2

Natural law and morality

Are gay marriages immoral? Why is racism wrong? Should the law permit abortion? Are we exercising proper stewardship of the environment? Moral questions routinely tug at the sleeve of our legal and political practices. Their persistence is perhaps one of the hallmarks of a democratic, or at least an open, society. Nor are such enquiries confined to the armchair of philosophy: the vocabulary of ethics increasingly infuses the language of international relations. To postulate an 'axis of evil' presupposes a normative touchstone by which to judge the behaviour of states that, since the establishment of the United Nations, is partly embodied in an ever-growing cluster of international declarations and conventions. The ubiquity of ethical problems, from the quotidian ('Should I tell him the truth?') to the momentous (a declaration of war on ostensibly moral grounds) has, of course, preoccupied moral philosophers since Aristotle. Indeed, the recent renaissance in natural law theory may represent an acknowledgement that we have, over the centuries, come no closer to resolving these awkward questions.

There are, broadly speaking, two opposing positions. The first is known as 'moral realism', and proposes that certain moral virtues exist independently of our minds or of convention. Natural lawyers and those of a Kantian persuasion generally march under this banner—an approach that will be examined in this chapter.[1] Secondly, there is the sceptical path, most closely associated with utilitarians, such as Bentham, and legal positivists like Kelsen, who deny the existence of any deontological, mind-independent moral values. This position is discussed in 3.2 and 4.3.

The place and function of morals in the law has always been a focal concern of legal and political philosophers, and it is no exaggeration to say that it has become one of the most significant questions, indeed the fundamental question, that animates the debates of today's jurisprudence. The full extent of the disagreements between legal positivists who seek to maintain a sort of conceptual apartheid between law and morals, on the one hand, and those, including natural lawyers, who reject the idea of a law/morals separation, will become a great deal more comprehensible in Chapter 4. At this stage, it suffices to alert you to this crucial dispute that has come to dominate—not always beneficially—contemporary legal theory.

While reading what follows, bear in mind that, along with natural law (which I sketch first below), the views of theorists who regard law as an essentially moral concept, have, in

[1] Ronald Dworkin nicely expresses what he calls 'Kant's principle' as follows: '[I]f the value you find in your life is to be truly objective, it must be the value of humanity itself. You must find the same objective value in the lives of all other persons. You must treat yourself as an end in yourself, and therefore, out of self-respect, you must treat all other people as ends in themselves as well'. Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass and London: The Belknap Press of Harvard University Press, 2011), 265. Dworkin's claim that '[l]aw is effectively integrated with morality' ibid, 414, could just as comfortably be considered in this chapter, but the significance and sweep of his argument, and the extent to which it constitutes an elaborate theory of law and morality, requires that it be considered in its own right in Chapter 5. But bear in mind that, though Dworkin is not, strictly speaking, a natural lawyer, his moral thesis often resembles a secular version thereof.

recent years, shrunk to a minority. You may want to ponder why this is the case, and why legal positivism, once denigrated,[2] has become something of a growth industry.[3]

The contrasting approaches of two Cambridge colleagues provide a nice exemplar of the gulf between contemporary jurists. Nigel Simmonds mounts a careful, compelling case in support of the view that '"law" is an intrinsically moral idea, and that inquiry into the nature of law is ultimately a form of moral enquiry . . . and . . . that system specific debates about law's content can never wholly be separated from the philosophical inquiry into the nature of law as such.'[4] On the other hand, his colleague, Matthew Kramer, while conceding that law and morality occasionally intersect, robustly defends legal positivism against its detractors.[5] A healthy difference of opinion?

2.1 Classical natural law theory

'The best description of natural law', according to one natural lawyer, 'is that it provides a name for the point of intersection between law and morals.'[6] There is an unquestionable tension between what 'is' and what 'ought' to be; theories of natural law attempt to resolve this. Its principal claim, put simply, is that what naturally *is*, *ought* to be. But this apparently uncomplicated proposition has been widely misunderstood and misinterpreted. An understanding of the essentials of natural law theory is therefore important.[7]

2.1.1 Plato and Aristotle

Among the Greek philosophers, it is particularly the ideas of Plato and Aristotle whose analyses of ethics are especially significant. For Plato the fundamentals of ethics lay in absolute values that things could emulate. For example, a beautiful object derives its beauty not from itself but from elements of beauty discovered within the object itself. We know beauty (a value) intuitively, although its precise content may be further extended by the application of reason. Another absolute Platonic value is justice which has an inherent connection to law: only laws that pursue the ideal of justice can be considered right. Indeed, according to Plato, justice is a universal value that transcends local customs or conventions.

[2] In the early 1980s a professor—newly appointed to a law school abroad—was about to deliver his first lecture in jurisprudence. He was greeted by a horde of rowdy students who refused to allow him to speak. The clamour continued for several minutes. Eventually he managed to impose a modicum of order, and asked why he had attracted such hostility. The students explained that it was because one of their lecturers had described him as a legal positivist. 'But why would anyone think that?' he enquired of a sea of puzzled faces. They did not know. When he explained that, as far as he knew, he was not positivist, the class quickly settled down. The professor was me.

[3] Its extent should become evident in Chapter 4.

[4] Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007), 6.

[5] See, in particular, Matthew H Kramer, *Where Law and Morality Meet* (Oxford: Oxford University Press, 2004) and Matthew H Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (Oxford: Clarendon Press, 1999).

[6] A Passerin D'Entrèves, *Natural Law* (London: Hutchinson, 1970), 116.

[7] A useful reader is *Natural Law*, edited (in two volumes) by John Finnis, in the *International Library of Essays in Law and Legal Theory*, published by Dartmouth in 1991. Most accounts of natural law to which you may be referred in your course normally sketch the 'development' of natural law thinking, starting with the Greeks and the Romans, through the religious teachings of St Thomas Aquinas and its secular (and political) adaptation by Grotius, Hobbes, Locke, Rousseau, and Blackstone. The decline of natural law theory in the nineteenth century (the rise of legal positivism after the attack by Hume) are then described—often to demonstrate that the 'debate' between natural lawyers and legal positivists, while important, is inconclusive. You will then learn of the 'revival' of natural law theory in the twentieth century. You will be expected to exhibit a knowledge of these developments, but too many students merely reel off these historical 'developments' (which they have committed to memory) without demonstrating a real grasp of what questions natural lawyers have sought to answer and explicate.

Aristotle also sought to discover values by the application of reason. Unlike Plato, however, the source of these ideals is to be found in our human nature rather than in external, transcendent values. The natural world, Aristotle argues, contains elements of both stability and change. These conflicting forces are integrated by the concept of '*telos*': the object or purpose to which things inexorably evolve. Humans are no less susceptible to this teleological process. We are social animals and therefore in order to flourish we require family and social groups. But we are also political animals and hence the *polis*—or state—exists in nature. It is our nature to live in a *polis*: it is indispensable to our thriving as human beings. And this has certain consequences for the law which should, amongst other things, further those elements that facilitate social life.

In his *Nicomachean Ethics*, Aristotle suggests that 'justice' describes two different but related ideas: 'general justice' and 'particular justice'. Our actions are generally just when we are wholly virtuous in all matters relating to others. Particular justice, on the other hand, refers specifically to treating others fairly or equitably.

On this foundation, he develops the concept of 'political justice' which is derived partly from nature, and is partly a matter of convention. Natural justice is a thus a species of political justice. It is, in other words, the system of distributive and corrective justice that would be established under the best political community (see Chapter 9).

2.1.2 **St Thomas Aquinas**

Aristotle's ethical theory influenced the teachings of the Dominican, St Thomas Aquinas (1225–74), whose principal work *Summa Theologiae* contains the most comprehensive statement of Christian doctrine on the subject. The thirteenth century witnessed the development of European city-states. The Pope's authority over these states was hampered through want of a theological stance in respect of the exercise of secular power. Previously, the foremost Christian thinker of the day, St Augustine, had merely endorsed the Biblical exhortation to 'render . . . unto Caesar the things which are Caesar's'. But Aquinas deployed Aristotle's philosophy in an effort to reconcile secular and Christian authority. He argued that Christianity was a stage in the development of humanity that was unavailable to the Greeks. The *polis* in which we were destined to live was therefore Christian.

