justifying the judge's decision unless the application of that rule is thought to be a requirement that stems from the judge's duty to apply the law.

But derivability from a basic rule of recognition will confer on a rule the status of law only if it is the rule of recognition of a system of law. Consequently, a judge who takes seriously his or her responsibility to

decide cases by reference to law cannot rest content with the application of the basic rule of recognition but must also ask a question about the status of the system to which that rule of recognition belongs: they must ask whether the system is law. In most cases this question may not be difficult to answer, but that does not show that an answer to the question (and therefore the question itself) is not logically presupposed by any conclusion to the effect that this or that rule, validated by the rule of recognition, is a law. Furthermore, the judge's answer to this jurisprudential question will depend upon some general conception of the nature of law, and that conception may in turn inform the judge's conclusions regarding the precise implications of their duty of fidelity to law. For example, the judge may know that a certain statute is validated by the rule of recognition and yet be unsure as to the precise law-making effect of the statute. Conclusions on this latter issue might appropriately be shaped by the general conception of law upon which the judge is relying in concluding that the rule of recognition is indeed the rule of recognition of a system of law. For example, should law be conceived of as inherently nothing more than a pliable instrument of a sovereign governmental will? Or is it inherent in the very idea of law that law is a good faith attempt to serve justice? The judge's conclusions as to the law-making effect of a statute could depend, in very obvious ways, upon the answers to questions such as these.

Raz wholly rejects the idea that adjudicative legal thought must rely upon some general jurisprudential conception of law. He tells us that 'questions about the nature of law can arise in courts, and can feature in judicial decisions' but only in the same way that questions of astrophysics or biology can arise. The 'judicial use of jurisprudential ideas ... is analogous to the judicial use of ideas from biology'.[17] He offers us two arguments in support of this very striking claim. The first is that we can recognize an instance as falling under a concept without having a theoretical explication of that concept: one can therefore know that a doctrinal argument has correctly identified the law even without a general theory of law's nature. The second is that the duty of judges is defined by the rules of the system under which they sit: consequently, 'their duty ... is to judge in accordance with the rules of that system, and it matters not at all whether the rules are legal ones'.[18]

[17] Raz 2009: 81–82. [18] Raz 2009: 84–85.

Each of these arguments is manifestly deficient. The first argument simply tells us that some cases will be easy cases where no plausible jurisprudential theory could cast doubt on the status as law of the rules in question. But that is not at all inconsistent with the thought that a complete setting forth of the judicial justification would require, as its foundation, an account of the nature of law. Furthermore, Raz's argument does not even begin to demonstrate that questions about the nature of law can feature in judicial decisions only in the same way that questions of astrophysics can. The general lack of judicial reference to theories of astrophysics indicates, not that those theories offer convergent support for the judgment, but that they are wholly irrelevant to it.

The second argument relies for its appearance of plausibility upon the fact that our notion of 'a judge' tends to be bound up with our idea of law. Someone appointed by a gang of thugs to apply and enforce rules is not, in any normal sense, a 'judge'. Thus, when we find ourselves agreeing that a judge has a duty to apply the rules of the system under which he was appointed, we must be careful to ensure that we are not simply taking it for granted that those rules are, of course, the rules of a legal system. Once we are careful to exclude that assumption, we become puzzled as to what Raz might mean by a 'judge'. With such uncertainty as to what a 'judge' might be, how can we possibly say what the judge's duty might be?

Given the manifestly inadequate reasons that Raz offers for his surprising thesis, we may well wonder why he proposes it. In my view, he does so in order to sustain his argument that the law 'claims' to possess legitimate authority binding on the citizen; and that this 'claim' is made through the law's officials when they treat the laws as imposing duties on the citizen. Raz views this thesis about the law's claims as explaining such features as the law's use of moral vocabulary, while being fully compatible with the denial of any necessary moral authority to law (since the law's claim may be false). Once we notice, however, that the judge's conclusion (e.g. that a certain rule, under which the case may be subsumed, imposes duties on citizens) is of one piece with the judge's decision that the applicable rule is a law, we realize that the anthropomorphic language of law 'claiming' would be better abandoned in favour of a simple acknowledgement that the concept of law generally assumed by judges, legislators and citizens (and which the philosophy of law is trying to understand) is the concept of

a binding set of standards. By obscuring the role that the concept of 'law' plays within adjudicative reasoning, Raz obscures this possibility.

Whether or not Hart would have endorsed Raz's views on the gulf dividing adjudication from jurisprudence, he certainly seems to think of the basic rule of recognition as an outer bounding limit on legal thought. The rule of recognition calls into being a distinct way in which rules can be said to exist; and, with that, a distinct realm of juridical thought. This means that Hart's theory cannot capture the way in which judges attach decisive importance to the status as law of the rules that they apply.[19] But it also means that, once the guidance provided by the rule of recognition is exhausted, there are no juridical standards to guide decision: for Hart, a judge's duty of fidelity to law is simply a duty to follow the rule of recognition. Here, as elsewhere, when penumbral cases arise, the judge must fall back on extra-legal considerations.

Suppose that I am right when I suggest that the jurisprudential question of the nature of law can never be excluded as irrelevant: for the judge must decide the case by reference to law, and therefore can accept the rule of recognition as a guide only if it is the rule of recognition of a body of laws. That suggests that, even though judges may generally be guided by a rule of recognition, their fundamental duty is not a duty to follow that rule, but a duty of fidelity to the idea of law: the duty to follow the rule of recognition is, within a legal system, simply the consequence of the judge's more fundamental duty. If this is so, then, when the rule of recognition fails to give determinate guidance, cases may (at least sometimes) appropriately be resolved by reference to the idea of law. A court that is conscientiously guided by a duty of fidelity to law should be loath to acknowledge circumstances where 'all that succeeds is success',[20] but should seek a juridically defensible basis for its decision in the idea of law. Thus, the German Federal Constitutional Court has described itself as deriving its authority 'not merely externally from the Constitution' but also from 'the very idea of law'.[21] And Chief Justice Marshall, in *Marbury* v. *Madison*, justified the court's decision by referring to the duty of the judiciary to enforce the law, while pointing out that the notion of law encompasses the

[19] This is partly because (as pointed out above) derivability from a rule of recognition will not confer status as law upon the rules so derived unless it is the rule of recognition of a legal system. For further considerations see Simmonds 2007: chapter 4.

[20] Hart 1961: 153. [21] Quoted in Alexy 2002: 8, n. 20.

Constitution and cannot be restricted to the diktats of the powerful, without reference to their constitutional basis.[22]

Laws may be said to derive their validity from a basic rule of recognition. But they derive their character as laws from the way in which the system (of which that rule of recognition is a part) approximates to a moral ideal. Furthermore, the law-making effect of individual decisions (such as the enactment of a statute or the decision of a case) cannot be determined except by reflection upon the way in which the decision is best understood as one part of a system of law. At least in most modern systems, we may think of judges as guided by a basic rule of recognition. But they follow this rule in compliance with their more fundamental duty, which is a duty of fidelity to the idea of law.

The Idea of Law

If judges are to be guided by a duty of fidelity to the idea of law, we need to answer the question: what is the idea of law?

My starting point is in a method of argument proposed by R.G. Collingwood, which he described as having been 'repeatedly used throughout the history of philosophy'. Collingwood tells us that, to define a philosophical concept, 'it is necessary first to think of that concept as specifying itself in a form so rudimentary that anything less would fail to embody the concept at all'. This, he tells us, 'will be the minimum specification of the concept, the lower end of the scale'. Later we will add 'new determinations, each implied in what went before, but each introducing into it qualitative changes as well as additions and complications'.[23]

Why should this be the right approach for us to adopt?

In answering that question, we should remind ourselves that the philosophy of law forms part of a broad tradition of inquiry which began with Socrates. That tradition is characterized by a concern to understand the human world of values and practices: the domain of morality, politics and law. Whereas the Sophists had asserted a clear distinction between nature and convention, central figures within the Socratic tradition were to offer a more nuanced account: the uniqueness of human action and speech

[22] *Marbury* v. *Madison* (1803) 5 US 137. [23] Collingwood 1933: 100–101.

was fully acknowledged, but the civil and political structures thereby constructed were viewed as containing *in potentia* a full realization of human nature, rather than as being a distortive imposition upon it. Consequently, for this tradition, an understanding of the nature and possibility of a fully human life requires careful reflection upon the significance of actual institutions and modes of association. It is here that we find commonalities linking all those philosophies that draw upon either Plato or Aristotle, whether they are part of the classical natural law tradition of Aquinas, or followers of the path that runs through Rousseau, Kant and Hegel.

The significance, for present purposes, of the form of argument described by Collingwood is that it enables us to capture the sense in which civil and political structures can contain full human flourishing *in potentia*: as aspirations from which those structures derive their significance.

On the understanding of these matters that we find within the Aristotelian tradition, moral judgement is not *fundamentally* a matter of the application of principles to particular circumstances (although it may sometimes *involve* such application of principles) but a seamless endeavour to realize, respect or participate in the good. To understand a value is to possess some understanding of the actions, practices and principles that might best embody it, and the broader structures of human interaction which those actions, practices and principles may presuppose or engender. Consequently, whereas technical knowledge and action assume a merely particular end, moral knowledge always contemplates an entire way of life and is ultimately concerned with right living in general. Our historically informed knowledge of practice serves to deepen our grasp of those very values towards which the practice is oriented.[24]

It is because jurisprudence needs to capture such possibilities that we sometimes find ourselves torn in the following way. Some typical features of a developed legal system, such as the characteristic forms of systematic doctrinal argument and scholarship, may not seem to be conceptual necessities for the existence of law: it has been said, for example, that ancient Greek law was 'ein Recht ohne Rechtswissenschaft'.[25] Yet, at the same time, we may feel that something very significant is missed if

[24] See Simmonds 2007: 145–150. [25] Rudolph Sohm, quoted in Jones 1940: 1.

such features are treated as mere contingencies. This is part of what leads legal historians (for example) to speak of 'developed' or 'mature' legal systems, by contrast with rudimentary or vulgar instances. Doctrinal legal thought may not be part of the idea of law on a 'minimum specification' of that idea. But it is nevertheless part of that idea when the idea is fully understood and realized in the world.[26]

The 'minimum specification of the concept', which is 'the lower end of the scale' is, in the case of law, not an easy thing to identify, for the nature of law has been contested for more than two millennia, and it sometimes seems as if there is no uncontested ground from which the argument can proceed. Furthermore, even if we find some relatively uncontested ground, will the ground prove fertile? Will our minimum specification of the concept of 'law' imply the further 'determinations' and 'qualitative changes' that Collingwood envisages?

Fortunately, Lon Fuller offers us a useful way forward. His famous story of Rex's attempts to make law, and the eight different ways in which Rex fails, does two things which are of great importance for the present argument. In the first place, it identifies eight settled conceptual intuitions concerning the idea of 'law'. Fuller is, in effect saying to us something like this: 'If you encountered a system of governance that included no rules at all, you would not regard it as a legal system, would you? Or, if you encountered a system where rules were published but the officials never followed the rules, you would not regard *that* as law would you?' (And so on for the other six forms of failure.) Of course, we may never encounter systems of governance like that (systems without *any* rules, or where the officials *never* follow the rules) in the real world, but that is precisely why Fuller tells us a fairy story. We may reasonably hope that these eight distinguishable claims about the minimum specification of the concept of 'law' will be very widely accepted, although each of them could be independently defended as sound if such defence became necessary.

But, precisely in being so minimal, is there not a danger that this 'minimum specification' will not lead us anywhere interesting? Fuller's

[26] Perhaps it is in some such terms that we might begin to understand Hegel's notorious observation, in the Preface to *The Philosophy of Right*, that 'What is rational is actual; and what is actual is rational'. It is clear that Hegel does not encompass all existence within 'the actual', which is to be contrasted with 'potential' rather than with 'unreal'. See Hegel 1821: 20.

eight modes of failure overcome this problem very well. For the modes of failure point us towards eight 'desiderata' for legal systems. If we imagine a system of rules, where the rules are published, prospective, fully intelligible, free from contradictions, possible to comply with, reasonably stable through time (not constantly changing), and where the officials act in accordance with the rules, we realize that we are describing an ideal for legal systems: the ideal of 'the rule of law'.

Legal positivists often like to separate the concept of 'law' and the idea of 'the rule of law'. On the face of things they might seem right to do so. For we are at first inclined to think that the concept of 'law' identifies a distinctive type of social institution, while the idea of 'the rule of law' identifies an ideal aspiration for institutions of that type. Since we know that laws and legal systems can fall a long way short of adequate compliance with the rule of law, it seems to follow that the two ideas are wholly distinct.[27]

This positivist argument, however, suffers from two related flaws. In the first place it reverts to the thought that the concept of 'law' is primarily an idea that classifies or describes ways of living, whereas it is primarily an idea we live by. Philosophy is not in the business of constructing typologies but of resolving puzzles; and the puzzles in question (in the first place, our three problems mentioned earlier) arise from the role of 'law' as an idea we live by, rather than 'law' as a classificatory label for types of social formation. Contrary to the claim of some positivists such as Raz, jurisprudential theories of the nature of law are not best regarded as part of a typology of social institutions.[28] But if we were, for some reason, to seek such a typology, our typology would be manifestly inadequate if it did not centre upon the way in which the actors within a community governed by law typically regard 'law' as an idea they live

[27] See, for example, Gardner 2012: 222. Gardner describes Fuller as having 'claimed that nothing could qualify as a legal system except by (largely) meeting' the requirements of the rule of law, and Hart as having 'quite rightly denied this'. This is, of course, not Fuller's argument at all. Or, if it is (Fuller not always being crystal clear), it is certainly not mine. The point is rather that *complete* failure (of a kind that is unimaginable outside a fairy tale) in any one of the eight requirements will result in something that is not law at all, while *full* compliance with all eight represents the idea of the rule of law. Fuller's theory leaves ample room for saying that legal systems can fall a long way short of satisfactory compliance with the rule of law. They nevertheless constitute instances of 'law' in virtue of their approximation to the ideal of full compliance.

[28] Raz 2009: 29.

by. As we saw above, Raz explicitly denies that law plays any such role (at least for the judges) but his arguments for that denial are manifestly unsound.

Secondly, the fact that legal systems can fall a long way short of satisfactory compliance with the rule of law contributes nothing to the claim that the two ideas of 'law' and 'the rule of law' are wholly distinct. For it is possible that the concept of 'law' is what I have elsewhere described as a concept structured by an archetype (the archetype here being the notion of full compliance with the rule of law) where instantiations of the concept count as such by their approximation to the archetype.

Collingwood was not suggesting his proposed method of analysis as suitable for all concepts, but only those which have been enduring sources of philosophical puzzlement. A little later in this essay, therefore, it will be worth mentioning some parallels between the idea of 'law' and another idea that has long inspired philosophical interest: that of friendship.

Freedom

Fuller claimed that his eight desiderata constituted an 'inner morality of law'. But even his friendliest commentators have had difficulty in defending his arguments in support of that claim.[29] My own suggestion is that the eight desiderata can be seen to represent a moral ideal in the following way. To the extent that one is governed in accordance with the eight desiderata, one enjoys a degree of 'freedom as independence' that can be enjoyed in no other way, so long as one lives in a human community. Since a fully human life requires that one live in community with others,[30] and also requires that one enjoys a degree of 'freedom of independence', the governance of law is essential to a flourishing life.

To understand these claims, we must understand the idea of 'freedom as independence'. This is the aspect of freedom that consists, not in the extent or number or value of options that are available to an agent, but in the

[29] See Simmonds 2014: 75.

[30] This is not for the material benefits of society but because one cannot really be a person except in a community of mutual recognition.

independence of those options from the will of others. It is the aspect of freedom that distinguishes the free man from the slave.[31] For a slave might conceivably have many more and better options available to him than does a free man: the slave might run a large commercial enterprise for his master, and lead a luxurious life. But we do not want to say that slavery is only *contingently* connected with a lack of freedom, which is what we would have to say if we were to insist that freedom consists exclusively in the number, extent or value of one's options. Nor could anyone plausibly deny that freedom as independence is a moral value, for we regard slavery as morally abhorrent precisely *because* it is such a fundamental violation of freedom.[32]

To the extent that one is governed in accordance with the eight desiderata, one is governed by published, prospective rules that are reasonably stable through time. At any one point in time, therefore, the rules permit one certain options,[33] and (to the extent that the legal regime claims, and endeavours to secure, a monopoly on the use of coercive force) those options will enjoy a perimeter of protection provided by general prohibitions upon assault and trespass. Particular options and protections can be removed for the future, but not retrospectively, if the rule of law is observed. Nor can the law be subject to constant change, without violating Fuller's eight precepts. Thus the enforcement of the law, and compliance with the law, both serve to sustain a set of conditions that are essential to a fully human life, and place a sound moral claim upon us for that reason.

Of course, it is perfectly true that the law is *also* important as a plan for the common good.[34] But, if we overlook the distinctive part that is played

[31] I speak here of full chattel slavery where the slave is an object of property without rights or duties.

[32] My notion of 'freedom as independence' clearly resembles the 'republican' account of freedom defended by the likes of Philip Pettit and Quentin Skinner. But it differs from their account in two connected respects: (i) 'freedom as independence' is an independently (although not indefeasibly) valuable *aspect* of freedom, but is not offered as an *alternative* to the standard liberal account of freedom in terms of the extent, number or value of options; (ii) as a consequence of the preceding point, and unlike the republican theorists, I do not claim that laws which are grounded in defensible reasons do not abridge freedom (they abridge 'freedom as available options' while respecting, to the extent that they are laws, 'freedom as independence'). See Pettit 1997; Skinner 1998.

[33] A system of rules that excluded all scope for optional conduct would be impossible to comply with.

[34] See Finnis 2011.

in the common good by the idea of freedom as independence, we will be unable to see why the common good must be pursued by law, rather than by some other form of planning and governmental coordination.[35]

Doctrinal Scholarship

'Law' is an idea we live by. It is an idea that orients the conduct of judges, of legislators and of citizens. It forms part of our general culture and moral fabric. For that reason, we should not think of legal theory as focusing exclusively upon the technical discourse of lawyers. Nevertheless, that technical discourse is importantly salient within our form of association, and we must be careful to appreciate the real significance of its enduring features.

One such feature is the existence of a tradition of scholarly commentary upon the law. This tradition is of great antiquity, although it is perhaps not quite as old as law itself. In the common law world it has often been debased into the mere production of textbooks for students, or handy manuals for practitioners. But, at its best, it represents an important constituent of a fully flourishing legal system. For the existence of a refined tradition of legal scholarship can ensure that individual legal enactments or decisions, when placed within the fertile soil of legal scholarly thought, blossom forth in a complex tracery of rights and principles. It is fundamental to such doctrinal scholarship that it strives to present the law as a systematic body of rights and duties, powers and potential liabilities. In this way, the propositions offered as statements of law by the doctrinal scholar inevitably go beyond anything that can be justified by a simple and unmediated appeal to the source-based materials of statute and precedent. Statutes and precedents may have an effect in altering the law: but their law-creating effect is a matter for intellectual debate and reconstruction, not a simple matter of reporting the wording of statute or judgment.

Without the collectively sustained practices of systematic doctrinal analysis, the claim of judges to discern the correct legal meaning of this or that provision would be an empty pretence. But legal scholarship, at its best, seeks to ensure that every legal fragment acquires a rich and

[35] See Simmonds 2012: 255.

determinate meaning from its relationship with all the other legal fragments. And, ultimately, they acquire this meaning precisely from the feature that makes them law in the first place: their membership in a system that approximates to the ideal of full compliance with the eight desiderata.

One version of legal positivism insists that the law consists of rules identified by their source. The theory then adopts various contrivances to explain the fact that judicial statements of the law frequently go beyond anything that can be found in such sources. The judge, we are told, is empowered by law to resolve penumbral cases in which the law does not itself yield a determinate answer; and this power is a 'directed power' which can properly be exercised only in certain ways and on certain sorts of grounds.[36]

But none of this is a good fit for the practices of legal scholarship. Legal scholars (as opposed to judges) enjoy no special legal powers; nor does the law direct them in the exercise of their craft. Rather, they live by a notion of law that is clearly not restricted to (although it partly depends upon) source-based rules. And it is such ideas of law, central to our form of association (of which legal scholarship is an important part) that we are trying to understand.

How good a fist can we make of understanding legal scholarship within the theory of law that I am advocating? Considerations of space require me to be brief, but that brevity is facilitated by the fact that I have addressed some of these matters elsewhere:

(i) The requirement that the law should, so far as possible, be stable through time provides us with good reason to seek, beneath the perhaps abruptly changing surface of the law, certain enduring and slowly evolving principles.[37]

(ii) A judge who acts from a duty of fidelity to the idea of law has good reason to decide penumbral cases by reference to standards of justice; and, given the absence of any discernible boundary between clear cases and penumbral cases, this can only be achieved by striving to construe all the laws as just, so far as possible.[38]

[36] Raz 1994: chapter 10. [37] See Simmonds 2013a: 271–274.
[38] See Simmonds 2007: 195–198.

(iii) In consequence of (i) and (ii), the materials of statute and precedent should be construed, so far as possible, as attempted articulations of a general coherent conception of justice.
(iv) In consequence of (i), (ii) and (iii), we may say that the idea of law (the idea to be advanced by those who act on a duty of fidelity to the idea of law) is the idea of a system of rules embodying an evolving but coherent conception of justice. Doctrinal legal scholarship is an exposition of the law, on that understanding of law's nature.

We see here an illustration of what Collingwood calls 'new determinations', taking us beyond Fuller's minimum specification of the concept of law, 'each implied in what went before, but each introducing ... qualitative changes as well as additions and complications'.[39] And we see also an illustration of how careful attention to human practice can alert us to aspects of our values that would not otherwise be obvious. Governance by published prospective rules leads us to an understanding of the value of freedom as independence. But, once we have seen that this is the value that gives importance to such a form of governance, we also come to understand that the (otherwise puzzling) practices of doctrinal legal scholarship are themselves to be accounted for by reference to the same value.

Thus, seeking to explain the point of general doctrinal theories of areas of law, Michael Moore writes that 'the very virtues that give point to having a legal system are served' if such doctrinal theories 'are regarded as part of the law'. Moreover, he explains why doctrinal theories cannot advance the rule-of-law virtues unless they go beyond the conclusions entailed by low-level, source-based rules. Unfortunately, Moore misidentifies 'the rule of law virtues' as being 'predictability' and 'treating like cases alike'.[40] But his general point is entirely sound.

Friendship and Reflexivity

It may seem odd to suggest that legal thought is guided by reflection upon the nature of law. But it should not seem odd, since in another context we are quite familiar with that form of reflexivity. Significantly, the context is

[39] Collingwood 1933: 100–101. [40] Moore 1997: 11–14.

one involving a form of human association that, like law, has long attracted philosophical attention; and, like law, it exhibits the type of structure that is presupposed by Collingwood's idea of the method of inquiry 'repeatedly used throughout the history of philosophy'. I speak of the relationship of friendship.

Discussions of friendship may have faded from the philosophical agenda in recent times, in a way that the inquiry into law has not, but it still merits our attention.[41] Those who are friends will, most of the time, act with an easy natural affection towards each other. But it is an important feature of friendship that, from time to time, in difficult circumstances, one will need to ask oneself a question along the lines of 'what would a true friend do in these circumstances?' The appropriateness of asking that question is central to the relationship, and it is this reflexivity within the relationship of friendship that makes its nature a philosophical puzzle.

Consider the following observation from Kant's *Lectures on Ethics*:

> When therefore Socrates remarks 'My dear friends, there are no friends', he implies that there is no friendship that fully conforms to the Idea of friendship. And he is right, for any such absolute conformity is impossible; but the Idea is true.[42]

This observation expresses very well both the structure of Platonic thought and the nature of friendship, as a relationship oriented towards an ideal. Friendship exhibits a large number of characteristic features, such as the concern that friends feel for each other's well-being, their enjoyment of each other's company, and so forth. But one essential feature of friendship is that the friends sometimes act in a way that treats their relationship as intrinsically valuable (e.g. we may reproach our friend by asking 'Does our friendship mean nothing to you?') and as creating special obligations that are to be identified by reference to an understanding of the nature of friendship. The philosophical problem of friendship arises from reflections of this sort: reflections that are internal to the practices composing each instantiation of the relationship. It is an inquiry into the nature of the ideal

[41] As John Finnis points out, 'there is no possibility of understanding the classical tradition of "natural law" theorizing . . . without first appropriating the analysis of friendship in its full sense'. Finnis 2011: 141.

[42] Kant 1930: 202. The remark 'My friends there are no friends' has sometimes been attributed to Aristotle (e.g. by Diogenes Laertius).

suggested by, and implicitly pursued within, the relationship of friends. Such reflections may, as a kind of by-product, yield certain taxonomic conclusions (and in this respect also they resemble the conclusions of inquiry within the philosophy of law), enabling us to distinguish friends from colleagues. But the production of this taxonomy is not the core aim of the inquiry, nor is it the feature that gives the inquiry its philosophical character. The philosophy of friendship is an attempt to deepen our understanding of the ideal towards which the conduct of friends is implicitly oriented. It is an aspect of the Socratic inquiry into the way we ought to live, not a classificatory adjunct to social science. The analogy with law is, I hope, now becoming obvious.

The assertion that Kant attributes to Socrates is, of course, intended to highlight the superficial appearance of paradox within the thesis that Kant then goes on to clarify: friends count as such by their approximation to, and orientation towards, an ideal that their relationship can never fully realize. The idea of friendship is therefore a practical reality both in the sense that it ought to guide our conduct and in the sense that the daily realities of the world around us (the existence of friends) cannot be properly understood except by reference to that idea. The general structure that is exhibited here is of critical importance for jurisprudence, where the idea of approximation to an unattainable (and inexhaustibly rich) ideal proves to be the key to understanding what Hart calls 'the general framework of legal thought'.[43] Unfortunately, that general structure seems to be greeted with total incomprehension by contemporary legal theorists. They see only the surface paradox of saying 'My friends, there are no friends', and fail to discern the deeper truth that, in regarding someone as my friend, I implicitly compare our relationship to an unattainable, and less-than-fully-understood, ideal.

Thus we find Raz dismissing the idea that the *form* of law (understood as that without which it would not be law) can be an *ideal* for law. He tells us that 'If it is part of the form of the law, then law conforms to it, or it would not be law'.[44] One can imagine Raz prosaically pointing out to Kant that, if Socrates is addressing his friends, he must be mistaken in saying that there are no friends. Perhaps Tony Honoré was experiencing similar difficulty in

[43] Hart 1961: Preface.

[44] Raz 1992: 320. See also Matthew Kramer's claim that my own theory of law's nature leads to the conclusion that law does not exist: Kramer 2007: 106–107.

grasping this familiar motif of the western philosophical tradition (without which, much of that tradition is simply incomprehensible) when he asserted that legal theory may be looked at 'from two different points of view': on the one hand 'it may be thought of as the enterprise of describing those conditions which are necessary to the existence of laws'; while, on the other hand, 'it may be conceived as the advocacy of political and moral ideals within the framework of a convention which requires them to be put forward as versions of the meaning, definition, or function of law'.[45] On reading this we might at first wonder whether Honoré has really grasped the possibility that these two activities, when properly understood, might actually form a single united intellectual enterprise. But the important feature to notice is his impoverished (and, frankly, quite odd) conception of the second activity. Honoré sees not an inquiry into the nature of a mode of human association, but a form of 'advocacy' which is (for some undisclosed reason) conducted within a puzzling, misleading and seemingly pointless 'convention'.

Aberrations such as these, within the work of influential modern writers, point to a rift of incomprehension that has opened up between modern jurisprudence and the older tradition of philosophical thinking about law. The rift is significant, and not simply because it currently obstructs our understanding: it is, in itself, the expression of some profound changes in our moral self-understanding. I have discussed these matters elsewhere and will not reproduce here what has already been said.[46] Suffice it to say that it is now common to endorse without question a metaphysical outlook wherein moral principles come to be thought of as entirely inward or abstracted from the diurnal realities of human practice and association. At the end of this intellectual path is the conversion of ethical life into an empty aesthetic posture. But, *en route* to that end, the very idea of coming to understand a moral ideal by reflecting upon an actual human institution begins to seem like a fundamental confusion. As a result of this, although the enterprise of jurisprudential inquiry into law's nature continues, it continues in a weird and zombie-like form. Since the subject is regularly wracked by bouts of agonized uncertainty about its own status, we may well wonder whether its most prominent practitioners secretly fear that they may be inhabiting a corpse.

[45] Honoré 1987: 32. For discussion see Simmonds 2007: 56–59. [46] See Simmonds 2013b.

Yet, if we can view the history of intellectual labour in an appropriate light, perhaps the dead may live once again.

Understanding Ourselves

It has sometimes been said that no-one would fall in love if they had not come across the idea of love. Such an observation is potentially very misleading, but nevertheless contains an important element of truth. The idea of love was presumably devised in an attempt to make sense of experience, not in abstraction from experience. Yet it would be a misunderstanding to see the idea as simply descriptive, or as classificatory of relationships. For a relationship that is appropriately conceived of by the participants in terms of love may, by that very fact, be altered and enriched. In such circumstances the realization that one loves and is loved is both a recognition of reality and a transformation. A grasp of the idea is an integral part of the experience itself. And our understanding of the idea may be enriched by experience: new dimensions of the value of love may be revealed by the diverse manifestations of love that we find in our actual experience of human relationships. Thus the institutions and forms of association that emerge in human communities involve a dialogic relationship between actor and product, value and practice. We act (perhaps unreflectively) and then reflect upon what is revealed by our collective action. For example, weariness with religious conflict leads us to a series of compromises: yet we discover in the result the intrinsic values of tolerance, religious liberty, and the abstract secular state.[47] Or we articulate our traditional patterns of mutual reliance in the form of explicit rules (perhaps with a view to reducing needless dispute) and the upshot reveals to us aspects and possibilities of freedom that we could not have anticipated.[48] Or we discover in our inherited constitutional arrangements and juridical ideas a coherent value of 'public reason' that is best understood by an otherwise counterintuitive intellectual detachment from some of our most fundamental beliefs.[49]

We understand ourselves, in large part, by reflecting upon the shared world of practices and values to which our actions have given rise. Our most significant forms of association can be understood as essentially

[47] Hegel 1821: section 270. [48] Simmonds 2007: 185–186. [49] Rawls 1993.

oriented towards ideals from which they may always to some extent fall short, and our knowledge of which can always be deepened and extended by experience and reflection. It is precisely this that explains the otherwise puzzling status of both political philosophy and jurisprudence: inquiries which seek to understand the nature of existing institutions (the polity, the rule of law) while simultaneously clarifying the values that we believe those institutions ought to serve.

Suppose that one were to attempt a rational reconstruction of the nature of the political community, by imagining the emergence of political communities from a pre-political 'state of nature'. If one tried to be true to the moral phenomena, the simple contractual view (portraying the polity as a cooperative arrangement to satisfy pre-political desires[50]) would need to be significantly modified even if it was not abandoned altogether. At a minimum it would be necessary to echo Aristotle's observation that, while the polity originates in 'the bare needs of life', it continues in existence 'for the sake of a good life'.[51] Today, the notion of 'the good life' has been debased in popular speech until it is synonymous with 'the highly pleasurable life', so that a modern reader might take Aristotle to be contrasting the satisfaction of 'bare needs' with the provision of luxury. But we would do better to read Aristotle's reference to 'a good life' as suggesting a meaningful life: a life that we regard as expressing some fundamentally significant aspect of what it is to be fully human. Nor does the good polity facilitate such a life so much as call it into being, by providing the framework within which its constitutive ideas possess a sense. We transform our nature and importance by the political and juridical practices that we construct.

Practical reason is grounded in human flourishing or well-being. Perhaps (although this strikes me as somewhat unlikely) it is possible to offer an adequate account of that flourishing in the form of a list of basic goods.[52] But, however we understand such notions of well-being, it seems clear that flourishing lives are possible only within the context of

[50] See the contribution of Glaucon in Plato's *Republic*, 358c–359b.

[51] Aristotle, Politics, Book 1, 1252a30. Cf. Plato, *Republic*, 369b.

[52] Finnis 2011: chapters 3–4. The search for a list may be motivated by the erroneous belief that genuine knowledge is always in principle articulable. In doubting the final adequacy of any such list it is not my intention to deny that a list may have a pragmatic value in guiding us into practices from which the nature of human flourishing may be more deeply understood.

communities where conduct is oriented around and towards more distinctively social and political values. Indeed, the way of life of any wise community may best be understood as a delicate ecology of acknowledged but imperfectly understood values, with each value deriving its meaning from its relationship to a more complex web of ideas and practices. The problem stemming from the plurality of values is not (as is often assumed) primarily one of agonistic struggle between distinct ideas, each of which possesses its own integrity and lays upon us its unconditional commands. Nor should we conclude that seemingly distinct virtues are ultimately dependent upon a single undifferentiated notion of 'good'. Rather, the problem is one of the mutual dependency of our orienting ideals. The extent of that dependency is never clear, thereby creating limitless scope for dispute concerning the true significance of each of our core values. Each value suggests the possibility of its realization being extended further, with potentially transformative effect. But the transformation thereby wrought may prove to be much more far-reaching than any mere shift in the balance between discrete requirements, for the meaning of each ideal can depend upon the presence and the authority of its neighbours. Too great a concern for loyalty may erode personal independence; and, when personal independence retreats, we find that loyalty has not extended its rule so much as transformed itself, becoming mere servility. Without mercy, justice does not become more perfect but instead reveals the lineaments of cruelty. Without justice, civility becomes hypocrisy. In this way all such ideals are potentially misleading abridgements of a primary reality to be found in the concrete ethical life of the community. As Michael Oakeshott observes, 'Moral ideals are a sediment: they have significance only so long as they are suspended in a religious or social tradition, so long as they belong to a religious or social life'.[53]

The mutual dependency of values within a concrete tradition of thought and practice is frequently misunderstood, even when it is not confused with value pluralism. Such misunderstanding can license a chain of confusions all tending to reinforce the traditional unqualified picture of

[53] Oakeshott 1962: 36. Consider, for example, the way in which Hume is able to portray as absurd such 'monkish virtues' as self-denial, humility, silence and solitude, by abstracting them from the religious outlooks and traditions which give them their point: Hume 1751: section IX, Part I. See Norman 1978. See also Darwall, 2013: 9.

positive law's relationship to a higher law, or to independent moral standards. On discovering, for example, that law may forfeit its value when conjoined to truly gross injustice, we are inclined to conclude that law's value is therefore 'contingent' upon its compliance with justice; and that, in circumstances when the law retains its value, its value is derived from its compliance with justice, rather than being 'intrinsic' to legality itself. Such distinctions between inherent and derivative goods are problematic, to say the least.[54] Our familiar guiding ideas serve to identify only aspects of a complex mode of association that is partly realized and partly envisaged as a possibility, but which cannot be grasped in abstraction from the vocabulary of ideas and practices that render it intellectually accessible. In this context, an insistence on searching for goods that are invulnerable to contingency inevitably sends one on a flight into abstraction, with the foreseeable result that the familiar world of human association is stripped of enlightening moral significance.[55]

If our core political values exhibit a close mutual dependency, there is also a similar dependency between our values and our institutions. And, if (as I have suggested) our misunderstanding of the mutual dependency of values launches us on a flight into abstraction, it also tends to obscure the close connection between value and practice.

One aspect of the dependency has recently become familiar, largely as a result of the work of John Finnis.[56] We find ourselves asking what law would be without justice; or what the family would be without love; or what the university would be without an overriding concern for truth. Such questions are not robbed of their power by our knowledge that there are unloving families, unjust laws and management-driven universities: for such evident facts derive their character precisely from their relationship to the ideal (they are watered down or corrupted versions of what they claim to be).

Yet the institutions making up the social world seem entangled with values in ways that go beyond this now more or less familiar point. For example, our grasp of a distinctive value requires an understanding of the relevant value-concept; and considerations associated with Wittgenstein's rejection of the possibility of a private language suggest that the availability of such a concept requires the existence of shared practices of judgement. A further, and perhaps more pertinent, facet of

[54] See Geuss 2001: 126. [55] See Simmonds: 2013b. [56] Finnis 2011: chapter 1.

the problem is (once again) revealed by Finnis's work. For Finnis points out that human possibilities must be recognized *as* possibilities before they can be seen as goods to be pursued; and, 'since the goods of human existence are each open-ended, the practical knowledge of basic human goods will outrun, by anticipation, the theoretical knowledge it presupposed'.[57]

Thus, not only is it frequently the case that we cannot understand the institution without some grasp of relevant values, but it is also often true that we cannot understand a value without knowledge of the institution which typically seeks its realization.[58] This fact can at first seem hard to square with the critical leverage that values must exert. For values stand in potential judgement upon our institutions, in a way that seems to require their independence from the facts of settled practice: in the absence of such independence they may appear to be no more than an uncritical sanctification of the status quo. But values must also be exemplified or intimated within established forms of conduct. In a world without the practices of scholarship and science, the value of truth might be understood simply in the impoverished terms of the prohibition on lies. Love might seem but a transient mood without the enduring and acknowledged commitments that give it substance. Without law, civil freedom would be impossible; and justice would lack the determinacy and the assurance of protection that is necessary for secure entitlement. Indeed, without some institutional expression (be it a court of law, or a dispute-resolving meeting of village elders), justice might be wholly absent, even as an idea.

Endeavouring to acknowledge the critical tension that can exist between our values and our practices, some philosophers have been tempted to portray values as akin to visitors from another world, reflecting the demands of pure reason, or a metaphysical vision of the good that is remote from the commonplace. But, while moral and political values are not works of deliberate artifice, they are nevertheless works of human creativity and imagination, akin in some respects to works of art. Artistic creation does not involve the concrete realization of a conception that was first fully formed in abstraction[59] but a dialogue conducted, at every stage of

[57] Finnis 1998: 94. [58] See also note 26 above.

[59] 'A poem is not the translation into words of a state of mind . . . Nothing exists in advance of the poem itself, except perhaps the poetic passion.' Oakeshott 1962: 72.

production, between the creator and the work of art: between the particular embodiment and the idea that is suggested within that embodiment. In a somewhat similar way our shared experience of action, and our collaborative reflections upon that experience, contribute to the enrichment of our values and our ways of relating to one another. A value understood becomes a platform for the imaginative exploration of further possibilities.

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The Moral Impact Theory, the Dependence View and Natural Law

11

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The central idea of the Moral Impact Theory is that legal obligations are those genuine obligations that obtain in virtue of the actions of legal institutions. (If we formulate this idea in terms of moral obligations, the paradigm of genuine obligations, we get the view that legal obligations are those moral obligations that obtain in virtue of the actions of legal institutions.) What philosophical question does the Moral Impact Theory seek to answer? Facts about the content of the law – for example, the fact that, under California law, contracts for the sale of land are not valid unless committed to writing – are not among the most basic facts of the universe. Rather, such *legal content facts* – *legal facts*, for short – obtain in virtue of other, more basic facts. A core question in philosophy of law is how to explain, at the most fundamental level, the obtaining of legal facts in terms of more basic facts. The Moral Impact Theory is an answer to this question.

The Moral Impact Theory thus offers an account of the more basic facts and how these more basic facts together make it the case that the legal facts obtain. Consider the issue of whether a statute's contribution to the content of the law is, say, the 'public meaning' of the statute, the content of the legislature's communicative intention in enacting the statute, the content of the legislature's legal intention,[2] the principles that would have best justified the enactment of the statute, or some other factor or combination of factors. What impact, if any, the enactment of a statute has on our genuine obligations depends on reasons that derive from relevant values such as democracy and fairness. The benefits of, for example, coordination, avoidance of harm, stability and the peaceful settlement of disputes yield many other moral reasons that bear on a statute's impact on obligations. On the Moral Impact Theory, very roughly, a statute's impact *on genuine*

[1] I am very grateful to Andrea Ashworth and Nicos Stavropoulos for valuable comments.

[2] For a brief explanation of what legal intentions are, see below pp. 302–303 & nn. 53–54.

obligations constitutes a statute's contribution *to the law*. Therefore, a statute's contribution to the content of the law is determined, at the fundamental level, by all relevant values. More generally, the Moral Impact Theory maintains that, at the fundamental level, what the determinants of the content of the law are – and how they contribute to the content of the law – is determined by all relevant values.

The Moral Impact Theory fits naturally into a particular background understanding of what law is for. On this understanding, law is supposed to improve the normative or moral situation by changing our obligations, powers, rights and so on. In order to fulfil this aim or function, legal institutions seek to change our genuine obligations (powers, rights and so on) in certain characteristic ways. Just as individuals do things, such as making promises and giving consent, that affect their genuine obligations, so legal institutions take actions, such as enacting statutes and regulations and deciding cases, that have a more general impact on genuine obligations. According to the Moral Impact Theory, roughly speaking, the genuine obligations that come about in these ways are legal obligations.

The Moral Impact Theory is a member of a family of theories, which I call the *Dependence View*. (I use this term because the central idea is that legal obligations constitutively depend on moral obligations.) Members of the family vary along several dimensions; for example, they take different positions with respect to which moral or normative obligations constitute legal obligations.

In recent years, there has been a surge of interest in the Moral Impact Theory and its cousins in the Dependence View family – *Dependence Theories*, for short.[3] Elsewhere I have argued for the Moral Impact Theory and the Dependence View more generally, developed the theory and responded to common objections.[4] Rather than duplicating those discussions here, this chapter takes on several other tasks. Section 1, after initial clarifications and discussion of dimensions along which Dependence Theories vary, provides an intuitive elucidation of the Moral Impact Theory. Section 2 situates the theory with respect to several themes

[3] See Berman forthcoming; Dworkin 2011; 2013; Greenberg 2004/2006; 2006; 2007; 2011a; 2011b; 2014; Hershovitz 2015; Sager 2016; Schaus 2015; Stavropoulos 2012; 2016; Waldron 2013.

[4] See my works cited in the previous note.

and positions associated with the natural law tradition. Section 3 addresses a common obstacle to understanding the theory. Section 4 briefly concludes.

1. Elucidating the Moral Impact Theory

In this section, I begin by clarifying two aspects of the Moral Impact Theory: the nature of the obligations to which the theory appeals and the level at which the theory's account operates. First, the Moral Impact Theory maintains that legal obligations are the *genuine* practical obligations that obtain in virtue of the actions of the relevant institutions. To be clear, it is not that there are two kinds of obligations, genuine ones and non-genuine ones. Rather, the point of the qualification *genuine* is to contrast my usage of *obligation* (and of other normative terms, such as *reason, requirement, right* and so on) with what we might call the sociological usage. A sociologist might say, for example, that Jews are obligated not to eat meat with milk. Here, the sociologist does not intend to take any position on whether Jews are in fact under an obligation not to eat meat with milk. The sociologist is merely reporting that Judaism takes there to be such an obligation. Roughly speaking, to say that there is an obligation to Φ in the sociological sense is to say that, on the best understanding of the relevant group's practices, the group regards Φing as obligatory.[5] This may not be as simple as a majority of the group's believing that Φing is obligatory or the group's authoritative texts' so specifying. For the group may have sophisticated practices that are best understood as recognizing an obligation to Φ, despite what members of the group believe or authoritative texts say. For convenience, rather than saying that there is an obligation in the sociological sense of the term, I will say that there is a *paper obligation*. It bears emphasizing that mere paper obligations are not obligations at all, for the fact that a group's practices are best understood as recognizing an obligation to Φ does not make it true that there is such an obligation.

[5] A claim that there is an obligation in the sociological sense has to be relative to the perspective of a group. It is often clear from the context which group's perspective is being assumed. Also, it is worth noting that a group may take an obligation to fall on agents who are not members of the group, and need not take an obligation to fall on all members of the group.

Genuine obligations are simply real obligations – they are genuinely binding. Moral obligations are the paradigm of genuine practical obligations (though a moral sceptic could hold that moral obligations are not genuine). There may be other kinds of genuine practical obligations. For example, some theorists hold that there are prudential obligations, and, depending on how narrowly the moral domain is understood, there may be other practical obligations that are not moral, such as all-things-considered normative obligations. I understand the moral domain broadly, with the consequence that, on my view, genuine practical obligations and moral obligations are roughly interchangeable for the purposes of the Moral Impact Theory.[6] Consequently, I will not be careful to distinguish between them in this chapter, sometimes writing of moral obligations and sometimes of genuine obligations.[7] Readers who take genuine obligations to be importantly different from moral obligations can substitute the former for the latter throughout. I call the theory *'The Moral Impact Theory'* rather than, say, *'The Genuine Impact Theory'* because the former name more effectively conveys the central idea in a few words.

(The content of the law includes not just obligations, but also powers, rights, privileges and so on. Just as the Moral Impact Theory takes legal obligations to be the moral obligations that obtain in virtue of the actions of legal institutions, it takes the content of the law more generally to be that part of the moral profile[8] that obtains in virtue of actions of legal institutions. For convenience, however, I often write simply of obligations.)

Many legal theorists and lay people alike assume that legal obligations are merely paper obligations. On this assumption, to say that there is a legal obligation in the United States to file one's federal tax return by April 15 is to say that the relevant legal practices and materials recognize such an obligation. By contrast, the Moral Impact Theory takes legal obligations to be genuine obligations.[9]

[6] See Greenberg 2011a: 82–84; 2014: 1306–1308.

[7] I will generally omit the qualification *practical*, as practical obligations are the only ones relevant to the discussion. Epistemic obligations are an example of non-practical obligations.

[8] I use the term 'moral profile' for the panoply of moral obligations, powers, rights and so on.

