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Natural Law Theory: The Modern Tradition

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Natural Law theory is a mode of thinking systematically about the connections between the cosmic order, morality, and law, which, in one form or another, has been around for thousands of years. The focus of this essay is on the more recent works on natural law theory. However, it is difficult to understand the origin and direction of the modern works within the tradition without having a strong sense of the tradition's history.

One can find important aspects of the natural law approach in Plato (c. 429-347 B.C.),[1] Aristotle (384-322 B.C.),[2] and Cicero (106-43 B.C.)[3]; it is given systematic form by Thomas Aquinas

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[1] Plato, Laws, Book IV, 715b, in **Plato: The Collected Dialogues** 1306 (E. Hamilton & H. Cairns, eds., 1961).

[2] Aristotle, Nicomachean Ethics, Book V, 7:1134b18-1135a5, in **The Complete Works of Aristotle**, vol. 2, 1790-91 (J. Barnes, ed., 1984). One can also find references to natural law-like views in ancient Greek drama. See, e.g., Sophocles, Antigone, in **The Oedipus Plays of Sophocles** 210 (P. Roche, trans., 1958).

[3] Cicero, Republic III.xxii.33 and Laws II.v.11-12, in **De Re Publica; De Legibus** 211, 383, 385 (C.W. Keyes, trans., 1928).

(c. 1225-1274).[4] In the medieval period and through the Renaissance, with the work of writers like Francisco Suárez (1548-1617), Hugo Grotius (1583-1645), Samuel Pufendorf (1632-1694), John Locke (1632-1704), and Jean-Jacques Rousseau (1712-1778), natural law and natural rights theories were an integral part of theological, moral, legal and political thought. Those theories were central to the development of international law, modern liberal political theory,[5] and the concept of human rights. The role natural law has played in broader religious, moral and political debates has, perhaps unsurprisingly, varied considerably. Sometimes it has been identified with a particular established religion, or more generally with the status quo, while at other times it has been used as a support by those advocating radical change. Similarly, at times those writing in the natural law tradition seem most concerned with the individual-based question, how is one to live a good ("moral," "virtuous") life; at other times, the concern has been broader – social or international: what norms can we find under which we can all get along, given our different values and ideas about the good.[6]

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[4] Thomas Aquinas, Summa Theologiae, I.II [First Part of the Second Part], Questions 90-97, in **Thomas Aquinas, The Treatise on Law** (R.J. Henle, ed., 1993).

[5] It is not coincidental that the American Declaration of Independence (1776) claims authority from "the Laws of Nature" and refers to the "unalienable rights" of "Life, Liberty, and the pursuit of Happiness." Similarly, the French Declaration of the Rights of Man (1789) declares "the natural, inalienable, and sacred rights of man." (The idiosyncratic equation of natural law with pursuing happiness in the American document may derive from the work of Jean Jacques Burlamaqui (1694-1748). See **Jean Jacques Burlamaqui, The Principles of Natural and Political Law** (Thomas Nugent, trans., 5th ed., 1807), in particular Part I, Chapter V.)

[6] Jerome Schneewind calls this last theme "The Grotian Problematic," **J. B. Schneewind, The Invention of Autonomy** 70-73 (1998), and he finds it not only in Grotius, but in nearly every significant natural law theorist after Grotius. It also clearly foreshadows some ideas of John Rawls. See, e.g., John Rawls, The Idea of an Overlapping Consensus, in **Collected Papers** 421-48 (1999).

Some of the modern legal theorists who identify themselves with the natural law tradition seem to have objectives and approaches distinctly different from those classically associated with natural law. Most of the classical theorists were basically moral and political theorists, asking: how does one act morally as a citizen within a state, or as a state official? What are the limits of legitimate (that is, moral) governmental action?[7] By contrast, some (but far from all) of the modern theorists working within the tradition[8] are social theorists or legal theorists, narrowly understood. Their primary dispute is with other approaches to explaining or understanding society and law: the best and most prominent example being the legal positivists (about which, more later). In fact, much of modern natural law theory has developed primarily in reaction to legal positivism. As will be discussed, one can see the two different types of natural law – natural law as moral/political theory and natural law as legal/social theory – as connected at a basic level: as both exemplifying a view of (civil) law not merely as governing, but also as being governed.

I. Traditional Natural Law Theory

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[7] Natural law theorists are often concerned with moral matters one step removed, that is, matters of "meta-theory": e.g., how does one go about determining what morality requires?; and, what is it in the world that makes a statement about morality true or false? Much of Aquinas's **Summa Theologiae** and John Finnis's **Natural Law and Natural Rights** (1980) are devoted to such questions.

[8] In an earlier article on natural law theory, I distinguished the moral/political theorists in the tradition from the legal/social theorists under the titles of "traditional" versus "modern" natural law theory (labels I now find more distracting than helpful). See Brian Bix, Natural Law Theory, in **A Companion to Philosophy of Law and Legal Theory** 223-40 (Dennis Patterson, ed., 1996). A similar distinction can be found in Philip Soper, Some Natural Confusions About Natural Law, 90 **Mich. L. Rev.** 2393, 2394-2403 (1992).

A. Definition

What makes a theory a "natural law" theory? There are almost as many answers to the question as there are theorists writing about natural law theory, or calling themselves "natural law theorists." Some of the proffered definitions are quite broad. According to some commentators who identify themselves as "natural law theorists," all that seems to be required for a theory to fit into that category is that it views values as objective and accessible to human reason.[9] Such a view might exclude very little: almost every moral theory could qualify as a natural law theory, give or take the most hardened moral relativism or moral skepticism or non-cognitivism.[10] Of course, in the cases of John Finnis (1940-) and many others self-described as natural law theorists, the claim for inclusion in the category is supported by their consciously working within a particular tradition,[11] citing, discussing, and elaborating the views of

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[9] See **Finnis, Natural Law and Natural Rights** 23-25; Philip Soper, Legal Theory and the Problem of Definition (book review),50 **U. Chi. L. Rev.** 1170, 1173-75 (1983) (discussing Finnis's position).

[10] See, e.g., Soper, Legal Theory and the Problem of Definition, 1174-75 & n. 21; see also Russell Hittinger, Varieties of Minimalist Natural Law Theory, 34 **Am. J. Juris.** 133, 133-35 (1989). Under the broader definition deontological theories, for example, would not seem to be excluded, and even Utilitarians and other consequentialists could argue that they believe that moral truths are objective and accessible to reason. Some discussions of natural law expressly exclude deontological theories and "aggregative conception[s] of the right and the just" from the tradition. John Finnis, Natural Law, in **Routledge Encyclopedia of Philosophy**, vol. 6, pp. 685-90, at 687 (1998); see also Robert P. George, Natural Law Ethics, in **A Companion to Philosophy of Religion** pp. 460-65, at p. 462-63 (Philip L. Quinn & Charles Taliaferro eds., 1997).

[11] On this matter, one should also note: "Historically there is not really a tradition of natural law, but several traditions." Russell Hittinger, Introduction, in **Yves R. Simon, The Tradition of Natural Law** xiii-xxxii, at p. xix (Vukan Kuic, ed., 1965).

prominent predecessors.[12]

Many writers within or about natural law theory define the category more narrowly, by offering more content to the word "natural."[13] Even here, though, the explanations of "natural" can diverge radically: e.g., (1) moral principles can be read off of "Nature" or a normatively charged universe[14]; (2) that moral principles are tied to human nature -- and "nature" here has been used to indicate either the search for basic or common human characteristics or (to the extent that this is different) some discussion of human teleology, our purpose or objective within a larger, usually divine, plan[15]; and (3) that there is a

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[12] Cf. **Robert P. George, In Defense of Natural Law** 1 (1999). Finnis is adamant that he is offering a theory of natural law, and not a history of other theories that have come under that name. **Finnis, Natural Law and Natural Rights** 24-25. At the same time, his text (and many of his other works) includes pervasive references to and discussions of Augustine, Aquinas, Gabriel Vazquez, Francisco Suárez, Francisco de Vitoria, Germain Grisez, and many others who have worked within the tradition.

[13] On such a basis, one eminent natural law theorist, Russell Hittinger can hint that John Finnis and Germain Grisez do not fit within the fold. See **Russell Hittinger, A Critique of the New Natural Law Theory** 8 (1987) (Grisez-Finnis approach does not qualify because natural law "requires a commitment to law as in some way 'natural,' and nature as in some way normative").

[14] See, e.g., **Lloyd L. Weinreb, Natural Law and Justice** 15-42 (1987); Ronald R. Garet, Natural Law and Creation Stories, in **Religion, Morality and the Law, NOMOS XXX** pp. 218-62, at 219-20 (J. Roland Pennock & John W. Chapman, eds., 1988) ("The underlying notion is that careful observation of nature permits us to understand which regime or basic social structure is best suited to beings such as ourselves"). This is a position found not only in some forms of Western natural law theory, but also in some theorists within the Chinese neo-Confucian tradition. See, e.g., **Tu Wei-Ming, Neo-Confucian Thought in Action** 167-68 (1976) (discussing Chu Hsi's interpretation of the concept of ko-wu, the "investigation of things").

[15] The contrast in perspectives is exemplified by the way Suárez seemed to view the moral theologian as the likely expert for determining the laws of nature, while Pufendorf considered the inquiry an entirely secular one in which a moral theologian would have no place. See **Schneewind, The Invention of Autonomy** 131.

kind of knowledge of moral truth that we all have by our nature as human beings.[16]

A further sharp division exists within the classical natural law tradition, among those who purport to be interpreting and applying Aquinas's ideas. As characterized by one participant in the debate, the question is whether the "knowledge of the reasonable, the good, and the right is derived from prior knowledge of human nature or what is 'natural' for human beings" or whether "something in the moral domain is 'natural' for human beings and in accord with human nature precisely in so far as it can be judged to be reasonable; and something in this realm of discourse is 'unnatural' and morally wrong just in so far as it is unreasonable."[17] It is not that one side makes a claim between human nature and the good and the right, and the other side does not; it is more a matter of epistemology — the path to knowledge. One side claims that we come to know what is right and good by investigating human nature, while the other side argues that knowledge of the good and the right comes by another path (usually a combination of rationality and empirical observation),[18] even if the "basic human goods and moral norms are what

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[16] One can find this view, for example, in the work of the modern French natural law theorist, Jacques Maritain (1882-1973). According to Maritain's view: "The first principles of this [natural] law are known connaturally, not rationally or through concepts -- by an activity that Maritain, following Aquinas, called 'synderesis.' Thus, 'natural law' is 'natural' because it not only reflects human nature, but is known naturally. Maritain acknowledges, however, that knowledge of the natural law varies throughout humanity and according to individuals' capacities and abilities, and he speaks of growth in an individual's or a collectivity's moral awareness." William Sweet, Jacques Maritain, in **Stanford Encyclopedia of Philosophy**, Fall 1999 Edition <plato.stanford.edu>.