For Aquinas natural law is merely one element of divine providence: it is a 'participation' in the eternal law—the rational plan that orders all creation. In other words, it is the means by which rational beings participate in the eternal law. Secondly, when human beings 'receive' natural law, its content comprises the principles of practical rationality by which human action is to be judged as reasonable or unreasonable. Indeed, for Aquinas it is this characteristic of natural law that justifies its description as 'law', for law, he claims, consists in rules of action declared by one who protects the interests of the community: since God defends and protects the universe, His decision to create rational beings with the capacity to act freely in accordance with reason entitles our regarding these principles as constituting 'law'.

The tenets of natural law are binding on us, Aquinas contends, because—as rational beings—we are guided towards them by nature; they point us toward the good, as well as certain specific goods. Moreover, these principles are known to us by virtue of our nature: we demonstrate this knowledge in our inherent aspiration to achieve the various goods that natural law exhorts us to pursue. We are able to discern the essence of practical knowledge, though the precise practical consequences of that understanding may often be difficult to determine. And, Aquinas acknowledges, our passion or malevolence may obstruct their application.

At the heart of the Thomist interpretation of natural law is the basic notion that good is done and evil avoided. In practical terms this means that we ought to pursue some

specific good. And we know, by inclination, what these goods are: they include life, knowledge, procreation, society, and reasonable conduct. For him the good is prior to the right. Whether an act is right is less important than whether it achieves or is some good. We are, he suggests, capable of reasoning from these principles about goods to practical means by which to realize these goods.

But how do we know when an act is fundamentally unsound? There is no simple yardstick; we must scrutinize features of the acts in question, such as their objects, their ends, the circumstances under which they are carried out. For example, Aquinas contends that certain acts may be defective by virtue of their intention: acting against a good, as occurs when one commits a murder, tells a lie, or blasphemes. While he resists stating universal, absolute, eternal principles of right conduct, he does claim that natural law regards it as always wrong to kill the innocent, to lie, blaspheme, or to indulge in adultery and sodomy, and that they are always wrong is a matter of natural law.

The leading (and most accessible) contemporary proponent of natural law, John Finnis (discussed below at 2.6) expresses it as follows in *Natural Law and Natural Rights*: anyone who tries to explain law, makes assumptions, willy-nilly, about what is 'good'—

> It is often supposed that an evaluation of law as a type of social institution, if it is to be undertaken at all, must be preceded by a value-free description and analysis of that institution as it exists in fact. But the development of modern jurisprudence suggests, and reflection on the methodology of any social science confirms, that a theorist cannot give a theoretical description and analysis of social facts, unless he also participates in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.[8]

This constitutes an important challenge to the alleged 'objectivity' or scientific methodology of legal positivism. But it also represents an incisive philosophical starting point of the natural law approach. It suggests that when we are discerning what is *good*, we are using our intelligence differently from when we are discerning what *exists*. In other words, if we are to understand the nature and impact of the natural law project, we must recognize that it yields 'a different logic'.[9]

Aquinas distinguishes between four categories of law, as illustrated in Table 2.1.

He contends that human posited law draws its power to bind from natural law. His 'definition' of natural law (above) speaks of participation of the eternal law in rational creatures ('*participatio legis aeternae in rationali creatura*'). This proposition is elucidated well by Finnis. Aquinas does not mean 'participation' in the normal sense of the word. As Finnis explains:

> For Aquinas, the word *participatio* focally signifies two conjoined concepts, causality and similarity (or imitation). A quality that an entity or state of affairs has or includes is participated, in Aquinas's sense, if that quality is *caused by* a *similar* quality which some other entity or state of affairs has or includes in a more intrinsic or less dependent way. Aquinas's notion of natural law as a participation of the eternal law is no more than a straightforward application of his general theory of the cause and operation of human understanding in any field or inquiry.[10]

[8] Finnis, *Natural Law and Natural Rights*, 2nd edn (Oxford: Oxford University Press, 2011), 3.
[9] Ibid, 34. [10] Ibid, 399.

Table 2.1 Aquinas's four categories of law

1. *Lex aeterna* (eternal law) Divine reason—known only to God. God's plan for the Universe. Man needs this law without which he would totally lack direction.
2. *Lex naturalis* (natural law) Participation of the eternal law in rational creatures. Discoverable by *reason*.
3. *Lex divina* (divine law) Revealed in the scriptures (God's positive law for mankind).
4. *Lex humana* (humanly posited law) Supported by reason. Enacted for the common good. Necessary because the *lex naturalis* cannot solve many day-to-day problems. Also, people are selfish; compulsion is required to force them to act reasonably.

His theory of understanding may be very briefly summarized as follows: Aquinas (following Plato and Aristotle) postulates a 'separate intellect' which causes in us our own power of insight. Humans, as opposed to animals, 'participate' in natural law in this sense: we are able to grasp the essential principles of natural law, that is, human nature's Creator's intelligent and intelligible plan for human flourishing. But we grasp it not by any kind of direct knowledge of the divine mind, but rather: 'all those things to which man has a natural inclination, one's reason naturally understands as good (and thus as "to be pursued") and their contraries as bad (and as "to be avoided")'.[11]

His analysis of natural law distinguishes between primary and secondary principles; the former may be supplemented by new principles, but not subtracted from. The latter may, in exceptional circumstances, be susceptible to change. But he does not tell us on what *basis* this distinction is drawn: which principles are primary? Nor does he explain how the secondary principles are *derived* from the primary ones.

An important claim routinely linked with Aquinas (and one which, according to Finnis, has been widely misconstrued) is that a 'law' which fails to conform to natural or divine law is not a law at all. This is normally expressed in the maxim '*lex iniusta non est lex*' (an unjust law is not law). It appears that Aquinas himself never made this contention, but merely quoted St Augustine. Certainly Plato, Cicero, and Aristotle expressed similar sentiments, yet it is a proposition that is most closely associated with Aquinas.[12] What Aquinas seems to have said was that laws which conflict with the requirements of natural law lose their power to bind morally. In other words, a government which abuses its authority by enacting laws which are unjust (unreasonable or against the common good) forfeits its right to be obeyed—*because it lacks moral authority.* Aquinas calls any such law a 'corruption of law'. But he does not suggest that one is always justified in *disobeying* it, for though he says that if a ruler enacts unjust laws 'their subjects are not obliged to obey them', he adds 'except, perhaps, in certain special cases when it is a matter of avoiding "scandal"' (ie, a corrupting example to others) or civil disorder.[13] This is a far cry from the radical claims sometimes

[11] *Summa Theologiae*, II/ I, 94, 2.

[12] See Finnis, *Natural Law and Natural Rights*, 363–6, for a powerful refutation not only of the view itself but also the suggestion that Aquinas held it in the naive sense in which many jurisprudence textbooks present it.

[13] *Summa Theologiae*, I/II, 96, 4.

made in the name of Aquinas which seek to justify disobedience to law. In 2.11 I attempt to show the difficulties and limitations of natural law when invoked in an unjust society.

In his 2011 postscript, Finnis describes as 'loose' the proposition that natural law 'accords to iniquitous rules legal validity'. Natural law, he affirms, 'accepts that iniquitous rules may satisfy the legal system's criteria of legal validity, and where they do, it does not seek to deny that fact, unless the system itself provides a juridical basis for treating these otherwise valid rules as legally invalid (directly or indirectly) of their iniquity.'[14]

It would be illusory to seek or attempt a 'definition' of natural law, but Cicero's Stoic pronouncement in *De Re Publica*,[15] contains the three main components of any natural law philosophy:

> True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting.... It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely.... [God] is the author of this law, its promulgator, and its enforcing judge.

This formulation stresses natural law's:

- universality and immutability;
- standing as a 'higher' law; and
- discoverability by reason (it is in this sense 'natural').