[9] In what follows, I will use terms such as 'obligation', 'requirement', 'standard' and 'norm' for genuine obligations, requirements, standards and norms, not merely paper ones.

We come now to the second clarification, which concerns the level at which the Moral Impact Theory offers an account of the determination of legal content. I said at the start that the Moral Impact Theory seeks to give an explanation of the obtaining of legal facts *at the most fundamental level*. This idea should be familiar from discussions of inclusive legal positivism. For example, on H.L.A. Hart's positivist theory, the content of the law is determined at the fundamental level by convergent practices of judges and other officials – what Hart calls the rule of recognition.[10] At this fundamental level, according to Hart, moral facts can play no role. But Hart maintained that moral facts may play a role in determining the content of the law at a less basic level, for the rule of recognition may specify that moral facts do so.[11]

The notion of how the content of the law is determined at the fundamental level is crucial to understanding the Moral Impact Theory and its competitors. Suppose that the content of the law is determined at the fundamental level by the convergent practice of judges and other officials in the way that Hart's positivism claims. To say that this is how the content of the law is determined at the most fundamental level is to say that *there is no further factor that determines that the content of the law is determined by the practice of judges*. For example, it is not that there are moral reasons that make it the case that the practice of judges is what matters. Rather, the most basic explanation of why statutes, judicial decisions and the like have the impact that they do on the content of the law is that judges have a practice of treating those items as having that impact.[12]

[10] For brevity, I will usually write 'the fundamental level' rather than 'the most fundamental level'.

[11] Hart 1994: 250–254.

[12] There is a deep question concerning what kind of philosophical explanation, if any, there can be of why the content of the law is determined, at the fundamental level, in the way that it is. Such an explanation would have to appeal to factors that are not themselves determinants of the content of the law. For example, assuming that Hartian positivism is true, suppose that a putative explanation of why the practice of judges is the fundamental determinant of the content of the law appealed to a certain factor. That factor could not be a determinant of the content of the law, for, if it were, it would be more fundamental than the practice of judges. I hope to address the question raised in this paragraph elsewhere, but for present purposes I set it aside. I will assume throughout that the kinds of explanations that I am discussing of how the content of the law is determined are ones that appeal to determinants of the content of the law. There can be no explanation of this sort of why the content of the law is determined, at the fundamental level, in the way that it is.

That the content of the law is determined in a particular way at the fundamental level is consistent with its being determined in a different way at the surface level of ordinary practice.[13] Suppose, again, that Hartian positivism is correct. And suppose that the practice of judges in a particular legal system is to treat statutes and other relevant materials as making the contribution to the content of the law that is supported by all of the relevant normative, including moral, factors. These normative factors therefore determine, at the surface level, the relevance of statutes and the like to the content of the law. The explanation of why the content of the law depends on normative factors is ultimately the convergent practices of judges. It is because of these practices that normative factors have the relevance that they do, not the other way around.

Of course, the converse is also a possibility. Suppose that, at the fundamental level, the content of the law is determined in the way specified by the Moral Impact Theory: roughly, the actions of legal institutions have the impact that is supported by all of the relevant values. But suppose that the upshot of these values in the circumstances of the legal system is that the actions of legal institutions should have the impact that is given to them by the convergent practice of judges (perhaps because of the importance of stability and protecting expectations). In other words, in this case, Hartian positivism is false – the practice of judges is not the fundamental determinant; rather, the fact that the practices of judges have the decisive say at the surface level is determined by the relevant values.

It bears emphasis that to say that the content of the law is determined in a particular way in a legal system (whether at the surface level or the fundamental level) is not to make a claim about what participants in the system do, such as a claim about how they in fact go about ascertaining what the content of the law is. Rather, it is to make a claim about what *makes* the content of the law obtain. A claim about how the content of the law is determined is therefore closer to a claim about how it would be legally correct to go about figuring out what the law is than to a claim about how judges actually do it. The point especially needs to be emphasized at the surface level. For example, suppose that the content of the law at the fundamental level is determined by moral values, and those moral values make it the case that, at the surface level, a statute's contribution to

[13] There can be intermediate levels between the fundamental level and the surface level, but I will set aside this complication, as it should not affect the main points.

the content of the law is determined by its 'public meaning'. Nevertheless, judges may in practice mistakenly treat a statute's contribution to the content of the law as determined in some other way.

One consequence of the foregoing discussion is that, for at least two reasons, one cannot straightforwardly read off which fundamental theory of the content of the law is correct by looking at how lawyers and judges work out what the law is. First, judges and lawyers may be wrong about how the content of the law is determined. Second, even if their everyday practice accurately reflects the way in which the relevant factors contribute to the content of the law at the surface level, the way in which the content of the law is determined at that level may be very different from the way in which it is determined at the fundamental level.

With these clarifications out of the way, we can turn to the Dependence View. I indicated above that the Moral Impact Theory is one member of a family of theories. The underlying idea that unites these Dependence Theories is, very roughly, that the content of the law is constituted by that part of the moral profile that obtains in virtue of the actions of legal institutions.[14] Different Dependence Theories develop this idea in different ways.

Most importantly, Dependence Theories differ with respect to which part of the moral profile constitutes the content of the law. The actions of legal institutions result in many moral obligations that are intuitively not legal obligations. In one kind of case, legal institutions put people in danger, thereby generating a moral obligation to help those people. More generally, legal institutional action that makes the moral situation worse may thereby generate obligations to remedy, oppose or otherwise mitigate the consequences of the relevant action. Call this general way of changing the moral profile *paradoxical* (because the resulting obligations run in the opposite direction from the standard case). A theory that had the consequence that paradoxically generated moral obligations constituted legal obligations would be very implausible. In another kind of case, legal institutions' actions lead through an extended chain of events to moral obligations that are intuitively too far downstream to qualify as legal obligations. For example, the actions of legal institutions in setting up

[14] For convenience, I continue to write of the *moral* profile and of *moral* obligations, but as I explained above, Dependence Theories can maintain that the relevant obligations are not moral obligations, but, genuine practical obligations of some other kind.

a tax system might lead me to promise to help you fill out your tax returns. As a result of my promise, I may have a moral obligation to help you. Although this moral obligation traces back (rather indirectly) to the actions of legal institutions, intuitively it is not brought about in the right way to constitute a legal obligation.[15]

The Moral Impact Theory's approach to this issue begins from an intuitive notion that the moral obligations in question are not brought about in the right sort of way to constitute legal obligations. Intuitively, for example, bringing about changes in the moral profile paradoxically is not the way in which legal systems, by their nature, are supposed to change the moral profile. Thus, the Moral Impact Theory holds that there is a distinctive way or ways in which legal institutions are, by their nature, supposed to create obligations. Call this *the legally proper way*.[16] The obligations that come about in this way constitute legal obligations. Obligations that come about in other ways do not.

In order to develop a principled account of how the law is supposed to change the moral profile, the Moral Impact Theory appeals to law's essential properties, including what law, by its nature, is supposed to do. For example, as mentioned above, the Moral Impact Theory fits naturally into a background view that the law, by its nature, is supposed to improve the moral situation by solving certain kinds of moral problems. If law, by its nature, is supposed to improve the moral situation, then a method of changing the moral profile that works by making the situation worse, thereby creating reasons to undo (or mitigate) what a legal institution has wrought, is a defective way of generating obligations.[17] I have not

[15] The issue raised in this paragraph concerns moral obligations that come about as the result of legal institutions' actions, but are not legal obligations. There is also a converse issue. Legal obligations not to assault, murder and rape, for example, seem to correspond to pre-existing moral obligations. So it might be objected that the relevant moral obligations do not obtain in virtue of the actions of legal institutions. For discussion of this issue, see Greenberg 2014: 1319–1321.

[16] This terminology should not be taken to suggest that the relevant way of creating obligations involves taking actions that are legally permissible or legally required. Rather, 'the legally proper way' is just a label for the way in which obligations have to be generated in order for them to constitute legal obligations.

[17] Such a method could, in a particular case, ultimately improve the moral situation overall, for example by producing a backlash against the legal system, or even a revolution. The paradoxical method is not a reliable way of improving the moral situation in *normal* circumstances, however. In general, accounts of what makes an object or system with a point or function defective depend on a distinction between normal and abnormal

offered a complete account of the legally proper way, but I have illustrated the idea that appeal to law's nature can do the necessary theoretical work, excluding putative counterexamples in a principled way.[18] Later in this section, I give examples of the legally proper way of changing the moral profile.

In a brief final chapter of his late work, *Justice for Hedgehogs*, Ronald Dworkin apparently adopts a version of the Dependence View.[19] The discussion is highly compressed, but he seems to take the position that legal obligations are those moral obligations that courts and similar institutions ought to enforce with coercion:[20] 'legal rights are those that people are entitled to enforce on-demand, without further legislative intervention, in adjudicative institutions that direct the executive power of Sheriff or police'.[21]

Unfortunately, Dworkin's argument for this view – *the Judicial Enforcement Theory* – is extremely weak. He claims that, if law and morality are separate systems of norms, then any attempt to answer the question of whether the content of the law depends on the content of morality must be viciously circular. 'Where shall we turn for an answer to the question whether positivism or interpretivism is a more accurate or otherwise better account of how the two systems relate? Is this a moral question or a legal question? Either choice yields a circular argument with much too short a radius'.[22] The two possibilities that he assumes are exhaustive are that the content of the law or the content of morality

circumstances (for the relevant type of object or system). For example, under certain circumstances, a heart with a leaky valve may be better at circulating blood than a heart without a leak. But a heart with a leaky valve is nevertheless defective because such a heart will not generally be effective at circulating blood under the circumstances that are normal for hearts.

[18] For discussion of the legally proper way, see Greenberg 2014: 1321–1323.

[19] In Section 2 below, I compare Dworkin's well-known 'law as integrity' theory of law, presented in fully developed form in *Law's Empire*, with the Moral Impact Theory.

[20] It is unclear whether Dworkin means to take the position that legal obligations are simply those moral obligations that should be enforced with coercion or the position that legal obligations are those moral obligations *that obtain in virtue of actions of legal institutions and* should be enforced with coercion. (On the one hand, he offers an illustration involving a family that seems to suggest the relevance of institutional action; on the other hand, as illustrated by the quotation in the text, he does not explicitly make reference to the relevance of institutional action.) He seems to take the former position in his posthumous article, 'A New Philosophy for International Law', *Philosophy and Public Affairs*, 41, 2, 12 (2013). For discussion, see Greenberg 2014, 1299–1300 note 28.

[21] Dworkin 2011: 406. [22] Dworkin 2011: 403.

specifies the relation between law and morality. He argues that either possibility is question-begging. There is, however, no reason to think that legal and moral norms are the only place to turn for an answer to the question of the relation between law and morality. Indeed, the question is not one that we would expect to be addressed by legal or moral norms at all, for it is not a question about what law or morality requires or permits. Rather, it is a metaphysical question about the relation between the two domains.[23] To make matters worse, having just argued that, if law and morality are separate systems of norms, any attempt to investigate their relation must beg the question, Dworkin's proposed way forward is to 'treat law as a part of political morality' – a starting point that blatantly begs the question against his positivist opponents.[24]

Not only is the argument weak, but the Judicial Enforcement Theory also suffers from the problem that there seem to be legal obligations that the courts and similar adjudicative institutions should not enforce, for example because of the institutional limitations of the courts, their relations with other branches of government, and the like.[25] Some obligations are better enforced by other branches of government or by more political means. Such obligations are not ones that people are 'entitled to enforce on-demand, without further legislative intervention'.[26]

[23] Unsurprisingly, the major philosophical attempts to answer that question have not focused on the content of moral or legal norms. Dworkin elsewhere takes a confused position that seems to deny the possibility of metaphysical or philosophical claims about morality and law that are not first-order normative claims. Dworkin 2011: 40–68. If such a position were true, it would indeed be hard to see how one could answer the question of the relation between law and morality – but the problem would not be the circularity one that Dworkin sketches in the last chapter of *Justice for Hedgehogs*.

Dworkin also suggests that an analysis of the concept of law cannot answer the question 'unless that concept can sensibly be treated as a criterial . . . concept'. Dworkin 2011: 404. But even if we granted for purposes of argument Dworkin's controversial ideas about concepts, he offers no argument that conceptual analysis is the only way to address the relation between law and morality. And his argument that law is an interpretive concept (Dworkin 1986: 31–113) is not a quick circularity argument for the conclusion that law is a subdomain of morality, but an elaborate and controversial argument for his earlier *Law's Empire* position.

[24] Dworkin 2011: 405.

[25] I make this objection in Greenberg 2014: 1299–1300 n. 28. There is a large literature on the question of when courts should not enforce legal obligations. For a seminal and powerful argument that there are legal obligations that courts should not enforce, see Sager 1978.

[26] Dworkin 2011: 406.

Moreover, an account of law should help us *explain* why courts should enforce some rights and obligations and not others. An important part of the reason why a court should not enforce, say, the moral duty not to lie is that it is not a legal duty. Indeed, it seems plausible that the fact that an obligation is not a legal obligation is, as a rule, a sufficient explanation for why a court should not enforce it. But the Judicial Enforcement account, because it explains what is law by appeal to what the courts should enforce, excludes the possibility of such an explanation. (To elaborate: suppose, with the later Dworkin, that legal duties are simply those that courts should enforce; in that case, to offer to explain why courts should not enforce the moral duty not to lie by appealing to the fact that is not a legal duty would be to offer to explain why courts should not enforce the duty by appealing to the very fact that courts should not enforce it!)

Although adherents of the Judicial Enforcement Theory cannot explain why a court should enforce an obligation by appealing to the obligation's being legal, they could do so by appealing to the obligation's tracing back in the right kind of way to legal institutional action. On the other hand, if the explanation of why courts should enforce an obligation is that the obligation traces back to legal institutional action, it is natural to wonder whether what makes an obligation *legal* is also that it traces back to legal institutional action, rather than that courts should enforce it. (I don't mean to suggest that the answer is obvious. One could coherently maintain that, though institutional origins explain an entitlement to judicial enforcement, it is the latter – and not the former – that makes the obligations legal.)

There are several options for improving on the Judicial Enforcement Theory. First, rather than saying that the relevant obligations are ones that people are entitled to enforce on-demand (i.e. that courts must enforce when requested to do so), we could say that the relevant obligations are those that courts have *pro tanto* reason to enforce. Perhaps better, we could say that the relevant obligations are those that, other things being equal, it is *permissible* for courts to enforce or that courts are *entitled* to enforce. Second, we could broaden the focus from adjudicative institutions to legal institutions generally, thus allowing for the possibility that, say, some constitutional rights are only enforceable by legislative action.

A variant of the Moral Impact Theory makes use of Dworkin's suggestion about enforcement (with improvements just sketched). According to this hybrid view, the relevant moral obligations or rights are those that it is permissible, other things being equal, for courts – or, alternatively, legal institutions more generally – to enforce *because of the way in which the obligations or rights trace back to legal institutional action*. This theory makes room for the possibility of legal obligations that courts should not enforce. And it adopts the intuitive direction of explanation, holding that the reason courts should not enforce certain moral obligations is that they lack an appropriate legal origin.

The Moral Impact Theory and the Judicial Enforcement Theory both focus on the actual moral profile and specify which part of it constitutes the content of the law. A second branch of the Dependence View family takes a fundamentally different approach, holding that the relevant part of the moral profile is that part of the moral profile that the (actual) actions of the legal institutions were *supposed* to yield. Let's call the moral profile that the actions of legal institutions were supposed to yield *the target profile*. There are a number of options for developing the idea of the target profile. For example, the target profile could be understood in terms of a counterfactual – as the moral profile that *would* have resulted from the actual actions of the legal institutions under ideal conditions. In order to develop a viable version of the Dependence View along these lines, it would be necessary to develop an appropriate account of ideal conditions. Space restrictions permit me to make only a few brief remarks.

If the legal system is supposed to solve certain moral problems by changing the moral profile, ideal conditions are ones under which the legal system or government is best positioned to change the moral profile. For example, ideal conditions will be ones under which the government is best positioned to make violence by private citizens morally impermissible, to make commitments that bind all of its citizens, to set up arrangements in such a way that fairness will require all to participate and so on. In more familiar terms, ideal conditions are conditions under which the government or legal system is maximally legitimate.

There is an intuitive way of understanding this ideal-conditions version of the Dependence View. It is natural to think that any legal system presupposes its own legitimacy. One way to make this idea more precise is this: for a legal system to presuppose its own legitimacy is for it to treat as actual the moral profile that would obtain if the system were

perfectly legitimate. So an ideal-conditions Dependence Theory can be seen as a way of spelling out what it means for the law to presuppose its own legitimacy.

I have focused on the way in which different Dependence Theories specify which obligations constitute legal obligations. There are other aspects of this issue. For example, as noted above, Dependence Theories can take the obligations that constitute legal obligations to be genuine practical obligations or some more restrictive class of genuine obligations, such as moral obligations narrowly conceived. Dependence Theories can also differ with respect to whether the relevant obligations are all-things-considered or *pro tanto* obligations.[27]

Dependence Theories can vary along several other dimensions. I will mention only that of scope. At one extreme, a Dependence Theory can purport to apply to all possible legal systems. At the other, a Dependence Theory can limit its scope to one legal system. In between these poles, the Moral Impact Theory makes a claim about a theoretically interesting class of systems that includes the legal systems of, for example, the United States and the United Kingdom. The theory makes no claim that, in ordinary usage, the term *law* or *legal system* is applied only to members of this theoretically interesting class. Nor is it part of the theory to claim that the term is best restricted to members of this class.

With these preliminaries out of the way, we can now provide an intuitive elucidation of the Moral Impact Theory. I mentioned in the introduction that the Moral Impact Theory fits naturally into a particular understanding of law. On this understanding, the law seeks to solve certain *moral problems* by changing the moral profile. In the absence of law, it would often be better if our obligations, powers and so on were different from what they are, but this change cannot come about without some kind of law-like institution.

For example, many problems cannot be solved without complex cooperation, but cooperation will often not be morally required (or practically feasible) in the absence of law. Morality plausibly includes some obligation to help others, but it does not specify exactly what help should be provided to whom. Morality generally requires us to keep promises, but it leaves a lot of questions unresolved. (Which promises are not binding? When is the obligation to keep a promise outweighed?)

[27] For discussion, see Greenberg 2014: 1307 n. 41.

Morality is arguably highly indeterminate about the conditions under which one acquires property rights and about the bundle of rights to which a property holder is entitled. Morality independent of law may allow people to acquire property rights simply be being first to stake a claim. But it would arguably be better to have a more nuanced scheme of distribution.

Pre-legal morality is especially problematic with respect to remedies. What remedy must be provided when a promise or agreement is broken, either justifiably or unjustifiably? When one person's activity causes harm to another? Morality may also allow a wide latitude for self-help, though it would be better if there were a central source of remedies and the permissibility of self-help were quite limited.

A different kind of problem is that self-interested behaviour by unscrupulous people needs to be deterred by the threat of punishment. But given the great moral importance of advance notice of punishment, the indeterminacy – or at least uncertainty – with respect to which punishment is morally appropriate for a specific wrong, and morality's unclarity about who is authorized to administer punishment, punishment is in general morally problematic without law. Another example is the need for settlement of disputes, as even well-meaning people will often disagree about the best course of action. Morality, unsupplemented by law, does not provide institutions for resolving disputes.

Legal institutions have a wide range of tools for changing the moral profile.[28] They can protect people from violence and punish those who violate others' rights, thereby making violence impermissible except in very limited circumstances. They can give notice of specified punishments for prohibited conduct, potentially making punishment permissible. Legal institutions have a variety of ways of making it likely that many or most people will participate in one solution to a problem. For example, they can create a mechanism for implementing that solution, threaten free riders with sanctions and increase the salience of the relevant solution. By making it likely that many people will participate in one solution, legal institutions can create powerful reasons for participating in that solution. Democracy provides another tool. The fact that a decision is reached by a system of governance in which people have the opportunity

[28] For discussion of these tools, see Greenberg 2014: 1310–1319 and Greenberg 2016a: 1965–1967.

to participate as equals has moral force. Thus, to the extent that the government is democratically constituted, legal institutions can generate democratic reasons.

Most legal theorists presumably would agree that legal institutions seek to create genuine obligations, not merely to create paper obligations. But, as noted above, many theorists nevertheless assume that legal obligations are paper obligations. For these theorists, when a legal institution creates a paper obligation to Φ (with respect to the legal system), it has ipso facto created a legal obligation to Φ because a paper obligation of a legal system *is* a legal obligation. If, in creating the paper obligation to Φ, the legal system serendipitously manages to create a genuine obligation to Φ, that is a good thing. But what makes it the case that there is a legal obligation to Φ is the existence of the paper obligation, which is independent of the genuine obligation.

The Moral Impact Theory is distinctive in claiming that the relevant genuine obligations constitute legal obligations. Let me illustrate with an example. Suppose that a community faces a problem for which there are multiple solutions, and there is no agreement on which solution would be better. As things are, though there is a moral obligation to help others, there is no obligation to participate in any particular scheme for solving the problem. For one thing, the efforts of many or most people are needed for a scheme to make a difference, and there is no reason to expect that enough others will participate in a particular scheme. Nothing determines which scheme is the one that people should participate in. In addition, there is no mechanism for people to join together in a common scheme.

Suppose that, in response to the problem, the legislature enacts a statute. The statute's linguistic meaning clearly designates a particular scheme, call it *scheme A*. (As there are different types of linguistic meaning, e.g. semantic content, speaker meaning, 'public meaning' and so on, we can start by assuming for simplicity that all of them pick out scheme A.[29]) As it happens, however, the scheme that becomes salient and that a majority of people are likely to participate in – scheme B – is subtly but significantly different from scheme A. This could come about in various ways, perhaps because a private company that is a dominant player in the relevant industry misinterprets the statute early on, or because a widespread

[29] For discussion of different types of linguistic meaning, see pp. 303–304 below.

psychological tendency makes it unlikely that people would adhere to scheme A. In this kind of situation, different reasons support A and B. For example, democratic reasons may militate in favour of A, while reasons of fairness, helping others and solving the community problem may militate in favour of B. Suppose that, in the circumstances, the effect of the enactment of the statute, all things considered, is to generate a (genuine) obligation to participate in scheme B, not scheme A.

What about *legal* obligation? According to a widespread implicit assumption, since the meaning of the statutory text picks out scheme A, there is a legal obligation to participate in scheme A.[30] According to the Moral Impact Theory, by contrast, there is a legal obligation to participate in scheme B.[31] It might be suggested that using the term 'legal obligation' for the scheme picked out by the meaning of the statutory text promotes clarity. But it is not clear why this is so. In the first place, we already have a term for the linguistic meaning of the statutory text; indeed, we have various more precise terms for different types of linguistic meaning. And, second, since the mere fact that the meaning of an authoritative text corresponds to scheme A does not make it the case that there is a (genuine) obligation to participate in scheme A, it is hard to see why using the term 'obligation' promotes clarity. It seems at least as clear a use of language to use the term 'legal obligation' for genuine obligations that obtain in virtue of the enactment of statutes and other such actions by legal institutions.[32]

If we consider the possibility that different linguistic meanings of the statutory text correspond to different schemes, the point becomes even stronger. Why would it promote clarity to say that there is a 'legal obligation' to participate in the scheme that corresponds to, say, the

[30] In Section 3, I discuss this implicit assumption and its relation to the Moral Impact Theory.

[31] According to Hartian positivism, the relevant legal obligation depends on the convergent practices of judges in the legal system. If, for example, the practice of judges is to respect the linguistic meaning of the text, then Hartian positivism yields the same result as the assumption that the statute's contribution is constituted by its linguistic meaning. If, on the contrary, the practice of judges is to respect the on-balance upshot of the relevant values, then Hartian positivism yields the same result as the Moral Impact Theory. And, of course, the practice of judges might be to treat some other factor or combination of factors as a statute's contribution to the content of the law. If the practice does not converge on how to resolve a conflict between linguistic meaning and the upshot of the relevant values, then Hartian positivism implies that the statute does not yield a legal obligation. See note 59 for an important qualification.

[32] See Greenberg 2014, 1304–1305.

semantic content of the text, rather than the scheme that corresponds to the speaker meaning or the 'public meaning'? It might be responded that there are reasons, for example, of democracy, why one type of linguistic meaning rather than others should have a special status. In that case, however, we need to consider the possibility that, on balance, the relevant reasons give decisive status to something other than linguistic meaning. In any case, the argument that there are reasons for giving special status to one factor or combination of factors points in the direction of something like the Moral Impact Theory, for this argument seems to presuppose that what matters is what the relevant reasons support.

2. Situating the Moral Impact Theory

In this section, I situate the Moral Impact Theory with respect to various ideas that are associated with the natural law tradition. A preliminary point is that, although there is a tradition of natural law theorizing about morality, our concern in this chapter is only with natural law ideas about *law*.

One theme associated with natural law theories of law involves normative or evaluative claims about law. A paradigm is the claim that one is obligated to obey only legal norms that meet some standard, for example, a moral or rational one. Another example is the claim that legal norms should conform to moral standards. Such claims do not purport to say anything about the nature or essence of law or legal systems, nor about what determines the content of the law; they are merely normative claims about law. These ideas therefore have little relevance to the Moral Impact Theory.

A second, more interesting type of idea involves the claim that law essentially has a moral or, more generally, normative function, aim or point. Examples of such functions or aims include that of promoting the public good; of doing justice; of ensuring that coercion not be deployed against individuals except as authorized by past political decisions; and of improving the moral situation (to be discussed below). We can generalize this kind of idea by saying that law, by its nature, is supposed to meet a certain moral or normative standard or, perhaps equivalently, that law is defective *as law* to the extent that it fall short of some such standard. (The claim that law essentially has a certain function, understood in the

relevant way, implies that law is supposed to perform that function and is therefore defective to the extent that it fails to do so.) John Finnis's claim that internally valid law is not legally authoritative 'in the focal sense' unless it is morally authoritative belongs in this category. For the claim seems to be that a legal system that does not meet a moral standard is not law in the fullest sense.

Another example of the idea that law, by its nature, is subject to a normative standard is what I have called *the bindingness thesis* – that legal norms are supposed to be binding (or, at least, that legal norms are supposed to be such that it is morally permissible to force people to comply with them).[33] It is important to understand that the claim here is not that it is good for law to be binding, but rather that it is part of the nature of law that law is supposed to be binding, and therefore that law is defective as law to the extent that it is not binding. An analogy: it is good if one's beliefs make one happy, but it is not part of the nature of belief that beliefs are supposed to make their subject happy or have the aim of doing so. By contrast, plausibly beliefs are supposed to be true, and are defective to the extent that they are not. Similarly, it would be nice if one's clock increases in value or reduces one's blood pressure, but it is no part of the nature of clocks that they are supposed to do so. But it is the function of clocks to tell time accurately, and an account of the nature of clocks that omits this function is unsatisfactory.

The idea that law, by its nature, is subject to certain standards – in particular that it is supposed to be binding and that it is supposed to improve the moral situation – is, as we will see, a natural part of the background to the Moral Impact Theory. But such ideas do not capture the Moral Impact Theory, for it is centrally a thesis about *what (metaphysically) determines the content of the law*.

A different kind of idea associated with natural law is the one often expressed by the slogan, 'an unjust law is no law at all'. Another common formulation of this idea is that there is a moral threshold test that a putative legal norm must pass in order to qualify as a valid legal norm. Such formulations imply, or at least strongly suggest, the thesis that prima facie or inchoate legal norms exist independently of anything moral, presumably because they have been authoritatively pronounced or otherwise posited. John Finnis seems to hold a strong version of this thesis – that

[33] See Greenberg 2011a: 84–96.

the content of the law is constituted by the content of authoritative pronouncements – with the qualification mentioned above that internally valid law is not legally authoritative 'in the focal sense' if it is not morally authoritative.[34]

Even with the qualification that a (prima facie) legal norm must satisfy a moral threshold in order to qualify as law, as non-defective law, or as law in the fullest sense, the acceptance of the idea that a legal norm exists in some form merely because it has been posited, and thus independently of its moral or normative merit, is a basic concession to positivist legal theory. It seems to be widely believed that all natural law theories must make this concession. For example, Fred Schauer complains that a legal norm must be identified before it can be evaluated, and therefore that it promotes clarity to distinguish the existence of a norm from its moral merit:

> [A]lthough the positions traditionally described as positivism and as natural law are commonly contrasted, and although the contrast is undoubtedly real in some respects, it turns out that all of those who subscribe to some version of anti-positivism, including but not limited to natural law, have a need for some form of identification of that [the content of certain social directives] which is then subject to moral evaluation. And so long as the alleged anti-positivisms engage in the process of pre-moral identification of legal items, then it turns out that they have accepted the primary positivist premises, premises which are not at all about the proper uses of the word 'law', but which are rather about the desirability and necessity of first locating that which we then wish to evaluate.[35]

The Moral Impact Theory rejects the idea that prima facie or inchoate legal norms exist or can be identified independently of anything moral. Indeed, it rejects the idea that legal norms exist *even in part* in virtue of having been posited. Its rejection of positivism is thus more thorough than the natural law theories just discussed. How is the Moral Impact Theory able to reconcile the fact that human legal institutions create law with the rejection of any constitutive role for the positing of legal norms? It maintains that the role of legal institutions in the fundamental account of the content of the law is not the positing of legal norms, but the taking of actions that change the relevant circumstances, thereby changing the genuine obligations that constitute legal obligations. Remember that, according

[34] See Finnis 1980: 27; 2000: 1606–1610. [35] Schauer 1996: 43 (footnote omitted).

to the Moral Impact Theory, the content of the law is the moral impact of certain decisions of legal institutions. Therefore, the very idea of inchoate legal norms existing independently of anything moral is a nonstarter. It is, however, a consequence of the Moral Impact Theory that certain morally bad standards – ones that could not be obligatory – could never be legal norms. As I will explain, this is not because legal norms must pass a moral test. Rather, it simply follows from the Moral Impact Theory's account of how the content of the law is determined.

To understand this point, it is necessary to distinguish between what morality requires ex ante – that is, not taking into account our specific circumstances and past actions – and what morality requires ex post – that is, taking into account all of the relevant circumstances and past actions, in particular the actions of legal institutions. According to the Moral Impact Theory, legal obligations are constituted by genuine obligations that obtain in virtue of certain actions of legal institutions. These obligations can be extremely different from what is required by morality ex ante, since actions of legal institutions can greatly alter the relevant circumstances, thus altering our obligations. Even standards that are quite morally flawed by ex-ante standards can become law because they can become morally obligatory given the (unfortunate) circumstances. But there are some standards that can never be morally obligatory. A useful analogy is an agreement. One can agree to an arrangement that is much less than ideally fair. The fact that one has agreed can make it the case that one is obligated, even though what one is obligated to do is very far from what one would have been obligated to do ex ante. But some agreements, for example, an agreement to murder, do not create an obligation to act as the agreement specifies (though they may still have normative consequences). In sum, the Moral Impact Theory does imply a version of the conclusion that certain morally bad standards cannot be law. But the explanation of this conclusion is not that there is any kind of moral test that putative legal norms must pass.

Another idea associated with natural law is that moral goodness is *sufficient* for a standard to qualify as law; in other words, that the moral goodness of a standard can make it a legal norm. Now, it might be thought that if a theorist rejects the idea that putative legal norms can be identified independently of morality, the theorist must accept that moral merit is sufficient for a standard to qualify as law. But this would be a mistake. The Moral Impact Theory illustrates the point. Again, the theory holds that

the content of the law is that part of the moral profile that obtains in virtue of certain actions of legal institutions. Therefore, only the actions of legal institutions can yield a legal standard – moral merit can never be sufficient. In sum, putative legal standards cannot be identified independently of morality, but moral merit is never sufficient for a standard to be law. The explanation is that legal norms are the moral consequence of actions of legal institutions. So they necessarily obtain in virtue of *both* institutional action and moral principles.

Mark Murphy has offered a characterization of the central idea of the natural law tradition: that, necessarily, law is a rational standard of conduct. On Murphy's interpretation, for law to be a rational standard is for it to be backed by decisive reasons for compliance. Murphy explicates that for an action to be backed by decisive reasons is for there to be sufficient reason to take the action and an absence of sufficient reason not to do the relevant action. So to be backed by decisive reasons for compliance is very close to, if not the same as, all-things-considered binding.[36] Murphy distinguishes a weak and a strong version of his natural law thesis. On the weak version, law is defective to the extent that it is not backed by decisive reasons for compliance. According to the strong version, necessarily, all law is backed by decisive reasons for compliance.

How do these theses relate to the Moral Impact Theory and the Dependence View more generally? Murphy's weak natural law thesis evidently belongs in the category of ideas discussed above according to which law, by its nature, is subject to a normative standard. In particular, the weak natural law thesis is very close to the bindingness thesis – that law is supposed to be binding – which, as mentioned, forms a natural part of the background to the Moral Impact Theory.

Murphy's strong natural law thesis holds that, necessarily, all law is backed by decisive reasons for compliance. It does not say anything about what determines the content of the law. (Nor does the weak natural law thesis.) So it does not make the central claim of the Moral Impact Theory that the content of the law is the moral consequence of the actions of legal institutions. (Indeed, since it says nothing about how the content of the law is determined, the strong natural law thesis – and, for that matter, the weak thesis – is consistent with the extreme claim that the content of the law is

[36] Murphy has indicated in conversation that he agrees with this point.

entirely determined by divine will or morality independently of the decisions and actions of humans.) On the other hand, something in the neighbourhood of the strong natural law thesis follows from the Moral Impact Theory.

As explained above, the Moral Impact Theory, unlike the strong natural law thesis, does not make a claim about all possible legal systems. But, for the legal systems to which it applies, it has the consequence that the law is genuinely binding. Thus, the Moral Impact Theory has a consequence that is roughly equivalent to the strong natural law thesis, but with limited scope. More important is the point that neither the strong nor the weak natural law thesis is a thesis about how the content of the law is determined and therefore neither thesis captures the Moral Impact Theory or is a competitor to it.

Ronald Dworkin's influential *law as integrity* or *Interpretivist* theory of law bears some affinity to natural law theories, as his theory gives morality an important role in constituting the content of the law. How does the Moral Impact Theory relate to Dworkin's work? Dworkin's mature theory, as elaborated in *Law's Empire*, holds that the content of the law is the set of principles that are the best *interpretation* of the legal practices and, on some formulations, the more specific rules that follow from those principles.[37] Central to the theory is Dworkin's distinctive account of interpretation, which applies to much more than law, for example, to literature and art. On Dworkin's account, the best interpretation of a legal system is the set of principles that best fits and justifies the practices of the legal system, including the past actions and decisions of legislatures, courts and other legal institutions.[38] This is not the place for detailed exposition of Dworkin, but the rough intuitive idea is that interpretation yields the principles that are implicit in the practices of the legal system. We can dramatize the idea by supposing that the past actions and decisions of the legal system had all been taken by a single, ideally coherent agent. We then

[37] The point about more specific rules is that, if the law includes a general principle – say, that no-one may have his or her property seized without reasonable procedures – it also includes more specific entailments of that principle, for example, that no-one may have his or her car seized without reasonable procedures. This qualification will not matter to our discussion, so I will generally omit it.

[38] I have elsewhere argued that the dimension of fit is best understood as one aspect of justification, roughly procedural justification. See Greenberg 2004/2006: 263 n. 47; Greenberg 2014: 1300 n. 29, 1303 n. 34.

ask which are the morally best general principles this agent could have been acting on. These principles, and the more specific norms that follow from them, make up the content of the law.

Dworkin's theory, like the Moral Impact Theory, is thus a theory of what determines the content of the law and one that gives an important role to moral notions. Moreover, like the Moral Impact Theory, Dworkin's theory does not accept that prima facie legal norms come into existence by being authoritatively pronounced, and then must satisfy some kind of moral evaluation.[39] But the two accounts of what determines the content of the law are very different. The central contrast is simple. The Moral Impact Theory focuses on the moral consequences of the actions of legal institutions, while Dworkin's theory seeks the principles that are implicit in such actions.[40] As explained above, the Moral Impact Theory takes the contribution to the law of the actions of legal institutions to be determined by all relevant normative factors. For example, according to Moral Impact Theory, the relevant question is how, in light of democratic values, fairness, the benefits of coordination, settling disputes peacefully and any other relevant factors, a statute affects our moral obligations. By contrast, on Dworkin's theory the relevant question is what principles would have justified enactment of the statute.[41]

[39] See Greenberg 2011a: 58–60.

[40] Dworkin standardly formulates his account in terms of legal practices rather than actions of legal institutions, and his understanding of practices encompasses more than the actions of legal institutions. I am simplifying the comparison by framing his account in terms of the actions of legal institutions.

[41] I elsewhere (Greenberg 2014: 1301) explicated this intuitive contrast with a metaphor. I wrote that, on Dworkin's theory, the content of the law is *upstream* of the actions of the legal institutions – it is what justifies them – while, on the Moral Impact Theory, the content of the law is *downstream* of the actions of legal institutions – it is the obligations, powers and so on that come about as a result of the actions of legal institutions. Some objected to this metaphor that, as noted above, Dworkin (at least sometimes) characterizes the content of the law as including not just the principles that justify the legal practices, but also what those principles entail. But this objection misses the mark. The entailments of the principles are not downstream of the actions of legal institutions; rather, they are simply the more specific consequences of the upstream principles. See note 37 above. We must not confuse the specific entailments of the general principles with the moral consequences of the actions of legal institutions. For example, suppose that the principle that best justifies certain distributive decisions by the legislature is that people should be rewarded according to their effort, not according to their needs or productivity. A straightforward consequence of that principle is that John, who worked extremely hard, but as a result of a poor education did not produce much, should receive more than Jill, who worked less hard, but produced more and has greater needs. By contrast, in order to answer the very

One salient difference is that Dworkin's account makes Dworkinian interpretation constitutive of the content of the law, while the Moral Impact Theory does not give a constitutive role to interpretation of any sort. (On the Moral Impact Theory, as with most theories of law, the role of interpretation is merely epistemic; that is, interpretation is just a way of figuring out what the law is.) And of course Dworkinian interpretation employs Dworkin's notions of fit and justification, which also play no role in the Moral Impact Theory.

The Moral Impact Theory is also more thoroughly moralized than Dworkin's theory. According to the Moral Impact Theory, legal obligations are constituted by (ex post) moral obligations. Roughly speaking, what is legally required is what is morally required in light of the actions of the legal institutions. On Dworkin's theory, by contrast, it seems likely that legal obligations will often diverge from moral obligations, even ex post ones. If the actions of legal institutions are sufficiently flawed, the principles that best fit and justify them (and the entailments of those principles) will be different from what is in fact morally required in light of the relevant actions.

Dworkin himself recognizes this point both implicitly and explicitly. The point is implicit in much of *Law's Empire*. Dworkin develops at great length the distinctive and novel account of interpretation that lies at the centre of his theory. If he believed that the output of Dworkinian interpretation, i.e. the principles that best fit and justify the legal practices, necessarily coincided in content with something straightforward and familiar – that which is morally required in light of the practices – it would have been peculiar not to say so. But he never suggests that the principles that best fit and justify the legal practices must be moral principles, let alone that they coincide with what is morally required in light of the practices.

More explicitly, Dworkin often explains that, on his account, legal interpretation involves taking those candidate principles that fit the legal

different question what the *moral* consequences of the relevant decisions of the legislature are, we would need to ask about, for example, whether those decisions were made democratically, whether people relied on them, how people understood the decisions and so on. The difference between the two theories is larger than the upstream/downstream contrast suggests because, as noted above, the practices that are to be justified encompass more than the actions of legal institutions.

practices sufficiently well and asking which is morally best.[42] He provides no reason for thinking that the principles that fit sufficiently well are guaranteed to be true moral principles.[43]

Dworkin also makes the point fully explicit. For example, he recognizes that the content of the law may diverge from what is morally required ex post – indeed, that the content of the law may be so morally flawed that it is 'too immoral to enforce'.[44]

Moreover, it is difficult to see why Dworkinian principles must coincide with what is morally required in light of the actions of legal institutions. Here is a way to bring out the intuitive implausibility of the idea that there is such a necessary coincidence. If the coincidence idea were true, then a bad decision would make it the case that one ought to follow the principles that would have best justified that decision. But this implication does not seem to be correct. Suppose that a philosophy department makes an unfair decision about how to allocate resources. That decision, once made, may well affect what it is fair to do going forward. Suppose, next, that a comparable issue about allocating resources arises at a later time. It is not at all obvious that adhering to the principle that best fits and justifies the past unfair decision is now morally justified. The past decision might have been so flawed that, even given the way in which it has changed what is morally required ex post, for example, even taking into account whatever expectations it created, it would be wrong to follow the principle behind that decision. I do not take this quick example to be a sufficient argument that Dworkinian principles need not coincide with what is morally required ex post, but just an indication of why it is far from obvious that they do coincide. Given that neither Dworkin nor anyone

[42] Dworkin: 1986, 284–285, 387–388; 1977, 340–342

[43] Even if, as I have argued, this way of explaining the theory is merely a heuristic or expository device (Greenberg, 2014: 1303 & n. 34), given how often Dworkin relies on it, it seems fair to assume that it does not radically mischaracterize the consequences of Dworkin's theory, converting a theory on which legal obligations are moral obligations to one on which they need not be.

[44] *Law's Empire* at 262. In *Justice for Hedgehogs*, Dworkin characterizes Interpretivism as holding that the content of the law includes 'the specific rules enacted in accordance with the community's accepted procedures' (2011: 402.) Assuming that he is using the terminology of enacting rules in the standard way, Dworkin is here taking Interpretivism to include in the content of the law the rules specified by the authoritative texts. In that case, it is even more clear that the content of the law diverges from morality, for a polity can enact rules that are no part of ex ante or ex post morality.

else has even attempted to argue for the coincidence idea, I will not address it further.[45]

3. An Obstacle to Understanding – The Standard Picture and the Moral Impact Theory

This is not the place to present extensive argument for the Moral Impact Theory.[46] But I want to address one common obstacle to appreciating the plausibility of the theory. A common implicit presupposition – *the Standard Picture* – is that the content of the law is just, to put it crudely, whatever the law books say. More precisely, the idea is that the content of the law is constituted by the ordinary linguistic meaning of the authoritative legal texts.[47] More sophisticated versions, recognizing that there are different types of ordinary linguistic meaning, hold that the content of the law is constituted by a specific type of linguistic meaning of the relevant texts. If one presupposes the Standard Picture, then, at first blush, the Moral Impact Theory might seem implausible, or even crazy. For, on standard views about linguistic meaning, the linguistic meaning of a text does not in general depend on the moral or normative consequences of uttering the text. In this section, I will show that a quick dismissal of the Moral Impact Theory on the basis of the Standard Picture would be

[45] As discussed above, in *Justice for Hedgehogs* and in a posthumous article (Dworkin 2013), Dworkin seems to have converted to a version of the Dependence View that is a close relative of the Moral Impact Theory. Unfortunately, Dworkin makes no attempt to say how this briefly sketched position relates to his developed theory in *Law's Empire*. It is notable that the argument that he gives for the position is very different from the argument of *Law's Empire* and extremely weak. See pp. 283–284 above and Dworkin 2011: 400–415; 2013: 2, 12.

I am very grateful to Nicos Stavropoulos for valuable discussion of the issues in the preceding four paragraphs in the text (although I believe he disagrees with my conclusion). Stavropoulos has proposed an understanding of interpretation according to which interpretivism about the law – the view that the content of the law is constituted by the best interpretation of the legal practices – is a Dependence Theory. See Stavropoulos 2014. Also, after writing this paper, I learned that Stavropoulos in an unpublished manuscript argues that Dworkin's mature theory of law is best understood as a Dependence Theory and claims that Dworkinian interpretation need not be redundant in such a theory. See Stavropoulos MS.

[46] See Greenberg (2004/2006; 2006); 2011b; 2014.

[47] Some adjustments and qualifications would be needed to yield an adequate account, but we can ignore such details here. For extensive discussion, see Greenberg 2011a.

misguided. In fact, on the most plausible construal of the Standard Picture, it is not in direct competition with the Moral Impact Theory, and it could be argued that something in the neighbourhood of the Standard Picture is actually a consequence of the Moral Impact Theory in the circumstances of familiar legal systems. Thus, the Moral Impact Theory can explain why the Standard Picture seems plausible to many.

It is worth emphasizing that the Standard Picture is a strong substantive view. The content of the law consists of obligations, rights, powers and the like. By contrast, linguistic meaning is information represented by symbols. These two things are not even of the same general category. And there is no necessary connection between norms and information represented by symbols. After all, there are systems of norms in which texts or other representations have no constitutive role. Morality is one example. And, whatever is the truth about the actual norms of etiquette, a society could have norms of etiquette that obtain in virtue of practices not involving linguistic or other representations.[48]

We distinguished above between an account of what determines the content of the law at the fundamental level and an account at the surface level.[49] An adherent of the Standard Picture must clarify whether the view is supposed to concern how the law is determined at the fundamental level or the surface level.[50] I discuss these options in turn.

I am not aware that any philosopher of law has ever explicitly espoused something like the Standard Picture as an account of law at the fundamental level.[51] And I suspect that philosophically sophisticated proponents of the Standard Picture, if pressed, would not maintain that it is supposed to be an account at the fundamental level. Rather, most would probably appeal to Hartian positivism – the most widely held contemporary theory of law – as their preferred account at the most

[48] For further discussion of the point that there is no necessary connection between norms and information represented by symbols, see Greenberg 2016b.