[17] George, Natural Law Ethics 462.

[18] The more complicated point is explaining how such knowledge is obtained. Robert George writes of "non-inferential acts of understanding wherein we grasp self-evident truths". **Robert P. George, In Defense of Natural Law** 87 (1999); see also **Finnis, Natural Law and Natural Rights** 59-80.

they are because human nature is what it is."[19] One obvious advantage of not trying to derive moral truths from descriptive claims about human nature is that one need not confront the objection (summarized in Part I.E below) that this involves an inappropriate derivation of "ought" from "is."[20]

One might sense a broad, perhaps metaphoric notion that unites the various forms of traditional natural law, and may even tie moral/political natural law moral theories to legal/social natural law legal theories.[21] The focus within natural law is away from conventional law, from civil law, to something higher or (to change the image) more basic that rules or guides (perhaps teleologically). In the voluntarist forms of traditional natural law,[22] it is divine commands creating moral standards; in some forms of Thomistic natural law, it is an ideal towards which humans, by their nature, strive; in recent natural law legal theories, it is the sense to which conventional legal rules are approximations of what law really is (Dworkin) or what law must try to be (Fuller). Additionally, it appears that in some strains of traditional natural law theory, natural law is not understood by analogy to (or as an imperfect version of) positive law, but rather the other way around: that it is natural law which is the primary focus, and positive law

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[19] **George, In Defense of Natural Law** 85; see also **Russell Hittinger, A Critique of the New Natural Law Theory** 10-20 (1987) (summarizing the Grisez-Finnis critique of more traditional Thomistic approaches).

[20] See **Finnis, Natural Law and Natural Rights** 33-36.

[21] I am grateful to Robert Tuttle for the basic idea of this paragraph. For other approximations of the same point, see, e.g., Hittinger, Introduction, in **Simon, The Tradition of Natural Law**; **Alexander Passerin d'Entrèves, Natural Law** (1996) (first published in 1951).

[22] "Voluntarism" has been defined as "[t]he theological position that all values are so through being chosen by God ...." **Simon Blackburn, The Oxford Dictionary of Philosophy** 396 (1994) (Blackburn also notes that a number of quite different philosophical and theological positions also carry the label "voluntarism").

which should be understood in analogy to (or as an imperfect version of) natural law.[23]

To return to the original inquiry: why does it matter whether something is called "natural law" or not, or what criteria we use for including or excluding theories from the category? The short answer is, that it does not (or should not) matter at all. A label is just a label, and a theory rises and falls on its own merits, not on the approach, school or tradition with which it is associated. That said, (1) it is a natural and understandable reaction to the vast complexity of life (and almost comparably complex theoretical literature) to deal with things in categories rather than individually; (2) there are times when one can usefully describe attributes, and strengths and weaknesses, of a particular category of theories; and (3) some theorists take pride in working out of a particular tradition, and seeing themselves as continuing a project initiated by some great thinker of the past (whether that thinker be Thomas Aquinas, Thomas Hobbes, Hans Kelsen, or H.L.A. Hart).

B. Natural Law and God

Natural law theory has become associated for many people with religious belief, in part because of the long period during which those associated with the Catholic Church were the main elaborators and defenders of that tradition.[24]

However, most of the important writers within this tradition have gone to some lengths to

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[23] Russell Hittinger, Natural Law as "Law": Reflections on the Occasion of "Veritatis Splendor", 39 **Am. J. Juris.** 1 (1994).

[24] An association between the Catholic Church and natural law theory continues, of course, as recently exemplified by Pope John Paul II's encyclicals, "Veritatis Splendor" (August 6, 1993) and "Fides et Ratio" (September 14, 1998).

dissociate the principles of natural law from belief in a particular religious tradition or from any kind of belief in a (certain kind of) deity. Grotius may have been the first to make the statement plainly: "What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him."[25]

Contemporary writers within this tradition are often equally insistent about being able to offer "a theory of natural law without needing to advert to the question of God's existence or nature or will."[26] Other theorists within the tradition have insisted that one cannot understand the notion of natural law without positing a supernatural being who is ordering compliance.[27]

The role of God within natural law theories is connected to differentiating such theories along the lines of the relative prevalence of "will" or "reason."[28] "Will" (or "fiat") refers to choices of individuals

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[25] **Hugo Grotius, De Jure Belli Ac Pacis Libri Tres** 13 (Francis W. Kelsey, trans., Clarendon Press, 1925) (1625) ("Prolegomena," para. 11). The position can probably be traced back to earlier writers, including Gregor of Rimini (c. 1300-1358), Francisco de Vitoria (1492/94-1546), and Francisco Suárez. See **Finnis, Natural Law and Natural Rights** 54. Suárez's summary of Gregory of Rimini's position is quoted in **Schneewind, The Invention of Autonomy** 60. For an argument that Grotius's role in this debate has been overstated, see id. at 67-68, 73-75.

[26] **Finnis, Natural Law and Natural Rights** 49; see also Michael S. Moore, Good Without God, in **Natural Law, Liberalism, and Morality** 221-70 (Robert P. George, ed., 1996).

[27] See, e.g., Garet, Natural Law and Creation Stories, 236-37. See also John T. Noonan, Jr., The Natural Law Banner, in **Natural Law and Contemporary Public Policy** 380-83, at p. 382 (David F. Forte, ed., 1998): "The ressentiment nourished against natural law [by unbelievers] arises because one who says 'nature' says 'creatureliness,' and creatures require a Creator. Law requires a lawgiver, and one who speaks of a law governing human purposes speaks of a Lawgiver transcending the state and individual desires."

[28] While the contrast between will and reason can be helpful in analyzing a number of topics within moral, legal and political theory, see, e.g., **Vernon J. Bourke, Will in Western**

or institutions, and the argument that the normative world is different because of such choices (e.g., the orders of a sovereign or an individual's signing a contract), generally without taking into account the content or the moral worth of those choices. "Reason," by contrast, is an argument based on the merit of an action or interaction or institution, generally without regard to whether it was chosen or under what circumstances it was chosen.

"Voluntarism"[29] is a sub-category of natural law theories in which God – and, in particular, God's will – plays an important role. One can go back to Plato's Socrates, who asks Euthyphro, "Is what is holy holy because the gods approve it, or do they approve it because it is holy?"[30] Voluntarism is the position that something is good or morally required because -- and only because -- God has ordered that we do it (or bad/morally-prohibited because of His prohibition).

Voluntarism of one type or another appears regularly in the history of natural law theory. For example, the important 17th century natural law theorist, Samuel Pufendorf, offered a voluntarist view, which one commentator has summarized as follows: "[G]iven that we have the nature God gave us,

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Thought: An Historico-Critical Survey (1964); Francis Oakley, Medieval Theories of Natural Law: William of Ockham and the Significance of the Voluntarist Tradition, 6 **Nat. L. Forum** 65 (1961); **Brian Bix, Jurisprudence: Theory and Context** 121-26 (2nd ed., 1999); Lon L. Fuller, Reason and Fiat in Case Law, 59 **Harv. L. Rev.** 376 (1946), the contrast is rarely as sharp or as obvious as it is within alternative approaches to traditional natural law theory.

[29] See supra note 22.

[30] Plato, Euthyphro 10a, in **The Collected Dialogues** 178 (Edith Hamilton & Huntington Cairns, eds., 1961) (Lane Cooper, trans.). The words are echoed in the summary John Duns Scotus (1266-1308) gives of a position of Aquinas: "for Thomas, Duns Scotus says, 'what is commanded [in the Decalog] is not good merely because it is commanded, but commanded because it is good in itself.'" **Schneewind, The Invention of Autonomy** 23, quoting **John Duns Scotus, Duns Scotus on the Will and Morality** 273 (Allan B. Wolter, ed. & trans., 1986).

certain laws must be valid for us, but only God's will determined our nature. As a result, our nature indicates God's will for us. Hence observable facts about ourselves show us what laws God commands us to obey."[31] (There is also a compromise position: that actions are intrinsically good or bad, but we are only required to pursue the good because God so commands us. This is Suárez's view.[32])

C. Natural Law and Natural Rights

Many people coming to the discussion assume that the two lines of thought, natural law and natural rights, are interchangeable, or at least closely connected. In fact, a common view within the literature is that the two traditions developed as competing views of the world. According to this view, the natural law tradition posits a normatively ordered universe and the normative order described often involves all individuals in society having a set place and corresponding duties. By contrast, natural rights theories often deny or downplay a view of society as a whole except as a function of individuals and their rights.

The matter remains highly controversial.[33] Additionally, one should be careful not to overstate

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[31] J. B. Schneewind, Samuel Pufendorf, in **The Cambridge Dictionary of Philosophy** 664 (Robert Audi, ed., 1995).

[32] See **Francisco Suárez, On Law and God the Lawgiver**, Book II, Chapter VI, excerpted in **Moral Philosophy from Montaigne to Kant**, vol. I, pp. 76-79 (J. B. Schneewind, ed., 1990); see also **Schneewind, The Invention of Autonomy** 60-62.

[33] In an important work that challenges many accepted views about natural law and natural rights, Brian Tierney offers a historical analysis of rights and natural rights discourse, tracing the idea of rights (or what European commentators often call "subjective rights") back to the twelfth century, with fuller development in the thirteenth and fourteenth century. **Brian Tierney, The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law 1150-1625** (1997). Tierney rejects the view, summarized above, of natural law and natural rights as having been historically

the differences. A traditional natural law theorist like Aquinas refers to individual rights, for example, to choose a vocation, to choose whether and whom to marry, and whether to subscribe to a particular religious faith.[34] Further, one can arguably find sufficient resources as much in Aquinas as in Locke to justify disobedience and rebellion against tyranny.[35]

Still, it seems hard to deny that the natural rights approach, as it developed, encouraged and reinforced an individualistic way of perceiving political and social realities in a way that traditional natural law approaches did not.[36] One can also sometimes find natural rights and natural law analyses in tension, if not in complete conflict. Michael Zuckert has described the way that traditional natural law theory tends towards discussions of duties, while the natural rights analyses of John Locke (and Thomas Hobbes before him) tends towards discussions of liberties.[37] A great deal will necessarily depend on the particular social and political context, and natural rights will not always be the hero of the drama; e.g., one can find historical examples of "natural rights" undermining civil liberties.[38]

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competing rather than complementary theories.

[34] **John Finnis, Aquinas: Moral, Political and Legal Theory** 172 & nn. 179-81 (1998) (summarizing Aquinas's views and giving citations to his texts); see generally id. at 132-80 ("Towards Human Rights").

[35] Id. at 272-74, 287-91.