Any account of natural law should—at the very least—incorporate these three elements. But note Brian Bix's important observation:

> Contrary to a lay person's expectations, natural law often has little if anything to do with 'law' as that term is conventionally used. The 'law' in natural law theory usually refers to the orders or principles laid down by higher powers that we should follow.[16]

This has not, however, prevented natural law from being deployed in contemporary moral and political argument in respect of a range of issues from world government to oral sex.[17]

As you might expect, there are differences and disagreement concerning its fundamental principles. The classical natural law tradition accentuates the importance of reason. Thus Finnis emphasizes the centrality of reason in answering the question (posed by a conscientious individual, a group, or an official): 'What should I do?' This tradition, according to Finnis,

> ...has a clear understanding that one cannot reasonably affirm the equality of human beings, or the universality and binding force of human rights, unless one acknowledges that there is something about persons which distinguishes them radically from sub-rational creatures, and which, prior to any acknowledgement of 'status', is intrinsic to the factual reality of every human being, adult or immature, healthy or disabled.[18]

[14] Finnis, op cit, 476. [15] Book 3, Ch 22, sect 33.

[16] Brian H Bix, 'Natural Law: The Modern Tradition' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002), 70–1.

[17] See, eg, Robert George's closely reasoned arguments against 'non-marital orgasmic acts', pornography, abortion, and homosexuality from a natural law standpoint in Robert P George, *In Defense of Natural Law* (Oxford: Oxford University Press, 1999), Parts 2 and 3.

[18] John Finnis, 'Natural Law: The Classical Tradition' in Coleman and Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, 4.

2.2 Contemporary natural law theory

There is some truth in the observation by Alf Ross (the Scandinavian realist, see 6.3.1) that 'like a harlot, natural law is at the disposal of everyone'.[19] The theory has been employed to justify both revolution and reaction. During the sixth century BC, the Greeks described human laws as owing their importance in the scheme of things to the power of fate which controlled everything. This conservative view could be (and presumably was) used to justify—however evil—features of the status quo. By the fifth century BC, however, it was acknowledged that there might be a conflict between the law of nature and the law of man.

With Aristotle there is less reference to natural law than to the distinction between natural and conventional justice. It was the Stoics who were especially attracted to the notion of natural law where 'natural' meant in accordance with *reason*. The Stoic view informed the approach adopted by the Romans (as expressed by Cicero) who recognized (at least in theory) that laws which did not conform with 'reason' might be regarded as invalid.[20]

It was, however, the Catholic Church that gave expression to the full-blown philosophy of natural law as we understand it today. As early as the fifth century, St Augustine asked, 'What are States without justice, but robber bands enlarged?'[21] In about 1140, Gratian published his *Decretum*, a collection of some 4,000 texts dealing with numerous aspects of church discipline which he sought to reconcile. His work begins by declaring, in keeping with the medieval conception of natural law: 'Mankind is governed by two laws: the law of nature and custom. The law of nature is contained in the scriptures and the gospel.' But he continues, 'Natural law overrides customs and constitutions. That which has been recognised by usage, or recorded in writing, if it contradicts natural law, is void and of no effect.'

As discussed above, the comprehensive account of the tenets of natural law by Aquinas has been most influential.

By the seventeenth century in Europe, the exposition of entire branches of the law (notably public international law) purported to be founded on natural law. Hugo de Groot (1583–1645), or Grotius as he is generally called, is normally associated with the secularization of natural law. In his influential work *De Jure Belli ac Pacis* he asserts that even if God did not exist ('*etiamsi daremus non esse Deum*') natural law would have the same content. This proved to be an important basis for the developing discipline of public international law, though exactly what Grotius means when he postulates his *etiamsi daremus* idea is not entirely clear.[22] My own view is that he regarded certain things as 'intrinsically' wrong—whether or not they are decreed by God; for, to use Grotius's own analogy, even God cannot cause two times two not to equal four. In saying this, however, he is not denying the existence of God (as is sometimes suggested); he is stressing that what is right or wrong are matters of natural appropriateness, not of arbitrary divine *fiat*.

In England the high-water mark of natural law was reached in the eighteenth century with Sir William Blackstone's *Commentaries on the Laws of England*. Blackstone (1723–80) commences his great work by adumbrating classical natural law doctrine—in order, it has been argued,[23] to sanctify English law by this appeal to God-given principles. But, while he makes various claims about positive law deriving its authority from natural

[19] Alf Ross, *On Law and Justice*, transl Margaret Dutton (London: Stevens & Sons, 1958), 261.

[20] An interesting attempt to apply Cicero's conception of natural law to contemporary problems of justice and rights is made by Hadley Arkes in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (Oxford: Oxford University Press, 1992), 245.

[21] *City of God*, Book 4, iv.

[22] For differing interpretations contrast D'Entrèves, *Natural Law*, 53–6, and Finnis, *Natural Law and Natural Rights*, 43–4.

[23] See D Kennedy, 'The Structure of Blackstone's *Commentaries*' (1979) 28 *Buffalo Law Review* 205.

law and being a nullity should it conflict with it, these assertions do not actually inform Blackstone's analysis of the law itself. It was, of course, this attempt to clothe the positive law with a legitimacy derived from natural law that attracted the criticism (one might even say the wrath) of Bentham who described natural law as, amongst other things, 'a mere work of the fancy'. See 3.2.

2.3 Natural law in political philosophy

Aquinas is associated (as pointed out above) with a fairly conservative view of natural law. But the principles of natural law have been used to justify revolutions—especially the American and the French—on the ground that the law infringed individuals' *natural rights*. Thus in America the revolution against British colonial rule was based on an appeal to the natural rights of all Americans, in the lofty words of the Declaration of Independence of 1776, to 'life, liberty and the pursuit of happiness'. As the Declaration puts it, 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights.' Equally stirring sentiments were incorporated in the French *Declaration des droits de l'homme et du citoyen* of 26 August 1789 which speaks of certain 'natural rights' of mankind.

The *political* application of natural law theory is bound up with various 'contractarian' theories which conceive of political rights and obligations in terms of a *social contract*. This 'contract' is not an agreement in a strict legal sense, but contains the idea that only with his consent can a person be subjected to the political power of another. It continues to have a hold on contemporary liberal thought, notably in the work of John Rawls (see 9.3).

Some courses in jurisprudence deal only in passing with the thoughts of the leading social contractarians (Hobbes, Locke, and Rousseau) either in the present context or when discussing the revival of such theories in the work of Rawls. These theorists are, of course, not, strictly speaking, jurists, but they have exercised such an important influence on social and political as well as legal theory that you ought—at the very least—to be familiar with the essentials of their respective views. For present purposes it will suffice to give only the briefest outline of each of their analyses of natural law and the social contract. You would, however, be well advised to spend some time reading about these important theorists or, better still, consulting their own works.

2.3.1 Hobbes

For many students Thomas Hobbes (1588–1679) is summarily identified with his aphorism that life is 'solitary, poor, nasty, brutish and short', though more than one examination candidate has rendered this as 'nasty, *British* and short'. (He actually lived an extraordinarily *long* life and was something of a fitness fanatic!) What he actually said (in his famous work, *Leviathan*) was that this was the condition of man *before the social contract*, that is, in his natural state. Natural law teaches us the need for self-preservation: law and government are required if we are to protect order and security. We therefore need, by the social contract, to surrender our natural freedom in order to create an orderly society. Hobbes, it is now widely thought, adopts a fairly authoritarian philosophy which places order above justice. In particular, his theory (indeed, his self-confessed objective) is to undermine the legitimacy of revolutions against (even malevolent) government.

For Hobbes every act we perform, though ostensibly kind or altruistic, is actually self-serving. Thus when I give a donation to charity, it is in fact a means of enjoying my power. In his view any account of human action, including morality, must acknowledge

our essential selfishness. In *Leviathan* (a book that Oxford University burnt as a seditious tract!) he wonders how we might behave in a state of nature, before the formation of any government. He recognizes that we are essentially equal, mentally and physically: even the weakest has the strength to kill the strongest. This equality, he suggests, generates disagreement. And we tend to quarrel, he argues, for three main reasons: competition (for limited supplies of material possessions), distrust, and glory (we remain hostile in order to preserve our powerful reputations). As a consequence of our propensity toward disagreement, Hobbes concludes in Chapter XIII that we are in a natural state of perpetual war of all against all, where no morality exists, and all live in constant fear:

> In such condition, there is no place for industry, because the fruit thereof is uncertain; and consequently no culture of the earth, no navigation, nor use of the commodities that may be imported by sea; no commodious building, no instruments of moving and removing such things as require much force; no knowledge of the face of the earth, no account of time, no arts, no letters, no society; and which is worst of all, continual fear and danger of violent death; and the life of people, solitary, poor, nasty, brutish, and short.