[49] Again, I set aside complications involving intermediate levels, but the points that I make below about the possibility that the Standard Picture is true at the surface level could be made with appropriate modifications with respect to the corresponding possibility at an intermediate level.

[50] In part because the Standard Picture is an implicit commitment rather than an explicitly avowed position, it is typically unclear whether adherents take the Standard Picture to concern the surface level, the fundamental level, or an intermediate level.

[51] I have elsewhere criticized the Standard Picture. See Greenberg 2011a. For criticism of a specific and sophisticated version, see Greenberg 2011b.

fundamental level. (It should go without saying that, if taken as a theory at the fundamental level, the Standard Picture is straightforwardly inconsistent with Hartian positivism, as well as with every other well-known theory of the content of the law. According to Hartian positivism, what matters at the fundamental level is not the linguistic meaning of the authoritative texts, but rather the practice of judges and other officials.)

As I don't believe that adherents of the Standard Picture would take it to be the fundamental account of the content of the law, I will be quick with this implausible possibility. One aspect of the implausibility is the implication that matters could not be otherwise. Now, how implausible this implication is depends on its scope, i.e. to which possible legal systems it applies. On the commonly held view that the fundamental account of what determines the content of the law is true of all possible legal systems, the Standard Picture as the fundamental account is especially implausible, for it would have the implication that a factor other than the ordinary linguistic meaning of the authoritative legal texts could not be a determinant of the content of the law in any possible legal system (except to the extent specified by authoritative legal texts).

I want to allow, however, that different fundamental accounts could be true of different legal systems. Therefore, consider the possibility that, though not true of all possible legal systems, the Standard Picture is the correct account of how the law is determined at the fundamental level in the US legal system.[52] In that case, the Standard Picture is true in virtue of nothing more than the essential facts of the US legal system – the ones that make it this very legal system. Therefore, it could not fail to be true of the legal system. Now, consider a candidate determinant of the content of the law that is not a linguistic content, for example, a legislature's legal intentions in enacting a statute. (A legislature's legal intention in enacting a statute is its intention with respect to what change in the law to make, or, to put it another way, its intention to enact a given legal norm.[53] On no

[52] Adherents of the Standard Picture think that it is true of the US legal system or similar systems, so I will confine my discussion to the US legal system, and set aside the arcane issue of whether the Standard Picture could be true at the fundamental level for some possible legal system.

[53] The legislature's legal intention is to be distinguished from the legislature's intention that the legal norm that it enacts apply or not apply to a particular activity – what we could call its *application intention*. For example, a legislature might enact a statute with the legal

colourable theory of linguistic meaning is one's legal intention in pronouncing a text constitutive of the linguistic meaning of the text.[54]) If the Standard Picture is true at the fundamental level in the US legal system, then even if the long-standing practice of judges were to give legal intentions substantial weight, and even if, say, democratic values clearly supported giving legal intentions such weight, such intentions would not be entitled to weight unless an authoritative legal text so directed.[55] (Remember that to say that the account is true is not to say that judges in fact behave in accordance with the account, but that, roughly, it would be legally correct for them to do so.) Can we really accept that neither legal intentions nor any other non-linguistic factor could be a determinant of the content of the law in the US legal system?

It is much more plausible that, if the Standard Picture were true in a given legal system at a particular time, it would be in virtue of something more fundamental – perhaps in virtue of the practices of judges and other officials, or in virtue of the fact that, in all the circumstances, reasons of fairness and democracy support the relevance of linguistic content over other factors. In that case, if, say, the practices of judges or the morally relevant circumstances changed, then the content of the law could come to depend on something other than the linguistic content of the authoritative texts.

There is a more basic point about whether the Standard Picture's candidate for the fundamental determinant of the content of the law is even the right sort of thing for that role. In order to bring out this point, it will help to recognize that there are different types of linguistic meaning or content. Linguistic contents include, for example, semantic content (roughly, what is conventionally encoded in the text), speaker meaning (on an extremely influential theory, roughly, what the speaker intended to communicate by means of the hearer's recognition of that very intention),

intention of requiring that people with contagious diseases be quarantined on entering the country. The legislature might have a conflicting application intention that people with psoriasis be covered by the statute, for the legislature might mistakenly believe that psoriasis is a contagious disease. See Greenberg and Litman 1998: 585–586.

[54] On the distinction between legal and linguistic intentions, especially communicative intentions, see Greenberg 2011b: 241–244 and 2016b.

[55] If the Standard Picture were true at the fundamental level, then an authoritative legal text could make legal intentions relevant by so specifying. In the interest of brevity, I will omit this qualification.

what is said (as opposed, for example, to what is merely implicated).[56] In addition to such notions, which are familiar in philosophy of language, legal theorists often appeal to what they call 'public meaning'. There is more than one way of understanding what they have in mind. For example, public meaning could be that part of the speaker meaning that a reasonable hearer would be expected to recognize. Or it could be what a reasonable hearer would take the speaker to have intended to communicate. (On the former notion, it is a necessary, but not sufficient, condition for public meaning that the speaker have actually intended to communicate the information. On the latter, there is no such necessary condition.) Again, it could be what a reasonable hearer would take the speaker to have said or asserted. There are various dimensions that need further specification. For example, what is the reasonable hearer assumed to know about the circumstances in which the text is issued? Is the reasonable hearer supposed to assume that the text was issued by a single rational mind? Depending on how we answer such questions, we get a range of different notions of public meaning. Not all of these notions have theoretical importance in the study of language, and it may be that none of them do. In order to be as generous as possible to adherents of the Standard Picture, however, we can be liberal about what we count as linguistic meaning for present purposes. (If we ruled out public meaning on the ground that it is not, strictly speaking, a type of linguistic meaning, then the Standard Picture would be that much less plausible.)

Given that there are multiple types of linguistic content, the idea that the content of the law is determined by the linguistic content of the authoritative legal texts is badly underspecified. Which type of linguistic content? Once a precise type of linguistic content is specified, could it really be the fundamental truth about law or a particular legal system that the content of the law is determined by that content – say, that part of what the speaker intended to communicate that a reasonable member of the audience would recognize? It looks *ad hoc* to insist that that's just the fundamental truth about how the content of the law is determined. Why, we are inclined to ask, that particular type of linguistic content, rather than some other one? It seems that there should be an answer to this type of question, perhaps, for example, that reasons of democracy support respecting what the

[56] For discussion of some of the relevant distinctions, see Greenberg 2011b and Greenberg 2016b.

legislature intended to communicate, except to the extent that it is not available to a reasonably informed member of the audience. But, in that case, the fact that a particular type of linguistic content constitutes an authoritative text's contribution to the content of the law is not the fundamental truth about the way in which the content of the law is determined.

The point is about the role of reasons. A deep feature of our legal practice is that claims about the way in which factors contribute to the content of the law must be backed by reasons. Now, if we are to avoid a regress (or an infinite circle) of reasons, there must be a fundamental answer that does not itself rest on further reasons. Intuitively, however, the reason-based nature of our practice means that not just anything could qualify as the fundamental answer. I have elsewhere argued that normative facts are the sort of thing that could provide the fundamental answer about how the content of the law is determined. In other words, the fact that, on balance, the relevant values support, say, the relevance of public meaning – and that there is no further determinant that makes those values relevant – is an answer that could satisfy the demand for reasons. And, although I have argued that the position is wrong, it is at least an understandable position that the practice of judges – that *this* is just how we do things in law, or in this legal system – could be the fundamental answer. By contrast, it is hard to imagine that the fundamental story, for which no further reason can be adduced, could be that the content of the law is determined by, say, what a reasonable person would take the legislature to have intended to communicate, except when that conflicts with the legislature's clearly established legal intentions.[57]

I turn now to the second option – that the Standard Picture is an account of how the law is determined at the surface level, not the most fundamental level. When we address the way in which the law is determined at the surface level, we need to be specific about which legal system we are considering. As noted, many philosophers believe that how the law is determined at the fundamental level cannot vary from legal system to legal system. But it is relatively uncontroversial that how the law is

[57] In my 2004/2006 and 2006, I elaborate the ideas in this paragraph under the rubric of rational determination. But one need not accept the details of those arguments in order to appreciate the counterintuitiveness of the idea that the Standard Picture could be the fundamental story about how the content of the law is determined.

determined at the surface level may vary, both from legal system to legal system and over time within the same legal system. (For example, if Hartian positivism is true, then the content of the law at the most fundamental level is determined by the practice of judges, and the practice of judges – what they treat as relevant to determining the content of the law – can vary between legal systems and over time.) Thus, the claim that the Standard Picture is an accurate account at the surface level has to be a claim about a particular legal system. I will focus on the US legal system because it is the one I know best and the one most written about, though I believe that my points in the next few paragraphs apply at least to common-law legal systems, if not to other legal systems as well.

If some version of the Standard Picture were true at the surface level in the US legal system, then what account could be true at the most fundamental level? What fundamental story could make it the case that a particular type of linguistic meaning of the authoritative legal texts is what matters at the surface level? I suggested above that many philosophically knowledgeable adherents of the Standard Picture would, on reflection, appeal to Hartian positivism as the theory of law at the fundamental level. But, as I now explain, the claim that the Standard Picture is true at the surface level in the US legal system is in fact inconsistent with Hartian positivism in the circumstances of the US legal system.

On the Hartian account, the fundamental determinant of the content of the law is the convergent practice of judges or other legal officials. The basic point is that the contribution to the content of the law made by constitutional and statutory provisions, judicial decisions and so on is determined by a convergent practice among at least a large majority of judges. For example, if judges: 1) regularly treat statutes' semantic contents as their contribution to the law; 2) regard this practice as a standard to guide their future conduct; 3) are disposed to criticize other judges who fail to treat statutes' semantic contents as their contribution to the law; and 4) regard such criticisms as justified, then statutes' semantic contents are their contribution to the law.[58] Setting aside an important qualification addressed in a footnote, to the extent that there is no settled practice

[58] Hart 1994: 55–61, 255.

with respect to what constitutes statutes' contribution to the content of the law, there is indeterminacy on that issue.[59]

In the US legal system, the practice of judges does not converge on treating one type of ordinary linguistic meaning – or even linguistic meaning at all – as the sole determinant of the content of the law. There is widespread controversy among judges about how the content of the law is determined. More importantly, many judges take into account factors other than the linguistic meaning of the authoritative legal texts: the expected consequences of their decisions, widespread practices in the community, moral values such as democracy and fairness, and the legal intentions of legislators or framers. Moreover, judges do not take these factors into account because they take these factors to be evidence of ordinary linguistic meaning. Nor do they believe that the relevance of these factors derives from the linguistic meaning of authoritative legal texts. That is, it is not that they believe that there is an authoritative legal text that directs judges to treat expected consequences of their decisions or moral values as relevant to the content of the law. Rather, they treat these non-linguistic factors as independently relevant factors in deciding what the law is. Because there is no consensus to be found in the practice of judges and other legal officials that the linguistic meaning of the authoritative legal texts constitutes the content of the law, Hartian positivism is inconsistent with the claim that the Standard Picture is true at the surface level in the US legal system.[60]

[59] Under Hart's theory, there is one other way in which such indeterminacy could be avoided – a rule specifying a particular way in which statutes or other sources contribute to the content of the law could be validated by a criterion of validity that is treated as correct by a large majority of judges (or validated by a chain of criteria leading back to such a consensus). In other words, there could be a consensus criterion that yields a determinate way in which sources contribute to the content of the law, though the participants have failed to notice that their criterion yields that result. I omit discussion of this possibility here because, in the US legal system, there is no criterion grounded in consensus that plausibly has the consequence that one type of linguistic meaning is the sole determinant of the content of the law. For related discussion, see Greenberg 2017: 114–117.

[60] See the important refinement of this point in note 59. I have pointed out elsewhere that there are strong links between the Standard Picture and legal positivism. Greenberg 2014: 1297–1299; 2011a: 60–72. For example, the Standard Picture 'dovetails with – and indeed fills a gap in – legal positivism' because the Standard Picture seems to offer an easy answer – and one that makes no appeal to moral facts – to the difficult problem of how practices, decisions and the like determine unique norms. Greenberg 2014: 1297. Partly as a result, the Standard Picture is widely assumed by legal positivists. Greenberg 2014:

Once we take into account that there are multiple types of linguistic meaning, the inconsistency is even clearer. As we have seen, the position that the content of the law is determined by the ordinary linguistic meaning of the authoritative legal texts is badly underspecified. One needs to specify which kind of linguistic meaning. But the practice of judges in the US legal system does not converge on one particular type of linguistic content.[61]

We have been considering the possibility that Hartian positivism is true, so that the fundamental determinant of the content of the law is the practices of judges. What are the implications at the surface level if the Moral Impact Theory gives the true account of how the content of the law is determined at the fundamental level? There is a range of possibilities. For example, given the circumstances of a particular legal system, it could be that the relevant values determine that, at the surface level, the contribution of statutes and other authoritative texts is determined by one specific type of linguistic meaning, perhaps their communicative content. In that case, at the surface level, values play no role. At the opposite extreme, it could be that, on balance, in the circumstances of the legal system, the relevant values do not yield much in the way of broad generalizations at the surface level. The contribution of each statute or other authoritative text depends in a case-specific way on reasons of fairness, democracy and so on. And there are various intermediate possibilities. For example, it could be that the contribution of statutes and other authoritative legal texts is, as a rule, determined by their communicative content, but that this default is overridden in specific circumstances.

It is notable that, when theorists and judges try to justify treating a particular type of linguistic meaning as relevant, they tend to appeal to normative considerations. That is, they often claim that it is legally correct to treat the preferred type of linguistic meaning as determining the content

1297–1299 & n.23; 2011a 60–66. In fact, H.L.A. Hart himself seemed to assume it. See Greenberg 2011a: 60–61 & n.21, 69. My present point is that, despite the links between the Standard Picture and legal positivism – and regardless of how conveniently the Standard Picture seems to dovetail with legal positivism – in the US legal system at least, the Standard Picture is in fact inconsistent with the most influential form of positivism given the actual practices of judges.

[61] A closely related point is that, in the circumstances of the US legal system, Hartian positivism is inconsistent with – or at least in severe tension with – any controversial view of legal interpretation. I develop this point and address potential replies in Greenberg 2017: 114–117.

of the law because relevant values support doing so. For example, a familiar kind of argument is that, because of democratic values, we should interpret the Constitution in accordance with the meaning (understood in a particular way) of the constitutional text, rather than in accordance with the framers' expectations or intentions about how the provision would be applied.[62] Similarly, theorists and judges appeal to normative considerations to justify diverging from linguistic meaning. For example, a theorist might appeal to democracy to argue that when linguistic meaning conflicts with what the legislature intended to enact, we should not respect linguistic meaning. So there is some evidence that, despite their inclination to mention Hartian positivism when pressed to philosophize, theorists and judges take the relevance of linguistic meaning to be based on normative considerations.

There is a question about how to understand the status of such appeals to normative factors. Are normative factors supposed to be relevant because of some more fundamental determinant of the content of the law or are they supposed to be relevant on their own merits, i.e. at the fundamental level? Typically, appeals to democracy and other normative factors are not framed as if the relevance of those factors derives from other more fundamental determinants. For example, judges who appeal to democratic values do not argue that such appeal is justified by a consensus among judges that democratic values are determinants of the content of the law – again, there is no such consensus, nor does anyone claim that there is. Rather, those who appeal to democracy or the like seem to assume that its relevance is self-standing.

Now, if the relevance of linguistic meaning to the content of the law depends at the fundamental level on normative factors, such as democratic values, it is difficult to see why *all* relevant normative factors should not matter. For example, if one democratic reason militates in favour of public meaning, but other democratic reasons outweigh that reason, it would be hard to argue that respecting public meaning is justified on democratic grounds. Similarly, if reasons of fairness in favour of public meaning are outweighed by democratic values, it would be hard to claim on fairness grounds that respecting public meaning is justified on balance. Consequently, once one takes normative factors to be relevant at the fundamental level, one is driven to the view that the determinants of the

[62] See Greenberg 2014:1329–1330 & nn.102–104; Greenberg, 2016b.

content of the law depend on all relevant normative factors.[63] And this is, in effect, the central thesis of the Moral Impact Theory.

Moreover, the Moral Impact Theory explains why linguistic meaning has an extremely important role in determining the content of the law. In addition to democratic values and fairness, the benefits of coordination, stability and peaceful resolution of disputes provide powerful moral reasons for respecting (some type of) linguistic meaning of the authoritative legal texts. Indeed, it is arguable that, in the circumstances of some legal systems, the Moral Impact Theory has the consequence that the contribution of a statutory provision or other authoritative text to the content of the law is always the linguistic meaning (more precisely, a certain type of linguistic meaning) of the provision. (Moreover, one could mount a related argument that, in the circumstances of some legal systems, courts are morally required not to take moral factors into account in working out what the law is.)

There are more complex possibilities as well. For example, it could be a consequence of the Moral Impact Theory that which type of linguistic meaning is a provision's contribution to the content of the law varies depending on the type of legal instrument or other circumstances. Alternatively, the Moral Impact Theory might have the consequence that a provision's contribution is its linguistic meaning, except under specific conditions. Thus, if the Moral Impact Theory is true, the consequence is arguably that the Standard Picture or some variant thereof is true at the surface level, at least in some legal systems.

Moreover, even if no such argument succeeds – so no general Standard Picture-like position is true at the surface level – the moral impact of the enactment of an authoritative text will often correspond to (some type of) linguistic meaning of the text, or at least to something in the neighbourhood of that meaning. Thus, if the Moral Impact Theory is true, the contribution of an authoritative text to the content of the law will often be close to its linguistic meaning. Consequently, the truth of the Moral Impact Theory could help to explain why the Standard Picture seems plausible to many.

[63] There could be a normative argument why, in practice, legal interpreters should take into account normative factors only in a limited way. But it is difficult to see how all relevant normative factors could fail to be relevant to that more basic normative argument (still assuming that the relevance of normative factors is at the fundamental level, rather than grounded in some more fundamental determinant).

In sum, if one is tempted by the idea – perhaps with various refinements – that the content of the law is determined by the linguistic meaning of authoritative texts, one needs an account of the content of the law at the most fundamental level that could support such a picture. The Moral Impact Theory provides a reasonably good fit. (And, regardless of whether the Moral Impact Theory actually supports the truth of the Standard Picture at the surface level, it provides an explanation of why the Standard Picture may seem plausible). Thus, an intuitive attachment to something in the neighbourhood of the Standard Picture is far from grounds for dismissing the Moral Impact Theory.

4. Conclusion

The Moral Impact Theory (and the Dependence View more generally) has recently attracted a great deal of interest. An important feature of the theory is that, in contrast with many natural law theories, it does not accept that legal norms exist even in part in virtue of being posited. It therefore is more thoroughgoing in its rejection of positivism than much of the natural law tradition. The reason is that the theory's central thesis – that legal obligations are constituted by certain moral obligations – gives no constitutive role to the positing of legal norms. When legal institutions take actions that change the moral profile in certain characteristic ways, they thereby create legal norms. So it is not, for example, that a legal norm comes into existence by being authoritatively pronounced, and then must satisfy some kind of moral evaluation. The Moral Impact Theory also contrasts sharply with Ronald Dworkin's 'law as integrity', or Interpretivist, theory. The theory rejects Dworkin's central thesis that a particular form of interpretation is constitutive of law. Instead, the Moral Impact Theory takes the natural position that the *genuine* obligations that legal institutions succeed in creating constitute *legal* obligations. The theory is therefore more thoroughly moralized (or normativized) than Dworkin's account, as it cannot be assumed that the best Dworkinian interpretation of legal practices consists of principles that are morally obligatory (either ex ante or ex post). Finally, finding the Standard Picture intuitively appealing should not be an obstacle to accepting the Moral Impact Theory. The most plausible version of the Standard Picture is not a direct competitor of the Moral Impact Theory, and one could make

out a case that a qualified version of the Standard Picture is what we would expect at the surface level if the Moral Impact Theory is the true account of how the content of the law is determined at the fundamental level.

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12 The Ideal Dimension of Law

Robert Alexy*

Does law have an ideal dimension? Or can the concept and the nature of law be completely grasped by considering its real dimension alone? The dual-nature thesis sets out the claim that law necessarily comprises both a real or factual dimension and an ideal or critical one. The factual dimension concerns law as fact, that is, as social facts. The social facts to which it refers are authoritative issuance and social efficacy, and each of these is familiar in many different variations and in many different relations to each other. Authoritative issuance as well as enduring social efficacy presuppose institutionalization of one sort or another. For this reason, the real dimension can also be called the 'institutional dimension'. The ideal dimension refers to correctness, primarily to moral correctness. If one claims that social facts alone can determine what is and is not required by law, this amounts to the endorsement of a positivistic concept of law. Once moral correctness is added as a necessary third element, everything changes fundamentally. A non-positivist concept of law emerges. Thus, the dual-nature thesis, in setting out the claim that law necessarily comprises both a real and ideal dimension, implies non-positivism.

I. The Claim to Correctness

The Archimedean point of the thesis that law necessarily has an ideal dimension is the argument from correctness. The argument from correctness states that individual legal norms and individual legal decisions as well as legal systems as a whole necessarily lay claim to correctness. The necessity of raising this claim can be shown by demonstrating that the

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claim to correctness is necessarily implicit in law. The best means of demonstrating its necessity is the method of performative contradiction.[1] An example of a performative contradiction is the fictitious first article of a constitution that reads:

X is a sovereign, federal and unjust republic.

It is scarcely possible to deny that this article is somehow absurd. The idea underlying the method of performative contradiction, as applied here, is to explain the absurdity as stemming from a contradiction between what is implicitly claimed in framing a constitution – namely, that it is just – and what is explicitly declared – namely, that it is unjust. Now, justice counts as a special case of correctness, for justice is nothing other than the correctness of distribution and compensation.[2] Therefore, the contradiction in our example is not only a contradiction with respect to the dichotomy of just and unjust but also a contradiction with respect to the dichotomy of correct and incorrect. What is more, in the aforementioned example of the fictitious first article of a constitution, the contradiction that arises there between what is explicit and what is implicit is necessary. It could be avoided if one were to abandon the implicit claim. But to do this would represent a transition from a legal system to a system of naked power relations, in other words, to something that is, necessarily, no legal system at all.[3]

Many objections have been raised against the argument from correctness, and numerous replies have been offered.[4] This exchange shall not be repeated here in any detail. Only one argument, recently put forward by John Finnis against the thesis that the claim to correctness is necessarily raised in law – it can be called the necessity thesis – shall be considered here.

In the Postscript to *Natural Law and Natural Rights*, Finnis maintains that 'it is possible that some legal systems abstain from claiming to be morally obligatory'.[5] If one substitutes 'correct' for 'morally obligatory', this is a clear negation of the necessity thesis. I criticized this position in 2013.[6] In his reply Finnis puts forward a 'competing argument' which he

[1] Alexy 2002a: 35–39. [2] Alexy 1997a: 105.
[3] Alexy 1998: 213–214 and Alexy 2002a: 32–35.
[4] See, for instance, Bulygin 1993; Alexy 1997b; Bulygin 2000; Alexy 2000; Bulygin 2013; and Alexy 2013a.
[5] Finnis 2011: 432 n.13. [6] Alexy 2013b: 100–101.

had already presented in his 'Reflections and Responses'.[7] It runs as follows:

> It seems entirely possible for a regime to proclaim:
>
> Our law, which satisfies all the (say) Hartian criteria (primary rules restricting violence, theft and fraud, secondary rules of recognition, change and adjudication, etc.), imposes legal duties and confers legal rights that have nothing to do with moral rights. Our law imposes legal obligations that are not moral obligations, and has nothing to do with justice in the moral sense etc., but is instead a structure of ordered power designed to pursue our sectional purposes. We as regime will mercilessly enforce this law.[8]

This proclamation uses twice the clause 'has (have) nothing to do with'. How is this to be understood? A first interpretation would be that the law to which the proclamation refers has no impact on moral rights or justice in the moral sense. It would have no impact if it could neither violate moral rights or justice nor protect them. Finnis connects the proclamation with 'wicked and exploitative regimes', and there is no doubt that wicked and exploitative regimes can violate moral rights and justice.[9] Thus, a negative impact exists. And there exists a positive impact, too. The proclamation refers with the words 'rules restricting violence, theft and fraud' to requirements that are also raised by morality. Therefore, the clause 'has (have) nothing to do with' cannot be understood as saying that contact between the law in question and morality is impossible. For this reason, only a second interpretation is possible: one in which the clause states that the law in question is indifferent to the question of whether moral rights or justice are violated, to whatever degree. It would express a motto like: Right or wrong, '[o]ur law'![10]

This intended moral indifference, however, does not imply that no claim to correctness is raised. In the proclamation, '[o]ur law' is characterized as 'a structure of ordered power designated to pursue our sectional purposes'.[11] This comes quite close to the counter example raised by Joseph Raz in his critique of the argument from correctness. Raz maintains that the argument from correctness 'is a conceptual thesis not specifically about the law (though it applies to the law) but about the nature of purposes, intentional actions and their products'.[12] With this, the claim

[7] Finnis 2014: 91 and Finnis 2013: 538. [8] Finnis 2014: 91-92. [9] Finnis 2014: 92.
[10] Finnis 2014: 91. [11] Finnis 2014: 91–92. [12] Raz 2007: 28.

to correctness is said to be nothing other than a general claim to appropriateness connected with all intentional actions. As such, it applies, in contrast to what I have said in *The Argument from Injustice*, even to the actions of a system of bandits.[13] Raz mentions 'being self-enriching' as a possible standard of the appropriateness of the bandits' action.[14] '[B]eing self-enriching' seems to belong to the same category as 'designed to pursue our sectional purposes' in Finnis's proclamation, namely, that of maximizing the utility for a certain group.[15] With this, we arrive at the intermediate result that '[o]ur law' raises a claim to correctness that refers to sectional or particular purposes as criteria of correctness.

But this is not the end of the story. It can be contested that sectional purposes are adequate as criteria of correctness in law. Law essentially concerns questions of distribution and compensation. As already remarked, however, questions of correct distribution and compensation are questions of justice. Still, for the authors of the proclamation adduced by Finnis, namely, the '[w]e as regime', there remains a way out.[16] They can explicitly abandon the claim to correctness. For this they might change the characterization of their law as 'a structure of ordered power designed to pursue our sectional purposes' into 'an incorrect structure of ordered power designed to pursue our sectional purposes'.[17] This, however, if it were offered seriously and not as a joke, would place the proclamation in the realm of absurdity, side on side with the fictitious first article mentioned above. To be sure, the claim to correctness can be violated, and it is nowhere completely fulfilled. But it is raised just as necessarily in law as the claim to truth is raised in science.[18]

II. Conceptual Analysis and Conceptual Necessities

Finnis connects his argument that the claim to correctness is not necessarily raised in law with a methodological objection consisting of two parts: an argument from fruitlessness and an argument from deficiency.

[13] Alexy 2002a: 33. [14] Raz 2007: 27. [15] Finnis 2014: 92. [16] Finnis 2014: 92.
[17] Finnis 2014: 92. [18] Alexy 2007a: 49.

1. The Argument from Fruitlessness

The argument from fruitlessness is expressed in the following way:

> I do not think that conceptual analysis yield significantly useful fruits in legal, political and moral philosophy. In particular, discussions of what is conceptually possible or impossible, or again of what is or is not conceptually necessary, are virtually always fruitless.[19]

This can be confronted with the thesis that the question of whether there exists a necessary connection between the real and the ideal dimension of law – that is, between law and morality – is of the utmost importance for our understanding of law. To be sure, the thesis that there exists a necessary connection between law and morality can be interpreted in a way that it is of little interest, for, being interpreted in this way, it can be accepted by positivists and non-positivists alike.[20] But when it is transformed into a more precise version, in which it states that there exists a necessary connection between legal validity or legal correctness on the one hand and moral correctness and incorrectness on the other, it becomes clear that the concepts of necessity, impossibility and possibility are indispensable if one wishes to draw a precise and systematic picture of the relation between exclusive positivism, inclusive positivism and non-positivism.[21]

This can be demonstrated by means of the 'necessity triad'.[22] Within positivism, the distinction between exclusive and inclusive positivism is the most important division where the relation between law and morality is concerned. *Exclusive positivism*, as advocated most prominently by Joseph Raz, maintains that morality is necessarily excluded from the concept of law.[23] If one takes 'I' to stand for 'law includes morality', exclusive positivism can be expressed, using the necessity operator '□' and the negator '¬', as:

$$\Box \neg \mathrm{I}. \tag{1}$$

Exclusive positivism stands in a relation of contrariety to non-positivism, which claims that morality is necessarily included in the concept of law. This can be expressed by:

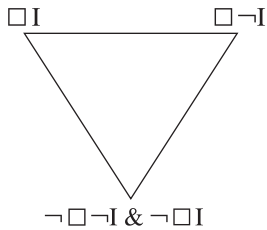
[19] Finnis 2014: 90.
[20] Raz 2003: 3; Raz 2007: 21; Alexy 2007a: 43–45; and Alexy 2008a: 285.
[21] Alexy 2008a: 285 n. 4. [22] Alexy 2012: 4. [23] Raz 2009: 47.

$$\Box \mathrm{I}. \tag{2}$$

Finally, inclusive positivism, as defended, for instance, by Jules Coleman, counts as the rejection of both exclusive positivism and non-positivism. It says that morality is neither necessarily excluded nor necessarily included. The inclusion as well as the exclusion is declared to be a contingent or conventional matter, turning on what the positive law in fact says.[24] This can be expressed as follows:

$$\neg \Box \neg \mathrm{I} \,\&\, \neg \Box \mathrm{I}. \tag{3}$$

These three positions stand in a relationship of contrariety, for each of the three excludes the others without stemming from the negation of any of the others. All of this can be expressed by means of the necessity triad. It exhausts the logical space of the positivism problem as far as the necessity of the inclusion or exclusion of morality in the concept of law is concerned:



To be sure, this analysis solves, as such, no normative problem. But it enhances, as does analytical clarity in general, the 'process of practical reflection', which Finnis sets in a certain opposition to conceptual analysis and the search for necessities.[25] But the question cannot be: either conceptual analysis or practical reflection. They have to be connected, and the extent to which conceptual analysis is perfect will have a considerable impact on the degree of the perfection of practical discourse or reflection. This suffices to reject the reproach of fruitlessness.

2. The Argument from Deficiency

The second methodological objection, the argument from deficiency, begins with the following thesis:

[24] Coleman 2001: 108. [25] Finnis 2014: 90.

> Conceptual-analytic arguments regularly become . . . a vexatious contest between rival intuitions about concepts supposed to be already fully and rightly established, and about more or less imaginary scenarios supposedly illustrative of the boundaries of those established concepts.[26]

This approach, the wrong way, attributed to me, is answered by Finnis with the right way. It focuses

> on the issues of reality and value that are really at stake, and really of interest. Far more fruitful are reflections and arguments about the *central* kinds of case that come into view when one looks at the main human realities and the main forms of intrinsic human wellbeing and deprivation – in other words, to characteristically human *needs* – and to the kinds of choice (and thus kinds of practice and institution) intelligently and reasonably responsive to these needs.[27]

In his description of the wrong way, Finnis reproaches analytico-conceptual arguments for beginning from 'intuitions about concepts supposed to be already fully and rightly established'. This is not true. To be sure, conceptual arguments begin with an analysis of the actual use of language. But the analysis of the use of language is, as J.L. Austin aptly remarked, certainly '*not* the last word', but it provides a starting point for the analysis, or – as Austin puts it – a '*first* word', a first word that 'can everywhere be supplemented and improved upon and superseded'.[28] To this, Finnis's description of conceptual arguments as starting from 'concepts supposed to be already fully and rightly established' does not fit well. Finnis's second point concerns the use of 'more or less imaginary scenarios' as analytical tools. If the analytically oriented debate about the concept of law were to confine itself to confronting the actual use of language with more or less imaginary scenarios, it would, indeed, be a poor debate. But no such confinement is to be found in it. I always have emphasized the point that conceptual arguments have to be connected with normative arguments in order to answer substantive questions relating to the concept and the validity of law – as, for instance, the question of whether extreme injustice can be law.[29]

The basis of this model of analytico-conceptual argumentation is a dual-nature concept of concepts. Concepts are, on the one hand, social conventions about the meaning of words, established by the use of

[26] Finnis 2014: 93. [27] Finnis 2014: 93. [28] Austin 1970: 185.
[29] Alexy 2002a: 20–23, 40, 42–43, 62.

language. That is their real dimension. But, on the other hand, they are social conventions that raise a claim to correctness. That is their ideal dimension. This ideal dimension requires, to put it in Kant's words, that concepts be 'adequate to the object'.[30] The concept of law does not refer to a natural kind – such as the concepts of water, black holes, and killing – but to a non-natural kind in the form of a social kind.[31] The argument from correctness *qua* analytico-conceptual argument requires that normative or practical arguments be given in order to establish the adequacy of the concept of law as a concept of a social kind, normative arguments that are based on the idea of making the best of this social practice in the light of its functions or tasks.[32] These arguments include 'the issues of reality and value that are really at stake' as well as the 'human *needs*' that Finnis misses in my approach.[33]

Finnis adds the argument that my conception of an 'expedient or adequate [*zweckmäßige oder adäquate*] concept formation that is justified by normative arguments' is

> not so much about the moral need for law, and law's consequent essential or central-case features, but rather about whether or not it is expedient or inexpedient to adopt a boundary-line between the legally valid and legally invalid by reference to injustice or at least severe or intolerable injustice.[34]

This sounds as if my theory of law were concentrated only or mainly on one thesis, a thesis Finnis qualifies as 'a subordinate theorem', namely the Radbruch formula, which, in its shortest form, states that extreme injustice is no law.[35] To be sure, the Radbruch formula is an important touchstone with respect to the question of whether a theory of law is a positivistic or a non-positivistic theory. But it is by no means the only element of the ideal dimension of law. It concerns an 'exceptional situation, that of a statute that is unjust in the extreme'.[36] Not only in law do extreme situations offer the possibility of gaining insights not available in normal situations. What would physics be without extreme situations? But I refer not only to extreme situations. In *The Argument from Injustice* I proceed in my analysis of the participant's perspective in three steps. I begin with the argument from correctness, which is the basis of the other arguments.[37]

[30] Kant 1996a: B 756. [31] Alexy 2008a: 284. [32] Alexy 2003: 7. [33] Finnis 2014: 93.
[34] Alexy 2002a: 40 and Finnis 2014: 90 n. 22.
[35] Finnis 2011: 351 and Alexy 2008b: 428. [36] Alexy 2002a: 68.
[37] Alexy 2002a: 35–39.

Then I continue with the argument from injustice that focuses, indeed, on the exceptional situation of extreme injustice.[38] Finally, I elaborate the argument from principles which concerns the 'ideal dimension' in the 'everyday life of law'.[39] Here, the central argument turns on the connections between the claim to correctness, principles and legal argumentation.

III. The Necessity of the Real Dimension of Law

A closer analysis of the ideal dimension of law presupposes an analysis of the real dimension. Here, again, the concept of necessity is the stage centre. The starting point is the idea of pure ideality. A purely ideal system of reasons for action would be a system based on nothing other than moral and prudential reflection, rational practical discourse, and spontaneous compliance with the results of reflection and discourse simply owing to their correctness. Such a system would be deficient for three reasons.[40] The first is the problem of practical knowledge.[41] There are a great many practical questions in which no agreement can be arrived at, not even between reasonable persons. That makes legally regulated procedures necessary, procedures that guarantee the arrival at a decision which determines what the law is. This implies the necessity of authoritative issuance as social fact. The second reason is that spontaneous compliance is not enough. If everyone could violate the rules authoritatively issued without any risk, the rules would lose their social efficacy. Therefore, their enforcement is necessary. This necessity includes coercion, incorporating it into the concept of law alongside correctness.[42] Determination and enforcement are to be completed by means of a third reason. Numerous needs and purposes cannot be satisfied by spontaneous action alone. Organization is necessary, and organization presupposes law. For these three reasons, the deficiency of the ideal dimension, if conceived as a purely ideal system of reasons for action, leads to the necessity of positive law: that is, to the necessity of the real dimension. This necessity, however, does not stem from positive law. It stems from the moral requirement of avoiding the

[38] Alexy 2002a: 40–68. [39] Alexy 2002a: 68–81. [40] Alexy 2003: 8.
[41] Alexy 2010: 172–173. [42] Alexy 2003: 6–9.

costs of anarchy and civil war and achieving the advantages of social coordination and cooperation.

IV. A Conceptual Framework

1. First-Order and Second-Order Correctness

One might assume that the necessity of positivity implies positivism. This, however, would be incompatible with the claim to correctness. To be sure, the moral necessity of positivity implies the correctness of positivity. But the correctness of positivity does not by any means imply that positivity is to be understood as having an exclusive character. To grant positivity an exclusive character would be to fail to take account of the fact that the claim to substantial correctness – first and foremost, the claim to justice – does not vanish once law is institutionalized. It remains alive, standing behind and found in the law, and it is the main task of the theory of the ideal dimension of law to make this explicit. In order to achieve this, one has to distinguish two stages or levels of correctness: first-order correctness and second-order correctness. First-order correctness refers only to the ideal dimension. It concerns justice as such. Second-order correctness is more comprehensive. It refers both to the ideal and to the real dimension. This means that it concerns justice as well as legal certainty. Legal certainty, however, can be achieved only by means of positivity, that is, by determination, enforcement, and organization. In this way, the claim to correctness, *qua* second-order claim, necessarily connects both the principle of justice and the principle of legal certainty with law.

The principle of legal certainty is a formal principle. It requires commitment to what is authoritatively issued and socially efficacious. The principle of justice is, first and foremost, a material or substantive principle. It requires that the decision be morally correct. Both principles, as principles in general, can collide, and they often do.[43] Neither can ever supplant the other completely – that is, in all cases. On the contrary, the dual nature of law requires that they be seen in correct proportion to each other. Thus, second-order correctness is a matter of balancing. This shows that balancing has a role to play not only in the creation and application of

[43] Alexy 2002b: 44–110.

law, that is, in legal practice, but also at the very basis of law. It is a part of the nature of law.

The distinction between first-order and second-order correctness is necessary in order to determine the relation between the real and the ideal dimension, but, taken alone, it does not suffice to achieve this. In order to determine the relation between them, this distinction has to be connected with three further distinctions: first, the distinction between the observer's and the participant's perspective; second, the distinction between perspectives and dimensions; and third, the distinction between classifying and qualifying connections.

2. Observer and Participant

The difference between the observer's and the participant's perspective is this. The observer asks questions about and adduces arguments on behalf of a position that reflects how legal questions are actually decided in that legal system, whereas the participant asks questions about and adduces arguments on behalf of what he deems to be the correct answer to a legal question in the legal system in which he finds himself. The observer's perspective is defined by the question, 'How are legal decisions actually made?'; the participant's by the question, 'What is the correct legal answer?'

These two questions require different kinds of argument. The observer is confined to fact-based arguments, whereas the participant – say, a judge – has to adduce, alongside fact-based arguments, normative arguments that are not fact-based. This applies to all cases that, owing to the 'open texture' of law, cannot be resolved solely on the basis of fact-based arguments.[44] These normative arguments can be classified as moral arguments about how the law ought to be. This is not, however, to say that the considerations of an observer

> cannot include considerations about what the participants whom he observes think the law ought to be. One might term such considerations about what persons think the law ought to be 'indirect' or 'third-person' considerations by contrast to the direct or first-person considerations of the participant.[45]

Finnis has characterized this conception of the observer's point of view as so 'inclusive' that it comes close to Hart's thesis that the positivist method allows one to see and

[44] Hart 2012: 128. [45] Alexy 2013b: 103–104.

understand all that law *really* is – the whole 'real dimension' of law *including the participant's* perspective.[46]

Thus, Finnis is arguing, the positivist has the possibility of declaring superfluous a participant's perspective, distinguished from the observer's perspective by means of its specific relation to the ideal dimension, where the participant's perspective implies a necessary connection between law and morality. But this is not true. There exists a fundamental difference between the indirect or third-person considerations of an observer about participants and the direct or first-person considerations of the participant himself. Just one example. Consider a court which has to decide a case with respect to which only one precedent exists. The precedent includes a dissenting vote, and the judges discuss whether, in their new decision, they should follow the dissenter in the earlier case. In order to decide this, they have to answer the question of whether the opinion of the former majority or the opinion of the dissenting judge is correct. This answer requires normative arguments addressed to the issue of the correct legal decision. The position of an observer is completely different. If he is a master at his trade, he can explain without a flaw the former decision and, equally perfectly, he can predict the new one. But he cannot say what now would be the correct decision without shifting from the observer's perspective to the participant's perspective. This implies that it is, first, necessary to distinguish the observer's perspective from the participant's perspective, and, second, to connect the participant's perspective with the ideal dimension.[47]

3. Perspectives and Dimensions

Finnis has qualified the ideas of dual nature and dual dimensions as 'elusive'.[48] To address things like the Radbruch formula 'in terms of "real" and "ideal" "dimensions of law"' is said to be 'unhelpful'.[49] My concentration on the distinction between the observer's and the participant's perspective in *The Argument from Injustice* (1992/2002), Finnis continues, was 'clearer'.[50]

[46] Finnis 2014: 89.

[47] There is one exception that connects even the observer's perspective with the ideal dimension. It concerns the claim to correctness. A system of social rules that does not raise a claim to correctness is not a legal system. This conceptual truth concerns, first, the ideal dimension and is, second, inevitable even for one who qualifies solely as an observer. See Alexy 2013b: 104.

[48] Finnis 2014: 86. [49] Finnis 2014: 101. [50] Finnis 2014: 87.

Now the ideas of a real and an ideal dimension, already present in *The Argument from Injustice*, comprise, on the one hand, the complex class of elements to which the observer has to refer when he describes the law, and, on the other, the even more complex class of elements to which the participant has to refer in order to arrive at a correct decision or judgement.[51] Without these two classes of elements, the two perspectives cannot be adequately grasped. For this reason, there exists no question of alternatives where perspectives and dimensions are concerned, as Finnis seems to assume.[52] Rather, the question is one of explication. The two dimensions are necessary for the explication of the two perspectives. Thus, if Finnis's thesis that the idea of dimensions were elusive, the idea of perspectives would be elusive, too.

4. Classifying and Qualifying Connections

Finnis and I agree that the participant's perspective is the central perspective.[53] The reason for this is that legal systems are possible without naked or sole observers, but they are not possible without participants. For this reason, the participant's perspective is the true battlefield of the debate between positivism and non-positivism. The mere fact that the positivist's separation thesis is essentially correct from the observer's perspective says nothing on behalf of the positivist's separation thesis.[54]

An answer to the question of how the relation between law and morality or between the real and the ideal dimension is to be determined from the participant's perspective is not possible without the distinction between classifying and qualifying connections between law and morality. The effect of a classifying connection is the loss of legal validity. By contrast, the effect of a qualifying connection is legal defectiveness or incorrectness that does not, however, undermine legal validity.[55] The decisive point here is that the effect of moral defectiveness or

[51] Alexy 2002a: 81, 128, 130.

[52] Finnis sometimes speaks of a 'double life' of law; see Finnis (2014: 95–96). Perhaps this can be interpreted as a move away from the alternatives of perspectives and dimensions in the direction of the dual nature thesis, which, again, includes the idea of two dimensions.

[53] Finnis 2014: 102.

[54] Alexy 2002a: 31, 35. Raz has argued that there exists no difference between the observer's and the participant's perspective (Raz 2007: 22–25). If this were true, we would be quite close to the truth of positivism. But it is not true; see Alexy 2007a: 45–48.

[55] Alexy 2002a: 26.

incorrectness is *legal* defectiveness or incorrectness. That morally defective laws are morally defective is a trivial truth. The positivist has no problem agreeing with this. But that these laws are, over and above this, also legally defective is not only not trivial but, indeed, of the greatest significance for the relation between the real and the ideal dimension of law, and this not only for theoretical reasons, but also for reasons practical in nature. If the defect were merely a moral one, it would be difficult to explain why a higher court – independently of what the positive law says – has legal power to set aside the unjust decision of a lower court in a case in which this unjust decision is every bit as compatible with positive law as a just decision would be.

The positivist's separation thesis states that there is no necessary connection between legal correctness or legal validity on the one hand and moral correctness and incorrectness on the other. This implies that positivism – whether exclusive or inclusive – must deny the existence of both a necessary classifying and a necessary qualifying connection in order to remain positivistic. In contrast to this, the necessity operator '□' in '□ I', which represents in the necessity triad all forms of non-positivism,[56] refers to classifying as well as to qualifying connections.

The claim to correctness implies that all forms of non-positivism must adhere to the thesis that there exists a necessary qualifying connection between law and morality in all cases. This is different with respect to the classifying connection. Non-positivism can determine the effects of moral defects or incorrectness on legal validity in three diverse ways.[57] It can, first, exclude all morally defective or incorrect norms from the class of legally valid norms. This most radical form of non-positivism can be called 'exclusive non-positivism'. A classical version of this view is expressed by Augustine's statement that 'a law that is not just would not seem to me to be a law'.[58] A recent example is Beyleveld's and Brownsword's thesis 'that immoral rules are not legally valid'.[59] If one employs 'V' for 'is valid', this can be expressed, with the help of the universal quantifier '∀', by:

[56] In contrast to this, exclusive positivism is represented in the necessity triad as '□ ¬I' and inclusive positivism as '¬ □ ¬I & ¬ □ I'.

[57] Alexy 2012: 4–7.

[58] Augustinus 2006: 86 (I, 11): '*Nam lex mihi esse non videtur, quae iusta non fuerit*'.