[36] See, e.g., **Alexander Passerin d'Entrèves, Natural Law** 51-62 (1994) (1951).

[37] See Michael P. Zuckert, Do Natural Rights Derive From Natural Law?, 20 **Harv. J.L. & Pub. Pol.** 695 (1997).

[38] See Richard Tuck, The Dangers of Natural Rights, 20 **Harv. J.L. & Pub. Pol.** 683 (1997). Tuck cites Britain's recent use of citizens' right to security as a justification for taking away the procedural rights of suspected terrorists, id. at 691, and the fact that the early natural rights theorists, Grotius, Pufendorf, and Hobbes, "explicitly defended slavery and absolutism." Id. at 684 (footnote

The development of the idea of natural rights is a vast topic on its own, and cannot be discussed at any length here. However, one should note at a minimum the obvious connection or parallel between talk of "natural rights" (a label some avoid in part because of the apparent connection with natural law theories) and the more common or more fashionable references to "human rights."[39]

D. Connection with Law

Contrary to a lay person's expectations, natural law theory often has little if anything to do with "law" as that term is conventionally used.[40] The "law" in natural law theory usually refers to the orders or principles laid down by higher powers that we should follow. However, traditional natural law theorists have had some important influences on thinking about law. First and foremost, natural law

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omitted).

[39] See, e.g., **Finnis, Natural Law and Natural Rights** 198-99; Soper, Legal Theory and the Problem of Definition, 1174.

[40] However, as a moral and political theory, natural law theory is often brought out in discussions of the moral and political controversies of the day. See, e.g., **David F. Forte, ed., Natural Law and Contemporary Public Policy** (1998); **George, In Defense of Natural Law** 123-245 ("Moral and Political Questions").

In the United States, natural law theory often arises in regards to questions of interpretation of the United States Constitution, with theorists in sharp disagreement on what relevance, if any, natural law theory might have on this question. See, e.g., Randy E. Barnett, Getting Normative: The Role of Natural Rights in Constitutional Adjudication, in **Natural Law, Liberalism, and Morality** 151-79 (Robert P. George, ed., 1996); Walter Berns, The Illegitimacy of Appeals to Natural Law in Constitutional Interpretation, in id., 181-93; Christopher Wolfe, Judicial Review, in **Natural Law and Contemporary Public Policy** 157-89; **George, In Defense of Natural Law** 110-11; Symposium on Natural Law, 4 **S. Cal. Interdisc. L.J.**. 455-738 (1995); cf. **G. Edward White, Earl Warren** 222-30, 354-67 (1982) (describing the "natural law" aspects of Chief Justice Warren's approach to constitutional interpretation).

thinking was foundational in the development of international law, as theorists began to wonder what principles could apply to disputes between nations (or between parties who were citizens of different nations), especially when the parties had different political or religious beliefs.

A different aspect of natural law theory is better known to modern legal theorists: the application by particular natural law theorists of their ideas to moral problems within the law. Best known is probably Aquinas's discussions of the obligations of officials and citizens,[41] a set of arguments that has been further elaborated by other writers, including, recently, John Finnis.[42] Aquinas defines (positive) law as "a certain dictate of reason for the Common Good, made by him who has the care of the community and promulgated."[43] Aquinas holds that officials are directed to pass legislation consistent with natural law. Sometimes the positive law can be derived from natural law principles, while at other times the officials will have some choice or discretion in the determination of specific rules from more general principles.[44] Positive laws consistent with natural law "have the power of binding in

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[41] **Aquinas, Summa Theologiae** Question 96, Article 4; see also **Finnis, Aquinas** 266-74.

[42] **Finnis, Natural Law and Natural Rights** 354-66.

[43] **Aquinas, Summa Theologiae** Question 90, article 4, corpus.

[44] **Aquinas, Summa Theologiae**, Question 95, article 2, corpus. On Aquinas's notion of determinatio, the concretization by rational but rationally under-determined choice, see **Finnis, Aquinas** 267-71.

John Locke may be presenting an idea similar to Aquinas's "determinatio" when he writes: "The Obligations of the Law of Nature, cease not in Society, but only in many Cases are drawn closer, and have by Human Laws know Penalties annexed to them, to inforce their observation." **John Locke, Two Treatises of Government** II: chap. 11, § 135 (1690); cf. **Jeremy Waldron, The Dignity of Legislation** 63-91 (1999) (arguing that Locke's text refers to a level of choice and responsibility more substantial than Aquinas's "determinatio").

conscience."[45] Unjust laws do not create moral obligations, though one might have an obligation to comply publicly with such laws if this is necessary to prevent a greater evil.[46]

Many opponents of natural law theory portray it as arguing that immoral laws necessarily lack legal validity. That is, it is not merely the case that one has no moral obligation to obey, but one also has no legal obligation. Occasionally one finds an assertion along those lines (or at least one open to such interpretations) among the less sophisticated advocates of natural law theory. Sir William Blackstone (1723-1780) offers the following comment in passing in his Commentaries: "no human laws are of any

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[45] **Aquinas, Summa Theologiae** Question 96, article 4, corpus. To be more precise, Aquinas said that "just laws" have the power of binding in conscience, and he lists three ways in which a law can fail to be just: it does not pertain to the common good, the lawmaker was acting ultra vires, or the burdens of the law are unequally distributed in the community. **Aquinas, Summa Theologiae**, Question 96, article 4, corpus.

[46] See id., Question 93, article 3, reply 2. For a modern treatment on similar lines, see **Finnis, Natural Law and Natural Rights** 354-62.

The above discussion is connected with the expression "lex iniusta non est lex" ("an unjust law is no law at all"), which is — often imprecisely, if not quite erroneously — ascribed to natural law theorists. The expression is true, and indeed somewhat banal, when understood as saying that unjust laws are not laws "in the fullest sense," in that they do not create moral obligations to obey them in the way that just laws do. See Norman Kretzmann, Lex Iniusta Non Est Lex: Laws on Trial in Aquinas' Court of Conscience, 33 **Am. J. Juris.** 99 (1988); **Finnis, Natural Law and Natural Rights** 363-66; **Bix, Jurisprudence: Theory and Context** 64-66.

One can find commentators (often writers who do not consider themselves part of the natural law tradition) who argue that laws which are not fully just can sometimes carry normative weight. See, e.g., Philip Soper, Legal Systems, Normative Systems and the Paradoxes of Positivism, 8 **Can. J.L. Juris.** 363, 375-76 (1995) ("the State does no wrong ... in acting on (enforcing) the norms which, in good faith, it believes are necessary to govern society," though the claim is lost for truly wicked laws); Jeremy Waldron, Lex Satis Iusta (unpublished manuscript, presented at the Hester Seminar, "Natural Law Theory: Historical and Contemporary Issues," Wake Forest University, November 1997) (some unjust laws can create an obligation to obey them). For a critique of Soper's view, see Joseph Raz, The Morality of Obedience (book review), 83 **Mich. L. Rev.** 732 (1985).

validity, if contrary to [the law of nature]."[47] This comment was taken by John Austin (1790-1859), perhaps unfairly, as being about legal validity. There are (at least) two major problems with a claim that injustice necessarily or always negates the legal validity of a rule. First, if one is using a normal understanding of "legal validity," the assertion is simply empirically false. Consider Austin's response to Blackstone:

> "Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God ... the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity."[48]

While this is slightly overstated,[49] the basic point is that the concept of "legal validity" is closely tied to what is recognized as binding in a given society and what is enforced, and it seems fairly clear that there are plenty of societies where immoral laws are recognized as binding and are enforced. Someone might answer that these immoral laws are not really legally valid, and the officials are making a mistake when

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[47] **William Blackstone, Commentaries on the Laws of England** I.41 (1765-1769). For a sympathetic portrayal of Blackstone's approach to natural law theory, see John Finnis, Blackstone's Theoretical Intentions, 12 **Nat. L.F.** 163 (1967); see also **Daniel J. Boorstin, The Mysterious Science of the Law** 48-59 (1941).

[48] **John Austin, The Province of Jurisprudence Determined** Lecture V, at p. 158 (W.E. Rumble, ed., 1995) (1832).

[49] It too quickly rushes an equivalence between enforcement and legal validity, leaving no room for the concept of legal mistake (whether through error or corruption or abuse of power). See **Brian Bix, Law, Language, and Legal Determinacy** 85-86 (1993).

they treat the rules as if they were legally valid.[50] However, this is just to play games with words, and confusing games at that. "Legal validity" is the term we use to refer to whatever is conventionally recognized as binding; to say that all the officials could be wrong about what is legally valid is close to nonsense. The interlocutor seems to be saying that immoral rules ought not to be recognized as binding — but this merely translates into either a proposal for reform of the society's legal practices, or a restatement of the traditional natural law point that immoral laws create no moral obligations, whatever legal obligations they might create.[51]

The second problem, clearly pointed out by Philip Soper,[52] is that judgments under a natural law standard, if incorporated within a legal system, would have to be made by fallible individuals working within fallible institutions. No matter how able or how virtuous the decision-makers, the decisions would have whatever significance they did by choice – this is what the authorized panel decided – rather than

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[50] A different kind of claim would be that in a particular legal system, certain legal principles, perhaps of a constitutional nature, ensure that no immoral enactment is (legally) valid under that system. However, note that this is a contingent claim about a particular legal system, not a statement about the general or conceptual nature of law.

[51] This last is arguably what Blackstone was attempting to convey, as might be made clearer by seeing Blackstone's quote in context:

> "The law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

Blackstone, Commentaries on the Laws of England I.41.

[52] Philip Soper, Some Natural Confusions About Natural Law, 90 **Mich. L. Rev.** 2393, 2412-13 (1992).

by reason. However well-intended the institution or the overall system, the result is a legal positivist product (law because a certain authorized actor so declared) rather than a natural law product.

E. Opponents Actual and Potential

A variety of challenges has been brought to the general project of natural law theory, or to some of its more prominent variations. While the full consideration and evaluation of these challenges is the work of many volumes, it may be of value at least to mention some of the writers and themes.[53]

Baruch Spinoza (1632-1677), in his Theological-Political Treatise objected to the idea of God as a law-giver on the basis that laws are commands and were the omnipotent Being to command something, men could not but obey. Spinoza's approach offers no room for the notion of a divinely-willed Natural Law that could be disobeyed as well as obeyed.[54]

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[53] One might add philosophical teachings which, though not directed specifically at natural law doctrines, could be thought to push thinkers in a different direction: for example, (1) "Ockham's razor," or the principle of parsimony, associated with William Ockham (c. 1285-1347), which holds that "entities should not be multiplied beyond necessity" in the construction of theories, **Robert Audi, ed., The Cambridge Dictionary of Philosophy** 545 (1995); and (2) the methodology of radical doubt used by René Descartes (1596-1650) in his **Meditations on First Philosophy** (1641). Some have taken the Ockham's nominalism as the force which "reduc[ed] Thomas's conception of ordered justice to the competing interests and claims of individuals," thus leading to the (natural) rights analysis of later centuries. Charles J. Reid, Jr., The Medieval Origins of the Western Natural Rights Tradition: The Achievement of Brian Tierney (book review), 83 **Cornell L. Rev.** 437, 438-39 (1998). However, this view of the role of Ockham is strongly contested, in particular by Tierney. See **Brian Tierney, The Idea of Natural Rights** 195-203 (1997).