Until this state of war ceases, everyone has a right to everything, including another person's life. Hobbes argues that from human self-interest and social agreement alone, one can derive the same kinds of laws which natural lawyers regard as immutably fixed in nature. He re-defines traditional moral terms (such as right, duty, liberty, and justice) so as to reflect his account of self-interest and the social contract. In order to escape the horror of the state of nature, Hobbes concludes in Chapter XIV that peace is the first law of nature:

> That every person ought to endeavour peace as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek and use all helps and advantages of war; the first branch of which rule contains the first and fundamental Law of Nature, which is, To seek peace and follow it; the second, the sum of the right of nature, which is, By all means we can, to defend ourselves.

The second law of nature is that we mutually divest ourselves of certain rights (such as the right to take another person's life) so as to achieve peace. This mutual transferring of rights is a contract and is the basis of moral duty. I undertake to forfeit my right to steal your property in return for a similar promise from you. In this way we transfer these rights to each other and hence fall under a duty not to steal from each other. For purely selfish reasons we mutually transfer these and other rights, for this will terminate the state of war between us. Such contracts, he concedes are not generally binding, for, if I live in fear that you will breach your side of the bargain, no genuine agreement exists.

When we covenant mutually to obey a common authority, we establish 'sovereignty by institution'. When threatened by a conqueror, and covenant for protection by undertaking to obey, we establish 'sovereignty by acquisition'. Both are, he points out, legitimate methods by which to institute sovereignty; they share the same rationale—fear—either of one's fellow man or of a conqueror. Political legitimacy turns not on how a government achieves power, but its capacity to protect effectively those who have consented to obey it. In other words, political obligation ceases when this protection terminates.

Hobbes derives his laws of nature deductively: from a set of general principles, more specific principles are logically derived. His general principles are:

- that people pursue only their own self-interest;
- the equality of people;
- the causes of quarrel;
- the natural condition of war;
- the motivations for peace.

From these five principles he derives the two laws mentioned above, as well as several others. He is under no illusion that merely concluding agreements can secure peace. Such agreements need to be honoured. This is Hobbes's third law of nature.

He acknowledges too that since we are selfish we are likely, out of self-interest, to breach contracts. I may break my agreement not to steal from you when I think I can evade detection. And you know this. The only certain means of avoiding this breakdown in our mutual obligations, he argues, is to grant unlimited power to a political sovereign to punish us if we violate our contracts. And, again, it is purely selfish reasons (ending the state of nature) that motivate us to agree to the establishment of an authority with the power of sanction. But he insists that only when such a sovereign exists can we arrive at any objective determination of right and wrong.

Hobbes supplements his first three laws of nature with several other substantive ones such as the fourth law (to show gratitude toward those who comply with contracts). He concludes that morality consists entirely of these Laws of Nature which are arrived at through the social contract. This is, as you will have noticed, a rather different rendition of natural rights from that espoused by classical natural law. His account might be styled a modern view of natural rights, one that is premised on the basic, the mundane right of every person to preserve his own life: a free-market version of natural rights, one that may have a message for us in our turbulent world.

2.3.2 **Locke**

A different position is adopted by John Locke (1632–1704) who argued that far from being the nightmare portrayed by Hobbes, life before the social contract was almost total bliss! One major defect, however, was that in this state of nature property was inadequately protected. For Locke, therefore (especially in *Two Treatises of Civil Government*), it was in order to rectify this flaw in an otherwise idyllic natural state that man forfeited, under a social contract, some of his freedom. Strongly reminiscent of Aquinas's central postulates, Locke's theory rests on an account of man's rights and obligations under God. It is a fairly complex attempt to explain the operation of the social contract and its terms, but be sure to have, at least, a grasp of two important precepts in Locke's theory.

First, its *revolutionary* nature: when a government is unjust or authoritarian, Locke acknowledges the right of 'oppressed people' to 'resist tyranny' and overthrow the government: 'a tyrant has no authority'. Secondly, he attaches considerable importance to man's right to *property*: God owns the earth and has given it to us to enjoy; there can therefore be no right of property. But by mixing his labour with material objects, the labourer acquires the right to the thing he has created. This view exercised an important influence on the framers of the American Constitution with its emphasis upon the protection of property. Locke has thus at once been hailed as the source of the idea of

private ownership and vilified as the progenitor of modern capitalism. For Locke, the state exists to preserve the natural rights of its citizens. When governments fail in this task, citizens have the right—and sometimes even the duty—to withdraw their support and even to rebel.

Though strongly influenced by Hobbes, he rejected his view that the original state of nature was 'nasty, brutish, and short', and that individuals through a social contract surrendered—for their self-preservation—their rights to a supreme sovereign who was the source of all morality and law. The social contract, in his view, preserved the natural rights to life, liberty, and property, and the enjoyment of private rights: the pursuit of happiness engendered, in civil society, the common good.

Whereas for Hobbes natural rights are logically prior and natural law is derived from them, Locke derives natural rights from natural law, that is from reason. While Hobbes discerns a natural right of every person to every thing, Locke's natural right to freedom is circumscribed by the law of nature and its injunction that we should not harm each other in 'life, health, liberty, or possessions'.

Locke espoused a limited form of government: the checks and balances among branches of government and the genuine representation in the legislature would, in his view, minimize government and maximize individual liberties.

2.3.3 **Rousseau**

Natural law plays less of a central role than does the social contract in the works of Jean-Jacques Rousseau (1712–78). More metaphysical than either Hobbes or Locke, Rousseau's conception of the social contract (in *Social Contract, Or Principles of Political Right*) inspired the ideological fervour that led to the French Revolution and rests on the idea that it represents an agreement between the individual and the community by which he becomes part of what Rousseau calls the 'general will'. He contends that as an individual the subject may be selfish and decide that his personal interest should override the collective interest. But, as part of a community, the individual subject disregards his egotism to create this 'general will'—which is popular sovereignty. It determines what is good for society as a whole. The social contract is encapsulated in the following terms: 'Each of us puts his person and all his power in common under the supreme direction of the general will; and in a body we receive each member as an indivisible part of the whole.'

His concept of the general will is coupled with his notion of sovereignty which, in his view, is not merely legitimate political power, but its exercise in pursuit of the public good, and hence the general will unfailingly promotes the interests of the people. Its object, however, is 'general' in the sense that it can establish rules, social classes, or even a monarchy, but it can never specify the individuals who are subject to the rules, members of the classes, or the rulers. To do so would undermine Rousseau's central idea that the general will addresses the good of the society as a whole rather than an assembly of individual wills that place their own desires, or those of particular factions, above the needs of the people at large. Indeed, he distinguishes between the general will and the collection of individual wills:

> There is often a great deal of difference between the will of all and the general will. The latter looks only to the common interest; the former considers private interest and is only a sum of private wills. But take away from these same wills the pluses and minuses that cancel each other out, and the remaining sum of the differences is the general will.[24]

[24] *Social Contract*, Vol IV, p 146. Does this sound a little like Rawls's 'original position'? See 9.3.3.

Thus Rousseau's—notorious—proposition that man must 'be forced to be free' should be interpreted to mean that individuals surrender their free will to create popular sovereignty. Moreover, as the indivisible and inalienable 'general will' decides what is best for the community, should an individual descend into selfishness, he must be compelled to fall in line with the dictates of the community.

There are, in Rousseau's theory, certain natural rights that cannot be removed, but, by investing the 'general will' with total legislative authority, the law could infringe upon these rights. As long as government represents the 'general will' it may do almost anything. Rousseau, while committed to participatory democracy, is also willing to invest the legislature with virtually untrammelled power by virtue of its reflecting the 'general will'. It has become trite to remark that he is therefore a paradox: a democrat and yet a totalitarian. But since, in Rousseau's view, the general will is a foolproof touchstone, it intervenes only when it would be in the interests of society as a whole. It is therefore arguable that his apparently authoritarian position is tempered by the importance he attaches to equality and individual freedom.