[59] Beyleveld and Brownsword 2001: 76 n.17.

$$\forall x \neg \vee x. \tag{4}$$

The second version of non-positivism includes all authoritatively issued and socially efficacious norms in spite of their moral defects in the class of legally valid norms. This can be called 'super-inclusive non-positivism'. With respect to the result of the classifying connection, super-inclusive non-positivism is equivalent to exclusive positivism. But a deep difference remains with respect to the qualifying dimension.[60] Aquinas's thesis that a tyrannical law 'is not law simpliciter'[61] or, as Finnis puts it, 'not law in the focal sense of the term "law"', but only law 'in a secondary sense of that term', that is, defective law, seems to mark a qualifying connection.[62] Another version of super-inclusive non-positivism that can be explained by means of the distinction between classifying and qualifying connections is to be found in Kant's combination of the postulate of '[u]nconditional submission' to the positive law with the idea of a necessary subjugation of positive law to non-positive law.[63] Super-inclusive non-positivism can be expressed in the following way:

$$\forall x V x. \tag{5}$$

The third version of non-positivism is inclusive non-positivism. Inclusive non-positivism claims neither that moral defects always undermine legal validity nor that they never do. Its most prominent expression is found in the Radbruch formula, which in its most compressed form runs as follows: Extreme injustice is no law.[64] According to this formula, moral defects

[60] Finnis (2014: 89) refers the attribute 'super-inclusive' also to the observer's perspective, and, with this, to positivism, and he criticizes a 'connotation of excess'. This critique would be justified if the concept of super-inclusiveness could indeed sensibly be applied to the observer's perspective. This, however, is not the case. Super-inclusiveness exists only on the side of non-positivism, and the 'connotation of excess' stems from the excessively high weight that super-inclusive non-positivism attributes to the principle of legal certainty in contrast to the excessively low weight attributed to the principle of justice. The result of this is the radical difference between the effect of defects on the level of the qualifying connection and on the level of the classifying connection. It makes no sense to speak of 'super-inclusive positivism', for positivism includes in the concept of law *per definitionem* all positive law. The observer's description of law does not include the balancing just mentioned.

[61] Aquinas 1962: 947 (I-II, q. 92, a. 1 ad 4): '*lex tyrannica* [. . .] *non est simpliciter lex*'.

[62] Finnis 2011: 364.

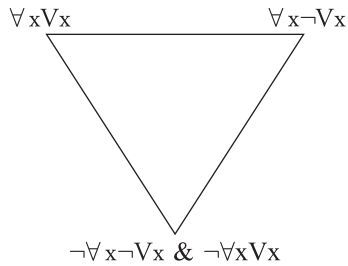
[63] Kant 1996b: 506. See Alexy 2008a: 288–290. On a possible exception to Kant's unconditional submission to the positive law see Alexy 2010: 174, n. 10.

[64] Radbruch 2006: 7.

undermine legal validity if and only if the threshold of extreme injustice is transgressed. Injustice below this threshold is included in the concept of law as defective but valid law. This can be expressed in the following way:

$$\neg\forall x\neg Vx \;\&\; \neg\forall xVx. \tag{6}$$

All three versions of non-positivism are represented in the necessity triad by '□ I'. They can now be brought together in a second triad, which counts as the explication '□ I' in the necessity triad:



This triad can be called the 'quantifier triad'. The three positions both in the quantifier triad and in the necessity triad stand in a relationship of contrariety, because each excludes the other without stemming from its negation. With this, the instruments for determining the relation between the real and the ideal dimension are at hand.

V. The Relation Between the Real and the Ideal Dimension

In order to determine the relation between the real and the ideal dimension of law one has to answer five questions. First, is there an outermost border of law? Second, is legal argumentation based exclusively on authoritative reasons or does it also include non-authoritative reasons? Third, what is the relation between human rights and legal systems? Fourth, is democracy to be understood exclusively as a decision procedure or also as a form of discourse? Fifth, do legal systems comprise only rules expressing a real 'ought' or also principles expressing an ideal 'ought'? These five questions shall be answered with the following five theses: the first with the Radbruch formula; the second with the special case thesis; the third with the thesis that constitutional rights are to be understood as attempts to positivize human rights; the fourth with the deliberative model of democracy; and the fifth with principles theory.

All five theses turn on the same point: the claim to correctness. That is, the claim to correctness is the main reason for all five theses. On could think about drawing a pentagon with one thesis found at each edge and the argument from correctness, like a sun, standing in their midst. This visualization – one might call it the 'ideal dimension pentagon' – can, however, only be seen as a heuristic model of a system of the institutionalization of reason that is to be elaborated by means of arguments determining the relation between the real and the ideal dimension in five directions.

1. The Radbruch Formula

The first direction concerns the idea of an outermost boundary of law. The most renowned version of the thesis, namely, that such an outermost boundary exists, is the Radbruch formula. In its shortest form, as already mentioned, it runs as follows:

> Extreme injustice is no law.[65]

The Radbruch formula is an expression of second-order correctness. Second-order correctness refers to both the real dimension as well as the ideal dimension of law. The central concern of the real dimension is legal certainty, arrived at by means of positivity, that is to say, by determination, enforcement, and organization. By contrast with this, the central concern of the ideal dimension is substantive justice. In this way, the claim to correctness necessarily connects both the principle of justice and the principle of legal certainty with law.

Second-order correctness requires that the problem of unjust law be resolved by means of balancing. The relation between the principles of justice and legal certainty on the one hand, and the Radbruch formula on the other, is determined by the first of the two laws found in principles theory, the law of competing principles. The law of competing principles says, in its less technical formulation, that

> [t]he circumstances under which one principle takes precedence over another constitute the conditions of a *rule* which has the same legal consequences as the principle taking precedence.[66]

[65] Alexy 2008b: 428. [66] Alexy 2002b: 54; new emphasis.

The Radbruch formula is nothing other than the rule of which this law speaks. The conditions of this rule are the circumstances under which the principle of justice takes precedence over the principle of legal certainty, namely extreme injustice. Its legal consequences are the consequences that would be required by the preceding principle, the principle of justice, if it were taken alone, namely lack of legal validity from the beginning. The picture changes below the threshold of extreme injustice. Under these circumstances the principle of legal certainty takes precedence over the principle of justice. A new rule emerges. It states that injustice below the threshold of extreme injustice does not exclude legal validity.[67]

The Radbruch formula represents inclusive non-positivism. The two other forms of non-positivism also can be reconstructed in the light of the law of competing principles. Exclusive non-positivism gives precedence to justice over legal certainty under all circumstances, and super-inclusive non-positivism gives precedence to legal certainty over justice, again under all circumstances. That is to say, both establish an abstract or absolute relation of precedence by contrast to the conditional relation of precedence established by inclusive non-positivism.[68] Such abstract or absolute relations of preference, however, express a bias in favour of either the ideal or the real dimension, both of which are incompatible with second-order correctness.[69] For this reason, law's claim to correctness requires inclusive non-positivism as expressed by the Radbruch formula and justified by balancing.

Finnis has raised two objections against this balancing approach. The first says that

> it confuses *Is* and *Ought* to assimilate (as Alexy does) the real dimension with 'the principle of legal certainty', a principle in tension with 'the principle of justice'. If the one principle is in tension with the other, they are in the same plane or realm, which in Alexy's terminology is the 'ideal'.[70]

The problem here stems from the term 'assimilate'. If I were to identify the principle of legal certainty with the real dimension, Finnis would be right. But I do not identify them. The real dimension consists of law as fact. By contrast with this, the principle of legal certainty is a reason that

[67] On a more technical analysis see Alexy 2015: 445. [68] See on this Alexy 2002b: 52–53.
[69] Alexy 2008a: 290. [70] Finnis 2014: 101.

requires compliance with what has been authoritatively issued and is socially efficacious. This is to say that the real dimension is the subject of the principle of legal certainty, which demands, as a norm, that this subject be taken as seriously as is possible. The principle of legal certainty and the principle of justice are both required by second-order correctness, and they are, *qua* principles, that is to say, *qua* norms, both found at the normative level. Thus, a confusion of 'is' and 'ought' is precluded.

The second objection against the balancing approach maintains that

> the idea that one could weigh *by reason* such incommensurables as 'ideal' and 'real/factual' 'dimensions'

is a mistake.[71] Now the weighing or balancing takes place between the principle of legal certainty and the principle of justice. The second law of principles theory, the law of balancing, shows that and how reasonable balancing between these two principles is possible. The law of balancing reads as follows:

> The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.[72]

According to the law of balancing one has to determine, on the one hand, how great the non-satisfaction of or interference with the principle of legal certainty is, and, on the other, how great the importance of satisfying the principle of justice is. An example is the bank deposit decision of the Master Panel of the German Federal Court of Justice for Civil Matters. This decision concerns the question of whether a Jewish woman who emigrated has, on the basis of Section 3 of the Eleventh Ordinance, November 25, 1941, issued pursuant to the Statute on Reich Citizenship, lost her claim to securities left in a bank deposit of a German bank. The Master Panel declared Section 3 of the Eleventh Ordinance, which provided for the devolution of such property to the Reich, as 'void from the outset',[73] and this can be reconstructed as a balancing led by reason. The injustice was extreme. Since, according to the Radbruch formula, only extreme injustice and not, then, every instance of injustice leads to

[71] Finnis 2014: 108.

[72] Alexy 2002b: 102. This law of balancing can be developed further by means of the weight formula, but this refinement is not necessary in the present context. See on this Alexy 2007b, 25.

[73] *BGHZ* 16 (1955), 350, at 354 (trans. Robert Alexy).

invalidity, the interference with the principle of legal certainty can be described as relatively light. By contrast with this, the interference with the principle of justice would be very serious if the Jewish woman, expropriated for reasons 'racial' in nature, were not to get her property back. Therefore, the law of balancing requires that the case be decided according to the rule: extreme injustice is no law. In order to contest the rationality of balancing in this case, one would have to contest the classifications of the interferences with the two principles, that is, the classification of the interference with the principle of justice as very serious, and the classification with the principle of legal certainty as only light or medium. It seems that it would be impossible to contest this with rational arguments. This implies that commensurability is established by rational discourse.[74]

Finnis's objection to, he claims, a confusion of 'is' and 'ought' as well as his incommensurability objection concern the justification of the Radbruch formula by way of balancing and are, in this sense, indirect objections. To these indirect objections he adds two objections that concern the Radbruch formula directly. The first concerns the practice, the second the theory of the Radbruch formula. The objection from practice classifies the formula as 'simplistic', 'somewhat rough and ready', and nothing more than a 'rule of thumb'.[75] The formula 'over-simplify[s] matters by offering too short a short-cut through the forest'.[76] Finnis's counter-model is characterized as follows:

> It is better, I think, to proceed on the assumption that the moral consequences of significant injustice in the making or content of purportedly and intra-systematically valid legal rules are to be assessed by reference to all the considerations of justice that bear on the situation in which the question of the rule's application (present or past) arises for consideration.[77]

It is striking that Finnis refers here to 'significant injustice' and not, as the Radbruch formula has it, to 'extreme injustice', and that he asks not for legal consequences but for 'moral consequences'.[78] But this shall not be elaborated here. At this point, the only question of interest is whether Finnis's all-things-considered fashion ought to be preferred to the 'all-or-nothing fashion' of the Radbruch formula.[79]

[74] Alexy 2007b: 18. [75] Finnis 2014: 106, 107, 109. [76] Finnis 2014: 87.
[77] Finnis 2014: 107. [78] On the last point see Alexy 2013b: 109–110.
[79] Finnis 2014: 108.

Finnis attempts to illustrate the lack of soundness of the all-or-nothing fashion by looking to a case to which I, indeed, have given 'pride of place' in '*The Argument from Injustice*'.[80] It is the decision of the German Federal Constitutional Court in 1968 on citizenship. The Eleventh Ordinance, November 25, 1941, issued pursuant to the Statute on Reich Citizenship, stripped emigrant Jews not only, as in the bank deposit case mentioned above, of property but also of citizenship on the ground of race. The Federal Constitutional Court was to decide whether, according to this directive, a Jewish lawyer had forfeited German citizenship by emigrating to Holland shortly before the outbreak of the Second World War. In 1942, he was deported from Amsterdam, and since his whereabouts were not known, he was presumed dead, ruling out the possibility of restoration of German citizenship in accordance with art. 116, para. 2 of the post-war Constitution of the Federal Republic of Germany. The Court reached the conclusion that the lawyer had never lost his German citizenship, arguing that the 'conflict' of the Eleventh Ordinance 'with justice [had] reached such an intolerable degree that the Ordinance must be held to be null and void, that is, invalid from the outset.'[81] And the Court adds: 'Moreover, the Ordinance did not become legally valid in virtue of having been observed over a number of years'.[82]

Finnis's argument that all of this is 'simplistic' is based on art. 116, para. 2 German Basic Law of May 23, 1949, which runs as follows:

> Former German citizens who, between 30 January 1933 and 8 May 1945, were deprived of their citizenship on political, racial, or religious grounds, and their descendants, shall be regranted German citizenship on application. They shall be considered as not having been deprived of their German citizenship if they established their domicile in Germany after 8 May 1945 and have not expressed a contrary intention.

Finnis is right in his argument that there exists the possibility of interpreting art. 116, para. 2, as a denial of the Radbruch formula.[83] The first sentence speaks about *regranting* German citizenship. One can regrant only what

[80] Finnis 2014: 105 and Alexy 2002a: 5–7.

[81] BVerfGE 23 (1968): 98, 106; English quotation in Alexy 2002a: 6.

[82] BVerfGE 23 (1968): 98, 106; Alexy 2002a: 6, translation changed: 'legally valid' instead of 'efficacious', because '*wirksam*', here, does not refer to social efficacy (*soziale Wirksamkeit*), but to legal validity (*rechtliche Wirksamkeit*).

[83] Finnis 2014: 106.

has been taken away. The second sentence does not say that they have not been deprived of their German citizenship, as the Federal Constitutional Court maintains. It only states that they shall be *considered* as having not been deprived of it. But this possibility of interpretation has two weak points. The first is that other interpretative possibilities exist. The Court's argument, turning over five pages, has it that the intent of the framers of the Constitution had two sides.[84] On the one hand, they wanted to conceive of the Eleventh Ordinance as null and void from the beginning. In the bank deposit case this was no problem. But in the citizenship case it was. Not all Jewish emigrants, after the Nazi Regime, wanted any longer to be considered as Germans. The Court stresses several times that their will has to be respected; that is, that German citizenship may not be imposed on them against their will.[85] This, however, does not imply that the Eleventh Ordinance is to be considered as legally valid. It only implies that it is to be considered as if it were legally valid. This is a paradigmatic case of a legal fiction. And it is a fiction justified by the human rights of those concerned. As a first step, their human rights require a holding of invalidity from the beginning. As a second step, their human rights require the fiction of validity for all those who do not want the consequences that stem from the holding of invalidity. Concerning the result, this may have some similarity with Finnis's all-things-considered fashion. For systematic reasons, however, it is completely different. The Radbruch formula remains the basis, a basis that cannot be replaced by the cluster of reasons that is relevant according to the all-things-considered fashion. This fashion is a completely open hermeneutical maxim that can only complement the Radbruch formula in the context of its application but cannot replace it.

This immediately leads to Finnis's theoretical or philosophical objection to the Radbruch formula. Finnis insists that the Radbruch formula and, with it, inclusive non-positivism is not 'a truth about the nature or essence of law'.[86] '*It is not a truth about law, a truth of the philosophy of law (legal theory)*'.[87] My reply to this is that it is a truth about the nature and essence of law and, with this, a truth of the philosophy of law. In the section 'Conceptual Analysis and Conceptual Necessities', above, I have pointed out that the analysis of the concept of law, *qua* concept referring to social

[84] BVerfGE 23, 98 (108–112). [85] BVerfGE 23, 98 (107, 108, 110, 111).
[86] Finnis 2014: 108. [87] Finnis 2014: 107.

kinds, requires a connection of analytical and normative arguments. Normative arguments concern the nature and the essence and, with this, the concept of law[88] when they refer to those normatively necessary requirements that are necessarily connected with law. The claim to correctness, necessarily connected with law as a conceptual matter, connects the normative requirements of legal certainty and justice necessarily with law, and these two requirements, taken together, include the Radbruch formula in the concept and nature of law.[89] And the question of the concept and nature of law is the main question of legal philosophy.[90]

2. The Special Case Thesis

The second field in which the real and the ideal dimension of law are connected is legal argumentation. This connection is expressed by the special case thesis. This thesis states that legal argumentation or legal discourse is a special case of general practical argumentation or discourse.[91] General practical discourse is a non-institutionalized discourse about practical questions. As a general practical discourse it comprises all kinds of non-authoritative practical arguments: that is, moral arguments concerning justice and rights as well as ethical arguments concerning individual and collective identity, and pragmatic arguments that give expression to means-end rationality. The moral arguments have priority, for they represent the universal point of view. This does not, however, mean that their content cannot depend on the other arguments.[92] Legal discourse is a special case of general practical discourse because it is committed to statute, precedent and legal dogmatics. These commitments represent the real dimension of legal discourse or argumentation. The ideal dimension comprises general practical argumentation.

An elaborated explication of the relation between the real and the ideal in legal argumentation cannot be given here. This would require an answer to the question: 'what is to count as a rational justification within the validly prevailing legal order?'[93] This, however, could only be answered by

[88] On the relation between the concepts of nature and essence and the concept of concept, see Alexy 2008a: 290–292.
[89] Alexy 2003: 12. [90] Alexy 2006: 23–25. [91] Alexy 1989: 211–220.
[92] Alexy 1999: 378–379. [93] Alexy 1989: 220.

means of a theory of legal reasoning or argumentation.[94] Only two points are of interest. The first is that the claim to correctness raised in legal argumentation is a claim to second-order correctness. This means that it concerns justice as well as legal certainty. The second point is that the special case thesis by no means represents, as Habermas fears, a blanket permission 'to move in the unrestricted space of reasons' of general practical discourse.[95] On the contrary, it includes a *prima facie* priority of authoritative reasons. This *prima facie* priority finds its expression, *inter alia*, in the following rule of legal discourse:

> Arguments which give expression to a link with the actual words of the law, or the will of the historical legislator, take precedence over other arguments, unless rational grounds can be cited for granting precedence to the other arguments.[96]

The structure of this rule is quite different from that of the Radbruch formula, but its function is the same. Both serve to determine the relation between the real and the ideal dimension of law.

3. Human Rights

The third area in which the relation between the real and the ideal dimension is of pivotal importance is the field of human and constitutional rights. Human rights are characterized by five properties. They are first, moral; second, universal; third, fundamental; and fourth, abstract rights; that fifth, take priority over all other norms with respect to their moral validity.[97] Here, only the first of these five properties is of interest: the moral character of human rights.

The moral character of human rights consists in their having, *qua* moral rights, only moral validity. This means that human rights as such belong exclusively to the ideal dimension of law. Now, a right is morally valid if it can be justified. Rights exist, as norms in general, if they are valid.[98] Thus, the existence of human rights depends on their justifiability and on nothing else. Elsewhere, I have attempted to show that human rights are justifiable and that they therefore exist.[99] This cannot be undertaken here. In the present context, the only question to be addressed is the relation between human rights and constitutional rights.

[94] Alexy 1989: 220. [95] Habermas 1999: 447. [96] Alexy 1989: 248.
[97] Alexy 2012: 10–12. [98] Kelsen 1967: 10. [99] Alexy 2013c: 13–18.

Constitutional rights are part of positive law, namely positive law at the level of the constitution.[100] As such, they belong to the real dimension of law. The relation between constitutional rights and human rights would belong to the relations between the real and the ideal dimension of law if there be a necessary connection between human rights and constitutional rights.

The key to this necessary connection is the concept of correctness. Constitutions, as with law in general, necessarily raise a claim to correctness. This is the one side of the argument. The other side is that human rights – since their existence consists in their justifiability – are necessarily connected with the concept of correctness, for what is justifiable is correct. This and the priority of human rights require a positivization of human rights at the constitutional level. For this reason, constitutional rights can be considered as attempts to transform human rights *qua* ideal rights into positive law, that is, into real rights. The ideal dimension remains alive after the transformation into the real dimension. And this has far-reaching consequences for the interpretation of constitutional rights and their role in the legal system. But this cannot be elaborated here.

4. Democracy

Democracy, at one and the same time, can be conceived as a decision procedure and as an argumentation procedure. Taking decisions, in the manner familiar from the majority principle, is the real side of democracy. Argumentation, as public discourse, is necessarily connected with the claim to substantive correctness. For this reason, it is the ideal side of democracy. The only possibility for the realization of second-order correctness in political life, especially in public law-making, is the institutionalization of a democracy that unites both sides. The name given to this unity is 'deliberative democracy'.

5. Principles Theory

In the application of law, rules as well as principles play an essential role. Rules express a definitive or real 'ought', principles a *prima facie* or ideal

[100] Including rights in constitutions is only one way of transforming them into positive law. International and supra-national covenants, conventions or charters are further possibilities here.

'ought'. The principles of a legal system, taken together, constitute what might be called a 'world of the ideal Ought'.[101] The theory of principles attempts to develop on this basis a theory of proportionality that connects balancing with correctness. This, again, cannot be elaborated here. In our context, the only point of interest is that principles theory completes the system of the five directions of the ideal dimension of law.

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13 Two Unhappy Dilemmas for Natural Law Jurisprudence

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Natural law jurisprudential theories have been put forward by Thomas Aquinas,[1] Thomas Hobbes,[2] Lon Fuller,[3] John Finnis,[4] Robert Alexy,[5] Michael Moore,[6] (perhaps) Ronald Dworkin[7] and others.[8] Clearly one way to attack such theories is to confront the specific arguments offered by their authors in favor of their views, and there are of course important critical confrontations with natural lawyers' arguments in the literature, some of them intramural disputes among natural law theorists. But the predominant form of recent critical engagement with natural law jurisprudential theories has not been of this form. Instead, recent engagement has taken a more distanced and abstract form, in which it is argued either that the very jurisprudential project that natural law theorists are engaged in is a wrongheaded project or that not just Thomas Aquinas's, or John Finnis's, or Robert Alexy's, or Michael Moore's natural law view, but *any* natural law view is subject to straightforward devastating objection.

Both of these challenges – that the project to which natural law jurisprudence aims to contribute is wrongheaded, and that even

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[1] *Summa Theologiae* IaIIae Q. 90–97.

[2] Hobbes 1651: chapter xxvi. Hobbes is often treated as a positivist, but his natural law credentials are very solid. See Murphy 1995: 846–873 and Dyzenhaus 2001: 461–498.

[3] Fuller 1964. [4] Finnis 1980. [5] Alexy 2002.

[6] Moore 1992: 188 and Moore 2001: 115.

[7] Dworkin 1982: 165–210. Dworkin's credentials as a natural law theorist are questionable because he is uninterested in providing a general theory of law's nature: see Dworkin 1986: 410.

[8] I defend the natural law view in Murphy 2003: 241–267, Murphy 2006, Murphy 2012: 45–60 and Murphy 2013: 3–21.

granting the worthwhileness of the project, natural law jurisprudence is a plain non-starter – can be formulated as a dilemma for the natural law theorist. The first takes aim at the natural law theorist's task of trying to provide an account of law's nature, rejecting as deeply implausible the notion that law has a nature at all. This is one of the two unhappy dilemmas mentioned in the title of this chapter: for law to have a nature in the sense that the natural law theorist cares about, law must be either something like a natural kind or something like an artefact kind, and the former is obviously wrong, while the latter undermines the notion that law has a nature in any interesting sense. The second strategy claims to show that the natural law theorist's view is not a theory of law's nature at all: for a theory of law's nature is a theory of law's existence conditions, and if natural law theory is not to be an absurd view, it cannot say anything about law's existence conditions that is at odds with what is said by natural law theory's putative rival, legal positivism. This is the second unhappy dilemma: natural law theory is either hopeless or non-distinctive. So either law has no nature, or natural law theorists aren't saying anything about it that cannot be said by its rival. I shall argue that both of these dilemmas can be broken. There is little reason, prior to systematic investigation of particular attempts to characterize law's nature, to take on a sceptical view about law's having a nature. And the view that natural law theory does not give us a distinctive account of that nature, even when we construe that question narrowly as a question of law's existence conditions, is profoundly misguided.

I. The Task of Providing a 'Theory of Law', and Two Ways to Reject Natural Law Jurisprudence

Analytical jurisprudence takes for granted that there is a property *being law*. It is the property that masterful users of the concept <law> mean to ascribe to something or to refrain from ascribing to something when they say that it is the law that one must pay one's federal taxes by April 15 but that it is not the law that one must be kind to one's parents. And thus there are various facts about what is or what is not law, and in what legal systems those things are or are not the law.

A theory of law, writes Joseph Raz, is a set of *necessary* truths about law that *explains* it.[9] What Raz means by this pithy remark is, in part, that in giving a theory of law, it is not enough to offer what are simply contingent truths about law. Let us neither overstate nor understate this. If it is merely a contingent truth that law is backed by sanctions, then that law is backed by sanctions does not belong in a theory of law. But in order for the law-sanctions connection to belong in a theory of law, it need not be necessarily true that every law is backed by a sanction. The necessary truth could be more complex than that. It could be that, necessarily, every law that is a duty-imposing norm is backed by a sanction. Or it could be that, necessarily, every law that is a duty-imposing norm is backed by a sanction in legal systems in which the members tend to violate the norms of that system. Of course there are many permutations available. Make the proposition as complex as you want, so long as it is necessary. Raz's point is only that the truths that belong to a theory of law are not those that are only accidentally true.[10]

But not even all those truths about law that are necessary in this sense belong, in Raz's view, to a theory of law. Raz's further constraint is that these truths have to explain the law. He is not saying that these truths explain why law comes to be instanced in some place and time, as though the theses in question are causal-historical. As Dickson notes, they are, rather, *constitutive* theses, claims about what the essence of law is.[11] This is what Shapiro calls the 'Identity question' with respect to *being law*.[12] The idea is that we are supposing that we can give an identification of *being law* with being some structured property;[13] since structured properties have properties as parts, and those parts are independently intelligible, a true identification of *being law* will be informative. We may then be able to draw from these truths about law's identity other truths about law, by employing supplementary premises. Shapiro calls these further truths answers to the 'Implication

[9] Raz 2004: 324.

[10] Recent work by Fred Schauer challenging the claim that theories of law must traffic in necessary truths does not adequately take into account, I think, that the only necessity that has to be involved here is non-accidentality. See Schauer 2012: 457–467.

[11] Dickson 2001: 17–18. [12] Shapiro 2012: 12.

[13] For a recent discussion of structured properties and their role in making sense of certain theses about reduction, see Schroeder 2007: 67–72.

question' about law – what further inferences can we draw about law, though they do not belong to law's essence.[14]

As I understand natural law jurisprudence, it both takes seriously the task of providing what Raz calls a 'theory of law' and purports to offer a distinctive sort of theory, one that is at odds with those legal philosophers who call themselves 'legal positivists'. The two dilemmas challenge the goal of providing a theory of law and of offering a natural law theory of law in particular.

II. Against Philosophical Theories of Law: Law as Natural Kind, or Law as Artefactual Kind?

Among others,[15] Brian Leiter has taken issue with recent characterizations of the task of analytical jurisprudence as that of providing an informative identification of the property *being law*.[16] He is explicitly targeting Raz and Dickson, and he takes Shapiro's to be a central case of a jurisprudential view that has gone off the rails. Shapiro, in trying to make clear the aspirations of his own spin on positivist jurisprudence, his 'Planning Theory of Law', compares the task of giving a theory of law to that of offering an informative identification of *being water* with *being* H_2O. Here is Leiter:

> Comparing 'law' to 'water' ought to strike most philosophers as mad: water is a natural kind, and law is not; indeed, on most accounts. . . law is a human artifact. Artifacts can be made of almost anything; natural kinds, by contrast, typically have distinctive micro-constitutions, whether molecular or genetic.[17]

So Leiter thinks that it is absurd to treat law as a natural kind; if it were a natural kind, then the idea of giving an informative identification of it in the way that Raz, Dickson, and Shapiro suggest would make perfect sense, but it would be mad to think of law in this way. Rather, we should think of laws as artefacts, and law as an artefactual kind. But this undermines the notion that law has a nature to be identified:

> Artefact concepts, even simple ones like 'chair', are notoriously resistant to analyses in terms of their essential attributes, both because they are hostage to

[14] Shapiro 2012: 12. [15] See Schauer 2012 and Patterson 2012: 47–58.
[16] Leiter 2011: 663–677 and Leiter 2016. [17] Leiter 2016: 4.

changing human ends and purposes, and because they cannot be individuated by their natural properties – unlike say natural phenomena like water, which just is H_2O. Chairs can be made of stone or wood or metal. Their apparent function – providing support for those who sit – can be discharged by boxes, tortoises, car seats, and steps. Moreover, some chairs have as their actual function ornamental decoration, not sitting; some serve primarily as shelves for stacking papers or books. . . Because human ends and purposes shift, the concept of a 'chair' has no essential attributes.[18]

I find puzzling a number of things about this passage of argument, especially the very casual way that Leiter characterizes the notion of a natural kind. While it is tempting to make the case that law is indeed a natural kind – I would be aided here by the disagreements regarding criteria for a kind's being natural – I will instead focus on the notion that there is some sort of tension between, on the one hand, characterizing something as an artefact and the kind to which it belongs as an artefactual kind and, on the other hand, thinking that it has a nature.

That there is a tension is not at all obvious, and if it seems obvious, one should be impressed by the fact that there is an ongoing discussion within analytical metaphysics not only about what we should think about what it is to be an artefact but also about whether artefacts have essences in the relevant sense.[19] Notice the difficulty that Leiter has in saying just what it is to be an artefactual kind. He recognizes that he cannot simply say that it is the product of human activity, for he is subject to the 'babies!' counterexample. Nor can we say that to belong to an artefactual kind is to be something that is brought about by agents' intentions to bring about that sort of thing. Not all artefacts require that sort of intention, nor is everything that is only brought about that way – think of chemicals that would never naturally occur, but can be brought about only in laboratory conditions – an instance of an artefactual kind. And since some laws are not the product of intention in that strict sense – take customary law – it would undermine the thesis in question to identify artefacts with that which is made with intentions of this particular sort.

Here is a rough cut that might serve Leiter's purposes: to be an artefact is in part to be something that owes its existence to the activity of persons who are its makers, and that *somehow* the intentions of those who are its makers enter constitutively into the explanation of its existence

[18] Leiter 2011: 666–667. [19] See, for example, the papers in Margolis and Laurence 2007.

conditions. This would cover artefacts the existence conditions of which are set directly by maker's intentions (say, aiming for something to serve a certain function may well enter into the existence conditions for *paper clips*) or less directly (a *road* might exist outside anyone's intentions to make a road, so long as the intentions to get somewhere by a certain path enters explanatorily into its creation or persistence). And one might suppose that being an artefactual kind in this sense is incompatible with being the sort of thing with a nature, the sort of thing for which we might seek informative identification.

But it is not at all obvious that being an artefactual kind in this sense is incompatible with being a kind that has a nature. I am going to put to the side the fact that artefactual kinds being somehow connected to contingent, shifting human interests does not seem to undermine the possibility of offering necessary, explanatory truths about what it is to be an artefact of a certain sort.[20] Consider a kind that clearly counts as artefactual by the proposed standard but which does not at all seem to me to be subject to the claim that artefactual kinds are matters of shifting, contingent interests. Consider kinds of illocutionary acts, acts of doing things with words. Take *assertion*, for example. Assertions are made by people. Their existence and identity conditions may not be well-understood, but it is pretty plain that assertion is connected to agents' intentions in a way that is characteristic of artefacts. If Leiter were to claim that everybody in philosophy knows that artefactual kinds lack natures, and so assertion has no nature, and thus those who try to exhibit the nature of assertion are philosophically out of touch, it would be Leiter who would show himself mad: for there is a thriving philosophical enterprise of working through the question of what the necessary features are of different sorts of illocutionary act, and assertion especially.[21] There is a thriving enterprise of asking if there is a constitutive norm of assertion,[22] what that norm is, and more generally what constitutes the success conditions for having made an assertion at all, the non-defectiveness conditions for assertion, and what the relationship is between the success and non-defectiveness conditions for assertions. There is a live debate on whether illocutionary acts like assertions have to be

[20] Leslie Green helpfully appeals to the concept <printer driver>; see Green 2013: 177–208.

[21] See, to get the flavor of this, the *Stanford Encyclopedia of Philosophy* entries on assertions and speech acts generally: http://plato.stanford.edu/entries/assertion/ and http://plato.stanford.edu/entries/speech-acts/, respectively.

[22] See, for example, Williamson 1996: 489–523.

conventionalizable; that is, that it is in virtue of conventions that it is possible to make assertions, or whether it is possible to make assertions in ways that do not make use of conventions.

In short, if the task that analytical jurisprudence has set for itself is no more wrongheaded than the task that philosophers of language set for themselves in offering and considering the merits of various hypotheses about the nature of illocutionary acts of different sorts, that is sufficient to make sense of Raz's, Dickson's and Shapiro's formulations of its goal, and thus no basis to object to what the natural law theorists are up to when they are trying to provide an account of law's nature.

Now, critics of the view that law has a nature might find the comparison between *being law* and *being an assertion* to be inapt. Law, as we all know, is a specific sort of social form, arising only in a specific sort of human context. Assertion is, by contrast, the most generic form, or one of the most generic forms, of illocutionary act. So even if an assertion is not the sort of artefact the features of which are not subject to shifting, contingent human interests, surely we cannot appeal to the possibility of exhibiting assertion's nature to defend the plausibility of exhibiting law's nature.

So consider another sort of illocutionary act: *testifying*. Testifying is a species of asserting, though it seems to have among its further conditions that there be some institutional context in which one's veracity as an asserter is vouchsafed. Now the possibility of testifying is logically posterior to the possibility of asserting. And it plausibly requires institutions of the sort that are not present in some sorts of human society. But it does not seem to me at all that the task of investigating into the nature of testifying, as some philosophers of language have,[23] is a wrongheaded activity. First, we are given a boost when we recognize that testifying is a species of asserting, such that we can employ our understanding of this more generic form of speech act in getting at what is necessary to testifying. Second, we can take the fact that it seems essential to testifying that it bears some connection to an institutional structure to try to separate out what seems a merely local and contingent feature of our way of testifying – say, that in some culture nothing counts as testifying unless one puts a hand on a holy book first – from what is a global and necessary feature of it.

[23] See, for example, Searle and Vanderveken 1985: 188–189.

Law is plausibly natural enough for there to be necessary truths that at least partially constitute its nature, and granting its status as an artefactual kind does nothing to call that into question. These necessary truths can give us some insight into which features commonly associated with it – coercion, apparatuses of interpretation and so forth – are merely contingent and which belong to it of necessity. Nothing here is an argument for the claim that it does have some nature. But for those arguments we must turn to the specific arguments of the natural law theorists themselves.[24]

III. Against Natural Law Theory: Natural Law Theory as Hopeless or as Non-Distinctive

So it seems to me that we have little reason to think that an inquiry into the nature of law – construed at least as a search for some necessary, explanatory features of law – is bound to be fruitless. Let me turn to the second allegedly unhappy dilemma for natural law theory, which takes for granted the prospect of a theory of the nature of law of this sort while denying that natural law jurisprudence could have anything of value to contribute to this inquiry.

Here is the second unhappy dilemma for the natural law theorist: natural law theory is either *hopeless* or *non-distinctive*. For it to be hopeless is for the reasons against it to be so overwhelming that it is not worth carrying it forward as a research programme. For it to be non-distinctive is for it to affirm only views that are compatible with the views of its central rival, legal positivism.

Now, one can deny that it is a necessary condition on the importance of natural law theory's contributions to analytical jurisprudence that it produce a view that is not only plausible but also incompatible with positivism. But I will not pursue the option of trying to show that natural law theorists should be happy to grasp one horn of the dilemma. Rather, I do not think that natural law theorists are forced to choose. I think that the unhappy dilemma is not a true dilemma, that the natural law theorist's view can be characterized in a way that is plausible

[24] For a different, though very plausible, account of how the artefactual character of law can be invoked in favour of natural law conclusions, see Crowe 2015: 737–757.

(and thus not hopeless) and that no legal positivist of the canonical sort can affirm.

I will first spend a bit of time indicating what I take 'legal positivism of the canonical sort' to be. I will then register some agreement with those that put forward this unhappy dilemma: I want to allow that there are varieties of natural law jurisprudence that really are hopeless, and that there are varieties of natural law jurisprudence that really are non-distinctive. But I want to fix on a certain natural law thesis – what I have in earlier work called the 'weak natural law thesis' – that is not at all hopeless, and I want to argue that it can be invoked in formulations of natural law jurisprudence that is incompatible with legal positivism of the canonical sort.

III.A. Legal Positivism of the Canonical Sort, and Natural Law Theory of the Canonical Sort

There has been in recent years a tendency for legal positivists to insist on the extreme thinness of positivism as a thesis about law. While there are good reasons to wonder about the basis for claiming that these formulations constitute the essence of positivist tradition, questioning that claim is not to my purpose here. In order to avoid begging questions, I will accept the recent formulation offered by Shapiro as expressing the positivist position:

> In the philosophy of law, there have been two different answers to [the question of the nature of law]. The first kind of answer, advanced by legal positivists, is that all legal facts are ultimately determined by social facts alone.[25]

Shapiro expresses here two dependence claims. What does the depending in both claims is the existence and content of law: that some law or laws exist with the particular contents that they have. What differs in the two claims is what the existence and content of law depends upon. The first claim is that it is not necessarily true that the existence and content of law depends on normative facts. The paradigmatic sort of normative facts the positivists wish to exclude from the relevant dependence relationship are facts about the moral status of the content of the alleged legal norms, their justice or injustice, say. So, that it is vicious to cooperate with an effort to

[25] Shapiro 2012: 27.

return an escaped slave to captivity is a normative fact, and positivists deny that the status of any law – including would-be laws that require the assistance of citizens in returning legal slaves to their owners – could necessarily depend on that, or any other, normative fact. It is not a necessary truth that the existence and content of law depends on the justice of that law's existence or content. It is not a necessary truth that law's existence depends on its being issued by a just legislative source, and it is not a necessary truth that a norm's status as law depends on its having a content that it within the bounds of the just. (In this chapter I am going to focus on content rather than source, for ease of exposition.) Some positivists strengthen the latter claim, so that it is a necessary truth that the existence and content of law does not depend on normative facts. But whether this thesis is correct – that is, whether 'exclusive' or 'inclusive' positivism is the true view – is an intramural dispute among positivists.

The second claim is that, necessarily, the existence and content of law depends upon non-normative facts. Though this second claim as formulated does gather in all legal positivists, and everyone else besides – is there *anyone* who thinks that law's existence and content depends entirely on normative facts, and not at all on non-normative facts? – it would add informativity to note that all positivists (and likely everyone else who has a view) thinks that among these non-normative facts (in the stipulated sense) must be some social facts – facts about subjects and their interactions with each other. I will assume that this is part of the positivist view, and indeed, any sensible view about what law's existence depends on.

So much for the facts that stand on either side of the dependence relation in the positivist view. How exactly are we to understand this dependence relationship?

We are to understand it in light of Raz's remarks above, as providing a kind of explanation of law. The nature of explanation is deep water, but we can rule out some views that would be at least inadequate to capture what the positivists have in mind. It is pretty plain that the dependence cannot be simply logical, that while some non-normative truth's holding of law is a necessary condition for law's existence, there are no normative truths the holding of which is a necessary condition for law. For it should be possible to be a positivist while also holding that the existence of law entails the existence of normative facts. Suppose it were true that God is

authoritative, and that God loves law – I mean, really loves it, and necessarily so – and necessarily commands everyone to do whatever the law says. (This command is addressed not only to ordinary subjects of law, but to legal officials who are to carry out terms of wills, etc.) It would be necessarily true that the following normative fact holds: everyone is bound to obey every law that applies to him or her. Necessarily, if x is a law that applies to A, then A ought to comply with x. But adherence to the view that God is authoritative and God loves law in this way should not in the least threaten canonical positivism, or provide any support for anti-positivism. For an adherent of canonical positivism would say the following: even if it is a necessary truth that x's being law entails certain normative facts involving x, it could still be true that the existence and content of law are explanatorily prior to its entering into this normative fact, and if its existence and content are explanatorily prior to this normative fact, then its existence and content do not depend on this normative fact, at least in the sense of 'depend' that we positivists want to insist upon. That is the common sense positivist response to the case: even if law necessarily has these normative features, having those normative features isn't what makes it law. (Compare Socrates in the *Euthyphro*: even if the gods necessarily love what is pious, the gods loving it isn't what makes it pious.) This can be captured by the idea that necessarily, law is explanatorily dependent on only non-normative facts, not on normative facts.

The dependence that canonical positivism invokes is that of explanatory posteriority – that the existence and content of law is necessarily explanatorily posterior to some set of non-normative facts, but it is not explanatorily posterior to any set of normative facts. Which non-normative facts are the relevant ones is a matter of dispute among positivists. But they are united in holding that it is within that class of facts that what makes for law can be found and in denying that what makes for law must be found also in the class of normative facts.

So the dependence that the positivist has in mind is explanatory dependence. But not just any sort of explanatory priority will do. Causal-historical explanation is, after all, one extremely important sort of explanation, but canonical positivism does not insist on some particular history as the necessary precursor to law's existence. *Being law* is not like *being a sunburn*, where being that sort of thing necessarily involves being in a condition with a certain history. It may in fact be the way that things

always work out that laws have a certain sort of history. But close inspection of the views of law's nature offered by the most prominent positivist views of law – Austin's,[26] Kelsen's,[27] Hart's,[28] Raz's,[29] Shapiro's[30] – suggest that the positivists' view of the dependence of law on non-normative facts is not the dependence of the law on having some particular history. Indeed, for each of these views, the law could, on their view, be brought into existence instantaneously by God. Take Hart's view: God could instil in some group of persons the relevant dispositions to take certain considerations as reasons in one 'let it be so', and there would be a legal system in place, with various laws. The point here is not to deny that there are characteristic sorts of history by which law comes into being. It is just to note that the explanatory priority that positivists insist upon is not any sort of causal-historical dependence.

No, the explanatory priority is of a more intimate sort. Gardner, for example, appeals to what facts can make a 'constitutive' difference,[31] so that the question is what non-legal facts together constitute the legal fact that some law of a certain content exists. Since what a thing is constituted by must be in some way explanatorily prior to what it constitutes, the desideratum is satisfied. Or take Shapiro's view, on which the best positivist formulation is an informative identification of *being law* with some structured non-normative property.[32] For a property to be structured, it must have, in some sense, properties as parts, bound together in a particular way, and so those parts must be explanatorily prior to the property *being law*.

By 'depends on' the positivist has in mind 'depends on in that intimate way, something like *is constituted by*', such that canonical positivism is saying something possibly true and interesting about the existence and content of law. Thus the distinctive positivist thesis is that the existence and content of law does not stand in that particular dependence relation to normative facts or properties. All natural law theorists believe that the existence and content of law necessarily depend on non-normative facts – meaning, that the spelling out what it is for a law to exist includes an appeal to some non-normative facts holding. If that alone were the positivist's thesis, it would be the

[26] Austin 1832. [27] Kelsen 1934 and Kelsen 1945. [28] Hart 1961.
[29] Raz 1994: 194–221. [30] Shapiro 2012. [31] Gardner 2001: 201.
[32] Shapiro 2012: 8–10.

positivist view that is doomed to being uninteresting. So let's see whether there is a natural law thesis that denies the positivist's interesting claim and which is not itself a hopeless view.

III.B. An Unhappy Dilemma, and Some Formulations of Natural Law Jurisprudence

Natural law jurisprudence, we shall say for now, is the thesis that the existence and content of law depends (in the just-described way) on normative facts. What this means is that in spelling out the facts that make for the existence of law of a certain content, one must include some normative facts.

An alleged unhappy dilemma for natural law jurisprudence is that any attempt to offer a particular, informative reading of this view will result either in a thesis that is hopelessly false or in fact does not satisfy this initial characterization of natural law jurisprudence. Since our characterization of natural law jurisprudence was constructed in order to ensure that any version of it will be incompatible with legal positivism, and thus distinctive, any formulation that does not meet our characterization of natural law jurisprudence will count as non-distinctive.

Moral formulations of natural law jurisprudence. One way that defenders of natural law jurisprudence have responded to critics of the view is by holding that such critics have misunderstood what natural law jurisprudence is asserting. Natural law jurisprudence, on this view, is not an analytic theory, trying to give an account of the concept or property *being law*. Instead, it is a normative theory, trying to tell us something about how we ought to act with respect to the law. The thesis is, then, that unless law manages to exhibit some positive normative features, then we cannot be bound to adhere to it. Thus natural law slogans like 'an unjust law is no law at all' are to be understood simply as giving colourful expression to the idea that unjust law makes no claim on us; it does not bind us to action, at least not as law.[33]

This moral formulation quite obviously falls to the second unhappy dilemma. It is not that it is hopeless. Indeed, it looks trivially true. And its trivial truth shows that it succumbs to the dilemma, for it is *non-distinctive*. Because it does not make any claims about the facts on which the existence

[33] See Soper 1983: 1181 and George 1996: viii.

and content of law depend, it does not make any existence and content claims that are incompatible with the positivist standpoint.