[54] See **Baruch Spinoza, Theological-Political Treatise**, chapter iv (1670), excerpted in **J. B. Schneewind, ed., Moral Philosophy from Montaigne to Kant**, vol. 1, 239-44 (1990); see also Edwin Curley, The State of Nature and Its Law in Hobbes and Spinoza, 19 **Philosophical Topics** 97-117 (1991).

Thomas Hobbes (1588-1679) affirmed the existence of natural law,[55] but stated that individuals entering civil society will voluntarily surrender their rights to act on (their own interpretations of) it,[56] for the exercise of such rights would lead to chaos, a return to the war of all against all that entering civil society was meant to avoid.[57]

In his Treatise of Human Nature, David Hume (1711-1776) famously commented on the connection between "is" and "ought," that it seemed "altogether inconceivable that this new relation ["ought"] can be derived from others, which are entirely different from it."[58] That is, one cannot derive an evaluative or prescriptive conclusion from purely descriptive or empirical premises.[59] To the extent

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[55] Some would go further: emphasizing Hobbes's role in the development of natural law thinking, arguing that "modern natural law theory begins with Hobbes rather than Grotius." **Norberto Bobbio, Thomas Hobbes and the Natural Law Tradition** 149 (1993).

[56] Excepting the right to defend oneself against a clear threat of death, a right Hobbes generally treats as inalienable. For a discussion of Hobbes's view on the topic, see **Richard Tuck, Natural Rights Theories: Their Origin and Development** 119-25 (1979).

[57] See **Thomas Hobbes, Leviathan**, chapters 18, 26, 29 (Richard Tuck, ed., Cambridge University Press, 1996) (1651); **Thomas Hobbes, Behemoth or the Long Parliament** 50 (Ferdinand Tonnies, ed., Stephen Holmes, intro., 1990) ("It if be lawfull then for subjects to resist the king, when he commands anything that is against the Scripture, that is, contrary to the command of God, and to be judge of the meaning of Scripture, it is impossible that the life of any King, or the peace of any Christian kingdom, can long be secure."); see also Richard Tuck, Introduction, in **Leviathan**, supra, at ix, xxviii. On a slightly different theme, the necessity of sovereign command to make natural law into actual law, see **Hobbes, Leviathan**, supra, chapter 26, at 191 ("The Authority of writers, without the Authority of the Common-wealth, maketh not their opinions Law, be they never so true. ... For though it be naturally reasonable; yet it is by the Soveraigne Power that it is Law.").

[58] **David Hume, Treatise of Human Nature**, iii, 1.1 (1739).

[59] There is some controversy over whether Hume's statement should be read this strongly. A second interpretation (taking the quotation in its larger context), supported by a number of commentators, is that Hume was concerned not about the move from the factual to the normative, but rather the move from any true statement (whether factual or moral) and statements about motivation.

that this is correct (and it has always been a matter of great controversy within philosophy), it seems to undermine a major strand of the natural law theory tradition: that which seeks to derive moral prescriptions from statements about the nature of human beings or the nature of the world. In fact, by many accounts, Hume's argument, and similar challenges, did much to push natural law theory to the sidelines of arguments about moral theory.

II. Modern Natural Law Theory

A. Introduction

Many of the important recent writers in natural law theory, like Jacques Maritain[60] and John Finnis, have continued within the tradition that goes back to Aquinas (and beyond). What may be most distinctive in the recent work done under the name "natural law theory" are those writers who have offered not a general ethical theory (with implications for law and policy), but instead a narrowly focused theory of the nature of (positive) law. This Part will offer overviews of both types of modern natural law theories.

A key moment in modern natural law theory is the exchange between H.L.A. Hart (1907-1992) and Lon Fuller (1902-1978) in the Harvard Law Review in 1958.[61] Hart located the separation

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See, e.g., **Stephen Buckle: Natural Law and the Theory of Property** 282-83 (1991); see also **Finnis, Natural Law and Natural Rights** 37-48.

[60] See, e.g., **Jacques Maritain, The Rights of Man and Natural Law** (1943).

[61] H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 **Harv. L. Rev.** 593 (1958); Lon Fuller, Positivism and Fidelity to Law — A Response to Professor Hart, 71 **Harv. L. Rev.** 630 (1958).

between legal positivism and natural law theory at the conceptual separation of law and morality — that is, the question of whether something (either a rule or a whole system) was "law" was conceptually separate from its moral merit. A number of writers — most prominently, Lon Fuller and Ronald Dworkin — have been willing to take on legal positivism on its own terms: arguing that one cannot conceptually separate law and morality, that one cannot separate what law is from it ought to be.

Modern natural law theorists have offered the following responses to legal positivism:

(1) Law is best understood, at least in part, as a teleological concept[62]: a concept or an institution which can be properly understood only when the ultimate objective is kept in mind — here, the ultimate objective being a just society.[63] This is in sharp contrast to the generally descriptive, largely-empirical, morally-neutral approach one finds among the legal positivists.

(2) Though the legal positivists might be able to offer a simpler model of law, a model that bears a better-than-passing resemblance to law in practice, a view of law that included more about the moral

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[62] On the use and value of teleological explanations, see **Larry Wright, Teleological Explanations** (1976).

[63] See, e.g., Kenneth Winston, The Ideal Element in a Definition of Law, 5 **Law & Phil.** 89 (1986).

claims[64] and moral aspirations of law[65] would be a more complete, and therefore better, theory of law.[66]

In both cases, the basic claim is that a (natural law) theory of law that incorporates moral evaluation or other aspects of morality, will be superior to a legal positivist theory, because the fuller, richer natural law theory includes or reflects aspects of our practice and experience of law that a (legal positivist) theory, avoiding such elements, cannot.[67] (One response to this argument might be that in considering the relative merit of alternative theories, detail and level of accuracy are not the only values; simplicity of a model is a countervailing merit.[68])

B. Lon Fuller

1. Critique of Legal Positivism

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[64] See, e.g., Soper, Searching for Positivism, 1756 ("That we would be puzzled about what to call standards that have no moral consequence at all is some evidence that the moral qualification is not contingent but part of the essence of law.").

[65] Arguably a legal positivist can incorporate claims about the moral claims of law, for that can be stated in a neutral way, without evaluation of the claims. In fact, the legal positivist Joseph Raz includes just such an element in his theory of law. See **Joseph Raz, Ethics in the Public Domain** 199 (1994) ("every legal system claims that it possesses legitimate authority"). The moral aspirations of law, however, may take us over the line of moral neutrality.

[66] One can find similar arguments offered by John Finnis, **Natural Law and Natural Rights** 11-18, and Philip Soper, Searching for Positivism, 1753-57.

[67] One can add an argument grounded on a linguistic point: the reason we may resist calling what the Nazi's had as "law" is that the term is not merely descriptive -- it is not like saying, this is a table, but it is not well-constructed. The term "law" has deep connections with morality, or at least with justice, and to give some social institution that label inevitably carries with it some amount of moral praise.

[68] See, e.g., **W. J. Waluchow, Inclusive Legal Positivism** 19-21 (1994).

Fuller's criticism of legal positivism can be summarized as follows: (a) legal positivism treats law as an object — an object of study, like any other such subject of scientific or quasi-scientific investigation — when it is better understood as a process or function; (b) legal positivism seems to believe or assume, falsely, that the existence or non-existence of the law is a matter of moral indifference; and (c) legal positivism presents law as a "one-way projection of authority," when it is better understood as involving reciprocity between officials and citizens.

a. Law as Object vs. Law as Process

For Fuller, law is not merely an object or entity, to be studied dispassionately under a microscope; law is a human project, with an implied goal – and an implied moral goal – the ability of people to coexist and cooperate within society.[69] It is not merely that law has an ideal, but that one cannot truly understand law unless one understands the (moral) ideal toward which it is striving (there are many human activities, from painting to jogging to boxing, that are hard to understand unless one knows the objective or ideal towards which the participants are striving). Law is the "enterprise of subjecting human conduct to the governance of rules."[70] Law thus is a process, to be contrasted with the slightly different process of managerial direction (the latter can be specific rather than general, is more attuned to

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[69] **Fuller, The Morality of Law** 123. Similarly, Fuller would insist, legal theory is not mere description: "definitions of 'what law really is' are not mere images of some datum of experience, but direction posts for the application of human energies." Fuller, Positivism and Fidelity to Law, 632.

[70] **Fuller, The Morality of Law** 96. Though the above text certainly has the appearance of a definition or conceptual analysis of law, it should be noted that Fuller seemed to have little regard for the project of "defining law." See Winston, The Ideal Element in a Definition of Law, 91.

attaining the objectives of the "rulemaker" -- as contrasted with law, whose purpose is usually primarily helping citizens coexist, cooperate and thrive -- though, even with managerial direction, it is unwise to make rules which oppress or confuse).[71]

The standard way to define or categorize objects is by assigning essential characteristics: for example, a substance is "gold" if it has a certain chemical composition, and an animal is a mammal if it is warm-blooded and suckles its young. A completely different approach to defining or categorizing objects would be by its function: everything that cuts grass is a "mower"[72]; everything that cuts food is a knife, etc. Fuller's approach to law can be seen as rejecting the notion that "law" is best understood in the first sense, as an object which can be analyzed down to its component parts. Instead, he would argue, law is better understood as being the official response to particular kinds of problems -- in particular the guidance and coordination of citizens' actions in society.

Once one takes a "functional" approach to law, then the mantra often ascribed to natural law theory, "an unjust law is no law at all,"[73] begins to make sense. We would certainly understand someone who says that a long thin metal object which cannot cut (cannot even slice butter) is "hardly a knife." Similarly, if one starts with the view that law is about guiding behavior, a purported legal system, which is so badly constructed and badly run (e.g., containing many obscure, retroactive or contradictory legal rules, with judicial applications of legal rules that do not match the content of those rules) that

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[71] **Fuller, The Morality of Law** 207-10.

[72] See Michael S. Moore, Law as a Functional Kind, in **Natural Law Theory: Contemporary Essays** 188, 207-08 (Robert P. George, ed., 1992).