Legitimate interference by the sovereign might thus be interpreted as required only in order to advance freedom and equality, not to diminish them. The delicate equilibrium between the absolute power of the state and the rights of individuals rests on a social contract that protects society against sectional and class interests.

2.4 The decline of natural law theory

Broadly speaking, two principal developments contributed to this decline. First, the rise of legal positivism (discussed in 3.1), and secondly, non-cognitivism in ethics (see below).

Chapter 3 will consider the assault on natural law led, in particular, by Bentham who was scathingly dismissive of Blackstone's espousal of natural law. For Bentham the assertion that human law derives its validity from natural law was a means of fending off the sort of criticism of the law that he so skilfully made. Yet even Blackstone was unable to provide an actual *instance* of the law of England being regarded as invalid because it conflicted with natural law. It is sometimes thought, therefore, that Bentham was attacking a paper tiger. Moreover, the reply of natural lawyers (and not merely natural lawyers: see 2.6) is that when we make a statement about the law we are normally also making a statement about morality. The question of what is the law is inextricably bound up with moral considerations. As Finnis puts it:

> The tradition of natural law theorising is not concerned to minimise the range and determinacy of positive law or the general sufficiency of positive sources as solvents of legal problems. Rather, the concern of the tradition . . . has been to show that the act of 'positing' law (whether judicially or legislatively or otherwise) is an act which can and should be guided by 'moral' principles and rules; that those moral norms are a matter of objective reasonableness, not of whim, convention, or mere 'decision'.[25]

The second development generally associated with the decline of natural law is the proposition that in moral reasoning there can be no rational solutions: we cannot *objectively* know what is right or wrong (non-cognitivism in ethics). It was David Hume (1711–76) who, in his *Treatise of Human Nature*, first remarked that moralists seek to derive an *ought* from an *is*: we cannot conclude that the law should assume a particular form merely

[25] See Finnis, *Natural Law and Natural Rights*, 290.

because a certain state of affairs exists in nature. Thus the following syllogism, according to this argument, is *invalid*:

- All animals procreate (major premise).
- Human beings are animals (minor premise).
- Therefore humans *ought* to procreate (conclusion).

Facts about the world or human nature cannot be used to determine what *ought* to be done or not done.

Finnis agrees with Hume that arguments of the above type are invalid. He refutes the claim that classical natural law theory (as expounded by Aristotle and Aquinas) ever sought to derive an 'ought' from an 'is' in this way.[26]

2.5 The revival of natural law theory

A number of factors have contributed to a reawakening of natural law theory in the twentieth century. Without providing a comprehensive account of this development here, the following six factors (in no particular order) seem to constitute the major landmarks in this evolution:

- The post-war recognition of human rights and their expression in declarations such as the Charter of the United Nations, the Universal Declaration of Human Rights, the European Convention on Human Rights, and the Declaration of Delhi on the Rule of Law of 1959. Natural law is conceived of, not as a 'higher law' in the constitutional sense of invalidating ordinary law, but as a *yardstick* against which to measure positive law. Thus the Universal Declaration of Human Rights speaks of its terms merely as a 'common standard of achievement' (or, in the French text, a 'common ideal to be achieved').
- The impact of the Nuremberg war trials which established the principle that certain acts constituted 'crimes against humanity' regardless of the fact that they did not offend against specific provisions of the positive law. The judges in these trials did not appeal explicitly to natural law theory, but their judgments represent an important recognition of the principle that the law is not necessarily the sole determinant of what is right.
- The neo-Kantianism of Rudolf Stammler (1856–1938) and Giorgio Del Vecchio (1878–1970). Stammler developed the idea of natural law 'with a variable content' (its principles are relativistic and evolving)—a formal construct with no particular content. Del Vecchio's theory approximated to classical natural law 'in placing the autonomy of the individual in the centre of his theory of justice; the maximising of the human being's capacity for free development, and the protection of the rights which naturally belonged to him because entailed by this end, was the main business of the state; the state, indeed, had no title to, activity incompatible with this purpose, which was its only justification for existence; and he described a state which acted contrary to justice in this sense as a "delinquent state".'[27] Gustav Radbruch (1878–1949) was, until the horrors of the Nazi regime, a legal positivist. He had been briefly Minister for Justice under the Weimar Republic, and a draftsman of the Basic Law of the new German Federal Republic. In 1947 he condemned legal positivism for its failure to prevent the evils of Nazism and advanced the contention that 'the idea of

[26] Ibid, 33–42, for a defence of this position.
[27] JM Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon Press, 1992), 378.

law can be nothing but the achievement of justice… [which] like virtue, truth and beauty is an absolute value'.[28]

- The neo-Thomism now best known to English-speaking lawyers in the works of John Finnis (see 2.6).
- The development of constitutional safeguards for human or civil rights in various jurisdictions (eg, the American Bill of Rights and its interpretation by the United States Supreme Court, especially the Warren Court in the 1950s; and the West German Basic Law).
- The natural law theory of Lon Fuller (see 2.6),[29] and Hart's 'minimum content of natural law'.[30] (See 4.2.1.1.)

2.6 John Finnis

Though he disclaims originality, and describes his book as 'introductory' Finnis's *Natural Law and Natural Rights* constitutes a major restatement of classical natural law theory. It is groundbreaking in its application of the methodology of analytical jurisprudence to a body of doctrine usually considered to be its polar opposite. There is no substitute for reading the original (though parts of the book are heavy going). A second edition appeared in 2011 with a 'postscript' in which the author (who modestly identifies a number of 'serious weaknesses' in the book) defends or elaborates upon several elements in his original text of three decades ago.[31]

The overarching purpose of the book is to continue the project begun by Plato, Aristotle, and Aquinas to consider and evaluate human choices, actions, institutions, and well-being. But students frequently tend to neglect this philosophical rationale of the undertaking and simply digest and regurgitate Finnis's seven 'basic forms of human flourishing' and his nine 'basic requirements of practical reasonableness'. This is plainly inadequate. It is essential that you grasp the *purpose* of the natural law enterprise. What is the point of the theory? In Finnis's words:

> A theory of natural law need not be undertaken primarily for the purpose of… providing a justified conceptual framework for descriptive social science. It may be undertaken, as this book is, primarily to assist the practical reflections of those concerned to act, whether as judges, or as statesmen, or as citizens.[32]

[28] The approach adopted by Radbruch is discussed by Professors Hart and Fuller in (1958) 71 *Harvard Law Review* 593 and 630 respectively—the so-called Hart–Fuller debate. See 2.10.2. For a useful analysis of Radbruch's thoughts see B v D van Niekerk (1973) 90 *South African Law Journal* 234. These jurists were neo-Kantian in the sense that they developed, in different ways, theories of law as 'justice' which envisaged the historical realization of a community of rational, autonomous agents.

[29] See LL Fuller, *The Morality of Law*, especially Ch 3, and (1958) 71 *Harvard Law Review* 630.

[30] See HLA Hart, *The Concept of Law*, Ch 9, and (1958) 71 *Harvard Law Review* 593.

[31] The postscript constitutes an important clarification of the author's interpretation and development of the natural law tradition. It does not, however, make for easy reading; there are numerous references to the large body of writing— principally articles and essays—that Finnis has published since 1980. Few students will have the time, skill, or energy to read them—even though Oxford University Press has recently published five volumes of his collected essays.

[32] Finnis, op cit, 18. And, presumably, simply as ordinary human beings. See Ronald Dworkin's notion of living well and having a good life, discussed in Chapter 5. Do Finnis and Dworkin share a common idea here?