We might attempt to give a more controversial formulation of a moral natural law thesis. One might claim, for example, that it is a necessary truth that we have a decisive reason to do what the law says, or that it is a necessary truth that defeasibly, we have decisive reason to do what the law says. For the moment put to the side whether either of these theses is plausible. Focus instead on the fact that there is no statement of any kind of the dependence relation. As stated, these theses are compatible with a positivist view on which the normative fact that those under the law are bound to comply with the content of the alleged law (or bound prima facie to comply with the content of the alleged law) is explanatorily posterior to law's existence and content – while normative facts do not enter into what makes something law, nevertheless it is a normative truth that law is to be followed. This would be *non-distinctive*, because compatible with positivism. (And, indeed, some positivists have thought that, compatibly with their positivism, they could give an argument for a prima facie obligation to obey the law.[34]) On the other hand, one might think that being binding in one of these ways enters into the constitution of legality, in a way that really is in tension with positivism, and I explore this possibility below.

Strong formulations of natural law jurisprudence. Here is one way to formulate this idea in a way that ensures that the desideratum that the law's existence and content depends on normative facts can be satisfied. Indeed, what follows is the most straightforward way, and that which is typically taken to be paradigmatic or even definitive of the natural law view, especially by those who reject it.

What this natural law thesis – which I call the 'strong natural law thesis' – asserts is that, necessarily, for each law, that law's existence constitutively depends upon its content's exhibiting some positive normative feature – *being just*, or *being reasonable*, or *being authoritative*. This thesis might be put forward as a conceptual truth – that the masterful use of the concept involves refraining from taking as law anything that fails to exhibit some particular positive normative feature – or a synthetic property identity – that, while not a conceptual truth, we can discover that the best candidate property to identify

[34] See Hart 1955: 185–186.

informatively with being law includes exhibiting some particular positive normative feature.

I want to discuss some of the dialectic surrounding this view, because although I do not think that the strong thesis should be lightly dismissed, I agree that in the end that the standard versions of the strong thesis, the ones that positivists have focused upon, are indeed *hopeless*, and simply to be rejected. If the natural law view cannot be a distinctive position without affirming one of these versions of the strong thesis, then we should all be positivists. But as we will see, the positivists have a dialectical problem: their best arguments against the strong theses are *survey arguments* rather than *impossibility proofs*. This leaves open the possibility that the positivist rejection of strong theses as such is based on a failure of positivist imagination rather than an exhaustive look at the possibilities for natural law jurisprudence.

The basic reason for rejecting the strong thesis I will call the 'simple clear cases' argument. The simple clear cases argument notes that there are what seem to be clear cases of law, denominated as such by ordinary subjects and legal officials alike, that do not conform to the strong natural law thesis. So the Fugitive Slave Act of 1850 required citizens to assist in the recapture of escaped slaves, and it seems clear that this was the law in the United States, abhorrent as it was. Since this is a clear case of law, but seems to lack any of the positive normative features that natural lawyers care about – *being just, being authoritative, being for the common good, being reasonable*, etc. – then it must be that the strong natural law thesis is mistaken.[35]

Now I take the simple clear case argument to be far too dismissive. People can be mistaken about how their concepts apply and which things really are clear cases of such application. A natural lawyer might well concede that the simple clear case argument makes a very light prima facie case against the strong natural law thesis. But a light prima facie case is one that can be easily overcome with a positive argument for the strong natural law view, and such an argument is what the strong natural law theorist would have to provide anyway to make his or her view defensible.

But the simple clear case argument against the strong natural law thesis can be made far more damning while becoming only slightly less simple.

[35] See, for example, Marmor 1992: 96–97.

In other cases in which we want to allow that what the folk take to be clear cases are not decisive evidence against some purported accounts, we typically explain the folk's error in terms of some factual beliefs that are mistaken and lead them to misapply their own concept, or we explain the folk's error in terms of the complexity of the concept which leads them to fail to grasp the implications of the application of that concept, or we explain it in terms of the folk's failure to be masterful users of the concept. Suppose, for example, that there is a folk concept of water, and a variety of clear cases which everyone agrees are instances of water. As it turns out, *everyone* agrees that samples of some substance, XYZ, is water, where XYZ is not H_2O. (XYZ is clear, potable, boils and freezes at approximately the same temperature, and so forth, but has a different chemical composition from H_2O.) Now suppose that you, as someone who wishes to propose that *being water* = *being* H_2O, want to argue that folks should *revise* their judgements here – that what everyone agrees is a clear case of water really is not, because it is not H_2O. What would count as a successful argument for such revision?

I am not looking for a necessary or a sufficient condition here. But here is something that strikes me as extremely plausible test for adequacy of an identification of the property picked out by some concept in use with some theoretical construct. If one is aiming to give an informative property identification of *being water* with *being* H_2O, then once ordinary, masterful users of the concept <water> have been appraised of the facts of the case – that this stuff over here in this puddle is chemically different than the stuff all over the world, H_2O – they will on reflection tend to withdraw their judgement that this stuff is water. Otherwise, the identification of being water with being H_2O, with the subsequent commitment to the view that everyone is simply in error about samples of XYZ being samples of water, will look simply stipulative. When giving an analysis of a concept or identification of a property, what serves as the anchor is the actual use of the concept in question, including what users take to be correct and incorrect standards of application. If the users of the concept <water> resist the withdrawal of the application here, insisting that nevertheless, this stuff is water, then the right thing to do is to offer an alternative account of *being water*, one that is such that both what is H_2O and what is XYZ count as water.

If these remarks are on the right track, then the typical versions of the strong natural law thesis really are hopeless. Users of the concept of law do

not withdraw their denomination of something as law once it is pointed out to them that the alleged law is terribly unjust, or unreasonable or whatever. They do not cease to treat these as clear cases of law, even when gravely inadequate in these standard normative ways. So the critics of these standard versions of strong natural law thesis, though too hasty, turn out to be right. This is a *hopeless* position. The unhappy dilemma is still present for the natural law theorist.

The dialectic is not yet complete, though. The critic of the strong natural law thesis is hampered by the form of his or her argument, which is that of a survey argument rather than an impossibility proof. For the form of the argument is this: *Here are the various normative features that natural law theorists have held that law's existence and content necessarily depend on. For each of these features, we can give clear cases of law that fail to have that feature, and our judgements that these are clear cases that fail to have these features stand up under reflection. Thus the strong natural law thesis is plainly false.* But this is not an argument for the impossibility of the strong natural law thesis, an argument that there is an incompatibility between law's indisputably bearing some other features and law's necessarily bearing any normative feature. It is an argument only that *the most common and straightforward* normative features that law might be held to necessarily exhibit are not such that law must necessarily exhibit them. The possibility is open that one might offer some other normative feature that law necessarily exhibits, one that is more off the beaten path, and less likely to be subject to positivist counterexample. I will make the case for this view at the end of the paper.

So, to summarize: I agree that standard versions of the strong natural law thesis are hopeless. But there remains some hope for non-standard versions. And I will give further reasons for such hope later in my argument.

Weak formulations of the natural law thesis, I: being law as a degreed property. In previous work I have distinguished between strong and weak formulations of the natural law thesis.[36] There are, however, multiple competing views that might be given the title 'weak natural law thesis'. Here I will focus on two such formulations, one that appeals to the idea of being law as a degreed property, another that appeals to the idea of law's non-defectiveness conditions.

[36] Murphy 2003: 243–254 and Murphy 2006: 8–20.

The degreed property formulation has been associated with the work of Finnis, though I am not confident that this was ever his considered view.[37] The idea is this. It is wrong to think that the property *being law* is an all-or-nothing matter. Rather, it is a degreed notion, such that something can be more-or-less law. There are a variety of features that make for law, and when all of those features are fully realized, then law is fully realized. However, when some of those features fail to be realized, or are realized only meagrely, then what we have is less law than something in which those features are more fully realized. Exhibiting some positive normative feature might be among those features. So while it may be correct to say that something can be law without exhibiting some positive normative feature, what one should say is that it is law to a lesser extent than it would be were it to exhibit that feature, *ceteris paribus*.

The degreed property view is a version of natural law theory because it does take the existence of law to depend on normative facts – the extent to which something exists as law depends on its normative features. Does the degreed property view fail in the obvious way that the strong natural law view does – by denying the status of some clear cases of law as law, even on reflection? Not necessarily. The defender of the degreed property view can say that for a law to exist *simpliciter* is simply for something to be law to any degree, or to a sufficiently high degree. Suppose that there is a cluster of features that make for law. Realizing all of those features makes something exist as fully as possible as law. Realizing none of those features entails that it is unambiguously not-law. There is some zone – as there will be on any plausible view – in which it is a vague matter whether something is law. But anything that realizes the relevant features of law more fully than as they are realized in the 'vague zone' exists as law. Since it is not entailed by the degreed property view that even the most dramatic cases in which law lacks some standard positive normative feature fall below this threshold, the defender of the degreed property view can assert both that the view is distinctive but that it does not have the implications that doom the standard versions of the strong view to hopelessness.

[37] Lines of the following sort might suggest the idea that *being law* is a property exhibited in degrees: 'Law, in the focal sense of the term, is fully instantiated only when each of these component terms is fully instantiated' (Finnis 1980: 277). Shapiro at 2012: 390–392 ascribes the degreed view of legal existence to Finnis.

Again, though, it seems that a view like this is false to the facts of legal experience, and so it requires an overwhelmingly powerful argument to overcome this sort of presumption. While most everyone is going to allow that existence of law can be vague – there can be vagueness about whether something is really law – there is little support in our practices for the view that legal existence generally has this sort of degreed character, and even less for the view that failing to exhibit some standard normative feature makes a would-be law partake less of legal existence. Again, in giving the elucidation of some concept or property, there has to be some anchor in our use for the claims that we are making. But the notion that laws are less wise or less just are necessarily less legal is something that does not have such an anchor in our use. Indeed, it seems that our experience of the legal is that, as Hart's account of secondary rules emphasizes, the aim is to render determinate, as an all-or-nothing matter, when some norm counts as legal.

As Shapiro notes, there is a difference between thinking of practically unreasonable law as being *less fully law* and thinking of it as being *defective as law*, and it is a mistake for natural lawyers to move easily between the two characterizations of the natural law view.[38] But I want to add to this. It seems to me that not only are they not equivalent, there is a *tension* between the two views of the way that the failure to exhibit positive normative features is related to legality. What makes something count as a defect in a particular thing is that it is an instance of a particular kind and there are non-defectiveness conditions that belong to that kind. So what makes this twisted piece of aluminium defective is that it is a paper clip, and to be a paper clip is to count as defective unless it is and does certain things, and this twisted piece of aluminium does not do those things. But look. Suppose that it is only true in some *weak and qualified sense* that this is a paper clip. Why should we think that the non-defectiveness conditions for a paper clip apply just as strictly? (Think, for example, of deviant cases of some kind – say, ornamental chairs, which are deviant as chairs – and the way that the defectiveness conditions for ornamental chairs are not the same as the defectiveness conditions for chairs.[39]) The same questions would arise for law on the degreed existence view. If one is committed to the view that law that lacks some normative feature is defective as law, then one should not be

[38] Shapiro 2012: 391–392. [39] See Murphy 2012: 51–53.

inclined to say 'and what's more, it is only weakly-speaking law'. For the basis for taking it to be defective if not exhibiting that normative feature is just that it is *unambiguously* law, and so has the non-defectiveness conditions that belong to law *unambiguously*.

For these reasons I take the degreed property account to be *hopeless*, and thus not to escape the unhappy dilemma.

Weak formulations of the natural law thesis, II: defectiveness. Consider now the defectiveness version of the weak thesis. According to this view, necessarily, a law's failure to exhibit some normative feature makes that law defective as law.[40]

One might think that this thesis hasn't the slightest chance of serving as the basis for a response to the charge that natural law jurisprudence is either hopeless or non-distinctive. As we said, to be distinctive it must claim that the existence and content of law depends on normative facts, or merits. But this thesis on its face makes no such connection to the existence or content of law. All it talks about is what it is for a law to be defective. So it appears that this version of natural law thesis is doomed to non-distinctiveness, and no answer to the dilemma at all.

This is a response to this weak natural law thesis that is now common in the literature. Dickson claims that by providing an account of the normative conditions that must be met for something to be law in the focal sense – that is, non-defective – Finnis's account is 'problematic for the reason that it does not seem to take seriously the enterprise of identifying what law's essential properties are'.[41] Leiter flatly states that natural law jurisprudence of this sort is guilty of a 'transparent change of the subject'.[42]

This reaction is understandable but entirely due to a non-essential way that this weak natural law thesis has been formulated, which emphasizes the point that the non-defectiveness conditions of law include normative conditions. Here is another way of putting its claim: being law depends upon being the sort of thing that is defective unless it meets certain normative standards. This is clearly a claim about law's existence conditions. What it says, in effect, is that you will not succeed in making a law unless you manage to make something that is defective if it does not meet a normative standard. That is not changing the subject.

[40] Finnis 1980: 24; Murphy 2006: 29–57; Murphy 2012; Murphy 2013.
[41] Dickson 2001: 77. [42] Leiter 2011: 677.

I think that this point is underappreciated by the positivists, who sometimes want to say that the question of non-defectiveness conditions is somehow entirely independent of the question of existence conditions. But there is typically no such independence in the case of objects that belong to kinds with non-defectiveness conditions. Consider the lowly paper clip. I do not know how to fully state the non-defectiveness conditions for paper clips – they include something like *being capable of holding papers together by elastic force exerted by the folded material* – and I also do not know how to state the existence conditions for a paper clip. But I do think the following is true: they are pretty clearly not independent, for when you say something about its non-defectiveness conditions you are saying something about its existence conditions. Suppose I ask: What do I need to do in order to take a chunk of aluminium and turn it into a paper clip? That is an excellent question, and I do not know the precise answer to it. But I can give a partial answer. In order to turn a chunk of aluminium into a paper clip, I have to turn this chunk of aluminium into something that, if it does not hold papers together, at least in typical conditions, then it is defective. (Or, as we would more intuitively put it: we have to make something that has the function of holding paper together.) So it is not at all changing the subject, if the subject is the existence conditions of paper clips, to tell us what the non-defectiveness conditions for paper clips are. Similarly, if I am asking what I need to do in order to take the content of some chunk of text – 'school buses must stop before railway crossings'[43] – and make it into a law, I do not know what a completely general answer would be. But part of the answer, I say, is that one needs to make this into something that is defective if it does not exhibit particular normative features.

So one objection to this formulation of natural law jurisprudence – that it does not address the existence conditions for law – is a failure, for it *does* make claims about those existence conditions. Here is a second objection. One might say: Fine, it does make claims about existence conditions. So at least it is about the same *topic* that legal positivism is commenting on. But it cannot be claiming that the existence and content of law depends in any way on normative facts. Because, after all, this view in no way rules out the existence of laws that have a content that is egregiously unjust,

[43] This is of course the content of the bill the transformation of which into a law is chronicled in 'I'm Just a Bill', *Schoolhouse Rock*, www.youtube.com/watch?v=tyeJ55o3El0

unreasonable, thoroughly discreditable. So even if the view is in some way about existence conditions, it is not a view on which law's existence depends on normative facts.

But this is false. Remember that the sort of dependence that we have in mind involves some sort of identity or constitution; in order for law to depend on facts or properties of some kind, it must be the case that *being law* is to be partly constituted by or informatively identified with a property or fact that includes the property and fact of the relevant sort. So if the full spelling out of what it is to be law involves normative facts or properties, then we have deflected the objection.

Consider again the paper clip. Suppose someone puts forward the thesis: the existence of paper clips depends on facts about the force that a folded piece of material needs to exert in order to hold pieces of paper together. And suppose it were objected that this cannot be true, because, after all, everyone will allow that there can be defective paper clips that don't do their job; since a paper clip can exist that does not exert sufficient force to hold pieces of paper together, how can the existence of paper clips depend on such facts? But the objection does not succeed. The thesis proposed does not say or imply that there cannot be paper clips that don't exert the requisite force. It just says that in spelling out what makes it true that a paper clip exists, one makes reference to facts about the force that a folded piece of material needs to exert in order to hold pieces of paper together. For one cannot bring a paper clip into existence without bringing into existence something that is defective if it cannot exert sufficient force through the elastic force of the folded material to hold pieces of paper together. Because such physical facts are involved in the non-defectiveness conditions for the paper clip, and the non-defectiveness conditions for the paper clip are involved in the existence conditions for the paper clip, these physical facts are involved in the existence conditions for the paper clip.

So now consider the property *being law*. We have seen that it is an initially plausible view that the statement of law's existence conditions include reference to its non-defectiveness conditions – to be law is to be something that is defective unless it satisfies certain conditions. And among those conditions are, we are supposing, non-defectiveness conditions. So it is false that the law's existence does not depend upon normative facts. As Greenberg has suggestively put it, positivism, at least

as characterized by Shapiro, entails that law's existence conditions would be what they are even if 'God destroyed all the value facts'.[44] But on a natural law view that affirms this version of the weak natural law thesis, normative facts play a role in setting law's existence conditions. So the relevant dependence relationship is in place.[45]

Positivists may find these arguments frustrating, taking me to be missing the point. They might say that I have been going on and on and on about the law's existence conditions depending on normative facts, via the non-defectiveness conditions on law, and in so doing I have merely fastened onto an injudicious way that positivists have put forward their view. Positivism should not be characterized as simply the view that the law's existence does not depend on normative facts. Perhaps that is indeed a false view or at least deeply contestable view. Instead we should be more focused.

Here is another common way of formulating the positivist thesis: in terms of a distinction between the *merits* of law and *sources* of law. This way of talking is due to Raz and has been re-stated by Gardner in his important paper on the proper formulation of legal positivism.[46] It is not enough, one might say, to hold that law's existence and content depend on normative facts. Rather, it is a specific sort of normative fact that matters. It cannot be entailed by something's being a law that it exhibits some positive normative feature – *being just*, or *being reasonable*, or *being backed by decisive reasons for action*. Or, if it is entailed, exhibiting that feature is not part of the essence of being law; its exhibiting that feature is explanatorily downstream. And nothing that I have said so far has suggested that any view that denies this is at all plausible. While I have insisted on the plausibility of the view that's law's existence conditions depend on non-defectiveness conditions, which non-defectiveness conditions include exhibiting normative features, I have not denied, not yet anyway, that it is possible that one can give a statement of those existence conditions in

[44] Greenberg 2004: 158; see also Murphy 2013: 18.

[45] It is part of law's nature that it is the sort of thing that is defective if it is treats people unjustly. If, counterpossibly, the normative world were fundamentally different for us – if justice were a normatively optional rather than a mandatory feature of how we humans should relate to each other – then law would not be the sort of thing that is defective if it treats people unjustly. This shows that law depends on normative facts in the relevant sense.

[46] Raz 1994; Gardner 2001: 199–201.

which law exhibits no merit at all. For, after all, to take my standard example, a paper clip can be gravely defective, unable to hold two pieces of paper together, and yet for all that be a paper clip. Indeed, it is because it is a paper clip that it counts as being a grave failure as a paper clip. And so too a law could be, on my view, gravely defective, totally failing to exhibit the positive normative features that are among its non-defectiveness conditions.

First, I should say that I would judge this to be a massive concession by the positivist, if the positivist wants to respond in this way. The recognition that law's existence conditions depend in any constitutive way on normative facts does not sound to me like a positivist thesis.

Second, let's be clear what this objection amounts to. It amounts to an insistence by the positivist that the only thesis that the positivist is interested in denying is the strong natural law thesis: the thesis that it is belongs to law's existence conditions to exhibit some positive normative feature. And the positivist might say that since I have already conceded the hopelessness of the strong natural law thesis, I am forced to concede the view that law's existence cannot be a matter of merits, in this sense.

But I deny that the positivist is on quite safe ground. For I did *not* concede above the hopelessness of the strong natural law thesis. I conceded the hopelessness of *standard formulations* of the strong natural law thesis, which take it to be essential to law to exhibit some standard first-order normative feature – *being just, being good, being reasonable*, etc. But there I also explicitly reserved judgement on whether some less-standard version of the strong thesis might be correct. And now I claim that, if the weak natural law thesis is true, then we have a reason to believe that a less-standard version of the strong thesis is correct: it is essential to law that it exhibit certain merits.

Here is why. It is a commonplace that merits of some thing or state of affairs can be *transmitted* to other things or states of affairs. If a glass of wine has a merit, then a corkscrew has a merit: for the corkscrew enables one to open a bottle and fill one's glass. This is all very familiar. But given the transmission of merits, then my agreement with the positivists that law need not have merits like *being just* or *being reasonable* or *being rationally required* does not decide the question whether it is essential to law to exhibit some merit. Because here is a very plausible view: it is essential

to law to be the right kind of thing to exhibit certain positive normative features. (Indeed, it is a view that even some positivists have wanted to affirm.[47]) Here is one way the argument might go. Suppose we think that *being backed by decisive reasons for compliance* is among the non-defectiveness conditions of law. We might think that some laws might fail to exhibit the feature being backed by decisive reasons. But we might nevertheless think both (a) that *being the right sort of thing to be backed by decisive reasons* is something essential to counting as law and (b) that it counts as *merit* of law that it is the right sort of thing to be backed by decisive reasons. And it is much, much harder to make a clear case argument against this view: even if it is plain that there can be law not backed by decisive reasons for compliance, it is far from plain that there can be laws that are not even the right kind of thing to be backed by decisive reasons for compliance.

If this argument succeeds, then it is not only true that law's existence conditions depend on normative facts; it is also true that the law's existence conditions include some merits. Such a view surely denies what canonical positivism affirms. And so natural law jurisprudence is not doomed to this second unhappy dilemma: it is both an initially plausible view and a distinctive view about law's nature.

IV. Conclusion

One interested in whether natural law jurisprudence offers the true view of law may be rightly impatient with the arguments of this chapter. For the most part, this person might say, these arguments did not try to show that the natural law view is the correct theory of law's nature; they tried only to show that it is sensible to make claims about law's nature, and that when the natural law theorist makes such claims, these may be distinctive and worthy of investigation. But that does not give evidence for natural law theory's truth. I of course agree. But that was the central point I wanted to make here: there is no shortcut to the rejection of natural law jurisprudence.

[47] Raz 1994: 199–204.

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The Common Good 14

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There is an uncontentious thin sense of the common good still prevalent within Western liberal democracies. Theorists of democratic legitimacy and participants in the political process both tend to assume that those in positions of authority have a responsibility to govern in the interests of *all*. On a theoretical level, the continued relevance of the common good finds expression in the political thought of a social theorist like Jürgen Habermas. Despite his denial of the applicability of natural law doctrines to functionally differentiated societies informed by value pluralism, Habermas maintains the importance of 'an orientation to the common good' in his attempted reconstruction of the legitimacy of democratic procedures.[1] Appeals to the common good are also prominent in founding constitutional documents. The preamble of the American constitution, for example, affirms that one of the aims of the constitution is to promote the general welfare.

Although the common good remains a concept with broad political (and rhetorical) appeal, it occupies a particularly central role in natural law theories of politics and jurisprudence influenced by Aristotle and Aquinas. The intention of the current chapter is to elucidate the normative role played by the common good in natural law jurisprudential theories situated in this tradition. Section 1 sketches the Aristotelian and Thomistic lineage of the natural law conception of the common good. In Section 2, I outline some

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[1] Habermas 1996: 84, 95. For the role of the common good within a liberal framework, see Rawls 1999: 219: 'the common good I think of as certain general conditions that are in an appropriate sense equally to everyone's advantage'. For the common good in recent civic republican political thought see Pettit 2004: 150–169. According to Pettit, the common good 'cannot plausibly refer to people's common net interests but only to the common interest that people have as members of the public'.

basic constraints on a distinctively natural law conception of the common good and critically discuss Mark C. Murphy's classification of the common good into instrumental, aggregative and distinctive conceptions. Finally, in Section 3, I demonstrate some appealing explanatory features of a natural law account of political authority grounded in the common good as the principal normative reason in the political and legal domains.

1. Aristotle and Aquinas on the Common Advantage and the Common Good

Contemporary natural law appeals to the common good derive from Aquinas's *bonum commune* (the common good), which is in turn influenced by Aristotle's *to koinēi sumpheron* (the common advantage). It is not possible to do full justice to the rich Aristotelian and Thomistic tradition of thought about the common good here. What follows in this first section is merely intended to provide some historical context for the subsequent discussion. Readers who are less interested in the history of the common good and more concerned with its contemporary relevance should feel free to proceed directly to Section 2 of the chapter.

1.1 Aristotle

Aristotle refers to the common advantage (*to koinēi sumpheron*) throughout his ethical and political works. The common advantage features in Aristotle's explanation of the claim that humans are by nature political animals (*Pol.* 1278b19–23), serves as the main criterion for classifying correct and deviant constitutions (*politeiai*) (*Pol.* 1279a17–29) and is identified with general justice (*Pol.* 1279a18 and 1282b17–18). Aristotle proposes that the end of the *polis* or political community – the most authoritative of associations (*koinōnia*) – is the good life, or the flourishing (*eudaimonia*) of members of that association (*Pol.* 1252b27–30 and *NE.* 1094b5–11). As the final good of human activity attributable to the *polis* as a whole, *eudaimonia* is plausibly understood as a genuinely shared good. Aristotle's suggestive statements on *politikē philia* in the *Eudemian Ethics* VII, 9–10 (see also *NE.* 1167b2–4), moreover, point to a conception of the common advantage based on an analogical extension of relations of personal friendship to the members of a *polis*.

Aristotle's *to koinēi sumpheron* directly influenced the medieval natural law conception of the common good (*bonum commune*) developed by Albertus Magnus and Aquinas.[2] This raises the question of whether it is significant that Aristotle almost invariably uses the compound term *to koinēi sumpheron* (the common advantage) rather than *to koinon agathon* (the common good) in political contexts. On the one hand, Aristotle's use of *to koinon agathon* in Books II and III (1268b32 and 1284b6) of the *Politics* suggests that the compound terms are more or less synonymous. On the other hand, Aristotle's more frequent use of the term *sumpheron* (with its suggestion of what is useful, expedient and profitable, as well as the advantageous or beneficial) indicates, as Richard Kraut has argued, that Aristotle's emphasis in the *Politics* is upon what is advantageous for the members of a political community, rather than good *simpliciter*.[3] Even if this restriction is granted, however, the concept of the common advantage of a political community leaves much open for interpretation in contemporary terms as to whether it is an individualistic or holistic notion and whether its primary role is motivational or normative.

With respect to individualism and holism, Fred D. Miller has furthered our understanding of the Aristotelian common advantage by distinguishing between extreme individualist and holist interpretations and moderate versions of the same positions.[4] On the extreme holist interpretation, the *polis* 'has an end or good which supersedes that of its members'.[5] An extreme individualism, by contrast, 'holds that the activities which constitute the good for an individual are done solely for the sake of the agent and not for the sake of anyone else'.[6] Miller rejects both interpretations in favour of a moderate form of individualism 'which holds that other-regarding virtuous activity is an essential

[2] On the reception and interpretation of Aristotle's political thought in the thirteenth century, see Martin 1955: 29–44 and Dunbabin 1982: 723–738.

[3] Kraut 2013: 351. Aristotle refers to a child as the common good (*to koinon agathon*) of its parents (*NE*. 1162a29). This suggests that *to koinon agathon* can pick out a genuinely shared good that is good beyond the useful benefit it provides. Liddell and Scott (2000: 764) note that the primary Latin synonym of *sumpheron* is *utile*. For discussion of the 'utilitarian' tendencies in Aristotle's thought (accompanied by the necessary qualifications), see Irwin 1988: 425–430.

[4] Miller 1995: 194–224 and Miller 2009: 549–551.

[5] Miller 1995: 196

[6] Miller 1995: 198.

part of individual perfection'.[7] In his defence of a moderate individualist position, Miller thus contends that it is possible to interpret the Aristotelian common advantage in a way that reconciles individualist and holist elements.[8]

Miller's attempted reconciliation of the individualist and holist strains in Aristotle's conception of the common advantage has much to recommend it. In particular, such a reconciliation coheres with Aristotle's employment of the common advantage as both a motivating reason for individuals to enter the *polis* and as a normative reason – identifiable with the political good of justice – that provides a criterion for an assessment of the correctness of constitutions (*politeiai*).[9]

Aristotle's use of the common advantage as a motivating reason for individuals to enter a political community is exemplified by the following statement from Book III, 6 of the *Politics*:

> A human being is by nature a political animal. That is why, even when they do not need one another's help, people no less desire (*oregontai*) to live together, although it is also true that common advantage (*to koinēi sumpheron*) *brings [human beings] together*, to the extent that it contributes some part of living well to each (*hekastōi*). (*Pol.* 1278b19–23. *Italics mine*)[10]

Aristotle suggests that, even apart from their desire to live together as political animals, human beings would still have a strong incentive to join together and constitute a political community. This is because the *polis* provides advantages or benefits that accrue to *each* (*hekastōi*) *and every* member.[11] Insofar as the advantage that accrues from living together in *poleis* is distributed to each member, it serves as a motivation for all to participate in political life.

[7] Miller 1995: 200. Miller also isolates a moderate holist position which rejects the view that the individual is a mere means to the higher purpose of the *polis* while also maintaining that the 'political good is a collective good distinct from the good of all the members'. Miller 1995: 197–198.

[8] Miller 1995: 201–202. See also Irwin 1988: 389–438 and Cooper 1999: 356–377.

[9] See Duke 2016a for further discussion.

[10] See also *NE.* 1160a9–13.

[11] I here assume an 'inclusive' interpretation of Aristotelian citizenship, according to which all the members (citizens) of the political community partake in the good life. See Miller 1995: 219 for defence of an inclusive approach to citizenship and *eudaimonia*. Of course, Aristotle's approach to citizenship is exclusive in the sense that women, slaves, resident aliens, etc. are not considered members of the *polis*. On this point see Annas 1996: 731–753.

There is also a normative aspect to Aristotle's conception of the common advantage, however. The just ordering of relations between citizens – the political good of justice – is identified by Aristotle with the common advantage in the following key passage of the *Politics*:

> The political good is justice (*esti de politikon agathon to dikaion*) and this is the common advantage (*to koinēi sumpheron*). (*Pol.* 1282b17–18)

The significance of Aristotle's identification of the common advantage with the political good of justice can be seen by reference to the function that *to koinēi sumpheron* plays in the theory of constitutions or regimes (*politeiai*) set out in the *Politics*. What separates good from bad regimes (*politeiai*) is the conformity of the former with the common advantage (*Pol.* 1279a17–21). If a regime serves sectional interests, rather than the good of the community as a whole, then it is defective. This use of the common advantage to provide normative criteria for an assessment of different *politeiai* is inseparable from Aristotle's political naturalism. A *polis* is in a natural, and hence just condition, if it has a correct constitution, and in an unnatural, or unjust condition, if it has a deviant constitution (*Pol.* 1289a14–17).[12] If justice is the good ordering of a *polis* (1253a31–9), then a just *polis* is a state of affairs that is identifiable with the natural good of the community as a whole.

It is plausible that for Aristotle the normative weight of the common advantage as a reason for action in the political domain is ultimately dependent upon its capacity to promote *eudaimonia*. Aristotle proposes that the end of the *polis* is the good life, construed as the flourishing (*eudaimonia*) of all the members of that association (see, in particular *Pol.* 1252b27–30 and *NE.* 1094b5–11). Aristotle's belief that membership of a *polis* is a necessary condition of *eudaimonia*, however, entails that *eudaimonia* can only be attained through the *political* good of justice. In identifying the common advantage with the political good of justice, Aristotle thus establishes it as a shared good and reason for action with privileged normative status in the political domain.[13]

[12] Miller 2000: 343.

[13] For more extensive analysis of Aristotle's common advantage, see Morrison 2013: 176–198.

1.2 Aquinas

For Aquinas the common good is an analogical concept applicable not only to political communities, but also to the universal good of God.[14] The Thomistic *bonum commune* is thus a concept that cannot be restricted to the political and legal domains, although these are my focus here.

In his commentaries on Aristotle and elsewhere Aquinas suggests that the common good of a political community is a unity of order that is distinguishable from a mere aggregate of individual goods.[15] This does not entail that the political community is an organic whole or substance. It is rather a structured unity that 'derives from the ordering of different individuals towards the goal that they have in common'.[16] The whole constituting a political association is a unity of order (*habet solam ordinis unitatem*), not something absolutely one.[17] Aquinas explains how a unity of order is nonetheless more than the sum of its parts as follows: a part of such a whole can operate separately from the whole (as a soldier can act separately to the whole army), but the whole nonetheless has an operation that is not proper to its parts, but rather to the whole (consider an assault by the entire army).[18] On the one hand, Aquinas emphasizes the sense in which the army is made up of individuals who are able to act independently of the whole. On the other hand, it is legitimate to ascribe action to the whole considered as a unity structured by a common goal. Insofar as the common good provides reasons for action, serving as an end for political deliberation and guiding the acceptance of its outcomes, it has a purposive aspect that is concisely expressed in Aquinas's statement that common good is rightly said to be common end.[19]

Aquinas's commitment to the notion of a political community as a unity of order is consistent with his characterization of the common good in terms of the justice and peace of a well-ordered polity. Justice refers to the preservation of a certain form of equality or a proper relation among persons.[20] Peace is both the proper ordering of citizens and the absence among them of strife and discord.[21] Justice and peace are conditions of the

[14] Aquinas's wide-ranging use of *bonum commune* and related terms is set out in Kempshall 1999: 76–129.

[15] ST I-II q. 72, a. 4; q. 93, a. 1; q. 95, a. 4; q. 96, a. 4; q. 97, a. 4; II-II, q. 109, a. 3; q. 114, a. 2; q. 129, a. 6; *De Regno*, I, 1; *Sententia Ethic*., I lect 1; IX, lect. 10; *Sententia Polit*., I, lect 1.

[16] Kempshall 1999: 100.

[17] *Sententia Ethic*, lib. 1 l. 1 n. 5.

[18] *Sententia Ethic*, lib. 1 l. 1 n. 5.

[19] ST I-II q.90 a.3.

[20] ST II-II q. 57, a.1.

[21] ST II-II q. 29. a.1.

community considered as a whole; a just and well-ordered community is an articulated unity in good condition. This identifies justice and peace as common goods that belong to the community itself. Aquinas's formulations thus suggest a distinctive good of community irreducible to the flourishing of individuals.

Pursuit of the common good is identified by Aquinas with 'regnative prudence', or the virtue of practical wisdom in the exercise of political authority, in the unfinished treatise *De Regno*.[22] Aquinas's discussion of Aristotelian general or 'legal' justice (*justitia legalis*) in *Summa Theologiae* also suggests that directedness to the common good can serve as a basis for the members of a political community to develop cardinal virtues such as courage, temperance and prudence.[23] A resolute soldier, for example, is able to cultivate the virtue of courage by serving the common good of his political community. For Aquinas, in contrast to Augustine, the common good of a political community – and the exercise of political authority necessary to promote that good – is thus perfective and not solely or primarily a reflection of our post-lapsarian condition.

The common good also plays a central role in Aquinas's famous discussion of positive law in the *Summa*. Aquinas defines law as 'nothing other than an ordinance of reason for the common good, made by the person who has care of the community, and promulgated' (*legis, quae nihil est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata*).[24] This definition introduces a purposive element to the characterization of law: in terms broadly consistent with the Aristotelian account of regimes outlined above, it can be taken to assert that law that is not in the service of the common good is defective as law. In contemporary terms, the common good has an indispensable explanatory role to play in an adequate natural law characterization of law's existence and defectiveness conditions.

Aquinas's definition moreover suggests that it is only by understanding the purpose and function of law – the good that it serves – that we are fully able to understand what law is. And this is consistent with a fundamental assumption of Aristotelian–Thomistic metaphysics, namely that final causes should feature in explanations of what it is to be an instance of

[22] De Regno, I, I.
[23] ST II-II q. 58, a.6. For insightful discussion see Weithman 1992: 353–376.
[24] ST I-II q.90 a.4.

a particular kind.[25] This assumption entails that the end, or purpose, of a kind of thing is constitutive of its identity. The notion of final causality operative in the realm of practical affairs can be understood as directedness towards an end in light of the fact that it is the nature of rational beings to act for that end.[26] In relation to human acts, moreover, which involve intentionality and the willing of an end identified by reason, the final cause has priority.[27] As John Finnis has argued, the natural law position in jurisprudence influenced by Aquinas is accordingly informed by the view that it is a mistake to assume, in relation to human matters such as law, that one can adequately answer the question 'What is it?' before engaging with questions such as 'Why choose to have it, create it, maintain it, and comply with it'.[28] The natural law tradition thus begins from the assumption that it is impossible to provide an adequate answer to the question of law's identity except by addressing the purpose, function and end of law; the good that it serves and its normative point.

2. The Natural Law Common Good

The natural law common good can be defined in broad terms as *a state of affairs in which each individual within a political community and the political community as a whole are flourishing.*[29] Recent adherents of natural law theory have nonetheless offered divergent accounts of the common good, which have been categorized by Murphy into instrumental, aggregative and distinctive conceptions.[30] In this section I first consider some basic constraints on a specifically natural law conception of the common good, before explicating Murphy's threefold distinction. I then argue that Murphy's three conceptions are better regarded as reconcilable

[25] ST I-II, q. 91, a. 2. More generally, Aquinas takes over Aristotle's doctrine of four 'causes': efficient, formal, material and final. See, for example, ST II-II, q. 27, a. 3.

[26] *Summa Contra Gentiles* III. 2. [27] ST I-II I, q. 1, a. 1 & 2. [28] Finnis 2011c: 45.

[29] It might be thought that a significant difficulty for any natural law account of the common good, in the context of the expansion of international law and theories of global justice, is whether it can justify a commitment to the particularity requirement, i.e. that an agent has a particular obligation to obey the laws established in their own political community. See Green 1990: 227–228 and Simmons 1979: 30–35. For a cautious natural law response, based upon Aristotelian assumptions, see Murphy 2006: 171–176. See also Finnis 2011b: 147–149.

[30] Murphy 2005: 133–164 and Murphy 2006: 61–90.

aspects of the natural law common good than as exclusive alternatives by reference to the normative function of the common good in natural law responses to the problem of justified political authority.

As Murphy suggests, the two most obvious constraints on a natural law conception of the common good are that it must be sufficiently **common** and sufficiently **good**. The constraint of **commonness** sets a condition on properly *shared* aims of political deliberation and action.[31] An account of the common good consistent with the natural law tradition influenced by Aquinas must not be conceived so broadly that it includes Hobbesian-style theories which acknowledge the importance of, for example, social stability and peace, but regard the obtaining of such states of affairs as a wholly agent-relative end.[32] The constraint of **goodness** sets a condition on the good-making characteristics – the normative desirability – of the common good. The natural law common good satisfies the constraint of goodness insofar as it provides *reasons* for action, serving as an end for political deliberation and guiding the acceptance of its outcomes.[33]

Murphy's commonness and goodness constraints help to frame a contrast between the natural law conception of the common good and thinner liberal and civic republican conceptions. One might argue, for example, that Rawls's liberal conception of 'justice as fairness' fails to satisfy the commonness constraint because of the agent-relative orientation of the 'conditions to everyone's advantage' it advocates.[34] Similarly, civic republican accounts which lack a specific theory of substantive human goods plausibly fail to satisfy the goodness constraint.[35]

The contrast between the natural law common good and conceptions of the general welfare found in the many variants of consequentialism and utilitarianism would appear to be less straightforward and to require analysis that extends beyond appeal to the commonness and goodness constraints. Following Finnis, consequentialist approaches can be understood as based on a methodological injunction to 'compare the benefits and harms promised by alternative possible choices . . . and make

[31] Murphy 2005: 134–135. [32] Murphy 2005: 135. [33] Murphy 2005: 135.
[34] Rawls 1999: 217.
[35] Mary M. Keys runs a persuasive natural law argument against Michael Sandel's civic republican critique of liberalism along these lines. See Keys 2006: 41–48.

that choice which promises to yield a better proportion of benefit to harm than any alternative choice'.[36] *Prima facie* such a formulation seems consistent with the welfarist emphasis of the natural law tradition upon the need to promote the overall good of the members of a political community. Contemporary natural law theorists such as Finnis, however, have criticized the 'proportionalist' approach to ethical and political deliberation on a number of levels. In the first instance, an appeal to the weighing or computation of benefit is impracticable and senseless due to the incommensurability of different forms of human good.[37] Faced with a choice between the decision to build a hospital or a school, for example, the proportionalist injunction would seem to suggest – incoherently – that it is possible to weigh the good of health promotion against the good of knowledge according to some kind of calculus. In the second instance, the proportionalist's model of choice is an inadequate methodology in the realm of human affairs because it neglects considerations of practical reasonableness that can only be developed on the basis of a theory of genuine human goods.[38] Decisions for the common good of a political community, on the natural law conception, cannot be guided by 'computations' of the benefits or harms that accrue from different choices, but rather presuppose a practically reasonable assessment of the many incommensurable human goods that can be promoted by determinate political decisions. The natural law critique of proportionalist reasoning in the ethical, political and legal domains thus draws on the goodness constraint, although it also depends on supplementary premises regarding the incommensurability of basic goods and the requirements of practical reasonableness.

While the commonness and goodness constraints are helpful in articulating what is distinctive about the natural law conception relative to other positions, natural law theorists have themselves offered divergent conceptions of the common good. These conceptions have been usefully categorized by Murphy into the instrumental, aggregative and distinctive approaches.[39]

The **instrumental** conception of the common good refers to 'a set of conditions which enables members of a community to attain for themselves

[36] Finnis 1983: 86–87.
[37] Finnis 1983: 87–89. See also Finnis 2011a: 114–117, 225, 422–423.
[38] On the requirements of practical reasonableness see Finnis 2011a: 100–133.
[39] Murphy 2005 and 2006: 61–90.

reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community'.[40] On the instrumental conception defended by Finnis, the political common good is subordinate to the realization of basic values or goods such as knowledge, friendship, health, play etc. at the level of individuals and families.[41] The political common good thus does not itself instantiate a basic good, but is rather instrumental to the realization of such goods. Practical reasoning about the common good reveals a wide range of projects, orientations and commitments with respect to the basic goods, none of which can be regarded as definitively superior to the others. It is this incommensurability that establishes what Finnis refers to as coordination problems, which reflect not only the diversity of human projects but also disputes about the most effective means to realize the basic goods.[42] Finnis gives as an example the rival interests of environmentalists and farmers in relation to river pollution to demonstrate the role of the law in providing authoritative solutions to resolve coordination problems arising out of competing projects, interests and values.[43] The farmer in this case is confronted with a law on river pollution that goes against his economic self-interest. Yet the farmer also has reason to believe that the law provides him with a range of benefits (protection of property, subsidies, etc.) that could not be realized other than through an authoritative legal system, and that such benefits contribute to integral human fulfilment more generally.[44]

It is important to note that Finnis's focus upon the instrumental role of the political common good relative to the realization of more fundamental

[40] Finnis 2011a: 155. This conception is influenced by Grisez 1993: 850 and John XXIII, *Mater et Magistra*, §65.

[41] Finnis 2011a: 155–156. See also Finnis 1984 and 1998b.

[42] This sense of a coordination problem is to be distinguished from the narrower sense of coordination problem found in game-theory, which Finnis rightly regards as constrained by an 'emaciated . . . instrumental rationality'. Finnis 1984: 115–137.

[43] Finnis 1984: 129–130.

[44] Finnis 1984. For defence of an instrumental interpretation of Aquinas on the common good, see Finnis 1996: 1–26; Finnis 1998b: 174–210. For critique of this interpretation, see Pakaluk 2001: 57–94. Aquinas (e.g. at ST I-II q.90 a.3 ad 2 and *Sententia Ethic.* X 14 nn. 13–18) endorses the Aristotelian teaching (*Pol.* 1280b33–3; 1281a1–4) that a complete political community is oriented by the goal of a self-sufficient life of flourishing and virtue and not simply a partnership established for the sake of living together. The question is whether this is consistent with the claim that the role of government and law is limited and instrumental.

basic goods at the level of individuals and families does not preclude a recognition of genuinely communal goods. Finnis argues that we have strong, though defeasible, moral reasons to aid others in the pursuit of the basic goods and acknowledges the relevance to practical deliberation of a 'complete' political community such as the nation-state. In recent work, for example, Finnis states that the common good of the nation is 'an intrinsically desirable object for the service of everyone whose *patria*, country, and people it is' and that the coordinated pursuit of the instrumental political common good can instantiate the good of friendship.[45] It is, moreover, Finnis suggests, difficult to think of political community without 'some more or less shared objective or, more precisely, some shared conception of the point of continuing cooperation'.[46] There are accordingly non-instrumental aspects to the common good in Finnis's work and his advocacy of the instrumental common good is better understood as pointing to the normative priority of law's role in allowing individuals to realize basic goods than as a wholesale rejection of the aggregative and distinctive approaches.

The **aggregative** common good 'consists in the realization of some set of individual intrinsic goods, characteristically the goods of all (and only) those persons that are members of the political community in question'.[47] This conception, which has been developed and defended by Murphy, assumes that the state of affairs in which an agent, A, is flourishing is 'a fundamental reason for political action within A's political community'.[48] If the state of affairs in which an individual A is flourishing provides a decisive reason for political action within A's community, then the state of affairs in which A and another individual, B, are flourishing is an even more decisive reason for action. One generates the normative ideal of the aggregative common good by carrying out this process of inclusion to its limit, including all of the goods of all of the members of a political community. As a result, the common good 'aggregatively conceived is that state of affairs in which all of the members of a political community are fully flourishing'.[49]

[45] Finnis 2013: 520.

[46] Finnis 2011a: 153. Finnis states, however, that we should not think of a political community as having a single 'aim or determinable sets of aims' (Finnis 2011a: 155). This reflects his views regarding the variety of human projects and commitments, and the lack of a single, objective hierarchy of value among the goods.