[73] See supra note 46.

citizens could not alter their behavior to comply with the law, even if they wanted to ... then it is not so strange to say that a law or legal system which fails to guide behavior just is not law.[74]

b. Existence and Non-existence of Law: A Moral Good

Additionally, Fuller claims, legal positivism seems to assume that the existence or non-existence of "law" within a society is a matter of moral indifference; however, the fact is that, at a minimum, living a good life requires a societal structure that only a sound legal system can provide.[75] The manner in which the existence of law, or the existence of "law in its fullest sense," can effectuate certain moral goods will be discussed further below, in the evaluation of Fuller's affirmative program.

c. One-Way Projection of Authority

Fuller argues that legal positivism sees laws mostly as a "one-way projection of authority" — one party giving orders, and other parties complying. This is most obvious in John Austin's work, with its reduction of law to the commands of a sovereign,[76] but later legal positivists are arguably not that different. This view of law, Fuller states, is a basic misunderstanding; so much of law, so much of a fully

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[74] Fuller's point is grounded in a procedural understanding of the nature of law; a substantive variation of the same "functional argument" can be given: that legal rules are intended to give reasons for action; immoral legal rules fail to give reasons for action, and thus fail to be law (in its fullest sense), as one might say that logically invalid arguments, which fail to give reasons for belief, are not really arguments. John M. Finnis, Problems in the Philosophy of Law, in **The Oxford Companion to Philosophy** 468-72, at 469 (Ted Honderich, ed., Oxford: Oxford University Press, 1995).

[75] **Fuller, The Morality of Law** 204-07.

[76] See **Austin, The Province of Jurisprudence Determined**.

functioning legal system, depends on there being a reciprocity of duties between citizens and law-givers: "the existence of a relatively stable reciprocity of expectations between lawgiver and subject is part of the very idea of a functioning legal order."[77] Only when citizens and officials cooperate, each fulfilling his or her own functions, can law work; for example, officials promise to enforce the rules as promulgated, to make the demands on citizens reasonable and consistent; to the extent that officials violate these duties, the smooth running of society will begin to break down.

Fuller discusses the choice between the flexibility and power of broad discretion (directly granted, or hidden in the use of vague or inconsistently-applied rules) as against the clear guidance of always following a lucidly-written rule — how managers in large companies and tyrants in wicked legal systems find a use for lack of guidance and arbitrary will. We find this to be wrong in a legitimate legal system, but our criticisms are not that arbitrary discretion is not "efficacious" — it is quite useful for some purposes, but it is contrary to the morality intrinsic to law and legitimate government.[78]

2. Fuller's Alternative: The Inner Morality of Law

Fuller's affirmative analysis develops from his evaluation of the shortcomings of legal positivism. In the place of legal positivism, he offers an analysis that focuses on law as a process, a process that

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[77] **Fuller, The Morality of Law** 209; see also id. at 39-40 ("[T]here is a kind of reciprocity between government and the citizen with respect to the observance of rules. Government says to the citizen in effect, 'These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct.' When this bond of reciprocity is broken, nothing is left on which to ground the citizen's duty to observe the rules." (footnote omitted)).

[78] Id. at 212-14.

emphasizes the importance of the interaction between officials and citizens, and that makes more transparent the way in which a legal order can be instrumental to the attainment of other goods.

Fuller offers a list of eight "principles of legality" which would serve as criteria for testing both the minimal duties of a government, and also set the objective of excellence towards which a good government would strive.[79] Fuller's eight criteria are as follows:

- the rules must be general

- the rules must be promulgated

- retroactive rule-making and application must be minimized[80]

- the rules must be understandable

- they should not be contradictory

- they should not be impossible to obey

- the rules should remain relatively constant through time

- there should be a congruence between the rules as announced and as applied[81]

Following the principles makes it easier for a lawmaker to guide the behavior of its citizens (and for citizens to be able to plan their activities knowing what they need to do to stay on the right side of the

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[79] See id. at 41-42.

[80] Obviously, it is impossible to conform one's behavior to norms promulgated after the fact; but Fuller understood that judicial decision-making will often have some retroactive elements. Fuller's point was that, at a minimum, governments needed to be aware of the injustice of such retroactive actions, and to work to keep them as infrequent as possible. See id. at 56-62.

[81] See id. at 46-91. The labels used in the text sometimes vary slightly from those Fuller used.

law[82]).

Some of Fuller's eight principles[83] are best seen as minimal requirements, for which there is no excuse – for example, laws which require the impossible or contradict one another. Others, such as the minimizing of retroactive legislation, the full promulgation of laws and the understandability of the laws, are best seen as ideals to which legal systems should always strive, but which we should not expect the systems to meet perfectly.[84]

To the extent that one sees law as a process, as a means of guiding and coordinating human behavior within society, this process will be more successful to the extent that Fuller's eight principles are met. In this sense, one could also speak of systems which are "more legal" or "less legal." At one point, Fuller talks of rule systems as "being legal" to a greater or lesser extent; at other times, he seems to imagine some threshold beneath which a rule system which no longer qualifies as "legal."[85] In any event, the basic point is the same -- that rule systems that substantially comply with the eight requirements are "legal systems," in the sense that they are likely to succeed to guiding the behavior of their citizens; rule systems that do not substantially comply with the eight requirements are not "legal systems," in the sense

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[82] As Robert Summers argued in Fuller's name: "Sufficient compliance with the principles of legality necessarily guarantees, to the extent of that compliance, the realization of a moral value ... that the citizens will have a fair opportunity to obey the law [whether the law is moral or immoral]." **Robert S. Summers, Lon L. Fuller** 37 (1984).

[83] Compare Joseph Raz's similar list of "principles which can be derived from the basic idea of the rule of law." **Raz, The Authority of Law** 214-19 (1979).

[84] On promulgation and understandability, the ideal is for all citizens to know all their legal obligations fully and precisely, without the need of consulting a lawyer. It seems that even (or especially) in modern, developed countries, we are very far from that ideal.

[85] See, e.g., **Fuller, The Morality of Law** 39.

that they are unlikely to be able to guide citizen behavior.

3. Criticisms

H.L.A. Hart, in a review of Fuller's The Morality of Law,[86] argues that Fuller has shown that law, to some extent, operates as a process, with an objective -- the objective being to guide behavior. Hart has no argument with this as far as it went, nor does he doubt that following Fuller's eight guidelines would make the legal system in question better able to guide.[87] What Hart objects to is calling this "morality" -- it is merely efficacy or efficiency; a neutral value as important to immoral people and governments as to moral ones (one could easily, Hart famously notes, have a "inner morality of poisoning"). If a legal system has evil ends -- like Nazi Germany or Apartheid South Africa, then following these guidelines will allow the government to be more efficient in achieving those evil ends.[88]

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[86] H.L.A. Hart, Lon L. Fuller: **The Morality of Law**, in **Essays in Jurisprudence and Philosophy** 343-64 (1983).

[87] Id. at 347-49.

[88] Id. at 349-53.

Matthew Kramer raises a quite different line of criticism: following Fuller's principles of legality might only lead consistently to the best results in the (unlikely) circumstance of a legal system which is always and only serving virtuous objectives. Where a law or set of laws is less than morally optimal, procedural deviations from what the laws (and Fuller's principles) would seem to require might actually have a morally good effect. Matthew Kramer, Scrupulousness Without Scruples: A Critique of Lon Fuller and His Defenders, 18 **Oxford J.L. Stud.** 235, 239-43 (1998). An analogous point might be made through the example of promise-keeping. Most people assume that keeping promises is a morally good thing. However, when considering someone who has made promises whose content is wicked, or at least less than morally optimal, it is possible that breaking the promises will create morally better consequences than keeping them.

One possible response to this line of argument is to question whether the value of Fuller's

A number of replies could be offered (many of which Fuller in fact gives on his own behalf):

(1) As others have noted, "playing by the rules of the game" -- or playing the game fairly, is itself an integral part of justice, even if not far from all of it[89] (by analogy: it is still of some virtue to keep one's promise, even if it was a promise to do something bad). Fuller gives the example from the former Soviet Union, where the lawmakers there were once so concerned about the increase in certain kinds of economic crime that they substantially raised the penalty, and to show how seriously they took this kind of crime, they made the increase in sentence retroactive for those already in prison for those offenses. The lawyers in the Soviet Union, not a country normally known for its adherence to procedural justice, protested that this was unjust.[90]

This is not just a question of "efficacy" -- if it were, one might applaud the extra deterrent power that might come if a potential criminal knew that her actions might lead to even worse consequences than are now advertised. If retroactive lawmaking is to be criticized, it is not at the level of efficacy, but at the level of justice and morality.

(2) Certain kinds of evil are arguably less likely when proper procedures are followed: for example, courts may be more likely to come up with just decisions when judges know that they must

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approach depends (or depends exclusively) on its usefulness as a proxy for consequentialist evaluations. As discussed earlier, Fuller's approach – a functionalist or teleological view of law – might be defensible simply as a better or more complete view of the nature of law.

[89] See **Weinreb, Natural Law and Justice** 185-94. Weinreb argues that justice is best thought of as an often-uneasy combination of "entitlement" (his term for the following of the rules laid down) and desert. Id. at 184-223.

[90] **Fuller, The Morality of Law** 202-03.

give public reasons for their decisions (certain forms of corruption may be hard to rationalize). Additionally, as one commentator has observed, "a wicked government's decision to act within the procedural constraints of the rule of law affords the general population at least some measure of security."[91]

(3) Fuller once wrote that he could not believe that a legal system which was procedurally just would not also be substantively just[92] -- certainly, a correlation exists (at least in the negative sense that countries that care little for one are likely to care little for the other), but there have also been countries which have promulgated evil in an efficient and meticulous way. On many accounts, Fuller's faith in the connection between procedural and substantive justice is an optimistic, but peripheral part of his theory.[93] However, some commentators have treated it as central, arguing that Fuller's theory stands or falls based on its (dubious) merit.[94]

C. Ronald Dworkin

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[91] **George, In Defense of Natural Law** 114.

[92] Fuller, Positivism and Fidelity to Law, 636.

[93] See, e.g., **Bix, Jurisprudence: Theory and Context** 76-77. One can find mixed evidence from Fuller's own writings regarding his views on this connection. At one point, he expressly declines to state that the connection is logically entailed: "I have never asserted that there is any logical contradiction in the notion of achieving evil, at least some kinds of evil, through means that fully respect all the demands of legality." Lon Fuller, A Reply to Professors Cohen and Dworkin, 10 **Vill. L. Rev.** 660, 664 (1965). On the other hand, he denied that there were many, or perhaps any, actual historical examples of such combinations. **Fuller, The Morality of Law** 154.

[94] See **Anthony J. Sebok, Legal Positivism in American Jurisprudence** 163-67 (1998).