In particular, *Natural Law* and *Natural Rights* represents a rejection of Hume's conception of practical reason which holds that every reason for action is merely ancillary to our *desire* to attain a certain objective. Reason merely informs us how best to achieve our desires; it cannot tell us *what* we *ought* to desire. Instead, Finnis adopts an Aristotelian starting point: *what constitutes a worthwhile, valuable, desirable life*? This is his inventory of the seven 'basic forms of good':

1. Life. The drive for self-preservation we all have, it includes health and the procreation of children.
2. Knowledge. It is a good in itself to be well-informed rather than ignorant or muddled.
3. Play. Recreation, enjoyment, fun.
4. Aesthetic experience. An appreciation of beauty in art or nature.
5. Sociability (friendship). Acting in the interests of one's friends.
6. Practical reasonableness. Employing one's intelligence to solve problems of deciding what to do, how to live, and shaping one's character.
7. 'Religion'. Our concern about an order of things that transcends our individual interests.

It is an attempt to answer Aristotle's question. And it is combined with his nine 'basic requirements of practical reasonableness':

1. The good of practical reasonableness structures the pursuit of goods. It shapes one's participation in the other basic goods, by guiding one's selection of projects, one's commitments, and what one does in order to to carry them out.
2. A coherent plan of life. One ought to have a harmonious set of purposes as effective commitments.
3. No arbitrary preference among values. One ought not to omit or unreasonably exclude or exaggerate any of the basic human values.
4. No arbitrary preference among persons. One should maintain impartiality in regard to others and their interests.
5. Detachment and commitment. One should be both open-minded and committed to one's projects.
6. The (limited) relevance of consequences: efficiency within reason. One must not squander opportunities through inefficiency; actions should be reasonably efficient.
7. Respect for every basic value in every act. One should avoid acts that achieve nothing but damage or impede one or more of the basic forms of human good.
8. The requirements of the common good. One should act to advance the interests of one's community.
9. Following one's conscience. One should not do what one feels should not be done.

Together these constitute the universal and immutable 'principles of natural law'.

Finnis argues that this approach accords with the general conception of natural law espoused by Thomas Aquinas. It does not, he claims, fall foul of the non-cognitivist strictures of Hume (see above) for these objective goods are *self-evident*; they are not deduced from a description of human nature. So, for example, 'knowledge' is self-evidently preferable to ignorance. And even if one were to seek to deny this (how often is one tempted to assert that 'ignorance is bliss'?), it could only be done by accepting that one's argument is a useful one; one is therefore accepting that knowledge is indeed good! You thus apparently fall into the trap of self-refutation.

Some critics have, however, responded that in arguing against the proposition that knowledge is an objective good you could be accepting that knowledge is valuable when put to a certain *use* (ie, instrumentally), but that when it consists in the acquisition of useless information it is not necessarily an objective good.[33]

Each of these principles is identified by Finnis in order to pursue the 'lines of thought about human choices, action, institutions, and well-being that were carried forward from Plato by Aristotle and Aquinas.'[34]

So, for example, the basic good of 'life' includes health, freedom from pain, and perhaps the 'transmission of life by procreation of children'.[35] In his 2011 postscript, Finnis adds to this basic good, the institution of marriage—'the committed union of man and woman with a commitment to expressing the good of marriage itself as both friendship and procreative.'[36] 'Religion' is tied to the notion that, whether or not we believe in God, we acknowledge that each of us is 'responsible'—ie obliged to act with freedom and authenticity—to choose what we are to be.

Do not simply swallow Finnis's assumptions unthinkingly. You will gain considerably more from a critical reading of his analysis (of which I have provided only the barest of bones) than from committing to memory his seven basic goods plus nine basic requirements of practical reasonableness as if it were a mathematical formula. Many students have found, for instance, Finnis's model of the family to be idealized, his politics too conservative, and his basic goods too restrictive (doesn't the common good require, for example, the right to work?). Finnis has conceded, in later writings, that his third basic good should have been: skilful performance in *work* or play. But do not lose sight of his general project.

The quotation from Finnis below illustrates his purpose: to understand 'what is really good for human persons'. For Finnis, before we can pursue human goods we require a *community*. This explains his view (mentioned above) that unjust laws are not simply nullities, but—because they militate against the common good—lose their direct moral authority to bind. Similarly, it is by an appeal to the common good that Finnis develops his conception of justice. For him, principles of justice are no more than the implications of the general requirement that one ought to foster the common good in one's community. The basic goods and methodological requirements are clear enough to prevent most forms of injustice; they give rise to several absolute obligations with correlative absolute natural rights:

> There is, I think, no alternative but to hold in one's mind's eye some pattern, or range of patterns, of human character, conduct, and interaction in community, and then to choose such specification of rights as tends to favour the pattern, or range of patterns. In other words, *one needs some conception of human good, of individual flourishing in a form (or range of forms) of communal life that fosters rather than hinders such flourishing.* One attends not merely to character types desirable in the abstract or in isolation, but also to the quality of interaction among persons; and one should not seek to realise some patterned 'end-state' imagined in abstraction from the processes of individual initiative and interaction, processes which are integral to human good and which make the future, let alone its evaluation, incalculable.[37]

[33] See NE Simmonds, *Central Issues in Jurisprudence*, 3nd edn (London: Sweet & Maxwell, 2008), 118.

[34] Finnis, op cit, 425. Finnis contends that Aquinas's contribution has been misunderstood, thereby rendering the natural law tradition 'needlessly vulnerable and enfeebled in its response, to the crude attacks of Hobbes, Locke, and Hume, attacks to which Kant responded quite inadequately and Bentham by compounding their errors', 425. Both quotations appear in the 2011 postscript.

[35] Finnis, op cit, 87. [36] Finnis, op cit, 447. [37] Ibid, 219–20, emphasis added.

This important passage encapsulates much of the essence of Finnis's conception of natural rights including the rights not to be tortured, not to have one's life taken as a means to any further end, not to be lied to, not to be condemned on knowingly false charges, not to be deprived of one's capacity to procreate, and the right 'to be taken into respectful consideration in any assessment of what the common good requires'.[38]

Remember that a crucial element in Finnis's explanation of natural law is his insistence that its first principles are (contrary to the widely held view) *not* deductively inferred from facts, speculative principles, metaphysical propositions about human nature or about the nature of good and evil, or from a teleological conception of nature. *They are not derived from anything; they are underived*. Aquinas, according to Finnis, makes it clear that each of us 'by experiencing one's nature, so to speak, from the inside' grasps 'by a simple act of non-inferential understanding' that 'the object of the inclination which one experiences is an instance of a general form of good, for oneself (and others like one)'.[39] For Aquinas, to discover what is morally right is to ask, not what is in accordance with human nature, *but what is reasonable*.

This restatement of classical natural law theory has been (and will continue to be) considerably influential. Finnis brings his scholarship to bear on a subject that has for too long been surrounded in mystery and generality. Nevertheless, there have, inevitably, been a number of criticisms made of Finnis's views. Some have claimed that his interpretation of Thomist philosophy is mistaken; he has replied, and the argument continues. More importantly, there is a question mark that, for some critics, hangs over Finnis's account of *law*. Thus for Lloyd:

> Finnis is a social theorist who wants to use law to improve society. His arguments for law thus, not surprisingly, centre on its instrumental value. The focal meaning of law concentrates on what it achieves, not what it is. As a result of this orientation we are left with the suspicion that Finnis gives us no substantial reason why social ordering through law is the most appropriate way of organising political life, that it has, in other words, the greatest moral value.[40]

I am not sure that this is a fair criticism, but it would be a provocative quotation as a seminar or examination question.

2.7 Hard and soft natural law?

Contemporary natural law theory has achieved a level of sophistication to rival the controversies and complexities that currently bedevil modern legal positivism. See 4.5. For a taste of this refined fare, have a look at Robert P George's defence of the brand of natural law espoused by Finnis, Grisez, and their disciples.[41] Most of the debate within natural law itself appears to focus on the extent to which the Grisez–Finnis slant constitutes 'real' natural law mainly because some of its fundamental propositions are far from self-evident, and, secondly, because it is not based on factual statements about human nature.

I suppose one could fairly describe the Aquinian, Grisez–Finnis approach as 'soft' natural law, and those who regard their stance as inadequately grounded in strict Aquinian doctrine, as 'hard' natural lawyers.