[47] Murphy 2005: 136. [48] Murphy 2005: 137. [49] Murphy 2005: 137.

On the aggregative conception it is ultimately the good of each and every individual that provides the normative reason-giving force of the common good. The core of the aggregative conception is the claim that 'an individual's good provides *all* members of the political community with a reason for action'.[50] Murphy argues in this context that the instrumental account of the common good and law's authority implicitly derives its normative weight from the aggregative conception insofar as it appeals to the overall flourishing of citizens in community.[51] Although Murphy is sceptical of the capacity of the natural law common good to ground an obligation to obey the law without supplementation from consent-theory, he regards the aggregated goods of the citizens of a political community as the normative core of an account of law's justified authority.[52]

The **distinctive** common good is characterized by Murphy as 'the obtaining of some state of affairs that is literally the good of the community as a whole'.[53] This formulation is influenced by more recent advocates of a distinctive position, including Ralph McInerney and Louis Dupre, who emphasize that the common good simultaneously perfects each individual of the community and the whole community.[54] By contrast with the instrumental and aggregative conceptions, the distinctive common good involves an explicit appeal to the good of the community as a whole in a manner irreducible to the basic goods of discrete individuals. Although not an ultimate end in an unqualified sense, the political common good on the distinctive conception thus derives its normative force 'as a direct consequence of the priority of the whole over the parts'.[55]

The distinctive conception accordingly differs from the other conceptions insofar as 'it is not an addition or multiplication of individual, private goods, but a distinct kind of good to be pursued and enjoyed together by people living in community'.[56] The priority of the whole over the parts defended by the advocate of the traditional distinctive conception can be understood in a normative sense as referring to the shared end of a community that promotes the personal goods of members.[57] The distinctive conception also suggests that a just and peaceful state of

[50] Murphy 2005: 138. Italics mine. [51] Murphy 2005: 142.
[52] Murphy 2006: 114. See also the discussion in Duke 2016b. [53] Murphy 2005: 136.
[54] See Dupre 1993: 687–712 and McInerney: 1988: 77–92. [55] Simon 1965: 105.
[56] Simon 1965: 232. [57] Cochran 1978: 233–235.

affairs is integral to the well-being of each member of a political community. The distinctive common good is thus not only instrumental to well-being, but morally perfective in that participation in the common good is a component of well-being. Aquinas notes that law which is for the common good directs citizens to be virtuous to the extent necessary to ensure justice and peace are maintained.[58] Arguably implicit in this statement is an acknowledgement that the common good may require prioritization of justice and peace, considered as good conditions of the whole community, over instantiations of individual good.

Murphy's threefold classification could be taken to suggest that the candidate conceptions of the common good just outlined are mutually exclusive: it is necessary for the natural law theorist to pick one conception and uphold and defend this against the other rival conceptions.[59] A more plausible interpretation, however, is that the three conceptions represent different dimensions of the political common good. In the first instance, the instrumental and aggregative conceptions can be understood as responses to different concerns. The instrumental conception answers the question of whether the common good is a basic good or a means to more fundamental basic goods. The aggregative conception, by contrast, answers the question of who or what is served by the common good: the community as a whole or individuals. More generally, there appear no obvious obstacles to reconciliation of the three conceptions. If there is a distinctive aspect to the common good, for example, then this does not preclude the common good also possessing an instrumental aspect (insofar as the common good is not only a distinctive good, but also serves to assist individuals in attaining basic goods) and an aggregative aspect (insofar as the common good serves both the community as a whole and the good of each and every individual).

This suggests that the natural law theorist should focus upon the different normative roles played by the three conceptions of the common good in different explanatory contexts, rather than the search for the single true conception. An example of this approach is found in Murphy's

[58] ST I-II, q. 96, a.3.

[59] The manner in which Murphy formulates the three candidate conceptions leaves open the possibility that the conceptions are reconcilable, despite his firm advocacy of the aggregative conception. Murphy's discussion of the instrumental conception, for example, entails that this conception is normatively dependent upon the aggregative conception, rather than precluded by it. See Murphy 2005: 139–147.

argument that the instrumental conception requires support from the more robust aggregative account of the common good to ground standard natural law claims about authority and obligation.[60] While different theorists may emphasize one conception at the expense of others, therefore, by giving it explanatory or normative priority, this does not entail that it is necessary to reject the (perhaps qualified) applicability of the other conceptions in different contexts.

It is accordingly instructive to attend to the function played by the common good in specific natural law arguments. In the first section I sketched an account of the role of the common good in supporting the natural law conception of the existence and defectiveness conditions of law. Another important function of the common good within natural law accounts is to provide a foundation for an account of justified political authority and it is this function that will be my primary focus in both the remainder of this section and the concluding section of the chapter.

An example of the common good serving as the normative foundation for an account of political authority and obligation is found in Finnis's arguments for a generic and presumptive obligation to obey the law set out above.[61] Finnis's account of practical reasonableness entails that the attempt to realize the basic goods is a morally obligatory goal for individuals. Insofar as it is a necessary condition for realizing a morally obligatory goal, the promotion of the common good may itself be regarded as morally obligatory. Given the further assumption that the law is the most effective instrument of promoting the common good, because of its unique capacity to resolve coordination problems, it follows that presumptive and generic law-abidingness is also morally obligatory.[62] Although Finnis does not regard the common good as an intrinsic good, it thus performs the normative role of a reason for action that sets conditions under which authority is legitimate (effectiveness in resolving coordination problems serving the basic goods) and laws

[60] Murphy 2005: 142–143. See also Duke 2013: 44–62.

[61] This summary draws in particular on Finnis 1984: 115–137. See also Duke 2013: 44–62. An obligation to obey the law is *generic* if it is considered in relation to each law taken simply as an instance of law. An obligation is *presumptive* if in some cases it may be outweighed by countervailing moral considerations.

[62] For critique of the assumption see Raz 1994: 341–354.

morally obligatory (obedience to law supports a more fundamental moral obligation).

A further example of the role of the common good in grounding a natural law account of political authority and obligation is found in the work of Yves Simon.[63] For Simon, authority serves three primary functions in unifying human action towards the common good.[64] In the first instance, authority directs the proper ordering of human goods in the light of human failings, including selfishness and ignorance. Secondly, political authority would be necessary even if humans were not selfish and ignorant, insofar as there is frequently more than one course of action that could serve as a means to the realization of the common good. Thirdly, in the absence of unanimity, authority directs both the intention of particular ends and the choice of means for a political community.[65] All three functions of authority ultimately derive their normative justification from the need to promote the common good in order to realize flourishing within human communities. In sum, according to Simon, the common good is the normative ideal that justifies the role of authority in providing unity to the deliberation and action of a political community.

From a normative perspective, therefore, a central criterion on which natural law accounts of the common good are to be judged is their capacity to ground claims about the justification of political authority, obligation and law. In the final section I thus offer an outline of some of the advantages of a natural law account of justified political authority over rival conceptions.

3. Political Authority and the Common Good

A central normative role of the common good in natural law theories of jurisprudence and politics, I suggested in the previous section, is to support an account of justified political authority. In this closing section I point to three advantages of an account of justified political authority grounded in the common good. First, the common good is a reason for action which

[63] See, in particular, Simon 1951; Simon 1962 and Simon 1965. See also Frank 2007: 813–832.

[64] Simon 1951: 1–71; Simon 1962: 23–80 and Cochran 1978: 232. [65] Simon 1951: 1–71.

provides a convincing answer to the fundamental political question: 'why have authority at all?' Second, the common good allows for a justification of political authority that pertains to a complete political community rather than subjects taken individually. Third, and perhaps most decisively, the common good allows for a reconciliation of two apparently conflicting features of political authority, namely that (1) its ultimate purpose is to promote the good of individuals and (2) it can require the subordination of the good of the individual to the good of the community.

Natural law approaches to political authority based on the common good have significant affinities with Stephen Perry's recent development of a 'direct' theory of political authority.[66] Perry's theory is supported by a demonstration of the internal conceptual difficulties that beset indirect or piecemeal justifications of political authority which focus on the possibility of establishing a right to rule based on the establishment of a correlative duty to obey. The alternative approach developed by Perry takes a *direct* route to the justification of political authority by concentrating on the goods or values that political authority can serve.[67] The moral core of legitimate political authority, Perry contends, is 'the ability of one person intentionally to change the normative situation of another, where it is sufficiently valuable or desirable that the first person possess such an ability with respect to the second'.[68] It is thus necessary on this model to assess directly the moral claim of political authorities to issue authoritative legal directives by asking after the good that political authorities are capable of serving, if any. The reason-giving force of particular legal norms, the model suggests, are ultimately a function of the value of establishing and maintaining a system of authoritative directives in the first instance.

Given acceptance of Perry's framework, a constraint on an adequate theory of justified political authority is that it provides an intelligible and plausible answer to the question 'why have authority at all?'[69] The common good is clearly able to satisfy this constraint. A state-of-affairs in which each individual and the political community as a whole are flourishing is an intelligible good worthy of promotion. The natural law

[66] Perry 2013: 1–74. See Duke (forthcoming) for further discussion. [67] Perry 2013: 25.
[68] Perry 2013: 5.
[69] Cf. Nozick 1974: 4. 'The fundamental question of political philosophy, one that precedes questions about how the state should be organized, is whether there should be any state at all. Why not have anarchy?'

common good is particularly well-suited to serve in a direct justification because it is manifestly a *reason* for action, serving as a normative ideal that allows for an assessment of political deliberation and the acceptance of its outcomes.[70]

Consider, by contrast, democratic procedure. Democratic procedures may be regarded as a privileged method for determining what the common good of a political community consists in. Yet democracy in this sense is a political system and process, not a basic value or good. As a consequence, procedural defences of the legitimacy of democratic authority tend to appeal, explicitly or implicitly, to substantive values that democracy is able to realize, such as justice, impartiality, fairness or equality. A counter-argument to this claim might be that legitimacy flows to democratic exercises of authority simply by virtue of desirable procedural features. Jeremy Waldron, for example, has argued that laws enacted through democratic procedure may be legitimate on procedural grounds, even if they are unable to satisfy substantive tests such as Raz's normal justification thesis (NJT).[71] Waldron's argument for procedural democratic legitimacy, however, ultimately rests on an appeal to the capacity of the relevant procedures to overcome – in a fair manner – disagreement in the circumstances of contemporary liberal societies where there are competing interpretations of the good. It is 'the need for a common solution and respect for conditions of fairness' that grounds the legitimacy of democratic authority on Waldron's procedural account.[72] Underlying this appeal to procedure are thus values and outcomes promoted by political authority. This is unsurprising insofar as a decision-making procedure is not in itself a fundamental reason for action, but rather an instrumental process valued for the goods that it is able to bring about, such as, for example, equality, fairness or resolution of otherwise irresolvable disagreement.[73] The natural law common good, by

[70] On this point see Murphy 2005: 134.

[71] Waldron 2001: 85–118. See also Hershovitz 2003: 201–220. The NJT asserts that 'the normal way to establish that a person' has legitimate authority over another person involves showing that a person is better able to conform with reasons that apply to them (other than the alleged authoritative directives) if the person 'accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons that apply to [the person] directly'. See Raz 1986: 53.

[72] Waldron 2001: 100.

[73] My claim is not, of course, that all accounts of the value of democracy are narrowly instrumental. See, for example, Christiano 2004 and Estlund 2009.

contrast, is a normative reason that can serve in a justification of the value of political authority.

My second, closely related, argument in favour of an account of political authority based on the common good sets out from the status of the common good as a shared reason for action that applies to each and every member of a political community. As Perry has argued, an assessment of the legitimacy of a political authority is best prosecuted as an investigation of the possibility of 'the enterprise *as a whole* possessing legitimate political authority' rather than on a case-by-case basis.[74] And the common good is congruent with such an approach for reasons I will now explain.

Many contemporary accounts of political authority adopt an aggregative approach to justificatory questions. On an aggregative conception of political authority, 'the extent of legitimate political authority within a state is a function of (1) the total number of individuals over whom, considered one by one, the state can be said to have legitimate authority and (2) the extent of legitimate authority held over each individual'.[75] A prominent example of an aggregative approach is Raz's service conception. The core of the service conception is found in the conjunction of the NJT and the Dependence Thesis.[76] The Dependence Thesis asserts that the directives of an authority should reflect reasons which apply to the subjects of those authoritative directives independently of the directives.[77] Raz's service conception seeks to show that it *can* be rational to follow authoritative directives. As presented by Raz, however, the service conception is self-consciously piecemeal.[78] If the state enacts laws in a domain I know more about than the state, then the state may not be justified in exercising practical authority over me in that domain. Raz's account also focusses on the relation between reasons and the subjects of practical authority; it sets constraints that must be met for it to be the case that an individual acts rationally in following authoritative directives.[79] Such an account is not apt to provide a wholesale justification of political authority, because it can only justify particular directives that promote

[74] Waldron 2001: 66. [75] Perry 2013: 64. [76] For the NJT see note 71.

[77] Raz 1986: 42–52.

[78] Raz 1986: 80: 'The normal justification thesis invites a piecemeal approach to the question of the authority of governments, which yields the conclusion that the extent of governmental authority varies from individual to individual, and is more limited than the authority governments claim for themselves in the case of most people.'

[79] On this point, see Hershovitz 2011: 1–19.

what each individual in any case has reason to do. The limitation of the aggregative approach is thus that an assessment of legitimacy carried out on a case-by-case basis can only determine the extent of the duty owed by each individual to political authority, not the general right of the authority to issue presumptively binding directives.

By contrast to the case-by-case authoritative reasons potentially justified by the service conception, the natural law common good is a truly shared reason for the members of a political community. An account of the legitimacy of political authority based on the common good can as a consequence refer to a shared reason that applies to each and every member of a political community *insofar as they are a member*. The natural law common good is thus particularly well-placed to satisfy the 'universality condition' regarding legitimate authority, namely the existence of a general and presumptive obligation that is a universal reason for action in the sense that it applies to all of a state's citizens with respect to all of the state's laws (although it is an obligation – as set out below – which is subject to countervailing moral considerations).[80]

A significant advantage of a wholesale, rather than piecemeal, justification of political authority is thus that the former provides a better foundation for the establishment of a general and presumptive moral obligation to obey the law. On a wholesale account, the morally obligatory force of particular legal directives can potentially be derived from the requirement to promote a value or values that function(s) as a reason for *all* members of a political community. Considered as isolated norms directed to individuals, it seems likely that the moral weight of many legal directives is either redundant (as in the case of laws against murder) or non-existent (as in the well-worn example of traffic lights in the middle of a deserted location). On a wholesale model, however, law's content-independent obligatory force is sought in a *shared* background reason which justifies the exercise of a normative power to change the situation of every person living within a particular political community 'in principle' rather than each person taken one by one. Such an overarching

[80] Green 1990: 224–9. Despite terminological appearances, Murphy's aggregative natural law conception of the common good meets this commonness condition. The aggregative approach to the common good differs from an aggregative approach to political authority of the kind found in an appeal to the NJT insofar as it satisfies the 'commonness' constraint that the common good be a reason shared by all members of a political community and not merely an agent-relative end.

background reason and value, moreover, allows for an explanation of the rationality of following 'exclusionary' or 'robust' reasons that conflict with one's own judgement or self-interest.[81] The common good, considered as a value that can justify the establishment and maintenance of a legal system wholesale rather than piecemeal, is thus a solid foundation on which to defend a generic and presumptive moral obligation to obey the law.

This brings me to the final beneficial explanatory feature of the common good: it allows for a potential reconciliation of two seemingly contradictory features of political authority: (1) its ultimate purpose is to serve the good of individuals and (2) it can require the subordination of individual goods to the good of the community. It is the status of the common good as a shared reason, I suggest in what follows, which allows it to support legally prescribed or proscribed conduct as generically and presumptively morally obligatory, even in cases of conflict between that conduct and the (at least apparent) interests of individuals, whether from a prudential or moral perspective. In this way the common good can, at a minimum, qualify the 'political subordination thesis' that 'all political reasons are subordinated to individual morality'.[82]

Philosophical anarchists generally assume the primacy *in all cases* of the rational autonomy of individuals over the common good.[83] This is perhaps most evident in R.P. Wolff's paradox of authority.[84] The paradox rests on a distinction between legitimate and *de facto* authority, with the former entailing a right to rule correlated with a general *obligation* to comply with a legitimate authority's directives. The directives of a legitimate political authority would, if such *de jure* authority were in fact possible, provide reasons for action regardless of the content of the directives issued. If a rational agent follows a directive *simply because* it has been issued by an authority independently of its particular content, then they are repudiating their status as a rational and – at least according to Wolff – morally autonomous agent. If, on the other hand, the subject of the

[81] For 'exclusionary reasons' see Raz 1986: 23–69. On 'robust reasons' see Enoch 2012: 296–332.

[82] Perry 2013: 58.

[83] At the very least, the cogency of the philosophical anarchist position depends upon the privileging of autonomy and the thesis that political institutions are artificial in nature. See Simmons 2001: 155.

[84] Wolff 1970.

authority had good reason to follow the directive in any case, such directives are seemingly superfluous from the perspective of practical reasoning. Political authority is thus either morally unjustifiable (illegitimate) or redundant on more fundamental moral norms.

Robust interpretations of the common good entail a direct repudiation of the 'political subordination thesis' on which the philosophical anarchist position rests.[85] It is also possible, however, to develop an account of the common good that accepts the normative priority of individual well-being – and hence views political authority as ultimately instrumental to individual welfare – but which also qualifies the necessary subordination of all political reasons to individual autonomy.

In Finnis's instrumental natural law account of political authority outlined above, for example, the political common good is subordinate to the realization of basic goods such as knowledge, friendship and health at the level of individuals and families. Despite its prioritization of the flourishing of individuals, Finnis's instrumental theory of the common good supports an account of the generic and presumptive moral bindingness of particular legal directives based on the need for authoritative solutions in the absence of unanimity. Finnis's argument relies on the premise that a legal system – because of its capacity to resolve coordination problems – is the most effective instrument for achieving the morally obligatory goal of the common good, the promotion of which is in turn a necessary condition for the well-being of each and every member of a political community. If a condition of the effective functioning of the law is that it is regarded as a 'seamless web', linking persons and transactions between them in a way that goes beyond the content of any particular law, then the obligation on members of the political community to obey the law must be general rather than piecemeal in character.[86] The underlying idea – which directly challenges philosophical anarchist assumptions – is that if there is a good we have a moral duty to promote, and the only way we can promote this good is by accepting the authority of a system of laws, then subjects are 'not permitted to pick and choose' which laws to obey.[87] Hence our obligation to obey the law reflects a moral requirement that must be regarded as generic in relation to each law as an instance of law independently of its content. This generic obligation to obey the law is

[85] On the robust interpretation see Pakaluk 2001: 57–94. [86] Finnis 1984: 120.
[87] Finnis 1984: 120.

balanced by recognition of the possibility of grossly unjust laws. Finnis thus acknowledges that our obligation to obey the law is presumptive: it may be defeated by strong countervailing moral considerations in obvious or exceptional cases of injustice.

On the natural law account just sketched, the common good grounds the normativity of legal obligation by reference to the role of an authoritative legal system in promoting the human good at the level of individuals.[88] Insofar as the promotion of the common good requires members of a community to comply or conform with authoritative norms, then the status of any particular norm as legally authoritative is sufficient to establish a presumption of obedience to that norm. This reflects, in Raz's words, the law's role to 'to secure a situation whereby moral goals which, given the current social situation in the country whose law it is, would be unlikely to be achieved without it'.[89] The stipulation of a norm as legally authoritative is not arbitrary, however, insofar as the justified normativity of any particular legal norm is dependent upon its inclusion within a system of norms directed towards the realization of the common good and the status of that particular norm as at least minimally just.[90] This natural law account of legal obligation qualifies the political subordination thesis by pointing to the rational requirement to achieve important moral goals unachievable in the absence of general compliance and conformity with legal directives.

Appeal to the status of the common good as a shared normative reason supporting a generic and presumptive moral obligation to obey the law can thus form the basis for a repudiation of the philosophical anarchist claim that just because the law might serve some prudential or moral good, does not entail there are content-independent moral reasons to obey the law.[91] And it seems plausible that only a reason for action that is shared by all members of a political community – such as the natural law common

[88] Cf. ST I-II, q.90 a.4. [89] Raz 2009: 178 [90] ST I-II, q. 96, a.4.

[91] This is not to suggest that an instrumental argument for the generic and presumptive moral obligatoriness of just and reasonable legal directives is sufficient to establish that, to put the point in Simmons's terms, we are 'specially bound to obey our laws or to support our government, *simply because they are ours*' (Italics mine). The reason for this is that no argument would be *sufficient* to establish such a strong conclusion. Appeal to the fact that laws meet the particularly requirement will clearly be insufficient to justify political authority without reference to the more fundamental justificatory considerations considered in this chapter. See Simmons 1979: 194.

good – could possess sufficient normative weight to justify the sorts of constraints on personal autonomy and practical reasoning that are seemingly entailed by the content-independent and exclusionary nature of legal directives.

One might of course interject at this point that, even if these arguments supporting an account of justified political authority grounded in the common good are sound, this does not entail that there are not alternative candidate normative values that could serve equally as well or better. Perhaps the most plausible rival candidate value is justice and it is accordingly to the status of justice as a constituent of the natural law common good that I now turn in closing the chapter.

As discussed above, the common advantage or good is identified by both Aristotle and Aquinas with general justice. For both Aristotle and Aquinas, moreover, justice is the other-directed virtue that applies where people share something in common (Pol. 1283a38–9).[92] On the traditional natural law picture, justice is a constituent of the common good in the sense that 'the requirements of justice are concrete implications of the basic requirement that one is to favour and foster the common good of one's community'.[93] As the other-directed virtue, the normative significance of justice on this picture derives from the impossibility of promoting the common good of a political community in the absence of just and fair relations between the members of that community.

While this view of justice as a constituent of the common good departs from the explicit intention of contemporary liberal theories of justice, it is not necessarily inconsistent with such theories. Understood in general terms as 'a characteristic set of principles for assigning basic rights and duties and for determining . . . the proper distribution of the benefits and burdens of social cooperation', the status of justice as worthy of promotion reflects the challenges of living together in a political community.[94] As the other-directed virtue, justice can thus be understood in terms of the necessity of social cooperation for human well-being. Indeed, the Rawlsian model of justice, according to which social and economic inequalities can only be justified if they are to the greatest benefit to

[92] ST II-II q. 58 a. 2. See also Miller 1995: 67–86. [93] Finnis 2011a: 164.
[94] Rawls 1999: 5.

the least advantaged, implicitly depends on the notion of the good – or benefit – of the entire society.[95]

Of course, the obvious concern from a Rawlsian, or liberal perspective more broadly, remains that a natural law position that privileges the common good will necessarily fail to 'take seriously the distinction between persons'.[96] The tendency of recent natural law theorists to abandon the thesis that the common good is literally the good of the community as a whole (the distinctive conception) reflects an understandable caution concerning the potential for a robust theory of the common good to conflict with contemporary assumptions regarding the normative priority of individual autonomy. Even if we accept the underlying premises of this concern, however, it is answerable by reference to the arguments set out above. As Murphy suggests, the practical force of the common good can be regarded as ultimately derived 'from its role in perfecting individual members of the community'.[97] While certain states of affairs can be recognized as good for the community as a whole, our reason to promote such states of affairs is, on this view, dependent upon our reasons to promote the well-being of individuals (including, perhaps, their status as autonomous agents). One can concede that ultimately the normative force of the common good derives from the well-being of individuals, however, while also maintaining that the promotion of the common good – with all that it entails regarding legal obligations as set out above – has irreducible normative force. The normative weight of the flourishing of the community as a whole derives from the status of justice, order and lack of violent discord as necessary conditions for the flourishing of each individual and as constituent parts of human flourishing more generally. It is the dependence of the well-being of individuals upon the good functioning of the whole that grounds the status of the common good as a shared normative reason for action that can, in at least some circumstances, assume priority over instantiations of individual good.

[95] Rawls 1999: 72. On the relationship between equality and the common good, see Finnis 2011a: 174.

[96] Rawls 1999: 29. [97] Murphy 2005: 149.

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Natural Law Theory and Constitutionalism 15

Gerard V. Bradley

Introduction

Natural law theory supplies a solid moral foundation for what's worth keeping in contemporary constitutional theory and practice, including limited government, robust protection for civil rights, and separation of church and state. It also explains and justifies the extensive role of contingency and prudential judgement – together describable as *political science* – in any sound theory of constitutions. Natural law theory explains as well the moral necessity for respecting the sheer *positivity* of constitutions: what's written down should be followed, notwithstanding that better constitutions can be imagined and that, in some important ways, no constitution is entirely contained within the four corners of the written document.

All these matters are discussed in Part I of this chapter. Then the chapter explores how natural law theory provides a critical basis for rejecting some leading, if not defining, features of modern constitutionalism, most especially its distorted understanding of the relationship among free choices, a person's self-constitution, and real human well-being. These features of contemporary constitutionalism block truths about reality and reason (and thus about human flourishing) from being brought to bear by public officials upon questions of social life. These features also impede the effective deployment of these truths by non-governmental actors, when these persons and organizations attempt to promote the general welfare. The combined effect is to mutilate the common good. This conscious turning away from reason and reality – the *closure of the modern constitutional mind* – is the subject of Part III. Part II provides some necessary context for this discussion.

Part IV considers how natural law theory contains the resources needed to address a crucial *lacuna* in modern constitutionalism, namely, the gap between the arid scheme of government powers and abstract rights

characteristic of written constitutions today and the (healthy) patriotism, national pride, identification with *this* political community and willingness to sacrifice for *its* common good, which are essential to the well-being of any country's people.

Part V is about the *unicity* of morality. Those who exercise public authority are bound by the same basic norms of morality that bind everyone else. These norms not only bind together those in authority and those subject to it, as equals in dignity and value. They also bind nations and national leaders – and so different peoples – in their relations with each other. The exceptionless negative moral norms (no enslavement, no torture, no intentional killing and the like) are the ligaments of any proper conception of a universal common good.

These absolute moral norms are not deliverances from some esoteric corner of natural law theory. They are the requirements of reason, and it is unreasonable to deny them. The moral norms which unconditionally prohibit certain actions are unvarying limitations upon the authority of any government. They deserve to be considered elements of any sound constitution (lower case 'c', if you will), even if they are not written down.

I. Moral Truth, the Common Good and Political Contingency

Natural law theory explores the deep structure of morality, where we find important reasons for action which are intelligible and have no proper name or possessive pronoun attached to them. These reasons pick out and direct us to diverse basic human goods, aspects or elements of genuine human flourishing which are goods for (and good in) everyone, and which we have reason to promote and respect in everyone. Recognition of this deep normative value in any human person's flourishing corresponds to, and presupposes, an ontological foundation: that in fundamental dignity and radical capacity, human persons are equal, notwithstanding all the inequalities between them in actualized capacities. This agent-indifferent character of the fundamental reasons for action means that they have the objectivity not only of being true, but also of being shared, common, and universal.

Besides its ontological foundation of equal basic dignity, the deep structure of morality (natural law theory) also includes, or at least presupposes, another metaphysical (and two-sided) fact, namely, that free choice responsive to these reasons is possible for human persons, and that free choices are self-constituting: by and through free choices one brings into being the person one is. Thus self-directing free persons ground the essential unity of the moral life.

The diverse basic goods supply anchor points or (together) the skeletal structure of the common good of a political community. Many constructed, instrumental realities (a currency, defences, courts, bridges, positive law) are essential to any thriving political society. Each can be understood on its own terms, as the distinctive contrivance for common benefit that it is. But each is only finally intelligible, and can be gauged for its value, by reference to one or more basic goods and to the well-being of persons in whom these goods are realized. The common good of a political society includes vast natural and humanly made resources. It is very important that a community's rules about distribution and use of these amenities be just. But it is a catastrophic mistake to reduce the common good to fair access to common materials, resources, and benefits, as if the common good were a huge, multifaceted public utility.

The *common* good is fundamentally about common *goods*. To borrow a phrase from V. Bradley Lewis, the common good is not distinct from and somehow opposed (as if it were a collective counterweight) to the goods of persons: 'it is a good that is common because it is a *good for all of those persons*'[1] [Emphasis original].

The basic goods ground reasons for everyone's action and duties of respect for them as instantiated in all persons. These goods include not only life, health, knowledge and excellence in performances. They also include religion, which, considered as a human good, has to do with persons' (and often enough, with communities') efforts to establish and to maintain a harmonious relationship with a greater-than-human source of meaning and value, most commonly called God. Anyone can see that persons' participation in this good depends partly but essentially upon the freedom with which they choose to act for that good: genuine harmony

[1] *Written Statement* prepared for Hearing held November 4, 2015, House Committee on Foreign Affairs, Sub-committee on Europe, Eurasia and Emerging Threats (manuscript in author's possession).

cannot be forced, or faked. Anyone can see too that the full scope of a person's religious life transcends temporal existence. A sound understanding of religion thus entails that persons must have a civil right to religious liberty. The same understanding shows that religion is embedded in and concerned with, while in some manner separate from, the affairs of political life.

We can now see that natural law theory supplies a firm foundation for all the fundamental components of modern and, if you will, *liberal* constitutionalism: autonomy for each person as self-perfecting agent; equal respect for everyone; separation of church and state; a limited political common good and thus a limited government (because public authority is rooted in and thus limited by the common good). Natural law theory also offers a sound basis for anticipating a healthy pluralism within a community whose members are of one mind about the bases of human flourishing, due to the diversity and universality of the several basic goods and the limitless distinct ways in which they can be realized in a person's life. Thus *difference*, which can reasonably be affirmed by everyone as *good*.

The elements of natural law theory so far adduced also ground a cogent case for the limitation of government's *coercive* power to the maintenance of social peace and of justice among persons. And, to the extent that it is feasibly available in a given civilizational context, the free and equal cooperation of a polity's members leads straightaway – though *not* ineluctably or necessarily – to some form of representative if not democratic form of governance.

Notwithstanding that it is commonly associated with themes such as 'diversity', 'pluralism', and national 'self-determination' – and even though they are suffused with denials of the possibility of 'objective' moral norms, which are instead branded as the stock-in-trade of religion and 'natural law' – contemporary (liberal) constitutionalism proffers a very limited, even formulaic, menu of constitutional options. Approved possibilities revolve around democratic forms of governance conditioned by a powerful unelected judiciary and rights protecting a smallish 'private' realm of antinomian 'identity' development and presentation.

Natural law theory, on the other hand, recognizes and morally justifies a greater variety of government forms. Natural law theory cogently defends the truth about each person's self-determination through free

choice, rejects as a gross caricature the prevailing conception of 'identity' and justifies a more diverse approach to protecting basic rights than does contemporary (liberal) constitutionalism. Natural law theory makes ample room for *all* the reasonable free choices of those in authority, who envisage by the light of perennial truths pathways to social and personal flourishing, amidst all the relevant contingencies and complications.

Much of any constitution and its authoritative exposition swings free of morality's deep structure in reasons for action corresponding to basic human goods. Many important questions about constitutions have to with articulating power relations in society; taking care to organize political decision-making so as to generate popular buy-in; anticipating the types of persons who are likely to occupy leading offices; arranging things in light of the peculiar temptations to which those who hold certain offices are prone; and how most effectively to balance all of these concerns so that the common good be preserved and promoted. These and so many other questions at the front of constitution-makers' minds are within the province of political science, there substantially immune from (strictly) moral criticism.

There is no natural-law template or recipe or even fleshy outline for a constitution. No basic form of government (democratic, republican, even monarchical) is simply incompatible with, or unconditionally entailed by, the requirements of human flourishing. All kinds of concurrent super-majority voting rules or effective minority vetoes are justified by peculiar conditions in polarized societies. This is the case in Northern Ireland, where Protestant and Catholic concurrence is required for important political choices. (Many other sectarian-riven societies have learned the lesson, or should.) The traditional role of the House of Lords and the equal representation of each American state in the United States Senate deviate from an arithmetical voter equality – 'one man, one vote' – which seems to be the central meaning of democracy. Each of these arrangements can be morally justified. On matters of this general sort, the *positive* law of the constitution all but *settles* – even from the unrestricted view of natural justice – what conscientious people should support.

No doubt there are human rights which should be respected by all persons, including those wielding public authority, everywhere all of the time. Natural law theory identifies them, as well as their bases in fundamental components of human flourishing. A political community

could nonetheless reasonably decide against adopting a constitutional bill of rights which articulated some or all of these rights, as America's founders initially and as Australia's political leaders recently did. The wisdom of doing so – or not – largely depends not upon the precise content (much less the existence) of these rights but upon the astuteness of the constitution-makers' estimations of the temper and culture of the people; the sources and possible remedies for any likely threats to rights and sundry additional contingent matters. The great virtues at work here are wisdom and sagacity, not (immediately, at least) moral analysis.

Vesting an unelected, elite-dominated judiciary with the final say over the meaning of individual rights provisions, or assigning great power to national authorities over local governments and, within the national government, to administrative agencies beyond the practical control of the people's representatives are all risky gambles for constitution-makers (or judges having the final say about what it means) to take. These fraught moves surely impede popular control of government, and diminish public officials' accountability to the people. But even a 'perfect' (if you will) constitution would be a bad constitution if it did not command the free allegiance of the people whose constitution it would be. Part of what makes any 'constitution' a (real) constitution is its effective acceptance by *this* people as the basic scheme structuring *their* collaboration for common good. This is one reason why the gambles just mentioned may be too risky to take.

II. *Prolegomenon* to Closure

Natural law theory not only permits but mandates that life in political society – as well as the exercise of public authority over it – be understood as wide-open to all aspects of reality, including full openness to the requirements of reason that constitute sound morality. Or, perhaps more exactly: natural law theory *expresses* the requirement of reason that when we speak of life in political society we must be cognizant of the whole set of conditions for and elements of human well-being. The common good of political society is neither all-inclusive nor eternal. But it is 'God-like', in the important sense that it, and everyone's choices and actions for its preservation and promotion, finally has to do with the whole human good.

Any theory of constitutions – for that matter, any constitution – depends most fundamentally for its soundness upon recognition of this requirement. To be sure, a sound distribution of government powers in a particular social milieu and the specific limitations upon those powers in a bill of rights might say, or imply, little about the basic goods, the more precise shape of the political common good, and the best modalities for its realization. Many extant constitutions declare more as a preambulatory axiom than as an operative legal principle that the whole apparatus which that document establishes is for the 'common good' (or the 'public good' or the 'general welfare'). A genuinely flourishing society might rely modestly (but still strategically) upon government to maintain the conditions appropriate to persons' true well-being where, for example, non-governmental communities like churches, neighbourhoods, and families are very strong, and where a sound common morality pervades social life.

All these suggestions of constitutional minimalism about the common good are true enough. But they are also misleading. For every supportable attempt to fashion a constitution does so with the common good as the end to be achieved. The common good is the moral justifying principle of any government's authority and actions. The common good is always the decisive moral criterion for the success or failure of a constitutional order. A constitution which is not conducive to the real flourishing of the people is a bad constitution. Worse is a constitution which in one way or another impedes or blocks their flourishing.

Unfortunately, apart from natural law theories, almost all contemporary accounts of constitutionalism – theories of what a constitution is for; how to interpret a constitution and the relationship of critical morality to that activity; and accounts of the human rights which a constitution properly interpreted will protect and promote – fail the test of the common good. Constitutionalism today is in many respects sound or at least unobjectionable. But many defining features of it are grievously flawed. Defining features of constitutionalism today undermine the common good by closing government, its laws, and the vast expanse of public life off from the true common good. Constitutionalism today also impedes everyone's access to genuine human flourishing, by constricting the scope of the 'private' life where each one is theoretically free to pursue the good (as he sees it), and by redefining the nature of moral worth within it.

How could this be? After all, constitutions leave vast expanses of legal territory empty, to be occupied by whatever positive law governing bodies choose to enact. Constitutions are predominantly concerned with government jurisdiction and second-order norms addressed principally to public officials, not to ordinary people. Are not constitutions too far removed from everyday life to have *that* kind of influence on how people's lives go?

Yes, and no. Constitutions do stand largely behind, one step removed from, everyday life. But 'largely' is not 'entirely'. And there is a huge asymmetry between the small percentage (so to speak) of a constitution's address to more ordinary affairs and the impact of that percentage upon social and personal well-being. A constitution that establishes secularism and defines 'liberty' as self-invention, for example, exerts enormous effects upon persons' understanding of and chances for genuine flourishing, by and through the ordinary civil law's magnification of those master norms of constitutional government.

The civil law is always answerable to constitutional norms, and the civil law's effect upon how persons' lives go is expanding. The raw volume of legal commands, prohibitions, regulations, subsidies, and inhibitions seems to be increasing exponentially. This growth shows no signs of abating. On the contrary, under the headings of (to cite a few examples) protecting national security, fighting crime, growing GNP, keeping up with foreign kids' math and science scores, and maintaining a globally competitive workforce, governments have taken over direction of activities and collaborations which until recently were thought to be little – or none – of its business. The unimaginably vast surveillance and data mining activities of the United States (and some other governments) affects everyone's actions, in ways largely still mysterious to us.

The social goals just mentioned are good things. It is bad for anyone if one's country is attacked, or if one lacks the basic necessities of life. But these national enterprises are very largely governed by functional (quantitative, means/ends) criteria of success. Those in charge of them do not recognize and thus do not adequately adjust their plans on account of human flourishing. The unwillingness of the Obama Administration to pursue its stated goal of 'women's health' by means respectful of the good of religion is a leading example.

There are many more examples in the queue. A superficial reading of the debate over what education is for and what a twenty-first-century

curriculum should look like reveals anxiety about workforce-prep education which leaves the whole person in shadows (or in the dust). Anyone can see the deep tension between global economic competition and keeping at home enough satisfying jobs which are compatible with a wholesome family life. A safe, prosperous society plainly can be a desert for anyone seeking to live in accord with the requirements of morality. No-one glancingly familiar with twentieth-century history can fail to appreciate the trade-offs between living (truly) well and government surveillance.

Public authorities should promote prosperity and safety and other collective ends. But they should do so mindful of the truth about persons and families. They should be more ambitious than they are to promote the overriding goal of civil society: helping people lead truly worthwhile lives. This ambition may not promote efficiency and might marginally increase some risks. But it will almost certainly promote human flourishing. To do so, though, public authorities would have to summon the political courage and rhetorical skills to explain convincingly what they are doing and why. They would have to articulate a compelling account of genuine well-being, social and personal. An added bonus of doing so: government is much more likely to be effectively limited by the requirements of a robustly articulated common good than it is by the prerogatives of the rootless self-inventing individual.

Civil law shapes us by commanding and prohibiting, by paying and debiting. Compulsory schooling up to age 16 or so, and subsidized education beyond, powerfully shape many young minds more than do family and church, and all young minds to a considerable extent. A contemporary government's countless subsidies, grants, contracts, tax policies, and other 'soft' powers makes it – by far – the biggest entrepreneur in a society's 'marketplace of ideas'.

In so many different ways, then, laws shape culture and the culture shapes us. This is not a necessary truth about law. It is not an axiom of social theory or political science. The relationship between civil law and culture in any society is contingent. In some places, the law has little or no purchase upon the local culture. Sometimes the government is too weak to matter. (Think of failing states, in the global south and elsewhere.) Sometimes the government is too remote to matter. ('God bless the czar and keep him . . . far away from us!' was the rabbi's prayer in *Fiddler on the Roof*.) Sometimes the government has no moral authority. (Consider so

many Communist regimes before 1989.) Sometimes folk customs, tribal ways, and religious norms of conduct are enough to keep a community on track. Civil law might then be an afterthought.

But it is different in the United States, in the broader Anglo-sphere, and in almost all modern democracies which describe themselves as 'pluralist'. In those places and as Francis George has argued, the 'law has peculiar and unique cultural functions': the 'many components of our culture are largely united by law, not by blood, not by race, not by religion, not even by language, but by law. It's the one principal cultural component we all have in common.'[2]

Law's cultural (and thus person-shaping) effects are compounded by the medium of value in which governments increasingly trade, one which is both myopic and delicate. Civil law is taking up regulatory projects now which go way beyond settling what persons must or must not *do*. Law's writ runs well beyond the external forum. Its preoccupations include the accoutrements of 'identity' politics – 'self-esteem', a certain 'dignity' keenly sensitive to the perceived moral judgements of others, protective norms against 'humiliation' or being 'demeaned' or 'insulted'. 'Stereotyping' and 'triggering' 'unwelcome' feelings and memories are now seen as moral wrongs. Legal penalties for these delicts are probably not far away.

In a few areas of social life – such as the familiar terrain of racial or ethnic non-discrimination – civil liability has long been concerned both about the *why* and the *what* of human actions. Civil law is also often concerned with intention. But even where that concern reaches a zenith – as it does in the criminal law – intention is salient in order to identify (describe, define) someone's *act*. (It is murder and not manslaughter if the actor intentionally caused death.) But this attention to intention still has nothing to do with any actor's wider moral viewpoint, save perhaps in the dubious circumstance of 'hate' crimes. What's happening now is different, for in the typical legal action against, say, a wedding cake maker who declines to participate in a same-sex 'wedding', the alleged injury inflicted is tightly linked to the baker's moral point of view; his or her refusal is actionable precisely because it manifests moral beliefs at odds with those of the same-sex couple. It is not the action, much less the raw behaviour, which constitutes the legal injury. It is rather the ulterior belief,

[2] George 2003: 131, 135.

which cannot even be properly analogized to motive. The relevant act is simply saying 'no' to a customer. So far considered, that is unremarkable. That act does not change once the real bases for legal recrimination are introduced into the picture, namely, the related moral judgements that persons of the same sex cannot really marry, and so any purported 'wedding' would amount to celebrating an immoral (because non-marital) sexual relationship.

In the brave new world being midwifed by constitutional law and theory, a burgeoning 'public' realm, defined expansively to include not only law and political affairs but commercial and social intercourse, is impinging upon heretofore unregulated (in that sense, 'private') life. This space is to be governed by a secular orthodoxy from the reach of which only mental reservation is exempted. As Justice Alito wrote in the same-sex 'marriage' decision (*Obergefell):* 'those who cling to the old beliefs will be able to whisper their thoughts in the recesses of their own homes'.[3]

It is less true now to say that the law *shapes* culture than it is to say that law in key domains *supplants* culture, and *supplies* its own univocal grid of right and wrong, of meaning and value. A legal world haunted by the spectre of 'dignitarian' harms and of 'unwelcome' comments portends a supervision of thought as well as direction of act. This dramatic effect is enlarged when courts (especially) in constitutional cases (especially) brand the background cultural authorities of religion and moral tradition as little better than purveyors of superstition or bigotry.

For all these reasons, then, it matters now more than ever – and it matters a great deal – that the civil law be an accomplice if not a vigorous promoter of true personal and social well-being. Unfortunately, contemporary constitutionalism is pulling the law in the opposite direction.

III. Closure of the Modern Constitutional Mind

Reasonable reflection upon our experience of practical reason(ing) reveals that there are basic goods which can be realized by and in everyone through free choices. These goods are constitutive of individual and social well-being. They are neither yours nor mine. They are *ours*, not by virtue of widespread or even universal agreement, but by dint of being truly what is

[3] *Obergefell v. Hodges*, 576 US at—(2015)

good for any human person, anywhere. Although free choice is essential to human flourishing – especially to participating in goods such as religion, where the meaning of the good includes assent to propositions and interpersonal harmonies – this freedom is never the sum of value in any choice. Free choice is not itself even a distinct basic good. It is rather an existential precondition for acting well. All these truths about objective goods, self-perfection through free choice of them and openness to all of reality (including transcendent, or divine, realities) are essential aspects of a political society's common good.

Constitutional lawyers and theorists go wrong – potentially, catastrophically – if they forget, deny, or obscure these truths about the common good, as so many of them do today.

Mindlessness of these things is evident in the ubiquitous testimonials to the supreme value of 'diversity'. There are surely occasions when the praises of 'diversity' should be sung, when, for instance, the term is disciplined by a limited meaning in a specific context. But the ambient joy surrounding 'diversity' (and 'difference' and 'pluralism') blots out the indispensable truth that *any* community which is 'diverse' about its justifying point or rationale is in trouble. Any political community characterized by disagreement about basic human rights and norms of justice is seriously afflicted. Any political community which insists that there are no objective goods but only so many individually affirmed 'values', is not only hobbled. It is practically incapacitated, unable to do what a political community can do and should do to help persons perfect themselves. For without objective *goods* there can be no true *common* good.

One portentous ode to 'diversity' was the 1989 dissenting opinion of Justice William Brennan, who wrote in the *Michael H.* case that ours is not an 'assimilative, homogeneous' society but a 'pluralistic' and 'facilitative' one. 'Even if we can agree that "family" and "parenthood" are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do.'[4] Brennan did not address the intelligibility of affirming the value of a relationship (such as 'family') without any fixed idea of its 'content'. He might have reminded himself that there were then (and are now) many regrettable appropriations of the term 'family', such as polygamous or polyandrous groupings, and other associated persons who have no open-ended commitment to each other.

[4] *Michael H. v. Gerald D.*, 491 US 110, 141 (1989) (Brennan, J., dissenting).

One important side effect of all the partying over 'diversity' is the stigmatization of any person, group, or institution which maintains that (for example) there are (real) families (to be affirmed and promoted), and other 'families' which, even if they are not to be prohibited, should be discouraged or at least *not* endorsed as good, and especially not as the equivalent of (genuine) families. So churches and other bearers of the truth about human well-being are marginalized. They can scarcely avoid being cast as propounding just one version of the good life among many others, notwithstanding their own claims to be speaking about what is really the case. Their refusal to be typecast leads straightaway to charges of seeking to 'impose their morality' upon others, and so of being 'oppressive'.