Ronald Dworkin (1931-) has been an immensely influential figure in English-language legal philosophy, and also in political and moral philosophy. In legal philosophy, his early work offered a wide-ranging criticism of H.L.A. Hart's version of legal positivism, a critique from which Dworkin built his own theory of law.[95] In later works, that theory was re-characterized as an interpretive theory of law.[96]

According to Dworkin's approach, to determine what the law requires – what the law "is" – one finds the best interpretation available of the relevant legal data: legislative acts, judicial decisions, constitutional texts, and so on.[97] As an interpretation, the theory must adequately fit the relevant data (e.g., it cannot dismiss too many old judicial decisions as "mistakes"); additionally, to be a good interpretation, it must also do well on the scale of moral value.[98] Dworkin also argues that this approach (which he calls "constructive interpretation"[99]) is as appropriate for legal theorists discussing the nature of a legal system as it is for lawyers and judges discussing what the law requires on a particular matter.[100]

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[95] **Ronald Dworkin, Taking Rights Seriously** (1977).

[96] See **Ronald Dworkin, Law's Empire** (1986).

[97] See id. at 225-28, 245-58.

[98] There are additional complications: (1) the values of "fit" and "moral value" must both be considered in comparing alternative tenable theories, id. at 228-258; and (2) Dworkin also speaks of a value of "Integrity" – that judges should prefer an interpretation that makes the legal system speak with a unified "voice." Id. at 225.

[99] See id. at 52 ("constructive interpretation is a matter of imposing purpose on an object or practice in order in order to make of it the best possible example of the form or genre to which it is taken to belong.").

[100] See, e.g., Ronald Dworkin, Legal Theory and the Problem of Sense, in **Issues in Contemporary Legal Philosophy** 9, 13-15 (Ruth Gavison, ed., 1987).

The literature on Dworkin's work is vast.[101] This is not the place extensively to revisit that already well-traveled territory. Instead, this section will focus on Dworkin's work only in a tangential way: discussing the way in which his work could be said to exemplify a natural law theory approach, and what Dworkin's own work might indicate about the need or the viability of such a project.

Dworkin does not normally use the label "natural law" for his own work. In fact, with the prominent exception of one lecture, later published as an article,[102] he has avoided referring to "natural law" entirely, either as a description of his own work, or as an approach to contrast with his own.[103] In that one reference, however, Dworkin concedes that his work might warrant the label "natural law": "If the crude description of natural law I just gave is correct, that any theory which makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law."[104]

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[101] See, e.g., **Marshall Cohen, ed., Ronald Dworkin & Contemporary Jurisprudence** (1983); **Andrei Marmor, Interpretation and Legal Theory** (1992); **Bix, Law, Language and Legal Determinacy** 77-132; **Stephen Guest, Ronald Dworkin** (2nd ed., 1997).

[102] Ronald Dworkin, "Natural" Law Revisited, 34 **U. Fla. L. Rev.** 165 (1982).

[103] Another interesting "silence" in Dworkin's work regards Lon Fuller. Long before Dworkin developed his interpretive approach to law, he wrote some articles critical of Fuller's approach. See Ronald Dworkin, The Elusive Morality of Law, 10 **Vill. L. Rev.** 631 (1965); Ronald Dworkin, Philosophy, Morality, and Law -- Observations Prompted by Professor Fuller's Novel Claim, 113 **U. Pa. L. Rev.** 668 (1965). (Fuller responded to some of the points raised by Dworkin in the "Reply to Critics" which appears in the Revised Edition of **The Morality of Law**. **Fuller, The Morality of Law** 198-202, 221-23, 238-40.) Though Dworkin's later, interpretive work converges in some interesting way with Fuller's approach to law, Fuller is rarely mentioned (e.g., his name does not appear in the detailed index of **Law's Empire**).

[104] Dworkin, "Natural" Law Revisited, 165. Dworkin offers no opinion on whether this view of natural law theory is historically accurate or succeeds in distinguishing legal positivism. Id.

Dworkin is a natural law theorist in the sense that his approach to law and to legal theory rejects a strict ("conceptual" or "necessary") separation between law and morality. Under his approach, the choice between tenable interpretations of past official actions may easily come down to a determination of which interpretation presents the legal system as better morally. Thus, within Dworkin's approach, one cannot determine "what law is" without considering moral or evaluative matters.[105]

Additionally, Dworkin's approach has connections with other natural law approaches in that "what law really is" is something different from the official decisions that most people conventionally associate with the term. Judicial decisions, for example, are, under this view, at best the application of interpretations, which in turn are only fallible guesses at what the law "really is," what it actually requires. There is something toward which the (better) judicial decisions are striving.

D. John Finnis

John Finnis may be the natural law theorist best known to modern English-language legal theorists. His work, in particular, Natural Law and Natural Rights,[106] consciously works within the

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[105] Here it is important to note Dworkin's equation of "law" with "what judges are obligated to apply." See, e.g., Ronald Dworkin, A Reply by Ronald Dworkin, in **Ronald Dworkin & Contemporary Jurisprudence** 247, 262 (Marshall Cohen, ed., 1983). This is a controversial and significant point, significant because of the contrary perspective of the legal positivist, Joseph Raz. Raz would have "law" defined in a legal positivist way, without reference to moral or evaluative terms, but has no objection to the idea that judges are often authorized or obligated to include moral terms as part of their decisions. See id.; Joseph Raz, Legal Principles and the Nature of Law, in **Ronald Dworkin & Contemporary Jurisprudence** 73, 84-85; Joseph Raz, Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment, 4 **Legal Theory** 1 (1998).

[106] **John Finnis, Natural Law and Natural Rights** (1980).

tradition of Thomas Aquinas,[107] emphasizing moral philosophy and meta-theory, while also contributing to contemporary debates about the nature of law.

1. Moral Theory

a. Overview[108]

Finnis builds his moral theory from a foundation of "basic goods," goods we value for their own sake, "aspects of authentic human flourishing, ... real (intelligent) reason[s] for action."[109] In Natural Law and Natural Rights, Finnis lists seven: life,[110] knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and "religion."[111] These are ends and purposes we can and do

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[107] Finnis has also written a detailed commentary on Aquinas. **John Finnis, Aquinas: Moral, Political, and Legal Theory** (1998).

Finnis's own work has been grounded directly on Aquinas, and also indirectly, through Germain Grisez's "re-presentation and development of classical arguments." See id. at viii; see also Germain Grisez, The First Principle of Practical Reason: A Commentary on the **Summa Theologiae**, 1-2, Question 94, Article 2, 10 **Nat. L. F.** 168 (1965). The extent to which Finnis's account is consistent with or deviates from Aquinas's teaching is a matter of contention. See, e.g., **Russell Hittinger, A Critique of the New Natural Law Theory** (1987) (criticizing Grisez and Finnis).

[108] The focus will be on Finnis's general discussions of natural law theory, which focus on moral philosophy in the broadest sense. Finnis has also written two texts focused on morality and ethics in a more narrow sense of those terms. **John Finnis, Fundamentals of Ethics** (1983); **John Finnis, Moral Absolutes: Tradition, Revision, and Truth** (1991).

[109] **Finnis, Natural Law and Natural Rights** 64; cf. **Aquinas, Summa Theologiae** Question 94, art. 2 (discussing the apprehension of human goods through Practical Reason).

[110] "Life" includes "every aspect of vitality" including physical health and procreation. **Finnis, Natural Law and Natural Rights** 86-87.

[111] Id. at 86-90. The quotation marks around "religion" are in the original, and signify that it is meant to include all forms of inquiry about human nature and its place within the universe, even if the

choose for their own sake, not merely (or always) as a means to other ends and purposes. It is not that no one ever seeks a basic good, say, a friendship, as a means to another end, but that the basic goods are those (few) ends and purposes which one can intelligibly choose for their own sake.[112]

The basic goods are grounded in human nature, not directly, in the sense of being read off a metaphysical theory, but indirectly, in the sense that "[t]he basic forms of good grasped by practical understanding are what is good for human beings with the nature they have."[113]

There are then nine intermediate principles for the treatment of these basic goods (principles which Finnis labels "the basic requirements of practical reasonableness")[114]:

- adopting a coherent plan of life

- having no arbitrary preferences among values

- having no arbitrary preferences among persons

- maintaining a certain detachment from the specific and limited projects one undertakes

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result of such inquiries may, for some, be a kind of atheism or existentialism. Id. at 89-90.

Finnis notes that there may be other ways of listing or characterizing the basic goods, but he does not think that there are other basic goods that could not be fit within his list of seven. Id. at 90-92. Finnis in fact offers a slightly different list John M. Finnis, Is Natural Law Compatible with Limited Government?, in **Natural Law, Liberalism, and Morality** 1-26, at p. 4 (Robert P. George, ed., 1996).

[112] Consider some goods whose value is clearly only instrumental: if a person reported that she was collecting money or medicine not for the good that might be done with such objects, either in the short-term or the long-term, but just in order to have more of those items, one might rightly question her rationality or sanity.

[113] **Finnis, Natural Law and Natural Rights** 34; see **Finnis, Aquinas** 90-94; see also **George, A Defense of Natural Law Theory** 83-91 ("Natural Law and Human Nature").

[114] **Finnis, Natural Law and Natural Rights** 100-26.

- not abandoning one's commitments lightly

- not wasting one's opportunities by using inefficient methods

- not choosing to do something which of itself does nothing but damage or impede the realization of or participation in one or more of the basic goods

- fostering the common good of one's community

- act in accordance with one's conscience

Finnis's approach is thus teleological, but not in the way in which some natural theories are – there is no single human (or superhuman) ideal towards which everyone must aspire.[115] The prescription is rather more general: "In voluntarily acting for human goods and avoiding what is opposed to them, one ought to choose and otherwise will those and only those possibilities whose willing is compatible with integral human fulfillment."[116]

Finnis holds the list of basic goods and the principles of practical reasonableness to be "self-evident," but by that he does not mean that they are obvious or intuitive or that all reasonable people will immediately assent.[117] "Self-evidence" means primarily that the truths in question are not derived from

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[115] See, e.g., **Finnis, Aquinas**, 314-19; John M. Finnis, Natural Law and the "Is" – "Ought" Question: An Invitation to Professor Veatch, 26 **Catholic Lawyer** 266 (1981); **George, In Defense of Natural Law** 50-52. For a contrary position, emphasizing a hierarchy among values and a stronger role for a sense of man's final end, see **Hittinger, A Critique of the New Natural Law Theory** 65-198.

[116] **Finnis, Moral Absolutes** 45 (footnote omitted); see **George, In Defense of Natural Law** 51 ("The concept of integral human fulfillment ... is not meant to indicate a supreme good above or apart from the basic goods.").

[117] **Finnis, Natural Law and Natural Rights** 64-69; see also **George, In Defense of Natural Law** 43-45, 61-66, 85-90, 262-66.

any more fundamental truth; they are "grasped by intelligent reflection on data presented by experience," supported indirectly by speculative and dialectical arguments.[118]

b. Criticism

Finnis's moral theory has been subject to a number of criticisms, representing a variety of alternative views (and a number of controversial areas in which Finnis has been an active disputant).