Legal positivists, of course, take issue with natural lawyers at a fundamental level (and their case is considered in the next three chapters of this book), but there are non-positivist

[38] At 225.
[39] At 34.
[40] *Lloyd's Introduction to Jurisprudence*, 8th edn (London: Sweet & Maxwell, 2008), 132.
[41] Robert P George, *In Defense of Natural Law* (Oxford: Oxford University press, 1999).

arguments against natural law on what might be called philosophical grounds. So, for instance, Jeffrey Goldsworthy is among several philosophers who deny the existence of objective moral values altogether. This non-cognitivist claim is based on the impossibility of genuinely rational, as opposed to merely emotional, motivation. Why? Because all human action includes emotional motivation.[42] This attack is overcome by those to whom, like Michael Moore (see 2.8), the objectivity of morality is neither 'queer' nor untrue. Robert George defends this patch robustly:

> [O]ften our rational grasp of the intelligible point of certain possible actions (e.g., the exercise of our intellectual powers in an effort to understand whether morality is truly objective or necessarily merely subjective) is what stimulates the emotional support that is admittedly necessary for us to perform the actions.... [O]bjective values are no less 'queer' than many other non-material phenomena whose existence we all recognise (e.g., meaning, consciousness, causation), and that it is, in fact, cognitivism, rather than non-cognitivism, which best explains people's own understanding of the evaluative practices they engage in when they conclude, for example, that gratuitous cruelty is wrong.[43]

Finnis's plea of innocence to the charge that natural law seeks to derive an 'ought' from an 'is' has already been mentioned. But some critics allege that this is precisely what classical natural law did: drawing on certain ontological features of human nature in order to obtain moral precepts. In other words, this assault, articulated, for example, by Weinreb,[44] is premised on the view that Grisez, Finnis, Boyle, and other 'neo-scholastics' (or what I have called 'soft' natural lawyers) misinterpret Aquinas. In particular, Weinreb rejects the proposition that moral truths are 'self-evident' and argues that Finnis confuses his personal ethical convictions with self-evidence.

Hittinger[45] attacks the Grisez–Finnis account of natural law on similar grounds, arguing that by severing the classical natural law connection with human nature (and so deriving a normative 'ought' from a factual 'is'), the 'soft' natural lawyers effectively adopt a Kantian deontological view of morals that dispenses with the philosophy of nature.

In short, therefore, the charge is that their morality is no longer derived from nature. This is a grave indictment against which 'soft' natural lawyers present a powerful and exhaustive defence. Robert George's long essay, 'Recent Criticism of Natural Law Theory' (itself not so recent), is rather heavy going, but expounds a sustained argument against these assaults that will illuminate many of the questions that animate this debate.[46]

2.8 **Moral realism**

Is objectivity possible in morals? As already mentioned, many dispute this central principle of natural law. Its advocates maintain, however, that moral properties are indeed 'real' in the sense that they are not merely illusory, not simply reducible to the subjective

[42] Jeffrey Goldsworthy, 'Fact and Value in the New Natural Law Theory' (1996) 41 *American Journal of Jurisprudence* 1.

[43] George, *In Defense of Natural Law*, 2. See too M C Murphy, *Natural Law in Jurisprudence and Politics* (New York: Cambridge University Press, 2006).

[44] Lloyd L Weinreb, *Natural Law and Justice* (Cambridge, Mass: Harvard University Press, 1987).

[45] Russell Hittinger, *A Critique of the New Natural Law* (Notre Dame, Ind: University of Notre Dame Press, 1987).

[46] Robert P George, 'Recent Criticism of Natural Law Theory' (1988) 55 *University of Chicago Law Review* 1371.

affective experiences of individuals—as its detractors claim. For these sceptics, morality is simply a matter of personal preference and subjective taste. They cannot, it is argued, be demonstrated to be true or false. If this is so, it would gravely weaken the natural law position. And what of the law? If a convincing case can be made for moral objectivity, does this have any bearing on legal judgment?

Among the leading champions of secular moral realism is Michael Moore (the philosopher, not the subversive *enfant terrible* director and fashionable *auteur*). In his prolific writing on this subject, Moore constructs a sturdy moral realist fortress, and with considerable agility defends it against the assorted invaders at the gate. Among these are subjectivists, relativists, hard-nosed empiricists, and other miscellaneous sceptics.[47] His careful justification of moral realism affords, at the same time, a useful means of understanding the nature of moral scepticism.

Moore identifies no less than eight sceptical arguments advanced by those who contest the objectivity of value judgments. Only the following four arguments disturb his battlements—but not excessively.

- *The argument from logic*. This is the claim that there are no logically compelling reasons to value anything. Thus the non-cognitivist theories of ethics adopted by logical positivists like AJ Ayer, assert that value judgments are not really judgments at all; they express merely emotion. A less extreme version of this argument is the proposition that there exist no self-evident first principles of morality from which all else may be derived.
- *The argument from meaning*. This is the belief that moral reality cannot exist because ethical words have no descriptive function. This position includes subjectivism (ethical statements express only an individual's subjective state of mind) and conventionalism (ethical statements express only a particular group's state of mind). Moore is disinclined to take either seriously. He does, however, regard emotivism/prescriptivism as a minor nuisance. This argument claims that the meaning of an ethical judgment is discovered when we know the typical 'job' that the expression is used to carry out. These 'jobs' include *expressing* but not *describing* the speaker's feelings toward a person or act. When you punch me and I cry, 'Ouch!' This exclamation does not describe my pain, it expresses it. The same is true, the emotivist/prescriptivist argument goes, when I describe David as a 'good' person, and Victoria as a 'bad' one.
- *The ontological argument that moral properties do not exist*. So, for example, JL Mackie's celebrated 'argument from queerness' rests largely on the empiricist claim that we don't *need* 'queer' entities of this kind, so why invent them?[48] They resemble what Oliver Wendell Holmes memorably called a 'brooding omnipresence in the sky' (see 6.2.1).
- *The argument from vagueness*. This form of scepticism concedes that there could be general moral truths (such as Kant's imperative to use others as ends, never means), but denies that they assist in resolving actual moral dilemmas. The American realist impatience with nebulous theory is a paradigm of this species of scepticism. See 6.1.

[47] Several of Moore's articles on this subject were published in 2004 in an anthology entitled, *Objectivity in Ethics and Law*. I draw here on my review of this work in (2004) 33 *Hong Kong Law Journal* 429. See too Michael Moore, 'Law as a Functional Kind' in R George (ed), *Natural Law Theories* (Oxford: Oxford University Press, 1992).

[48] JL Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth: Penguin, 1977, reprinted 1990).

Each of these marauders is given short shrift by Moore.[49] In addressing the central problem of the relationship between law and morality, he develops his own account of natural law. He sets out the truth conditions of legal judgments which, he insists, are not exhausted by the truth conditions of certain moral judgments. He reasons that non-moral facts enter into the truth conditions of legal judgments; this explains why legal judgments might not be objective in the way moral judgments are. There is, however, a close relationship between them, and, in pursuit of their objectivity, he applies the same tests for both. In other words, he enquires whether legal judgments are true in the sense that they correspond to certain kinds of facts that exist in the world—independently of whether we believe them to exist. And he concludes that the objectivity of legal judgments is, in part, attributable to the objectivity of moral judgments.

Rejecting the functional (or teleological) tradition of natural law that he discerns in the approaches of Fuller and Dworkin, Moore argues that they are too procedural to guarantee substantive justice in systems that comply with them.[50]

He contends also that historical, institutional, and semantic facts do not suffice to render legal judgments objective. His thesis is that it is because moral facts are partly constitutive of legal judgments that the latter can be objective. In other words, moral objectivity is a *requirement* of legal objectivity.[51]

What makes legal propositions true? Moore identifies no less than six possible candidates for 'legal truth makers'.[52] These include the 'ostrich position' (for its refusal to examine the ontological question), and the metaphysically realist view about what Moore labels 'legal kinds' (a mélange of historical semantic, causal, and moral facts). The argument here is based on an analysis of two legal phenomena. The first is the law of a case, or what legal theorists call singular propositions of law. Moore chooses the United States Supreme Court's decision in *Kirby* v *United States*,[53] to demonstrate how, in arriving at its judgment, the court applied the spirit rather than the letter of the law.