The 'diversity' social script and the 'value neutrality' which it would establish as political orthodoxy plainly block access to the common good by denying – for operative public purposes, at least – that there are objective *goods* which could be held in *common*. In this neutralist story, possessive pronouns or proper names are attached to all claims about real basic goods.

This ascription anchors some leading contemporary theories of constitutional rights, and impacts others. Ronald Dworkin has prominently (and variously) argued that a person's way of living – his or her conception of the good life – just *is that person*, insofar as any action restrictive of that person's liberty based even (Dworkin grants) upon a true account of well-being at odds with that person's own account, is *prima facie* a denial of that person's equal standing in the political community. That a conception of value is *mine*, and thus *me*, is the decisive factor. But as John Finnis aptly observes: as to 'Dworkin's attempts to derive a constraint of neutrality from the "principle of equal concern and respect", refutations of them are perhaps well enough known to need no repeating here'.[5]

The collective version of proprietary ethics is 'majoritarian morality'. It figures not only in Dworkin's work, but in others' as well as in innumerable court decisions as the nemesis of (in one famous expression) 'discrete and insular minorities'. But even solitary dissenters possess the trump card. In these civil liberties cases courts typically translate a proposition about the common good (which is held hypothetically by a majority) into a fact

[5] See Finnis 2011b: 96. Finnis refers readers specifically to George 1993.

about some people: it is *their* morality, bearing down upon *me* (and *mine)*. Sometimes the 'neutrality' script-writer doubles down on the possessive, by transposing the popular conviction into a feeling. Majorities are said to be 'offended' by homosexual relations or pornography, and 'repulsed' or 'insulted' by it. So a proposition about how to promote the common good is rendered first as a fact about people's beliefs and then into a report of their emotions.

Once the scene is set this in way, the rest of the story is convincing enough. Of course the mere numerical preponderancy of a proposition's supporters establishes nothing about its truth. Naturally, the fact that some (most?) people are agitated by what someone is doing settles nothing about what the common good truly requires. And, yes, the whole story is a profoundly mistaken picture of reality.

The most brazen expression of this complex of ideas is the self-credentialing found on the first page of the controlling opinion in the 1992 American abortion case, *Planned Parenthood v. Casey*. There the joint opinion writers declared: 'Our obligation is to define the liberty of all, not to impose our own moral code'.[6] This trope implies that 'morality' is comprised of posited rules ('code'), and therefore that morality has its source and obligatoriness in a superior's will. Besides this gratuitous voluntarism, the expression *opposes* morality to 'liberty'. Even more: this 'liberty' is, if not objectively *a* or *the* good, the one good which is everyone's ('liberty of all'). It is the pearl of great price. 'Morality' is inevitably partial, possessive, sectarian and cheapened.

A few pages later the Justices nailed down just what the supreme good means. 'At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life'. This 'Mystery Passage' [MP] has become a central feature of the Court's civil liberties jurisprudence. Cognates can be found in the constitutional jurisprudence of nearly every western regime today.[7]

This exaltation of 'self-definition' might seem to echo a proper self-determination through free choices. But the notions are very different. The former derives value from the choice; that is, from *my* act of establishing a mental world that is *mine*. The validity of the worldview (its correspondence

[6] 505 US 833 (1992).

[7] Upping the stakes, the Justices then alleged that one's 'personhood' depended upon this freedom of self-definition.

to the way matters really are) is incidental, and bereft of value. Champions of this liberty could not and do not speak of *perfecting* oneself at all. If they reasoned consistently from their premises, they would have to say that someone living in a fantasy world could be doing fine, or was as free as anyone is likely to be.

Exercises of MP liberty seem, moreover, to oscillate *between* reference back to some primordial self which is all nature and no nurture – an angel-like creature uncontaminated by socialization, culture, or the expectations and demands of others – *and* a wholly reflexive understanding of 'liberty' as just that: *choosing*, with anticipation of raw subjectivity and individuality. Neither of these imaginings resembles the person who, through free choice among opportunities to participate in the true goods of human nature, perfects himself by and through a unique life of service and good works.

MP liberty is nonetheless the key switch point in modern constitutionalism. Its graver defects are therefore worth considering in some detail. This liberty of self-definition holds that everyone has a valid (at least from the constitutional point of view) liberty interest in doing whatever one desires to do. But no society affords persons the liberty to simply do as they wish. What is obviously missing from this whole picture is an illumination of responsibility and constraint, some reasonable account of the point, justification and value of limits upon doing as one likes.

Illumination of limits – not the presence of them. The sheer volume of law and enforced restraint in modern societies is (as we saw in Part II) not especially modest. Endowing each person with the MP liberty to inhabit a unique mental world leads, however, to a zero sum game. *A*'s liberty to *X* – say, to be free from being forcibly sodomized – simply takes away *B*'s liberty to sodomize *A*. *B* has, or may well have, no reason to respect the integrity of *A*'s body, save fear of consequences.

This impasse is structurally similar to that engineered by Hobbes, who thought that men had the most rights – and the largest liberty – in a state of nature. '[I]n such a condition', according to Hobbes, 'every man has a [r]ight to everything; even to one another[']s body'. But is this not also to say that no-one has a duty to respect another's body? Is it not to say that no-one has a right to bodily integrity?

Where the civil law supervenes upon this understanding of rights and duties, legal constraints cannot be understood or experienced as the

reasonable requirements of free and fair cooperation for the common good. Legal constraint in the MP (Hobbesian) world is destined to be understood, received, and experienced as no more edifying, or more intelligible, than brute restraint, shackles, fetters.

If liberty detached from any account of the good is crowned as the supreme constitutional right, pursuit of common *good*s becomes, strictly speaking, impossible. For no good is just so. None is simply good; that is, valuable in itself prior to and independent of any human decision or convention. Persons can and do still band together to achieve common goals. But these goals need not be truly good, and are commonly understood by those pursuing them not as *goods*, but as shared interests or appetites, or as a common agenda.

Devolution of value upon each one's self-definition disenchants common life. This disenchantment is much more than the loss of warm feeling. It is a genuine demoralization. Free cooperation guided by law for the purpose of helping everyone truly flourish is replaced by the sullen non-interference of solipsistic selves. Everyone's prospects for flourishing are diminished, unless of course one holds that there is nothing good in life whose realization depends upon, or is at least burnished by, inhabiting a well-governed political community. People who bravely strive to hold what they hold and do what they do because they seek the truth misperceive the ontological status of the life they happen to fancy.

MP liberty has emerged not as one among other civil liberties, or even as the biggest or most important of them. It has rather become the 'heart' of them all. And it makes the world of civil liberties go flat. Justice Kennedy in the *Hobby Lobby* decision (about whether companies could be compelled to distribute free abortifacients to their employees) said that free exercise of religion is 'essential' to preserving the 'dignity' of those who choose to 'striv[e] for a self-definition shaped by their religious precepts'. This same liberty anchors his opinion for the *Obergefell* Court: 'The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other"'. In *Casey* the joint opinion writers (including Anthony Kennedy) declared that a woman's abortion decision 'originate[s] in the zone of conscience and belief', and must be settled by 'her own conception of her spiritual imperatives'. The meaning and value of marriage and the family, and of religion, and of the overriding value of abortion rights, are now *all* transparent for the meaning and value which individual persons realize by *their choosing*.

The transformative effects of the MP's hydraulic drag upon the roster of civil liberties are most keen when it comes to religion. Make no mistake about it: the source of *all* constitutionally cognizable meaning and value is the self, even for selves who abide by a transcendent source, namely, God. Religion is thereby pulled down to earth, where it is appropriated by (at least) public authority as the projection of someone's mind. Religion is assimilated to the 'conscience' or 'dignity' or 'identity' of the acting person. This whole area is suffused with will and imagination. The foundation of value here is not the adequacy of any religion's content to what there is – seen and unseen. The value of religion lies not in the truth about anyone's obligations to a greater-than-human source of meaning and value. The metric of worth is a certain authenticity, that is: one's subjective sense of one's own deepest self. Religion is about personal empowerment and consolation; it is not about any reality larger than that.

An English Law Lord (named Law) gave thematic expression to this development in a case denying relief to a Christian relationship counsellor who could not endorse the same-sex acts of his potential clients. Her refusal was a *prima facie* case of sexual-orientation discrimination. She sought an exception rooted in ambient legal norms of religious liberty. Lord Law declared that any exemption on religious grounds would be 'unprincipled'. He reasoned that it would 'give effect to the force of subjective opinion' (read: religion), and thus could not 'advance the general good on objective grounds'.[8] Given its largely invisible and trans-temporal subject matter, this is to say that religion is fantastic, a species of unreality.

Plainly the MP establishes secularism. The sky is opaque, and it hangs low over the public square. But nothing in sound reasoning about the common good or constitutional theory requires *secularism:* the practical absence of religion, operating just as if there is no God and nothing real corresponding to the propositions in religious creeds. As a matter of fact, contemporary constitutional provisions rarely explicitly establish secularism, which instead has been installed as public orthodoxy by courts, acting under the perceptible influence of contemporary theorizing about constitutional law and human rights.

[8] *McFarlane v. Relate Avon, Ltd* [2010] EWCA Civ. 77 section 23

Most extant constitutions do provide for the disestablishment of religion. But these provisions do not imply anything other than a non-confessional state. They do not imply or entail that there really is no true religion, or that one religion is just as true as another, or that all religions are more or less equivalent admixtures of truth and error. Much less do these provisions imply or even suggest that religion is simply not the kind of thing that is either true or false. They offer no support for the proposition that religion is utterly subjective, and unreal. Yet this is where courts have taken the law of non-establishment.

One specific feature of today's establishments of secularism calls for a closer look. Constitutional law rarely distinguishes between reason and revelation, between natural religion and positive religion. This distinction is central to any comprehension of the constitutional history of the United States, and of many other countries as well. It is essential to understanding how public authority, particularly in a constitutional disestablishment, can and should care for religion as part of the common good. But constitutional law and theory today lump together *all* references to divine realities, and treat the undifferentiated mass univocally: it is all the same sort of sectarian speculation about unreality.

This ignorance or wilful blindness strips the public square naked. It prevents a political community from enjoying the many *temporal* benefits of living self-consciously 'under God'. It obliterates the land bridge by which unaided reason connects the many religions, all built upon a rational foundation and striving to penetrate further the deeper reaches of the cosmos, and what lies behind and beyond it. A polity's unapologetic affirmation of the truths of natural religion – including that there is a transcendent creator God who exercises provident care for humankind – would do much more to turn swords into ploughshares than any Hobbesian 'liberty' possibly could.

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The monochromatic 'liberty' of self-definition not only transforms the content of constitutional law and dramatically affects the common good. It amends the constitution in the most straightforward sense of that term, for it both enlarges and then reassigns to the court jurisdiction over a sector of common life. The banner under which this re-constitution proceeds is now a commonplace of contemporary constitutionalism

(the common points of which appear next in *italics*, followed by my commentary): '*Human rights are by definition counter-majoritarian claims.*' (But they are not, save in the limited sense that they are moral truths which do not depend for their validity upon the assent of *anybody*, or bodies – large or small, numerically dominant or small.) *'They are restrictions imposed on the freedom of choice of the people.'* (Yes: basic moral truths are binding upon everyone, including judges. But this has nothing to do – as we already saw in Part II – with assigning jurisdiction to settle matters pertaining to human rights.) *'[A]nd especially on the scope of legislative powers.'* (No, not 'especially' on anyone, or any body of people.) *'There is no effective human rights protection without real protection against the democratic legislator.'* (. . . And everyone else who exercises public authority.)

The MP supplies the intellectual cover for a usurpation of authority. But there are at least two more problems with this judicial coup. First: owing to the judicially orchestrated flattening of civil liberties, constitutional adjudication increasingly presents conflicts between exercises of the same right of self-definition. Thus religious believers (wedding servicers) seek MP protection from homosexuals' exercise of the same liberty (in 'marrying'). Religious institutions seek protection from women's sexual self-definition (to which access to contraceptives is deemed essential). Just so far described, these kinds of disputes are flat-footed contests for which no non-arbitrary outcome is readily in view. It is 'liberty' v. 'liberty'. What is the sense, then, of saying that courts are *uniquely* qualified to decide them because judges are creatures of principle, and have recourse to no 'moral code'?

Second: a glance at constitutional jurisprudence today in the United States, the UK, Europe, and elsewhere reveals that resolving rights cases typically involves 'balancing' or 'proportionality'. John Finnis writes of 'proportionality' (and could as easily have referred to 'balancing'): it 'provides the framework for countless judgements of the Court, but its appearance of juridical craftsmanship barely conceals the unbounded, essentially legislative character of the assessments it involves, which frequently include both a) unbound moral reasoning and moral judgement, and b) speculation about the range of possible future consequences of the measure impugned, alternative measures, and/or some regulatory *status quo ante* free from any measures'.[9]

[9] Finnis 2014: 119.

There is no uniquely correct philosophical or legal answer to cases of this sort, which instead depend crucially upon *anticipating* (settling, choosing) the kind of political community a people shall be. Will it be a community which is more secure but less free? More secure but less devoted to persons' privacy? More of a 'marketplace of ideas' and less protective against the abuses of that freedom? More solicitous of religious liberty than not? Or a commercially dynamic and mobile one, rather than one which seeks to inculcate a greater devotion to place and tradition?

A political community could reasonably choose either alternative in the paired sets. In doing so that polity exercises a liberty of *social* self-determination, which is more legislative than judicial in character, and which sensibly should be carried out by the people or their representatives. Judges who are advertised to deal with principles and abstractions, who are insulated from the people, and who have neither politics nor morals would seem to be among the *least* qualified officials to make the call.

IV. Minding the Gap

Sometimes a group of persons who recognize that they possess so many common experiences and other ties that they are *a* people – a nation, a distinct community of memory and ongoing cooperation – make a constitution. Then the identity of the people whose constitution it is, is clear, even if the country so brought into being is constitutionally defined only territorially. Although constitution-making invariably requires wisdom and skill and is always chancy, this emergent polity enjoys the advantage of having, rather than needing, that widespread shared sense of belonging to the one community, and that mutual commitment to be governed by this constitution and laws made pursuant to it, which are indispensable to any polity's flourishing.

This prerequisite includes or arises from common history, holidays, and heroes. But more than hallowed memories and occasional civic festivals is needed to sustain persons' willingness to conform their conduct to that pattern of restraint and abstention (often enough to one's disadvantage) established by laws made under the aegis of the constitution. More is needed to cultivate the citizenry's spirit of willingness to accept burdens and even sacrifice for all, the spirit on which a polity depends every day and which, when under grave threat (internally or externally), can require

of some the last full measure. More is needed especially where the constitution establishes a popular form of government, in that case to generate citizens' willingness to do their bit to make democracy work. More is needed to inculcate dedication to the true well-being of one's fellow citizens, keenly because all the legally unregulated but interpersonal daily exchanges amount to so many opportunities to choose for everyone's good, or just mine.

More than a constitution and laws is needed to create and sustain the healthy patriotism and political friendship upon which any constitution and laws depend for their success. *Neither* of these supports has much to do with constitution or laws, however. Neither 'our constitution' nor 'our law' is the primary object or focal point of these civic virtues. Patriotism is about affection for and loyalty to the nation (this people) as an entity passing through history. Political friendship is about identifying with one's fellow citizens, and about being willing to act for their true well-being.

The civic virtues are essentially extra-legal, even in many respects non-political. They are social, cultural, and perhaps religious in their roots and orientation. Laws cannot command them, or even call them into existence; they are attitudes *towards* the law, not part of it. Public authorities in a free society have limited resources for bringing these traits into being. These traits are attitudes, sentiments, beliefs, motivations, intentions. Finally, they are free choices.

These constraints upon public authority are portentous because relatively few ready-made 'nations' establish constitutions today. This is partly a matter of fact: all too often, statesmen presume to try – or reluctantly judge themselves forced by circumstances to try – to stitch together distinct, even alien, religious, ethnic, and cultural groups into one sovereign people by and through the act of constitution-making. The results of this weaving include the many secessionist and irredentist movements which parade across the nightly newscast. More stable and coherent nations struggle today to assimilate immigrants who have little familiarity with, and often enough no predisposition to favour, the host country's way of life. (Consult again the headlines.)

Meanwhile, modern life corrodes civic virtues. The worlds of work and media tend to obscure national boundaries and identity. Reference coordinates for the connected person today are the whole world, and then one's circle of familiars. Many persons consider themselves citizens of the

planet, or are simply apolitical. Commitment to others just by dint of common membership in a particular political community – local, state or national – slips away from consciousness.

Some of these patterns could be reformed piecemeal, up to a point. Immigration restrictions could be enacted, and protectionist laws enacted. Good history courses could be required in elementary schools. But there is a low ceiling to these possibilities for arresting the acidic effects of modern life, so long as the worlds of thought and value remain untouched, especially since neither the need for nor the scarcity of the civic virtues owes entirely to matters of fact (about imprudent nation-building, promiscuous migration or contemporary *anomie*). There are some intellectual causes of the scarcity. These include conceptual linchpins of contemporary constitutionalism – '*constitutional* patriotism', 'shared *values*', 'liberalism' – and deep moral commitments of the political morality which this constitutionalism expresses. They can be replaced. And should be.

Both solutions – arrested development and replacement – depend upon revivification of a sound understanding of the common good. This is the critical standard according to which we can see the compelling need for new strategies, for *this* shows what more can and should be expected from political association. It is *this* that supplies the connective tissue (if you will) between a polity's formal legal institutions and the civic virtues, for attention to common good enlivens and illumines the whole notion of political friendship. The common good, rightly understood, gives everyone more to be patriotic about than the liberal procedural republic can possibly offer. It supplies the ties of political friendship.

We discussed in Parts II and III the many elements of contemporary constitutionalism which, we can now see, erode the conditions for cultivating civic virtues. Chief among these is the notional stranger, the unlocated person, around whom this constitutionalism orbits. Whether he (she? neither? both?) is hypothesized as inhabiting a 'state of nature' or as standing in an 'original position', or is envisaged as a solitary self who becomes a 'person' by inventing theories of life, the universe, and of 'mystery', the repercussions are the same: the possibility of true common *good* is practically effaced. One's personal world of meaning has no essential connection to the political community's history or substance. Political friendship is conceptualized as complying with law in 'public' life and as autonomous self-expression in the 'private' realm. Genuine

moral responsibilities are limited to those freely assumed. Common life otherwise is to be understood as the not-unfair pursuit of one's own aims and projects. One rarely hears any more serious argument about how public well-being depends upon the ('private') character and virtue of persons. That tradition of discourse, which goes back at least to Federalist Ten, has been supplanted by an alter-ego: public life operates under its own steam, and its purpose is to enable everyone to define virtue as he wishes in the shrinking 'private' sphere.

In this corroded outlook, one's country can scarcely be identified – much less understood or morally appropriated – as more than its constitution and laws. Its history and traditions, where they are not denigrated as exclusionary or oppressive, are accidents of ancestry for some of those presently resident. No-one is seriously summoned to celebrate them, or even to have affection for them. Contrary assertions are deemed 'unwelcoming', 'exclusionary'. Connection to the nation's past through its religious heritage is precluded by the same norms of contemporary 'inclusiveness'. Any suggestion that the nation today understand its unity by reference (through natural religion) to a greater-than-human source of meaning and value is treated as violating mandated secularism.

Of course, many people living today in cosmopolitan polities have a richer idea of what being a citizen entails. But public officials are bound by the canonical rules of contemporary constitutionalism, and cannot act on any such vision. Ordinary people are hemmed in by ambient legal norms of 'equal respect' and the like, which are designed to marginalize, or simply to render inert, that richer conception of citizenship.

The civic virtues are in short supply, and the pipeline seems to be running dry. The trajectory of contemporary constitutionalism is clear enough. It clearly leads to an increasingly intrusive, supervised, and supervisory – yet morally arid – public realm of conformity to legal or 'human rights' directives. This arc points too at a smaller and smaller private realm of 'identity', where an ever more solipsistic self expresses and presents to the world. One wonders how many persons will sacrifice much for, or learn to love, a 'way of life' with long stretches of conformity, punctuated by occasions of carnival, and occasional weepy public rituals of mass flower-laying at the scene.

Circumstances are nonetheless conspiring to place a premium on – and disclose not a fading but a deepening need for – patriotism and political friendship, as societies fragment. As V. Bradley Lewis writes: 'Where laws and institutions are simply constructed, nations are not; they develop over time and not according to any pre-determined plan'.[10] So too with constitutions and the civic virtues: the one kind can be struck off by the hands of men and women on a date certain; the other can only be cultivated and nurtured. Where law supplies so much of a society's centripetal force and the private realm is simply centrifugal, where are the resources for generating centripetal habits of mind and heart – call them *allegiance?*

Holidays and heroes are superb maintenance tools where a *nation* has made a constitution. But they can never generate that sense of being one people. Nor can laws and formal political structures make one out of many. Revivification of a full-orbed conception of the common good is the necessary ingredient, provided that that common good is envisaged across the time of this continuing people. If history and public rituals represent the *sensibility* of civic virtues, then the common good, so envisaged, is their *sense*. If the affective dispositions respond to the pull of halcyon cords, the intellect responds to the appeal of reasons for action corresponding to basic goods. Patriotic hearts are not stirred by recitation of dry legal phrases, but rather by a justified pride in the truly good accomplishments of *my* people (and some concern to purge, in action, *our* missteps). Political friendship is animated by what animates all friendships – the intelligibility of acting for another's genuine, and thus common, good.

V. The *Unicity* of Morality

For the pursuit of the common good to be open to reality and to reason – an openness required and articulated by natural law theory – life in political society must be permeated by all the truths of normative ethics. Reason unaided by revelation – the practical reason whose content Saint Paul, like philosophers before and after him, called natural law – includes the judgement that among the moral principles and norms (or precepts) that are valid for all persons, at all times and in all places,

[10] See note 1.

are some exceptionless negative moral norms. For example: torture is never permissible, nor is enslavement nor mutilation nor rape nor intentional killing. It is thus reasonable to affirm and unreasonable to deny the position asserted by Pope John Paul II in his 1993 encyclical on moral philosophy, *Veritatis splendor: 'When it is a matter of the moral norms prohibiting intrinsic evil, there are no privileges or exceptions for anyone*. It makes no difference whether one is the master of the world or the "poorest of the poor" on the face of the earth. Before the demands of morality we are all absolutely equal'.[11] It would be hard to state more clearly the *unicity of morality*.

This *unicity* of morality means that there is no tenable distinction such as some recent political philosophers have attempted to draw with their concept of a merely consensualist 'public' reason – supposedly required by justice when addressing political matters in a 'pluralist' society – and the reason they seek to banish from the public realm as too 'thick' or 'comprehensive', and so as fit only for reasoning in private. The exceptionless negative moral norms bind public authorities along with everyone else, and not only in domestic matters. Indeed, they apply beyond the border as well: '[t]he same natural law, which governs relations between individual human beings, serves also to regulate the relations of nations with one another'.[12]

John Finnis has provided a cogent account of how sound practical reasoning includes such 'moral absolutes' as those against torture, slavery, rape, and more.[13] He has also persuasively defended the untenability of distinguishing 'public reason' from the reason anyone uses 'in private'. According to Finnis, because every political actor is a human person (or, in the case of group acts, because collective acts have no existence apart from the acts of the groups' members), all political acts find their proper justification in each acting person's conception of truly good and bad reasons for action. 'For one's public acts are at the same time one's private acts; they are part of one's one and only life'. Political acts – which includes not only those of office-holders but of all active citizens some of the time (when voting, serving on a jury, or while offering testimony to a local council) – 'must not be merely logically consistent with one's conception of a good and decent life; it must actually be rationally motivated by that conception. . .'.[14]

[11] *Veritatis Splendor* 96. [12] *Pacem in Terris* 80. [13] Finnis 1991.
[14] Finnis 2011b: 95.

The unicity of morality as just so far considered plainly benefits political leaders and the communities for which they are morally responsible. By making their reasoning about what to do more perspicuous and more unified, leaders are able to act with a moral integrity, a clarity of purpose, and a certain sense of confidence which would be unavailable to them if they were hamstrung by the fetters of 'public' reason. Finnis writes that 'political actions often have the gravest consequences both for the actor and for others; so, the public reasons are not good (adequate) reasons unless they justify the act, so to speak, all the way down—*justify the actor in doing it*'[15] [Emphasis added].

The political community benefits from having leaders thus enabled to act conscientiously and (if you will) transparently. Most important, recognition of morality's unitary character enables leaders to act more efficaciously for the genuine common good. Because everyone has some (greater or lesser) responsibility to promote the common good, the *unicity* of morality means that everyone should be deliberating about his common project from within the same basic moral framework. The artificial if not foreign language of 'public' reason (in its new-fangled sense as opposed to the genuinely public reason historically called natural law)[16] should no longer bifurcate political officials or alienate them from ordinary folks. Public accountability of leaders would be greatly enhanced. So, too, citizens' buy-in to – engagement with – their political institutions and laws.

This restoration of an inclusive conversation about the common good and how to promote it is especially important since neither morality nor political wisdom requires that all the exceptionless norms be written down in a constitution, or even that those written down be entrusted to judges for their finally authoritative interpretation. These norms and the infra-structure of moral reasoning upon which they rest are, however, always in play and constitute community property, in the end to be safeguarded by everyone as foundations of the common good.

[15] Finnis 2011c: 106.

[16] 'A sound "natural law" theory has never been other than an appeal to public reasons – concerning kinds of choices consistent or incompatible with the real interests of all human persons – reasons that would command a universal consensus under ideal conditions of discourse and meanwhile are available to, and could be accepted by, anyone who is willing and able to give them fair and adequate attention . . .' Finnis 2011a: 58.

The exceptionless negative moral norms bestow many more benefits upon any political community in which they are understood to bind master and servant and everyone in-between. One benefit has to do with basic human rights. It is not so much that these are implied or entailed by the exceptionless norms. It is that the most important among them simply *are* these norms, viewed from the beneficiary's rather than the duty-bearer's perspective. To declare that everyone has a right not to be tortured is to declare (the norm) that it is always wrong to torture. A right not to be enslaved simply means that slaveholding is, without exception, morally prohibited. Everyone has a right not to be raped or intentionally killed, because (really: which is to say that) no-one may rape or intentionally kill anyone. Because almost everyone recognizes that no 'private' person may do any of these things – the criminal law prohibits them anyway – the *unicity* of morality performs the invaluable service to the common good of establishing that not even those with a monopoly on legitimate force and with the resources to shield themselves from criminal responsibility – namely, those who run the government – may *ever* do any of these things either.[17]

Natural law theory affirms the exceptionless negative norms and supplies defences for them. Perhaps just as important is that natural law theory – by supplying a full-orbed account of human good and of basic reasons for actions, as well as a rich account of choice and action in which the object of the act ('intention') is distinguished from foreseeable but unintended side-effects – identifies *what* precisely is prohibited by these norms (against, for example, torture or enslavement). Anyone can see that 'inflicting pain' cannot always be 'torture' (lest doctors and personal trainers be arrested). Nor can depriving another of sleep or isolating them or even asking them hard questions after doing so. One cannot even

[17] The *unicity* of morality (or, in other words, the *assimilation* of 'public' to 'private' morality) is complete as far as it goes. But it does not mean that there is no such thing as 'public morality'. There are two senses of the term 'public morality' which remain valid and useful. The first is 'public morality' understood as the complex web of cultural and legal expectations and prohibitions that make up a society's ambient moral ecology. The second surviving sense of 'public morality' refers to the unique moral responsibilities of the public official. This sense has to do not with a distinct morality but rather with responsibilities having no 'private' analogue. Punishing criminals and making war are two examples of acts which only public officials have the moral authority to perform.

confidently say that waterboarding is, simply, 'torture', unless one is prepared to prohibit its imposition by special forces trainers upon their recruits in anticipation of the latter's possible capture and 'torture' by the enemy.[18]

Is all compelled labour a form of 'slavery'? What of those persons who are made to work in prison for almost nothing? Or forms of human domestic service or contractual apprenticeships?

What is justifiably protected by the commonly acknowledged but often now controverted 'right to marry'? Does it mean more than that no-one may rightly be forced to marry, or to marry a particular person – but that no-one has a 'right' to redefine marriage, such that one has a 'right' to marry several people, or someone of the same sex?

What exactly is forbidden by the duty to accord everyone 'religious freedom'? Does suppressing conscientious terrorism somehow violate another's religious liberty, if his religion commands or authorizes such terrorism? Does threatening with severe penalties someone who threatens a terrorist act in the name of Allah abridge freedom of conscience?

In all these (and other) instances where the content of a basic natural right is at issue, natural law theory – especially due to its unrestricted access to value theory and act analysis, ranging, that is, as far as reason and reality do – is the indispensable resource for all those deliberating in and for the political community. Open at every point to rational questioning, discussion, and judgement, it is a truly public reason. The question also arises (particularly where respecting a natural right – say, of non-combatant immunity from intentional harm – is both unpopular and requires considerable sacrifice by the community): *why?* Reasonable justifications for such political restraint are always useful and sometimes essential to a polity's willingness to bear that burden.

No proportionalist or consequentialist moral theory could possibly ground exceptionless moral norms. 'Public' reason cut off from any theory of basic goods and reasons for action cannot either. Constitutional prohibitions expressed unconditionally ('Congress shall make no law . . .') are widely understood to be strategic absolutizations of *generally* beneficial rules. But these written declarations are widely understood to be breachable by a community facing grave threats, or even just where a 'compelling state interest' calls for it. Powerful justification for treating

[18] See Lee 2006.

some human rights differently – as inviolable, in every person, all the time – is needed. A sound natural law theory supplies it.

It is especially important that a political community's stock of common discourse include the resources needed to cogently answer the question (for example): why should we expose our troops to greater danger by respecting some strangers' right not to be intentionally killed? The universality of the exceptionless negative moral norms corrects the very common tendency of citizens of one nation to prefer themselves to those of other nations, to side with their own especially when it comes to hard moral choices. The Truman Administration's decision to drop the atomic bomb on Japanese cities, for example, was motivated by a desire to end the war. But Truman seems to have been most highly motivated to end the war in a manner which saved the lives of American combatants. He did not worry about targeting (seeking to kill) Japanese civilians in order to do so. He ordered the bombs to be dropped.

The point here is not precisely that bombing Hiroshima was immoral (though it was). It is that any decision to bomb Hiroshima (or a hamlet in Afghanistan or a hospital in Kunduz or a meeting hall in Gaza) must respect the moral truth that *everyone* has an equal right not to be intentionally killed. Any such decision must comport, moreover, with the truth that each human life is due equal respect when deciding whether it is fair to accept lethal side effects – 'collateral damage' – of acts which are not excluded by the norm against intentional killing.

Conclusion

The temptation to treat some persons as unworthy of equal rights, and even to dehumanize them into non-persons, does not arise just when a polity's agents cross the border. America's sorry history of slaveholding was long animated (in part) by the understanding that our Constitution, in the words of Chief Justice Taney in *Dred Scott*, vouchsafed the African no rights which the white man was bound to respect. Here and there the western tradition of reflection on criminal justice was unfortunately influenced by the metaphorical visualization of some criminals as 'beasts', who had forfeited their natural right to be treated as persons. The sometimes grossly unjust treatment of indigenous peoples by colonial powers was abetted, sometimes, by mistakenly taking their

degraded visible condition, and their often morally corrupt culture, as evidence of their sub-human nature.

Happily, *these* deviations from an essential truth about law and political organization have been overcome, at least in our culture (broadly understood). The truth is that the state and all its appurtenances and the whole common good are *for* persons – not the other way around. The Roman Emperor Justinian's jurists supplemented the classic legal textbook in front of them so as to make it say that '[k]nowledge of law amounts to little if it overlooks the persons for whose sake law is made'. They were right: law – including most prominently constitutions, and therefore theories of them – is for persons and their flourishing.

Tragically, some other deviations have replaced these older, discredited ones. Chief among the new dehumanizing projects is legalized abortion, now present in almost every Western country, usually accomplished by interpretation or 'interpretation' of the constitution; in some places (the United States, for example) it is required, in effect, to be available on demand through the late stages of pregnancy.

Abortion presents the gravest question about justice that a society can face: whether an entire class of human individuals is to be stripped of that equal protection of the law against killing which protects every other human individual, and thus exposed to unfettered disposal by those who have the will and legal authority to do so. For the unborn are surely human individuals – biology and the other sciences establish that much beyond doubt. And so legal abortion could be just *only* if the unborn as a class lack something (beyond their status as human individuals) which is essential for any human individual to merit the higher status of *rights-bearing* individual.

This is the 'personhood' question. It is most unforgiving of wrong answers: any mistake which consigns (real) persons to the legal category of 'non-person' leads straightaway to homicide practised with impunity. It is therefore unsurpassably important to get 'personhood' right. Justice and the basic components of the common good require that any attempt to answer the 'personhood' question must be wide open and strictly attentive to all the relevant data, and scrupulously unbiased in all of its reasoning. Any other approach to the question is not only mistaken. It is morally irresponsible.

So too is the approach of the United States Supreme Court, and of countless other judges, constitutional lawyers and scholars, commentators

and politicians who have in one way or another followed the Court's declaration in *Roe v. Wade* that 'we need not resolve the difficult question of when life begins'.[19] A polity which aims at the truth about persons is likely to get it right, and can self-correct if it does not. A polity which does not even aim at the truth, and which instead decides to suppress the truth about the unborn for the sake of others' (chiefly but not only women's) interests, is not only going to get it wrong. At least in one decisive respect, such a polity is nothing less than barbaric.

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[19] 410 US 113, 159. In a rare practical application of his principles to a contested issue, John Rawls considered (in his *Political Liberalism*) the 'troubled question of abortion'. Rawls 1993: 243 n. 32. The question had to be determined, he wrote, according to three 'political values', none of which was the truth about when persons begin, or that all persons have an unconditional right not to be intentionally killed. These 'values' were instead the 'due respect for human life, the ordered reproduction of society over time, including the family in some form, and finally the equality of women as equal citizens'. Rawls asserted without argument that 'any reasonable balance' of these 'values' 'will give a woman a duly qualified right' to a first-trimester abortion. He further asserted that this was because 'the political value of the equality of women is overriding' at that early point in pregnancy.

16 Opening the Doors of Inquiry: Lon Fuller and the Natural Law Tradition

Kristen Rundle

Introduction

When asked whether his famous claims about the 'internal morality of law' represented some variety of natural law theory, Lon Fuller's response of 'an emphatic, though qualified, yes' surely begged more questions than it answered.[1] The scholar widely regarded as the leading twentieth-century proponent of a distinctive 'procedural' or 'formal' natural law jurisprudence was never wholly at ease with the label that so often attached to his thought. This resistance had defensible causes. Fuller began exploring his jurisprudential intuitions in an era in which to even mention the term 'natural law' was, as he put it, to 'unloose a torrent of emotions and fears'.[2] Then there was the problem of how the term 'natural law' meant different things to different people, including among the sympathetic. Simply by evoking it, therefore, one invited the confusions that come with foundationally contested intellectual territory. But there was also the fact that Fuller's efforts to 'discern and articulate the natural laws of a particular kind of human undertaking' genuinely did pose a different set of questions than one might typically expect from inquiry in the natural law vein.[3] His jurisprudence strayed from some of the most commonly assumed commitments of the tradition as often as it did towards them.

Throughout his career, therefore, Fuller was driven to clarify those aspects of natural law thought to which he did *not* subscribe. In a heated exchange with the philosopher Ernest Nagel, in which the question of his apparent status as a 'natural lawyer' was at issue, Fuller passionately argued that that he did not accept any 'doctrine' of natural law that favoured 'one or more of the following propositions: 1) the notion that the demands of natural law can be subject of an authoritative

[1] Fuller 1969a: 96. [2] Fuller 1946: 379. [3] Fuller 1969a: 96.

pronouncement; 2) the notion that there is something called "*the* natural law" capable of concrete application like a written code; 3) the notion that there is a "higher law" transcending the concerns of this life against which human enactments must be measured and declared invalid in the case of conflict'.[4] Not all of Fuller's interlocutors were convinced that statements of this kind, intended to clarify by elimination, were necessarily accurate.[5] But it was and remains a separate question to ask where such statements leave us in illuminating the features of the natural law tradition to which Fuller clearly *did* commit.

The aim of this entry is to answer that question in the spirit of Fuller's own response to it. Charting a broadly chronological course through his key writings in jurisprudence, the narrative to follow will reveal that the 'yes' aspect of Fuller's answer to the 'natural law question' is strongly reflected in his sustained affirmation of the role of reason in the design and operation of legal institutions,[6] his belief in the inherently (if modestly) 'purposive' character of law, and his orientation to the idea that the obligation to obey law cannot be explained without reference to that purposive character. To these we might add his consistent and impassioned defence of the very enterprise of legal philosophy as always normative and never purely descriptive, and, in his engagement with positivist legal philosophy, his insistence that there are necessary connections between law and morality.

But as Fuller himself was at pains to indicate, these affirmative aspects of his commitment to theorizing law in a natural law vein were strictly 'qualified' by his strong rejection of the idea that there is such a thing as *the* 'natural law', emanating from some 'higher' source, capable authoritative pronouncement, and universal in its application. The kind of natural law that Fuller had in mind was 'entirely terrestrial in origin and application'.[7] He equally took a highly qualified position on the question of the moral merit or justice of individual laws. Here Fuller is clear that the

[4] Fuller 1958a: 84. The quote continues with Fuller clarifying that a natural law approach of the kind that contains such exclusions 'is at least as ancient as Aristotle, in whom I find no trace of the elements I reject'.

[5] As a contemporary of Fuller's, Julius Stone's intervention is notable here in his criticism of how, despite the 'potential fruitfulness of the questions raised' by his work, Fuller's approach might nonetheless 'introduce additional polemical cross-purposes, so long as it continues to explicitly deny basic positions on which it nevertheless implicitly proceeds'. Stone 1965: 226.

[6] Fuller 1968a: 116. [7] Fuller 1969a: 96.

kind of 'natural laws' he sought to study dictated no commitment to 'ultimate ends',[8] nor otherwise pronounced on wider questions of moral life. To the extent that such enduring concerns of the natural law tradition were addressed in his writings at all, it was as an adjunct only to his focus on the conditions of law's creation and implementation. Indeed, the latter was precisely the line of inquiry that Fuller accused modern writers of a natural law persuasion of abandoning in their apparent contentment 'to lay down rules about what is right', but 'leave to someone else the problem of how you get there'.[9]

What, then, of the 'emphatic' aspect of Fuller's self-understanding as a natural law scholar? On this question the answer is clear: it is explicit from his earliest writings that Fuller held the *method of thinking* reflected in natural law scholarship in the highest esteem. The natural lawyer's way of approaching law and legal problems, to his mind, reflected a method which 'closed fewer doors of inquiry'[10] than any of its contemporary alternatives. The importance of this point cannot be overstated if we are to appreciate the character and aims of the distinctive brand of jurisprudence that developed through Fuller's efforts. This is not least because his passionate advocacy for the natural method represented something much more than an observer's preference for one attitude towards how the demands of legal inquiry might be met over another. It was the commitment of a thinker who needed precisely those methods to generate and articulate his own project.

That project developed in an era where the theory of legal positivism was in its ascendancy. Indeed, as a self-described anti-positivist, Fuller's sustained objections to positivism account to no small extent for his reputation *as* a natural lawyer. But when Fuller very willingly entered the 'battle of the schools', his ambition in doing so was not to defeat the substantive claims of legal positivism one by one in the name of the superiority of 'natural law'. Rather, corresponding to his faith in the method of thinking exemplified in natural law thought, his primary concern was to highlight the limitations he perceived in the positivist

[8] Fuller 1954. See also his discussion of how his eight principles of lawgiving can be 'neutral over a wide range of ethical issues' in Fuller 1969a: 162.

[9] Letter to Professor B. R. Inagaki, April 9, 1969, The Papers of Lon L. Fuller, Harvard Law School Library, Box 11, Folder 17 (Correspondence relating to *The Morality of Law*).

[10] Document titled 'Natural Law', The Papers of Lon L. Fuller, Harvard Law School Library, Box 12, Folder 1 (Draft notes for the 'Reply to Critics').

method for how we might understand the scope of legal philosophical inquiry itself. Legal positivism, Fuller thought, presented a disintegrative approach to the study of law that removed the 'whole view' from our gaze.[11] He insisted that this needed remedying through a much more capacious theoretical approach.

But the fact that Fuller saw positivism as the problem did not mean that natural law was necessarily the answer. For Fuller, the stakes were more complex. If a nuanced narrative of his relationship to the natural law tradition is to be offered, therefore, it is important to understand *why* Fuller became a participant in his debates with positivism, *what* he sought to achieve in doing so, and *how* he pursued those aims. This is as important to understanding his critical ambitions as an opponent of positivist legal analysis as it is to an appreciation of his distinctly *constructive* ambitions as a legal philosopher working within the methods of the natural law tradition.

On the matter of those constructive ambitions, few could dispute that Fuller's account of the eight principles of the 'internal morality of law' – the demands that law be general, publicly promulgated, sufficiently clear, non-contradictory, possible to comply with, relatively constant through time, non-retroactive, and that there be congruence between official action and declared rule[12] – ought to lie at the centre of a study of his jurisprudence. His tale of King Rex's eight failures to make law from which those principles derive quickly became a classic of Anglo-American legal philosophy, as well as a seminal contribution to theorizing the nature and demands of the 'rule of law'. Yet Fuller's idea of the internal morality of law and the claims made in its defence marked just one point, albeit a very important one, along a sustained trajectory of inquiry that ultimately spanned more than three decades. At the centre of that inquiry was an effort to uncover how, and in what ways, the human interactions constitutive to different 'forms of social order'[13] generate distinctly *moral* demands on their agents. What is asked of those responsible for the creation and maintenance of forms of social order, Fuller insisted, is something much more than mere regard for their conditions of efficacy. The fate of persons and their purposes is at stake. The 'law job',

[11] Fuller 1946: 377. [12] Fuller 1969a: 41.

[13] By 'forms of social order' Fuller meant to include 'rules, procedures, and institutions': Fuller 1956: 704.

as he often put it, must therefore be understood as a particular kind of *role*, dependent on a particular kind of conscientiousness on the part of those who occupy it. The result is a style of natural law jurisprudence only secondarily concerned with the 'law' or 'laws' that comprise the normative output of a legal system. Its primary concern lay instead with illuminating the character of the generative conditions, *prior* to law, that are foundational to the possibility of law itself.

Natural Law at Centre Stage: Fuller's Early Writings

With the benefit of hindsight, Fuller thought that the unashamedly polemical account of the stakes of legal philosophy presented in his first major work in jurisprudence, *The Law in Quest of Itself*, rendered it a vulnerable book. Still, its provocative title calls attention to a point that Fuller would ultimately sustain throughout his career: a strident objection to the ambition of legal positivism to insulate inquiry into the nature of law from all other moral, political, and social phenomena.[14] The stated purpose of *The Law in Quest of Itself* was to take this ambition to task through an attack on the methodological commitments of dominant legal philosophies as Fuller understood them.[15]

At the centre of those commitments, as Fuller saw things, was an adherence to the 'scientific' distinction between what 'is' and what 'ought' to be in the philosophical analysis of legal phenomena. Accordingly, the central claim of *The Law in Quest of Itself* is that rather than rigidly separating the study of what 'is' from that of what 'ought' to be – as approaches to legal inquiry in the vein of legal positivism insisted – we should instead follow the lead of the natural law tradition in 'tolerating a confusion' of the 'is' and the 'ought' in legal discussion.[16] What he had in mind by way of the content of such a 'natural law' approach is not entirely clear. But what is apparent is that two themes are central to his position.

First, Fuller was concerned to sustain a sense of law's 'purpose' within the study of the nature of law itself. To his eyes, the primary fault of

[14] Fuller's 'My Philosophy of Law' also rejects the idea 'that the basic problems of our social order can be solved by what adherents of this point of view call "the scientific method"'. Fuller 1941: 118.

[15] Fuller 1940: 103. [16] Ibid.: 5.

positivism lay in how its contemporary variants had lost sight of how law is not merely something to be described, but 'a program to be carried out'.[17] The second theme relates the enduring faith of natural law scholars in the human capacity for reason. Through this faith in reason, Fuller argues in *The Law in Quest of Itself*, the method of natural law thinking keeps alive the 'element of creation and discovery in the law',[18] which 'unhampered by positivistic restraints . . . tends inevitably to find anchorage in the natural laws which are assumed to underlie the relations of men'.[19]

Even this snapshot of the core concerns of *The Law in Quest of Itself* is sufficient to lend support to the criticism that the book saw Fuller 'firm in the knowledge of who he was against, though not at all certain of what he was for'.[20] His passionate efforts to put the stakes of legal philosophy so squarely on the table undoubtedly earned Fuller a measure of respect, and one that arguably grew rather than diminished over time. But in its era, *The Law in Quest of Itself* was widely regarded as too polemical, its argumentation on the 'is/ought' issue too awkward, and its position on what exactly he had in mind by 'natural law' too vague.