One line of criticism, or at least questioning, is whether the combination of "basic human goods" and "basic requirements of practical reasonableness" are sufficient to come up with answers (and to come up with the right answers) to the important moral questions we face.[119] From critics who offer alternative readings to the natural law tradition generally, or Aquinas's views in particular, the challenge regarding the adequacy of Finnis's approach is often connected with claims about its exegetical accuracy.[120] In terms discussed earlier, the exegetical question is whether Aquinas is best understood as constructing a teleological view based directly on a view of human nature, or is best understood as offering a kind of "virtue ethics" – that there are certain goods basic to human flourishing, that we know

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[118] **George, In Defense of Natural Law** 61-63.

[119] At least those questions which have answers. It is common ground among Finnis and many of his critics that there are important questions which may have no single, unique right answer (as a moral matter), due either to the plurality of goods or (to the extent this is a different point) the incommensurabilty of goods.

[120] See, e.g., Ralph McInerny, The Principles of Natural Law, 25 **Am. J. Juris.** 1 (1980); Henry B. Veatch, Book Review, 26 **Am. J. Juris.** 247, 255-59 (1981).

or discover by using reason, and whose connection to human nature is (more) indirect.[121] The sufficiency criticism is that we can find the answers to the difficult moral questions only once we have a full-fledged teleology with an ordered hierarchy of goods, rather than Finnis's list of equally-basic goods.[122]

Steven Smith has suggested that Finnis's approach to "the basic goods" (and Finnis's use of such concepts in his writings on sexual issues) reflect a too-great divide between the idea of "the good" and actual persons' desires and experiences.[123] Smith notes not only the absence of "pleasure" as a "basic good," a good sought for its own sake,[124] but also the strangely non-empirical status of claims like the following: "[H]omosexual conduct (and indeed all extra-marital sexual gratification) is radically incapable of participating in, actualizing, the common good of friendship."[125] By non-empirical status, Smith means that, in the context of Finnis's writings, it seems clear that Finnis would not consider the

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[121] On this debate, see, e.g., **Hittinger, A Critique of the New Natural Law Theory**; **George, In Defense of Natural Law** 59-75 (responding to Hittinger); McInerny, The Principles of Natural Law; John Finnis & Germain Grisez, The Basic Principles of Natural Law: A Reply to Ralph McInerny, 26 **Am. J. Juris.** 21 (1981)

[122] See, e.g., Russell Hittinger, Varieties of Minimalist Natural Law Theory, 34 **Am. J. Juris.** 133 (1989).

[123] Steven D. Smith, Natural Law and Contemporary Moral Thought: A Guide from the Perplexed (book review), 42 **Am. J. Juris.** 299, 316-21 (1997). One could concede the point and still note that Finnis's approach does a better job than Kantian deontological theories in trying to connect morality with a view of human well-being. See **George, In Defense of Natural Law** 60-61.

[124] Cf. **Finnis, Natural Law and Natural Rights** 95-97 ("Is Pleasure the Point of It All?").

[125] John Finnis, Is Natural Law Compatible with Limited Government?, in **Natural Law, Liberalism, and Morality** 1-26, at 12-13 (Robert P. George, ed., 1996) (emphasis omitted).

claim about homosexual conduct to be rebutted by testimony from homosexual couples claiming that their intimate conduct is a way of maintaining, expressing, and strengthening friendship.[126] However, Smith argues, as the gap grows between "being a good" and "being experienced as a good," the potential for disconnection grows between academic morality and our actual moral concerns.[127]

2. Legal Theory[128]

Law plays a role within Finnis's moral theory, in that there are certain common goods that are best obtained through the specific kind of social coordination that law offers,[129] and there is a sense in which participation in the community and in the common good of building a (political) community is an integral part of living a good life.[130] Finnis also discusses legal theory in the narrower sense of the term. In analyzing the concept of law, he agrees with the general approach of H.L.A. Hart: that one should look at "law" (or "legal system") in its fullest or highest form, rather than in some lowest common denominator of all systems we might consider "legal"[131]; and that such an approach must incorporate the

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126 Smith, Natural Law and Contemporary Moral Thought, 316-19.

127 Id. at 319-21.

128 Along with moral theory and legal theory, Finnis has also written on political theory. See, e.g., Finnis, Is Natural Law Compatible with Limited Government?

129 **Finnis, Natural Law and Natural Rights** 260-64; John M. Finnis, Law as Co-ordination, 2 **Ratio Juris** 97 (1989).

130 See **Finnis, Natural Law and Natural Rights** 164-65, 260-64; Veatch, Book Review, 252-53.

131 **Finnis, Natural Law and Natural Rights** 3-11.

perspective of participants. However, Finnis narrows and strengthens Hart's "internal perspective": it is "the viewpoint of those who not only appeal to practical reasonableness but also are practically reasonable."[132] According to Finnis, one must select the "internal viewpoint" according to the idea of "central case" (the concept in its fullest sense), and that this will direct one away from a morally-neutral perspective: "If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation ..., a viewpoint in which the establishment and maintenance of legal as distinct from discretionary or statically customary order is regarded as a moral ideal if not a compelling demand of justice, then such viewpoint will constitute the central case of the legal viewpoint."[133] This may seem a minor modification, but it is one sufficient to move a theorist across the border, from legal positivism (law conceptually separated from morality) to natural law theory (moral evaluation central to understanding law).

E. Michael Moore

Michael Moore offers a theory of law and legal practice built around metaphysically realist views of morality, meaning, and reference.[134] (Metaphysical realism is generally understood as a claim about

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[132] Id. at 15.

[133] Id. at 14-15; see also **Finnis, Aquinas** 257-58.

[134] See Michael S. Moore, Good Without God, in **Natural Law, Liberalism, and Morality** 221-70 (Robert P. George, ed., 1996); Law as a Functional Kind, in **Natural Law Theories: New Essays** 188-242 (Robert P. George, ed., 1992); Moral Reality Revisited, 90 **Michigan Law Review** 2424 (1992); The Interpretive Turn in Modern Theory: A Turn for the Worse?, 41 **Stan. L. Rev.** 871 (1989) [hereinafter Moore, Interpretive Turn]; Precedent, Induction, and Ethical Generalization, in **Precedent in Law** 183-213 (Laurence Goldstein, ed., 1987) [hereinafter, Moore, Precedent]; Metaphysics, Epistemology and Legal Theory, 60 **S. Cal. L. Rev.**

ontology[135] – that our words refer to objects whose existence and properties are independent of conventional beliefs or observers' beliefs about the objects.[136]) Moore does not merely assert that there are right answers to moral questions (though he certainly asserts that[137]); on ontological matters, he posits the existence of "moral entities such as rights and duties, virtues and vices, and moral qualities such as goodness and badness" as well as "moral kinds" (a moral analogue to natural kinds).[138] On meaning, he equates terms, including evaluative terms like "justice" with "natural kinds" or "natural kinds of events," with meaning being supplied by "the best scientific theory we can muster" about the natural kind or the natural kind of event in question.[139] Moore, however, is not a Platonist on all matters: he is a

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453 (1987) (book review); A Natural Law Theory of Interpretation, 58 **Southern California Law Review** 277 (1985) [hereinafter, Moore, Interpretation]; Moral Reality, 1982 **Wisconsin Law Review** 1061; and The Semantics of Judging, 54 **S. Cal. L. Rev.** 151 (1982). For an extended critical overview of Moore's approach, see **Bix, Law, Language and Legal Determinacy** 133-77.

[135] Michael Dummett has argued that realism would be better understood as a claim about meaning and truth, in particular the application of bivalence to all statements within an area of discourse. See, e.g., **Michael Dummett, The Seas of Language** 230-76 (1993). Most people who are realists about an area of discourse under a semantics-based definition will also be realists under an ontology-based definition. There are yet other (different, but overlapping) understandings of metaphysical realism. For a good, brief overview, see **Simon Blackburn, The Oxford Dictionary of Philosophy** 319-20 (1994) ("realism/anti-realism").

[136] Moore's own views on metaphysical realism emphasize ontological commitments, but also includes views regarding truth, reference, and meaning. Moore, Moral Reality Revisited, 2432-40.

[137] See, e.g., Moore, Interpretation, 286.

[138] Moore, Precedent, 208. On "natural kinds," see Hilary Putnam, The Meaning of "Meaning", in **Mind, Language and Reality** 215-71 (1975).

[139] Moore, Interpretation, 291-301; Moore, Moral Reality Revisited, 2436-40. Even with terms like the legal concept of "malice" (not to be confused with the everyday-speech use of that term, which indicates a desire to harm others), Moore argues that this term "picks out some thing in the world" and might be thought of as an example of a "moral kind." Moore, Interpretation, 333.

coherentist on epistemology,[140] and he views law not as a natural kind, but as a "functional kind."[141]

Moore's challenge to those who are not metaphysical realists is to claim that metaphysical realism is the correct approach,[142] and that this approach requires us to modify our views about the nature of law and how legal institutions should operate.[143] The question might be characterized: how should/would we – as lawyers, judges, legislators, citizens – act differently if we believed, and took seriously, the notion of unique right answers to moral questions, and determinate referents to most concepts (whether or moral, legal, or natural-kind terms)?

A robust belief in the existence and accessibility of moral truth, in a metaphysically realist sense, helps and hinders legal analysis in a number of ways:

(1) Many of the notorious paradoxes and indeterminacies of precedential (common law) reasoning may fall away if we believe (or assume) that there are "moral kinds."[144] Then the proper way

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[140] See, e.g., Moore, Interpretation, 312; Moore, Precedent, 197-98, 208-09.

[141] See Moore, Law as a Functional Kind. "Unlike nominal kinds, items making up a functional kind have a nature that they share that is richer than the 'nature' of merely sharing a common name in some language. Unlike natural kinds the nature that such items share is a function and not a structure." Id. at 208.

[142] Sometimes he argues or implies that most of us are already metaphysical realists, however much we might deny it. See Moore, Interpretation, 322-26, 397-98. If one defines metaphysical realism broadly enough, this is likely true (as indicated earlier, a similar claim could also be made for "natural law theory," defined broadly enough).

[143] Moore, Interpretive Turn, 873, 881-90; Moore, Moral Reality Revisited, 2468-91.