His second example is the Good Samaritan rule in tort. Its application is illustrated by the case of *Union Pacific Railway* v *Cappier*[54] in which the court dismissed a suit for

[49] 'Moral Reality' (Ch 1 of *Objectivity in Ethics and Law*, originally published in (1982) *Wisconsin Law Review* 1061) contains a powerful assault on these detractors. He returns to the fray in 'Moral Reality Revisited' (published ten years later), Ch 2 of *Objectivity in Ethics and Law*, originally published in (1992) 90 *Michigan Law Review* 2424, but with a greater emphasis on the content and consequences of natural law. His adversaries here include judges (Bork, Burger, and Posner) as well as constitutional theorist, John Hart Ely, and an assembly of other legal theorists (including Schauer, Bix, Waldron, Rawls, Mackie, and Harman). The article is rather turgid, with more than 100 pages of dense argument. But it is a virtuoso piece of philosophical discourse—even if you find yourself unable to share his view of moral objectivity.

[50] 'Law as Justice', Ch 4 of *Objectivity in Ethics and Law*, originally published in (2001) 18 *Social Philosophy and Policy* 115. But is this true of Dworkin's approach in *Justice for Hedgehogs*?

[51] 'The Plain Truth About Legal Truth', Ch 5 of *Objectivity in Ethics and Law*, originally published in (2003) 26 *Harvard Journal of Law and Public Policy* 23.

[52] 'Legal Reality: A Naturalist Approach to Legal Ontology', Ch 6 of *Objectivity in Ethics and Law*, originally published in (2002) 21 *Law and Philosophy* 619.

[53] 72 US 482 (1869). Kirby was a state sheriff who was arrested for 'obstructing or retarding the passage of the US mail'. He had, indeed, obstructed the mail by halting a riverboat transporting a federal mail carrier and his mail and removing both from the vessel. But he had done so because the mail carrier was wanted for murder and Kirby had arrested him under a valid arrest warrant. The Supreme Court held that he was innocent of the offence.

[54] 72 Pac 281 (Kan Sup Ct 1903). This involved a child trespasser on the defendant's railway line. The boy was hit and seriously injured by one of the defendant's trains. An engineer stopped the train, removed the boy from the tracks, and drove on. The boy bled to death. The Kansas Supreme Court held the defendant was not liable as it had not 'culpably' caused the boy's peril of bleeding to death. No duty of care was, at that juncture of American tort law, owed to trespassers, and hence the court was unable to find the defendant negligent in its failure to prevent the collision.

nonfeasance when a railway company whose train had collided with a child trespasser failed to render aid to him as he lay dying. The thrust of Moore's argument is that the case would be decided differently today. In the light of the law's 'greater experience with positive duties to those whose risk we have created, and . . . correspondingly greater insight',[55] the Supreme Court, if faced with a similar set of facts, he maintains, would overrule *Cappier*. This, he claims, is because the law of Kansas is not exclusively a function of historical fact, but 'a blend of such historical facts and certain *moral* facts'.[56]

2.9 **Critique**

As mentioned above, among the criticisms levelled at the 'new' (or soft) natural law theory defended by Grisez, Finnis, Boyle, and others is its alleged failure to integrate practical reason with a philosophy of nature. In other words, natural law is inadequately 'natural'. It departs from the ontological approach adopted by classical and medieval natural law theorists.[57] Instead of an ontological posture (based on human nature) it adopts a deontological standpoint (based on principles that are not derived from our nature) that asserts that certain normative propositions are self-evidently true.[58]

Soft natural lawyers reject this claim, largely on the ground that it commits the 'naturalistic fallacy' of deriving norms from facts (see 2.7). They argue that logically, a conclusion cannot validly introduce a proposition that is not in the premise. In other words, one can draw a moral conclusion only from a premise that includes a more basic reason in support of that conclusion. The justifications for moral action, they contend, are not derived from facts about human nature, but, as Finnis explains, from our knowledge of worthwhile ends. These are, it is argued, self-evident.

We are, however, entitled to ask why *this* catalogue of objective, non-inferred basic goods? Is it wrong for me to act merely because I enjoy the activity in question? What's wrong with my acting to advance my pleasure if it causes no one harm? And why, as the 'new' natural law asserts, are these basic goods incommensurable? If they are, how am I to decide whether to do X or Y? The soft response would be that I should never act directly against a basic good. This is a fundamental moral rule. These, and other, arguments are contested mainly within natural law. The critique, especially by legal positivists, of the central tenets of natural law is the subject of Chapters 3 and 4.

2.10 **Law and morality**

Moral questions invade the law at every turn. A rigid separation between morality and the law—even in pursuit of analytical clarity—is, to natural lawyers, highly improbable. The legal positivist's quest for a value-free account of law is countered by the natural lawyer's claim that it neglects the very essence of law—its morality—that 'the act of positing law . . . can and should be guided by "moral" principles and rules; that those moral norms are a matter of objective reasonableness, not of whim, convention, or mere "decision"'.[59]

[55] Moore, 'Legal Reality: A Naturalist Approach to Legal Ontology', 329.

[56] Ibid, emphasis added.

[57] This is the thrust of the criticism made by Weinreb and Hittinger. See nn 44 and 45 above.

[58] See George, op cit, 84.

[59] Finnis, op cit, 290. For a powerful defence of the 'separability thesis' see Matthew Kramer, 'Also Among the Prophets: Some Rejoinders to Ronald Dworkin's Attacks on Legal Positivism' (1999) 12 *Canadian Journal of Law and Jurisprudence* 53.

To compound what has long been a perplexing question, legal positivists do not, however, deny that moral considerations are without truth or practical consequence. As HLA Hart declares:

> So long as human beings can gain sufficient co-operation from some to enable them to dominate others, they will use the forms of law as one of their instruments. Wicked men will enact wicked rules which others will enforce. What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.[60]

This concession to a normative appraisal of legal rules cannot, however, extinguish the apprehension that a narrow positivism may engender, or at least support, unjust laws. Ideal fidelity to law, as Lon Fuller has shown, must mean more than allegiance to naked power.[61]

But, as we have seen, earlier versions of what has come to be called 'hard' positivism, have been widely traded for a kinder, gentler, 'soft' positivism (adumbrated even by Hart in his postscript to *The Concept of Law*). The former, exclusivist position, espoused most conspicuously by Joseph Raz insists that only social sources can supply the criteria of legality. The latter, inclusive, view claims that where specified in the rule of recognition, morality may constitute a condition of legal validity (see 4.5).

While we cannot avoid encountering moral questions daily, the existence, or even the recognition, of moral values by which to live, is far from uncontroversial. Being or doing good is not always synonymous with obeying the law. But there can be little doubt that the law, its concepts, and its institutions are frequently animated by moral values. It would be odd if it were otherwise. And it may sometimes appear that, as Dias puts it, the two sides are 'shadow-boxing on different planes'.

You will need to reflect upon a number of questions before deciding where you stand on this central issue. They will include: in what respects might it be said that the pugilists are not really landing blows? Do they genuinely join issue? If so, how? What precisely are the different positions adopted by the two theories in respect, say, of the moral attitude to law? Do the two accounts have more in common than they have in conflict?

2.10.1 Natural law v positivism

Legal positivism—both soft and hard—differs, of course, from the natural law theory espoused, say, by Finnis who, as we have seen, bases his conception of law on the requirements of practical reasonableness. Yet there are several respects in which the apparently conflicting theories of legal positivism (*à la* Raz) and natural law (*à la* Finnis) share a common ground. Four quick examples will suffice here. First, as Finnis himself acknowledges, his approach is informed by the tradition of analytical jurisprudence. Secondly, they both seek to examine and justify the authority of law. Thirdly, they both subscribe to the view that there is no prima facie moral obligation to obey an unjust law. Fourthly, they both accept the importance of the ideal of the rule of law.

[60] HLA Hart, *The Concept of Law*, 2nd edn by PA Bulloch and J Raz (Oxford: Clarendon Press, 1994), 210.

[61] Lon L Fuller, 'Positivism and Fidelity to Law—A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630, 634.