Fuller evidently took these criticisms to heart. His next major jurisprudential work, the essay 'Reason and Fiat in Case Law', clearly sets out to counter any inference of an unqualified association between his thought and the natural law tradition.[21] Indeed, in 'Reason and Fiat' natural law thinking is hardly presented as the saviour of legal inquiry: in its apparently over-zealous faith in the possibilities of reason, it is potentially one of the problems.[22] The nub of Fuller's argument in 'Reason and Fiat' is that the natural lawyer's faith in the possibilities of reason can only illuminate so much about a process of adjudicative decision-making and the nature of the decisions produced therein. This is because when the possibilities of reason run out in the practice of adjudication, as they inevitably will, 'fiat' is deployed to reach a final determination.

[17] Ibid.: 28. [18] Ibid.: 140. [19] Ibid.: 104.

[20] Austin 1958: 350. In Fuller's era, the relevant targets were both legal positivism and legal realism (see Fuller 1934), though it was as a critic of the former that he became most well-known, and which is therefore the focus of the present discussion.

[21] Fuller was especially discouraged by Morris Cohen's scathing review that not only questioned his grasp on the philosopher's distinction between 'is' and 'ought', but also declared his 'strange definition of positivism and natural law' to not only do 'violence to the historic meaning of these terms', but to hopelessly confuse his claims as well: See Cohen 1941: 244.

[22] Fuller 1946. This point had also been put in Fuller 1940: 109.

The assumption Fuller seeks to test, therefore, is whether this exercise of fiat must be perceived as an encroachment on or reversal of reason. His point in reply is that the combination of reason and fiat in the production of case law need not be regarded as a threat if the exercise of fiat is hedged in by an overarching environment of reason. That is, reason and fiat can *complement* each other when those who possess the power of fiat are committed to its exercise in a manner closely attentive to the needs of its context. This relationship *between* reason and fiat, Fuller contends, exists even within those forms of ordering, like adjudicative decision-making, that we might otherwise associate with an image of 'top-down' authority.

This thesis is elaborated through a thought experiment in which one among a group of amnesiac shipwrecks is assigned the role of judge of their disputes. The argument Fuller develops is that, even with no previous knowledge of the institution over which he now presides, the desert island judge would find himself not only 'driven into an attempt to discover the natural principles underlying group life, so that his decisions might conform to them', but would also come to see that 'it was his responsibility to see that his decisions were *right* – right for the group, right in light of the group's purposes and the things that its members sought to achieve through common effort'.[23] Fuller describes these demands as 'natural' constraints on the role of the judge, and suggests that what would emerge would be a kind of 'system of "positive law" that approaches to an indefinite degree "natural law"'.[24]

Quite apart from reflecting the imagination and sense of play for which his writings would become known – exemplified above all in his 'Case of the Speluncean Explorers'[25] – this analysis from 'Reason and Fiat' offers an instructive indication of a number of key themes that were to emerge in Fuller's writings in the years following. We might especially notice the early hints of his thinking on the question of how the responsibilities of role-occupation relate to the conditions needed to possess authority over others. But, for present purposes, what is especially important to notice about 'Reason and Fiat' is what it signals about the *character* of Fuller's engagement with the natural law tradition. He clearly regards natural law

[23] Fuller 1946: 378. [24] Ibid.: 379. [25] Fuller 1949.

thinking as *a* resource for pursuing legal inquiry, rather than *the* resource to be defended irrespective of the nature of the inquiry at hand.

An equally careful attitude to the legacy of natural law thought vis-à-vis his own questions found still more important expression a short time later in an essay that has come to be regarded by Fuller scholars as crucial to an understanding of the critical and constructive ambitions of his jurisprudence alike. Though its stated aspirations ultimately remained under-fulfilled,[26] the importance of 'American Legal Philosophy at Mid-Century'[27] lies above all in its announcement of a new direction of jurisprudential inquiry of Fuller's own making. His 'science or theory of good order and workable social arrangements', moreover, was given the label 'eunomics' by Fuller in a deliberate effort to avoid 'the confusions associated with the term "natural law"'.[28]

This unashamedly 'one foot in, one foot out' approach to an association between his agenda and the tradition of natural law makes the 'eunomics' project intriguing in its own right. Certainly, the corrective ambitions of the project as sketched in 'American Legal Philosophy' hark back to the themes of *The Law in Quest of Itself* in how Fuller presents 'eunomics' as a reaction to the apparently widespread contemporary acceptance of 'imperative' theories of law.[29] But in an effort to develop this point away from an insufficiently defined contest between 'positivism' and 'natural law', Fuller's complaint in 'American Legal Philosophy' is a specific one. What is missing in imperative theories, he argues, is any acknowledgement of how political authority is founded on 'essentially a moral power' that is derived from 'the general acceptance of the rules by which the law-making process is conducted'.[30] The gaze of legal philosophical inquiry thus needs to be cast in a very different direction to that promoted by imperative theories if these moral foundations of legal order are to be illuminated.

This constructive aspect of the 'eunomics' project becomes still more apparent in Fuller's declaration that the very task of legal philosophy ought to be concerned with discerning 'those minimum principles that must be accepted in order to make law possible and then to protect the integrity

[26] I say 'under-fulfilled' rather than 'unfulfilled' because it is the view some Fuller scholars that the eunomics project offers the best representation of his wider jurisprudential project. See especially Winston 2001.

[27] Fuller 1954. [28] Ibid.: 477. [29] Ibid.: 459. [30] Ibid.: 462.

of those principles and to promote a general understanding of them'.[31] Fuller makes clear that the overarching objective of his project is to discern 'the compulsions necessarily contained in certain ways of organizing men's relations with each other':[32] concern for 'ultimate ends' of the kind that might ordinarily be expected from inquiry in the natural law vein is *not* the focus.[33] Little else about the agenda of the project is provided in the essay. Indeed, the curious fate of eunomics as an ultimately unfinished program of inquiry is a question for study in its own right.[34] Still, the importance of the agenda itself is more than apparent in what was to follow: the common interest signalled in 'American Legal Philosophy' and 'Reason and Fiat' in 'the compulsions necessarily contained' in forms of social ordering was to become central to Fuller's jurisprudence from that point onwards.

This theme can be seen in the essay 'Human Purpose and Natural Law',[35] though here Fuller's return to the key methodological complaints of *The Law in Quest of Itself* arguably operated to overshadow the promise of his emergent constructive theoretical agenda.[36] Turning from the dichotomy of 'is' and 'ought' that preoccupied *The Law in Quest of Itself* to a new focus on the apparently equally misguided distinction between 'fact' and 'value' in legal inquiry, 'Human Purpose and Natural Law' again sees Fuller takes issue with efforts to describe a 'purposive' activity like law without regard to the ends that activity is intended to serve. As he puts the argument, in any interpretation of events which treats what is observed as 'purposive', a 'natural law' approach will counsel in favour of seeing that 'fact' and 'value' invariably merge.[37]

This argument met with little sympathy from Fuller's interlocutor Ernest Nagel, who considered 'Human Purpose and Natural Law' to be replete with methodological confusions and to establish its writer's wholesale commitment to 'natural law'.[38] Fuller's aggressive clarification of to what in the name of natural law he did *not* subscribe, reproduced earlier, was the result. But the most important issue to notice for present purposes is that,

[31] Ibid.: 463. [32] Ibid. [33] Ibid.: 473, 476.

[34] The eunomics project is only explicitly developed further, under that label, in an essay titled 'Means and Ends' that was unpublished during Fuller's lifetime. Thought to have been written around 1961, the timing of this return to the wider frame and ambitions of the eunomics project – between his 1958 debate with Hart and writing the lectures that became *The Morality of Law* – is worth noting. The essay is reproduced in Winston 2001.

[35] Fuller 1956. [36] The 'is/ought' issue is also traversed in Fuller 1954: 467–473.

[37] Fuller 1956: 698. [38] Nagel 1958: 78.

however awkwardly it might have been argued, the methodological critique revisited in 'Human Purpose and Natural Law' is not just made for its own sake. Rather, in this context it is offered to support the argument that forms of social order are not merely means to ends, but also ends in themselves that contain their own 'natural laws'.

It is in elaborating this last point in 'Human Purpose and Natural Law' that Fuller introduces the idea that all forms of social ordering contain their own 'internal morality', which he explains as meaning that each will make 'its own technical demands if it is to be in fact what it purports to be'.[39] Much more, famously, was to come in later writings to flesh out this idea. But the specific point Fuller is trying to make in 'Human Purpose and Natural Law' and its associated 'A Rejoinder to Professor Nagel' is that the ingredients of this 'internal morality' of the forms of social order, which he also refers to as 'principles of social order', cannot be theorized through frames that separate the question of what these principles *are* from what they have been deployed to *do* or are trying to *be*.

The point, then, is that the methodological preoccupations of Fuller's early writings need to be understood with some subtlety. What ultimately emerges is an attempt to highlight the inherently normative comportment of those charged with responsibilities towards the existence of forms of social order, and how this inherently normative comportment must be adequately grasped within any attempt to theorize the phenomenon under study. Central among the responsibilities attaching to this comportment is the need to discern what Fuller repeatedly refers to as the 'natural laws' of the relevant enterprise. In this idea, therefore, we see the classic natural lawyer's commitment to the answerability of lawmaking efforts to a set of standards. But here the crucial point is that the standards in view are not drawn from ideas or beliefs *outside* of the undertaking itself. They are instead thought to be *internal* to it.

Elaborating the Internal Morality of Law: Fuller's Middle Writings

H.L.A. Hart's famous lecture at Harvard Law School in 1957, 'Positivism and the Separation of Law and Morals', provided the catalyst needed for

[39] Fuller 1958a: 704, 705.

Fuller to bring the ideas sketched in 'Human Purpose and Natural Law' about law's 'internal morality' to stronger expression.[40] That said, when reading 'Positivism and Fidelity to Law: A Reply to Professor Hart',[41] it is important to bear in mind its status as a targetted response to Hart's effort to defend the positivist 'separability thesis' that there is no necessary connection between law and morality. Fuller might willingly have accepted that agenda of debate when he chose to take Hart's arguments to task. But even a cursory review of 'Positivism and Fidelity to Law' reveals the extent to which the underlying concerns of the reply burst the boundaries of that frame.[42] Indeed, contemporary legal scholars have increasingly come to recognize aspects of the 1958 Hart–Fuller debate, though declared to be about the connections between law and morality, to be still more squarely about the connections between the concept of 'law' and the concept of 'the rule of law'.[43]

The sustained complaint of Fuller's essay can be captured simply: the view of law promoted in Hart's claim that there is no necessary connection between law and morality is fundamentally incomplete. In particular, Fuller saw in Hart's essay a lost opportunity to explore the idea, raised by Hart himself, that 'the key to the science of jurisprudence' lies not in the notion of a command, as had been argued in 'imperative' theories of law, but instead in an acknowledgement of how 'nothing which legislators do makes law unless they comply with fundamental accepted rules specifying the essential lawmaking procedures'.[44] For Fuller, Hart is clearly right to pay attention to these 'fundamental accepted rules' that are foundational to a legal system. But, he argues, close attention to these rules soon reveals that they rest on 'moral' foundations that are distinctly 'internal' to law.

Fuller sets the stage to argue this point by suggesting that there is a 'twofold sense' in which law cannot be built on law, but rather must be built on something else. First there is the necessary support *for* law conveyed by those subject to it. Fuller calls this the 'morality external to law', but notes that this 'external morality', though crucial, is insufficient on its own to ensure that law will possess the attributes that enable it to

[40] Hart 1958. [41] Fuller 1958b.
[42] See especially Lacey 2010 and Rundle 2012, especially Chapters 1 and 3.
[43] See especially Waldron 2008.
[44] Hart 1958: 603. This is, of course, the project that Hart came to develop in Hart 1961.

function successfully *as* law. For this aspiration, he argues, we must also respect the 'internal' morality of law.[45]

It is in elaborating this point that Fuller introduces the first of several hypothetical tales that were to emerge over the course of his writings about hapless or ill-motivated monarchs who attempt, invariably without success, to take on the role of lawgiver. In 'Positivism and Fidelity to Law', the monarch in question becomes slothful in the phrasing of his commands, punishes loyalty, rewards disobedience, and commits all number of other lawgiving misdemeanours.[46] His failure, Fuller contends, suggests that

> Law contains its own 'implicit morality' which must be respected if we are to create anything that can be called law, even bad law. Law by itself is powerless to bring this morality into existence. Until our monarch is really ready to face the responsibilities of his position, it will do no good for him to issue still another futile command, this time self-addressed and threatening himself with punishment if he does not mend his ways.[47]

Though some notion 'responsibility' is evidently here at issue, much more than these suggestive observations is needed to illuminate precisely *why* the monarch's mishaps demonstrate something 'internally moral' about the practice of lawgiving. Fuller's reply to Hart on the question of Nazi law, later in the essay, sheds light on this point. Here the argument to which Fuller is replying is Hart's uncompromising rejection of the apparent 'natural law' claim of the German legal philosopher, Gustav Radbruch, that grossly unjust laws may be denied the status of valid laws.[48] True to his positivist commitments, and in keeping with the claim of his Utilitarian predecessors that the existence of law is one thing but its merit or demerit another, Hart is firm in his view that the status of Nazi laws *as* law should not be questioned.

To Fuller, however, the apparently straightforward question of the status of Nazi law is much more complicated. What is missed in Hart's analysis, he argues, is the extent to which the Nazis disregarded 'the inner morality of law itself'.[49] When this is brought into view, it is 'impossible to dismiss the problems presented by the Nazi regime with a simple

[45] Fuller 1958b: 644 [46] Ibid.: 645, 644. [47] Ibid.

[48] Hart 1958. Radbruch's 'formula' for 'statutory lawlessness' is of course much more complex than is recorded summarily here, or indeed in Hart's essay. For a sophisticated analysis, see Mertens 2002. See also Rundle 2012 at 66–84.

[49] Fuller 1958b : 649–650.

assertion: "Under the Nazis there was law, even if it was bad law".[50] Fuller's argument, instead, is that the status of Nazi law *as* law ought first and foremost be approached by asking 'how much of a legal system survived the general debasement and perversion of all forms of social order that occurred under the Nazi rule, and what moral implications this mutilated system had for the conscientious citizen forced to live under it'.[51]

Again, we need much more to fully comprehend the 'inner morality' idea than what is provided in these claims. Still, we might observe some key innovations within how Fuller formulates this argument, in the sense of how he effectively reinvents a range of traditional natural law commitments to support his analysis. We might especially notice how the traditional natural law concern for the basis of the obligation to obey law leads at Fuller's pen to an important claim about how the *formal* conditions through which law is expressed – what we might call the principles of 'the rule of law' – may in certain circumstances of debasement remove the obligation of a legal subject to accept the claim of authority of a given legal order. The natural law premise of the answerability of positive law to standards beyond its own pedigree thus finds new articulation by reference to the formal character of the legal order from which Nazi laws emanated. As Fuller puts the point, 'a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system'.[52]

It is very important to see that this is not an argument about the *validity* of Nazi laws, strictly speaking.[53] It is instead an argument about what ought properly be regarded as 'legal', and why, and what implications might follow from this. By developing traditional natural law preoccupations towards questions about how the form of law might shape its claim to legal status and to authority over its subjects alike, Fuller's reply to Hart in 'Positivism and Fidelity to Law' thus does much to advance the idea that a *legal* condition is one that constitutes *a particular kind of relationship* between persons occupying lawgiving office and those positioned as subjects. The specific message conveyed through the Nazi law analysis is that to abuse this relationship will be, at a point, to lose law itself.

[50] Ibid.: 646. [51] Ibid. [52] Ibid.: 660.

[53] For a consideration of how Fuller's position might be reframed as an argument about legal validity, see Rundle 2012: 78–84.

This last idea was to return as the animating theme of the tale of King Rex and his eight failures to make law in Fuller's most well-known book, *The Morality of Law*.[54] As Fuller tells the story, Rex came to the throne with every good intention to make his name in history as a great lawgiver. Unfortunately, however, his dream was short-lived. First Rex failed to achieve appropriate generality in the rules he issued. Then some of his laws were kept secret from his subjects, while others operated retroactively. His legislative draftsmanship suffered from obscurity, and his laws perpetuated confusion. They were also changed far too often, and at their worst required the impossible from his subjects. Then, adding insult to injury, Rex rendered judicial opinions that bore little relation to the enacted rules on which they were allegedly based. Facing revolt from his subjects and disillusioned with the legal enterprise, Rex died a miserable king. The first act of his successor, Rex II, was to take the powers of government away from lawyers and put them in the hands of psychiatrists and experts in public relations so that his people could be made happy without rules.[55]

By presenting us with this playful account of how *not* to create and administer a legal system, this classic of Anglo-American jurisprudence invites us to reflect on what the pathologies of Rex's efforts at lawgiving might reveal about the constitutive demands of the endeavour that he undertook. These demands are articulated by Fuller in the form of 'eight kinds of excellence towards which a system of rules may strive': that law be general, publicly promulgated, sufficiently clear, non-contradictory, possible to comply with, relatively constant through time, non-retroactive, and that there be congruence between official action and declared rule. Together these eight principles are said to comprise 'the internal morality of law'.[56]

It is clear from how Fuller presents his account of the eight principles that he is not merely offering a description of how to do the lawgiving job well. Akin to his final position in the Nazi law debate, his claim is a much stronger one: a total failure to meet the demands of the principles does not simply result in a bad system of law, but something 'that is not properly called a legal system at all'.[57] As before, this apparent conceptual claim about the constitutive requirements of a condition of legality is explained by reference to the natural lawyer's concern for the obligation of the subject to obey law. As Fuller puts the point in *The Morality of Law*,

[54] Fuller 1969a. [55] Ibid.: 33–38. [56] Ibid.: 41. [57] Ibid.: 39.

'there can be no rational ground for asserting that a man can have a moral obligation to obey a law that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rules of the same system, or commanded the impossible, or changed every minute'.[58]

The argument here is not that it is necessarily impossible, in practical terms, to obey a law enacted or administered in violation of one or more of the eight principles of the internal morality of law. The argument is instead that, in the face of a formally debased legal order, the question of obligation must remain open.[59] To this end, Fuller is clear that the demands of his principles of the 'internal morality of law' must be understood as existing along a continuum, with their achievement subject to considerable variation across different contexts. But the main argument is that the legal subject's obligation to obey law will arise only in response to, or in anticipation of, a *corresponding effort* on the part of the lawgiver. To secure the subject's fidelity to law, Fuller insists, the lawgiver must enter into a relationship of 'reciprocity' with them.[60]

The theme of 'reciprocity' is clear, but Fuller's arguments about the 'internal morality of law' still seem to raise as many questions as they answer. What exactly *is* the 'morality' aspect of this so-called 'internal morality of law'? To whom or what is it directed? How are we to know it? Much confusion has historically surrounded these questions, but a close examination of the trajectory of Fuller's claims indicates what is needed to answer them.

The *internal* designation within the idea of the 'internal morality of law' signals a point that should now be clear: that Fuller's focus is not on the *ends* of a condition of legality, in the sense of its specific outputs of law, but on the constitutive structure of the condition itself. On this point, Fuller readily admitted in his private correspondence that he might better have spoken of the internal morality of 'law-ing', or 'legality', rather than 'law'.[61] As for the matter of how we are know the content of this 'internal

[58] Ibid.: 40.

[59] As Fuller explains the point, if the bond of reciprocity is finally and completely ruptured, 'nothing is left on which to ground' the subject's obligation to observe the lawgiver's rules: Ibid.

[60] Ibid.: 39–40.

[61] Letter from Fuller to Dorothy Emmet, October 7, 1966, The Papers of Lon L. Fuller, Harvard Law School Library, Box 2, Folder 16 (Correspondence).

morality', the natural law method of discovering the demands of the legal endeavour through reason and reflection is clearly crucial. But, as earlier emphasized, here there is no 'higher law' in view to settle the question of what exactly these demands are or will be. Indeed, Fuller suggested that if 'any metaphor of elevation is appropriate' his eight principles might be thought of as 'lower laws' akin to those respected by a carpenter 'who wants the house he builds to remain standing and serve the purpose of those who live in it'.[62]

But what of the *morality* of this 'internal morality of law'? This most controversial aspect of Fuller's position can be helpfully illuminated by revealing what might to some seem a shocking admission: Fuller conveyed privately that he had 'no particular brief for the term "morality"', and indicated a willingness to deploy alternate terms such as 'ethos', 'trusteeship' or 'conscientious attitude' to convey the point he was trying to make.[63] Why Fuller ultimately chose to retain the terminology of 'morality' in the face of these alternatives is a question on which we can only speculate. The fact that the received philosophical space within which he sought to prosecute his claims was dominated by an enduring debate about the necessary connections between 'law' and 'morality' is surely key. But more important for present purposes is what these other terms reveal about the core idea that Fuller had in view when he insisted that 'the enterprise of subjecting human conduct to the governance of rules' contains 'internally moral' demands.[64]

There is much in *The Morality of Law* that helps us to provide a response to this question. Fuller invites us throughout the book to understand lawgiving not just as a task, but as 'a relationship with persons generally'.[65] Indeed, he goes on to describe these persons as 'responsible agents, capable of following rules and answerable for their defaults' whose dignity is affronted by departures from the eight principles of the internal morality of law.[66] This relational frame – between lawgiver and subject – in turn informs Fuller's

[62] Fuller 1969a: 95. This formulation comes dangerously close to feeding the criticisms about 'efficacy' that ultimately met this account of the internal morality of law on the part of Hart and others.

[63] Letter from Letter from Fuller to H.L.A. Hart, 18 October 1965, The Papers of Lon L. Fuller, Harvard Law School Library, Box 3, Folder 14 (Correspondence).

[64] Fuller 1969a: 96. Fuller regarded this formulation of his subject as the closest thing he ever offered of a 'definition' of law.

[65] Ibid.: 42. [66] Ibid.: 162.

argument that the demands implicated in the creation and maintenance of a legal order place particular burdens on the position of a lawgiver, and ask more by way of conscientiousness than simply trying to do the job effectively. Lawgiving must appeal not just to 'the pride of the craftsman', but also to 'a sense of trusteeship'.[67]

The eight principles of the internal morality of law can therefore be read as a statement of the *demands of role* – what Fuller would later call the 'role morality' – appropriate to the particular relationship between lawgiver and legal subject entailed in the legal enterprise. This richly moralized conception of role is the strongest substantive (as opposed to methodological) aspect of his jurisprudence as a version of natural law jurisprudence.[68] Fuller's interlocutors, however, read his position rather differently, with the line of argument developed by Hart in his review of *The Morality of Law* proving to be especially troublesome on this score.[69] Designed to neutralize the alleged moral significance of Fuller's eight principles, and thus to establish that the positivist separability thesis remained untouched by his objections, Hart argued that the so-called 'moral' principles of the internal morality of law in fact amounted to no more than principles of efficacy to aid the lawgiving task. Akin to an 'internal morality of poisoning' – principles that might aid the poisoner to poison his victim well – observance of Fuller's principles simply makes the end-product of law more effective in the pursuit of its ends, good or evil. Nothing of moral significance, Hart therefore concluded, could be said about the principles themselves.

Hart's 'efficacy' account of Fuller's eight principles has been remarkably resilient in its hold on the imagination of legal philosophers who have sought to engage with the idea of the 'internal morality of law'. Yet, and

[67] Ibid.: 43.

[68] Other 'substantive' moral commitments of Fuller's jurisprudence might also be identified in *The Morality of Law*. These include his explanation just noted of the conception of the person implicit in the principles of the internal morality of law: Ibid. We might also note his description of man as a 'communicative being' that supports Fuller's suggestion in the same context that the 'central indisputable principle of what may be called substantive natural law – Natural Law with capital letters – I would find it in the injunction: Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire'. Fuller 1969a: 186. In both of these instances, however, these comments are offered by way of fleshing out one or other attribute or presupposition of his eight principles.

[69] Hart 1965.

especially for the purpose of situating the place of this interpretation within a narrative about Fuller's relationship to the natural law tradition, it is important to see the extent to which Hart's reply reflects not only a very confined engagement with the claims that Fuller actually made, but a highly limited conception of the appropriate scope of debates about the possible connections between law and morality more generally. The view conveyed, in essence, is that such debates are concerned only with the question of the moral content of individual laws. Given Fuller's repeated clarifications that he sought to make no such conceptual claim about the connection between observance of his eight principles and the morality quality of legal ends, it is difficult to see why this confusion so readily arose. That is, to the extent that Fuller engaged with the question of the morality of legal substance at all, it was at most through some quasi-empirical observations about how a connection between observance of his principles and the goodness of legal ends was something likely (but not necessarily) to be seen in practice.[70]

Treating the demands of Fuller's internal morality of law as merely aids to legal efficacy is also problematic for how it complements and compounds the 'checklist' reading that has come to be widely associated with Fuller's principles, and arguably still more with the idea of the 'rule of law'. On this interpretation, 'law' or 'laws' must exhibit each and all of Fuller's eight criteria to be such. The trouble with this reading lies in how it invariably diverts attention from the much more important idea that Fuller sought to convey about the demands of the *relationship* between lawgiver and subject that is reflected in compliance with his principles. Moreover, it also obscures Fuller's own view that sometimes the health of a legal system might actually be better served by *departing* from certain principles, if to do so would serve the wider cause of legality.[71] For him,

[70] See e.g. Fuller's clarification that his claim was limited to the contention that when we have regard to 'the prosaic facts of human life', we not only see that coherence tends to have 'more affinity with goodness than with evil', but also that in an ordered system of law, formulated and administered conscientiously, there is 'a certain built-in respect for human dignity'. Fuller 1965: 664–665.

[71] This point is made especially strongly in Fuller's analysis of the principle of non-retroactivity. Fuller argues that a retroactive statute can, in certain instances, be an important curative measure in repairing the 'various kinds of shipwreck' in which a legal system might find itself. The complexity of the requirement of non-retroactivity thus arises from how and when to know the difference: that is, how to know when its breach represents a tolerable sacrifice of legality, as opposed to when such would be an abuse

as earlier noted, universal compliance is not necessarily the game: the existence of a legal system 'is always a matter of degree'.[72]

And we must of course also remember that Fuller himself spoke of the appeal of the internal morality of law to 'a sense of trusteeship and the pride of the craftsman'. It is not necessary to wholly reject Hart's 'efficacy' reading of the principles of the internal morality of law in order to defend this point. What *is* needed, however, is an appreciation of *why* Hart's efficacy reading of his internal morality of law was so bewildering and devastating for Fuller. In short, by reducing the demands of lawgiving to a morally neutral technique, ostensibly indifferent to the connections between the responsibilities of lawgiving and the fate of persons, Hart's 'efficacy' argument (if accepted) operates to remove the very heart of Fuller's agenda from view.[73] The way that Fuller chose to push back against this intervention, however, facilitated developments within his jurisprudence that raise still further and intriguing questions for how we are to understand his relationship to the natural law tradition.

Natural Law Inquiry with a Sociological Twist? Fuller's Late Writings

In correspondence in the mid-1960s Fuller described himself as 'having been for some time practising sociology without a license'.[74] This might well have been so, but the specific amplification of his engagement with sociological ideas in writings following the publication of *The Morality of Law* is especially striking. Hart's 'efficacy' reading of the principles of the internal morality of law clearly provided a rousing catalyst for Fuller to think seriously about how he might better communicate the thrust of the

of the feature of prospectivity that otherwise makes sense of the enterprise of governing through rules. Fuller 1969a: 53–54.

[72] Ibid.: 122.

[73] Fuller's correspondence makes clear that he was especially disturbed by how Hart's review deployed his mention of the appeal of the internal morality of law the 'pride of the craftsman' phrase – while excluding the phrase 'a sense of trusteeship' that immediately precedes it – as if to suggest Fuller himself ultimately adhered to a morally neutral instrumental 'efficacy' account of the significance of the eight principles.

[74] Letter to Professor Thomas P. Wilson, October 29, 1968, The Papers of Lon L. Fuller, Harvard Law School Library, Box 8, Folder 12 (Correspondence).

arguments about law's internal morality that he was trying to make. But the fact that this challenge coincided with his separate decision to spend a year reading sociology is important. In the result, Fuller's diversion in that direction proved crucial not only to how he came to defend his arguments about the internal morality of law against the 'efficacy' charge, but also to his decision to thereafter direct his energies to studying the 'sociology' of legal processes.[75]

But *what* exactly did he have in mind by 'sociology'? Here again Fuller found himself at the disciplinary margins. His 'sociological' concerns lay *not* in a desire to study an extant thing called 'society' and its relationship to a separate object of study called 'law', or, indeed, vice versa. To his eyes, this way of conceptualizing a would-be study of 'legal sociology' promoted a top-down view of law as an authoritative datum projected onto a thing called 'society'.[76] It operated, at its essence, to reproduce the imagination of legal positivism. None of this held any appeal to Fuller, who was concerned instead with the social interactions constitutive *to* law. What he wanted to illuminate was an idea of the social *within* rather than separable from law. He sought to articulate a particular kind of sociology *of* law.

Though no single scholar in the sociological tradition had squarely undertaken the kind of inquiry that Fuller had in mind, his established interest in the thinking of the early twentieth century German sociologist, Georg Simmel, proved to be especially generative. This affinity with Simmel's thought was already recorded in *The Morality of Law* where, among the very few footnotes accompanying Fuller's account of the eight principles of the internal morality of law, we find reference to Simmel's thinking on the relational dimensions of the authority structures that comprise legal governance. Simmel's argument was that these structures remained fundamentally relational even though they might appear to be unilateral.[77] The connection between Simmel's insight and

[75] See especially letter from Fuller to Professor John P. Dawson, November 30, 1966, The Papers of Lon L. Fuller, Harvard Law School Library, Box 2, Folder 12 (Correspondence) for a clear statement of these intentions.

[76] This explains Fuller's great sympathy for Philip Selznick's effort to challenge the resistance among sociologists to the kinds of normative inquiry contained in natural law scholarship: Selznick 1961.

[77] Fuller 1969a: 39, note 1, referring to Simmel's 'Interaction in the Idea of Law', and 'Subordination a Principle' in Wolff 1950: 186–189 and 250–267.

the arguments Fuller came to develop about the inherent 'reciprocity' of the relationships upon which the very possibility of a legal condition is dependent is thus not hard to see. But Fuller also recognized that the missing element in Simmel, which could not be overlooked within his own enterprise, was the *moral* or *ethos* aspect of those relationships.[78]

Bearing this background in mind helps us to appreciate the motivations underlying the writings in which Fuller's self-styled 'sociological' turn is most evident, and especially in those which see him develop his thinking on the 'social' aspects of relationships of authority. These include the curious essay, 'Irrigation and Tyranny',[79] which sees Fuller argue that 'every kind of social power is subject to an implicit constitution limiting its exercise',[80] and which he regarded as 'the most explicitly sociological' of his writings to that point.[81] 'Tyranny', he thought, managed to 'compact into fewer pages more of the basic ideas that I have been struggling with than anything else I have written'.[82] Notable also from this period is of course the book *Anatomy of the Law*, which Fuller described as 'an elementary and fragmentary exercise in legal sociology'.[83] Written primarily for a lay audience, *Anatomy of the Law* revisits Fuller's arguments about the principles of the internal morality of law through a discussion of 'the implicit elements of made law'.[84] But for present purposes the book is also striking for how it sees Fuller return to the enduring debate between legal positivism and natural law to explicitly associate the latter with the 'affirmative' claim that 'those who participate in the enterprise of law must acquire a sense of institutional role and give thought to how that role may

[78] Fuller's excitement in discovering the affinities between his questions and those posed by Simmel is palpable in a letter he wrote to Simmel's translator, Kurt Wolff, which indicates his desire to further develop an engagement with Simmel's thought in later work: Letter to Professor Kurt H. Wolff, December 30, 1963, The Papers of Lon L. Fuller, Harvard Law School Library, Box 8, Folder 13 (Correspondence).

[79] Fuller 1964. [80] Ibid.: 1027.

[81] Letter from Lon L. Fuller to Philip Selznick, May 24, 1965, The Papers of Lon L. Fuller, Harvard Law School Library, Box 7, Folder 6 (Correspondence).

[82] Letter from Fuller to Douglas Sturm, August 9, 1965, The Papers of Lon L. Fuller, Harvard Law School Library, Box 7, Folder 15 (Correspondence).

[83] Letter to Wilhelm Aubert, November 26, 1968, The Papers of Lon L. Fuller, Harvard Law School Library, Box 1, Folder 6 (Correspondence).

[84] Fuller 1968a: 57–69. Fuller was commissioned by Encyclopaedia Britannica to write the book, this was intended to serve as an introduction to law and legal inquiry for a lay audience.

most effectively be discharged without transcending its essential restraints'.[85] 'Human Interaction and the Law', also of this period, in turn emphasizes how the kind of 'stable interactional expectancies' characteristically associated with the phenomenon of 'customary law' are equally constitutive to contract and enacted law,[86] while 'Freedom as a Problem of Allocating Choice', with unmistakable echoes of the tale of King Rex, tells the story of a tyrant who came to appreciate how the need to respect the conditions of freedom of his subjects operated as a limitation on his efforts at lawgiving.[87]

It was the 'Reply to Critics', however, that Fuller personally regarded as his best attempt at 'an exercise in interactional sociology as applied to legal phenomena'.[88] Appended to the second edition of *The Morality of Law*, and tasked above all with the defence of the claims of that book, Fuller thought the 'Reply' laid bare the basic premises of his thought in manner he had not otherwise achieved to that point.[89] Whether he was correct in that assessment is a matter upon which minds might differ. But what is clear is that Fuller's aim in the 'Reply' is to defend his arguments about the internal morality of law through a renewed emphasis on the 'elements of tacit interrelatedness' overlooked in positivist accounts of law, and which, he thought, accounted to a significant extent for the impasse between him and his critics.[90]

Fuller's main claim in the 'Reply' is that the only way that Hart's 'efficacy' reading of the value served by observance of the principles of the internal morality of law can make sense is if it is attached to a top-down conception of law in which the role of a legal subject is merely to serve the lawgiver's ends. To Fuller's eyes, however, this is not a conception of law at all: it is, at its essence, a conception of 'managerial direction'.[91] Fuller elaborates this new argument by testing the salience of his eight principles against the phenomenon of managerial direction as opposed to law.

[85] Fuller 1968a: 116.

[86] Fuller 1969b: 24. Fuller often referred his readers to 'Human Interaction' in association with the arguments of his 'A Reply to Critics'.

[87] Fuller 1968b. We might also note, in the same period, Fuller's introduction to the republication of his early work on legal fictions, which expresses a strong complaint about the 'analytical' approach and its tendency to 'disregard the institutional processes that bring law into existence and produce its efficacy in human affairs' in Fuller 1967: vi.

[88] Letter to Wilhelm Aubert, November 26, 1968, The Papers of Lon L. Fuller, Harvard Law School Library, Box 1, Folder 6 (Correspondence).

[89] See Fuller 1969a: v–vi. [90] Ibid.: 191, 193. [91] Ibid.: 207–215.

Especially emphasizing the principles of generality, non-retroactivity, and congruence between official action and declared rule as principles crucial to the distinctiveness of law – yet constitutively *ir*relevant to managerial direction – Fuller argues that part of the very *idea* of a functioning legal order is the existence of 'a relatively stable reciprocity of expectations between lawgiver and subject'.[92] A legal order, at its heart, 'depends upon a cooperative effort – an effective and responsible interaction – between lawgiver and subject'.[93] Not so, however, for managerial direction, where the subordinate has 'no justification for complaint if, in a particular case, the superior directs him to depart from the procedures prescribed by some general order'.[94]

Whether 'managerial direction' is the best placeholder for the species of ordering Fuller sought to associate with the concept of law presented by legal positivism is a question worth posing. Yet in other respects the 'Reply' seems to land Fuller precisely where he had been trying to arrive. It is here, for instance, that he comes to describe the commitment implied in lawmaking as a particular kind of 'role morality'.[95] And yet, curiously, the 'Reply' has been subject to relatively little attention among those critical of Fuller's claims: for many, it seems, the Hart–Fuller debate concluded with Hart's 'efficacy' reading of the principles of the internal morality of law. But for those interested in Fuller's thought on its own terms, the 'Reply' is regarded as a crucially important moment within the trajectory of his jurisprudence. This is above all because of how the work sees Fuller take his existing arguments about the relationship of reciprocity between lawgiver and legal subject that is constituted and sustained by law's distinctive formal features in the direction of a much richer analysis of the conditions, statuses, modes of responsibility, and modes of treatment that *underlie* that relationship of reciprocity and make it possible.[96]

It is also important to notice how, as the intended last word of a particular kind of 'natural law versus legal positivism' debate, Fuller chose to end the 'Reply'. Harking back to the project of *The Law in Quest of Itself* almost three decades earlier,[97] the concluding lines of the 'Reply' see Fuller return to the fundamental stakes of the 'battle of the schools'

[92] Ibid.: 209. [93] Ibid.: 219. [94] Ibid.: 208. [95] Ibid.: 239.
[96] For an extended analysis, see Rundle 2012: 122, 131–140.
[97] See especially Fuller 1940: 101.

between legal positivism and natural law, though now with his own distinctly 'sociological' frame of analysis in view. Unlike the surprisingly conciliatory tone that concludes *Anatomy of the Law*, where Fuller suggests that the counsel of *both* positivist and natural law theories might each might find its resonance at different junctures in human affairs,[98] here Fuller closes his defence of his claims in *The Morality of Law* by reminding its readers of the stakes of the contest. Calling expressly for 'a little more tolerance' for the practical wisdom of the natural law tradition, the 'Reply' ends with a hopeful appeal to a new era in which 'legal philosophers will cease to be preoccupied with building "conceptual models" to represent legal phenomena, will give up their endless debates about definitions, and will turn instead to an analysis of the social processes that constitute the reality of law'.[99]

Conclusion

Fuller's later years ultimately saw little by way of published works. This included a failure to complete his ongoing project on 'The Forms and Limits of Adjudication' which, though widely circulated, remained unpublished during his lifetime.[100] It is worth lingering on that essay for the purpose of concluding this entry, as it indicates much about the persistent questions and themes of Fuller's jurisprudence. Fuller sought in 'Forms and Limits' to develop the argument that the distinctiveness of adjudication, *as* adjudication, is generated not by the presence of a judge but rather from how an adjudicative process affords each of its participants the opportunity to present 'proofs and reasoned arguments for a decision in his favor'.[101] Moreover, reflecting the preoccupations he had intended for his 'eunomics' project, 'Forms and Limits' also saw Fuller turn to the question of the kinds of problems for which adjudication might be unsuited, including his famous consideration of whether adjudication might be inappropriate to the resolution of 'polycentric' disputes.[102]

[98] Fuller 1968a: 119. [99] Fuller 1969a: 242.

[100] Fuller 1978. Fuller's private papers indicate that he was still circulating copies of 'Forms and Limits' for comment as late as a decade after its first iteration was drafted.

[101] Ibid.: 364. [102] Ibid.: 394–404.

The fact that Fuller evidently thought he had never brought the arguments of 'Forms and Limits' to adequate expression is curious as much as it is instructive. It suggests that the essay proved to be something of a microcosm for the more general difficulties he experienced in articulating precisely what his wider jurisprudential agenda was about, and how it needed to be pursued. Still, Fuller was firm in his conviction that the 'Forms and Limits' project ought properly to be regarded as one of legal philosophy, even while he acknowledged the apparent disinterest of the field in precisely this kind of theoretical reflection. He equally made clear that he regarded the concerns of 'Forms and Limits' as sharing the same space as his thinking on the 'internal morality of law',[103] in so far that, like his writings on the latter idea, the aim of 'Forms and Limits' was not to set out what makes adjudication effective, but rather to focus on the 'social framework' within which the adjudicator functions.[104] Again as in his writings on the 'internal morality of law', Fuller equally sought in 'Forms and Limits' to emphasize the *affirmative* aspects of the adjudicative process as one which manifests a 'certain regard for human dignity' in how it treats its participants as ends in themselves.[105]

Where, then, does this leave us in answering the question with which we began? From an early focus on disputing philosophical antimonies thought to encourage a disintegrative approach to legal inquiry, to an elaboration of the 'internal morality' of legal forms and processes, to a self-styled sociological turn towards the interactional foundations of relations of legal authority, the trajectory of Fuller's particular brand of 'natural law' jurisprudence might at first glance seem a wide-ranging, even esoteric one. It is hoped, however, that the preceding narrative has demonstrated that there is much that unites the various points along that trajectory. Here Fuller's late-career correspondence is especially revealing with respect to what, with the benefit of hindsight, he ultimately thought his life's work had been about. Reflecting particularly on his writings on the idea of 'the

[103] See especially letter from Fuller to Professor John P. Dawson, November 30, 1966, The Papers of Lon L. Fuller, Harvard Law School Library, Box 2, Folder 12 (Correspondence) for a clear statement of these intentions.

[104] Letter to Roderick Firth, January 30, 1962, The Papers of Lon L. Fuller, Harvard Law School Library, Box 3, Folder 5 (Correspondence).

[105] Fuller 1978: 362.

internal morality of law', Fuller came to see his enduring concern for 'process and jobs and their jibe with one another'[106] as having been 'influenced chiefly by the concept of a "role morality"'.[107] That he wanted to develop this and related themes in subsequent work is recorded in enthusiastic statements of intention to pursue further writing on 'the sociology of basic legal processes',[108] an 'interactional theory of law',[109] or simply 'my own brand of legal sociology'.[110]

Statements such as the last might be thought to problematize the question of where to 'fit' Fuller within the natural law tradition.[111] But rather than attempting to arrive at a settled view on that issue, it might be more fruitful to ask what precisely is served by posing the 'natural law question' in relation to Fuller's jurisprudence in the first place. The point to bear in mind here is how we will invariably find the answer to that question differing according to the stakes. For Fuller's positivist interlocutors there was much at stake in declaring that he was indeed a card-carrying natural lawyer. So labelled, he could be unceremoniously dispatched to the misguided group of legal scholars who disputed the separability thesis, and left alone. There was also something important at stake for those from the natural law camp who lamented the apparent distance of Fuller's project from the question of the substantive justice of law. Labelling him a 'natural lawyer' – or not – could operate a means of defending this or other commitments

[106] Letter to Anthony Blackshield, February 12, 1973, The Papers of Lon L. Fuller, Harvard Law School Library, Box 1, Folder 12 (Correspondence).

[107] Letter to Rolf Sartorius, January 29, 1974, The Papers of Lon L. Fuller, Harvard Law School Library, Box 7, Folder 11 (Correspondence).

[108] Letter to Douglas Sturm, September 30, 1969, The Papers of Lon L. Fuller, Harvard Law School Library, Box 7, Folder 15 (Correspondence).

[109] For some scholars who have worked closely with Fuller's arguments, an 'interactional' theory of law is precisely what the body of works that comprise his contribution to jurisprudence ultimately yields. See especially Brunnée and Toope 2010, and van der Burg 2014.

[110] Letter to Mrs Julie Levitt, July 9, 1969, The Papers of Lon L. Fuller, Harvard Law School Library, Box 5, Folder 2 (Correspondence).

[111] It is beyond the scope of this entry to dwell upon the important prior question of what exactly is envisaged in the very idea of 'a tradition', and whether the history of scholarship we have come to associate with natural law inquiry might appropriately be so described. For present purposes we might simply note that Fuller himself used various terms in association with 'natural law' throughout his career, including 'school' and 'tradition'.

played down in Fuller's work as necessarily lying at the centre of the concerns of the tradition.[112]

The stakes for Fuller himself, however, were something different again. His own answer to the 'natural law question' of 'an emphatic, though qualified, yes' was, all things considered, the only answer he could have given. To respond still more affirmatively would have risked laying down direction posts for the interpretation of his thought that would have sent the minds of his readers in certain directions and away from others. Given the unorthodox character of his inquiry – not to mention the considerable extent to which it was happening anyway – this was something Fuller could ill-afford to encourage. Yet to deny the connection altogether would not only have been an act of intellectual dishonesty, but a way of leading the development of contemporary legal philosophy in a direction in which he was unwilling to travel. Because despite some of its more 'foolish assertions',[113] Fuller regarded the tradition embodied in the literature of natural law as one towards which legal scholars could rightly feel proud, and one from which they could still learn much. In its careful reaching after reason, its orientation to the needs of persons and their responsibilities towards one another, its sensitivity to problems of 'social architecture',[114] and its light tread on the quest for clarity above all else, the natural law tradition presented itself to Fuller as one which always kept the doors of inquiry open. He therefore considered it to be his responsibility, too, to protect the fate of its legacy. A reply to a colleague critical of his efforts in *The Law in Quest of Itself* captures well Fuller's stubborn refusal to be deterred from that challenge, and so provides a fitting way to conclude this entry:

> About the choice of the expression 'natural law'. I debated a long time before using that term as I did, and I used it knowing that I was prejudicing my case by adopting it. . . . What I wanted to do was to make a contribution to removing the pejorative force of the term, so in the future if someone says to me, 'Why, that's natural law,' I can answer, 'Yeah, so what.' Thomas Mann's Naphtha, in

[112] Fuller, however, strongly sustained the opposite complaint against Catholic natural law scholarship, which he thought insufficiently recognized 'the creative side of the natural law concept'. He also thought that the sympathy of Catholic natural law thinking for the idea that there could be an authoritative interpretation of natural law as potentially converted it into 'a kind of positivism': Letter to Dean O'Meara, July 28, 1964, The Papers of Lon L. Fuller, Harvard Law School Library, Box 5, Folder 14 (Correspondence).

[113] Fuller 1969a: 241. [114] Ibid.: 240.

'The Magic Mountain', said that Europeans would never be able to think politically until they got over shuddering at the word 'reaction'. I think that lawyers should get over shuddering at the expression 'natural law', and I would have contributed nothing towards that end if I had kowtowed to current linguistic prejudices in my lectures.[115]

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