[144] Moore, Precedent.

to (re)characterize the holding of a past case is as describing the application of a relevant moral kind[145]; additionally, the indeterminacy of characterization, that any judicial decision can be restated at different levels of generality, falls away, at least in principle, for the correct level of generality is that of the moral kind. Under Moore's approach, common law legal reasoning is understood as all-things-considered moral reasoning – while emphasizing that one of those factors to be considered is the "institutional" or "rule of law" argument, an argument that may result in the entrenchment of some past wrong decisions, because of the relevance to moral reasoning of people's reliance interests.[146]

(2) The equally troublesome problems with determining the legislative intentions of the groups who enacted legislation (or created constitutional language)[147] might be circumvented if the lawmakers "should be held to have the same linguistic intentions as other language users, namely [metaphysically] realist ones."[148] The lawmakers' intentions regarding the meaning or application of the terms they use (beyond their realist intentions that words be understood according to their "real" meaning) are not relevant.[149] To put the same point a different way, judges should guide their interpretation of legal terms (whether of statutory, constitutional, or common law origin) according to a metaphysically realist theory

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[145] See id.; see also Moore, Interpretation, 358-76. More precisely, most of the use for the concept of "holdings" falls away. Moore, Precedent, 210-13. What we are doing at each step – both in deciding cases, and in describing past decisions – is trying to state "truths of the common law." Id. at 210.

[146] Id.

[147] See, e.g., **Ronald Dworkin, Law's Empire** 313-99 (1986); Moore, Interpretation, 338-58; **Antonin Scalia, A Matter of Interpretation** (1997).

[148] Moore, Interpretation, 323.

[149] Id. at 338-58.

of meaning – according to "the real nature of the things to which the words refer and not by the conventions governing the ordinary usage of those words."[150] Moore goes farther, arguing that even the stipulated definitions within legislation are not to be given special deference; to the contrary, those definitions should be treated as mere "conventional glosses" on the "real" meaning of terms (and it should be assumed that this is how legislators wanted those definitions to be treated).[151]

(3) More generally, legal reasoning and interpretation should be derived from "the moral reality" (and never merely from people's conventional beliefs regarding moral matters).[152]

(4) Moral realism, like any other form of right-answer theory (e.g., Ronald Dworkin's[153]), would direct judges to keep looking for the unique right answer to the difficult questions they face, not merely to give up and decide the matter on the basis of policy or personal preference.[154]

An interesting aspect of Moore's approach, already noted, is that he prefers a coherentist approach to knowledge. This sometimes leaves him vulnerable to the charge that his moral realism, at least its ontological claims, are doing no work.[155] When he contrasts his moral realist view with

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150 Id. at 287.

151 Id. at 331-38, 383.

152 Id. at 286-88.

153 See, e.g., **Ronald Dworkin, Taking Rights Seriously** 123-30 (1977). Moore offers a strong argument that Dworkin cannot maintain both his opposition to metaphysical realism and his "right answer thesis." Moore, Metaphysics, Epistemology and Legal Theory, 475-94.

154 Moore, Interpretation, 308; Moore, Moral Reality Revisited, 2480, 2484-87.

155 See **Bix, Law, Language, and Legal Determinacy** 148-50. For Moore's response to this line of argument, see Moore, Moral Reality Revisited, 2470-91.

"conventionalist" forms of coherence reasoning, he argues for the superiority of the former because it has room for "mistake" and justifies the final conclusions not by mere "conventional acceptance" but "by correspondence with what there is."[156] However, if our only way of determining "what there is" is coherence with conventional beliefs, then the differences may seem to be more in packaging than in substance.

Moore offers a variety of responses to this line of argument. First, he assents that his theory is one focused on ontology (what there is), not epistemology (what we know and how we justify our claims of knowledge), but he considers this concession far from fatal.[157] Second, he argues that metaphysical realism explains our beliefs and practices better than alternative approaches; that is, the theory is important because it is true, even if it would not or did not affect our practices.[158] Third, he argues that moral realism may be of value in that it can justify existing practices that might seem problematic under a different moral or metaphysical view of the world.[159] A related point: if judges see themselves as acting on the basis on "the true nature of things" rather than merely acting on the basis of personal idiosyncratic beliefs or conventional beliefs, this will (rightfully) affect the attitude the judges

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156 Moore, Precedent, 209.

157 See Moore, Moral Reality Revisited, 2470-72.

158 See, e.g., id. at 2452-68, 2471-72, 2511-18.

159 See Moore, Moral Reality Revisited 2472 ("moral realism can make sense of some of our adjudicatory practices such as judicial review – and thereby give us a reason to continue them, or modify them, as the case may be – that moral conventionalism and moral skepticism cannot.").

carry towards the legitimacy of their actions.[160] Fourth, he reaffirms his assertion that metaphysical and moral realism do make a difference to how judges (should) act[161] (a view summarizes elsewhere in this section).

One category of questions that is prominently raised by Moore's work, but that is relevant to many other modern writers within the natural law tradition, is the extent to which having the right moral theory (or theory of meaning) can or should pre-empt other apparently political or institutional issues. These are matters on which Moore himself is usually sensitive: e.g., to what extent should a judge decline to reach the morally correct common law decision because prior judicial decisions came out the other way?[162] In other words, should judges affirm wrong or partly wrong decisions in deference to "rule of law" values or similar concerns about consistency, reliance, predictability, equality, and the like? A comparable question arises elsewhere in judicial reasoning, in particular in constitutional interpretation: to what extent should judges (who ascribe to natural law thinking) act on the view that the natural law is a part of the country's foundational law, or otherwise incorporate natural law learning into (all) legal interpretations, even (or especially) if prior judicial decisions have taken a different view?[163] While it is hard to find real-world advocates for the extreme view that natural law truths should always trump

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160 Id. at 2469-91. This argument is tied in with the claim that moral realism can justify unconventional, indeed revolutionary, responses to moral, legal, and political questions, in a way that non-realist approaches cannot. See id.

161 See, e.g., id. at 2480-91.

162 See, e.g., Moore, Precedent, 201-04, 209-10; Moore, Interpretation, 372.

163 Cf. **Sebok, Legal Positivism in American Jurisprudence** 222-30 (describing "strong epistemic natural law" approaches to constitutional interpretation).

institutional, "rule of law" reasons for adhering to mistaken precedent, one can find prominent natural law theorists arguing for a position on the other extreme, that the natural law tradition offers no views on judicial decision-making other than to instruct judges to defer to whatever the institutional and interpretative rules are within the legal system in question.[164]

F. Relationship with Legal Positivism

1. Traditional Natural Law Theory and Legal Positivism

The founder of modern legal positivism, H.L.A. Hart, offered the opinion that there was little if anything in a traditional natural law theory like that of John Finnis that he would have reason to object to.[165] A similar assertion of general agreement has been offered by another prominent legal positivist, Neil MacCormick.[166] Finnis has returned the favor, in a sense, asserting that traditional natural law theory would be able to accept and affirm most of the statements which have been offered as tenets of legal positivism.[167]

Even if one accepts that traditional natural law theory might be compatible with legal positivism,

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[164] For this view, see, e.g., **George, In Defense of Natural Law** 102-12; see also Wolfe, Judicial Review.

[165] See **H.L.A. Hart, Essays in Jurisprudence and Philosophy** 10 (1983) (Finnis's natural law theory as being "in many respects complementary to rather than a rival to positivist legal theory.").

[166] Neil MacCormick, Natural Law and the Separation of Law and Morals, in **Natural Law Theory: Contemporary Essays** 105-33 (Robert P. George, ed., 1992).

[167] See John Finnis, The Truth in Legal Positivism, in **The Autonomy of Law: Essays in Legal Positivism** 195-214, at 203-05 (Robert P. George, ed., 1996).

one should consider the argument that traditional natural law theory — and, indeed, any comprehensive moral or ethical theory — undermines the project of legal positivism. Consider the following from Richard Dien Winfield:

> "[L]egal philosophy can proceed [as a discrete discipline] solely if it truncates its own understanding by presupposing the normative neutrality of law. Only when the concept of law is assumed to be independent of all norms applying to the domains of its jurisdiction can legality be conceived apart from a far more encompassing investigation of ethics. Otherwise, the rights and duties of other spheres will dictate what kind of rules law should uphold and how legal practice should function, enjoining legal authority to examine every facet of justice in order to determine the form and content of law. ...[¶] ... Only by adopting a normatively indifferent stance can one entertain law as a discrete object of investigation warranting separate study."[168]

Many of the modern natural law theorists discussed in this essay have confronted the extent to which moral issues should, or must, be considered when constructing a descriptive theory of law. For example, Michael Moore's theory can be seen as being particularly responsive to the type of concerns Winfield raised.

Finally, one should note Roger Shiner's argument, that as legal positivist theories become more sophisticated (to meet weaknesses in and criticisms of simpler forms of the theory), the resulting theories

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[168] **Richard Dien Winfield, Law in Civil Society** 1-2 (1995); a similar point is made in John M. Finnis, Problems in the Philosophy of Law, in **The Oxford Companion to Philosophy** 468-72 (Ted Honderich, ed., Oxford: Oxford University Press, 1995).

verge on natural law theories.[169] Shiner's point may be most obvious in some recent efforts by legal positivists to discuss the normative aspects of law in a detached and descriptive manner. The most prominent example may be H.L.A. Hart's use of the internal aspect of rules and law in his legal theory, which allowed theory to take into account the fact that participants in the practice "accept" the legal norms as reasons for action, without in turn endorsing that judgment.[170] Consider also Joseph Raz, who, within his legal theory, builds much of his analysis from the assertion that "every legal system claims that it possesses legitimate authority."[171] (It is important in this context to emphasize the "claim" in the phrase "claim ... [to] possess legitimate authority," for Raz certainly does not believe that all legal systems in fact "possess legitimate authority."[172]) According to Raz, much follows from this truth about legal systems, because even to have the capacity to be authoritative law must offer guidance which can be followed without reference to the general (moral and prudential) reasons that the guidance was meant to supplant.[173] The point is not to evaluate the value or truth of Raz's argument,[174] but only to point out

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169 **Roger A. Shiner, Norm and Nature: The Movements of Legal Thought** (1992).

170 **H.L.A. Hart, The Concept of Law** 55-58, 91-99 (2nd ed., 1994); see Brian Bix, H.L.A. Hart and the Hermeneutic Turn in Legal Theory, 52 **SMU L. Rev.** 167 (1999).

171 **Raz, Ethics in the Public Domain** 199.

172 Raz has elsewhere argued eloquently against the proposition that even generally just legal systems create a general obligation of obedience. See, e.g., id. at 325-38; **Joseph Raz, The Authority of Law** 233-49 (1979).

173 See **Raz, Ethics in the Public Domain** 199-204.

174 For a variety of perspectives of Raz's argument, see, e.g., Brian Leiter, Realism, Hard Positivism, and Conceptual Analysis, 4 **Legal Theory** 533, 540-44 (1998); **Waluchow, Inclusive Legal Positivism** 123-40; Jules L. Coleman, Incorporationism, Conventionality, and the Practical Difference Thesis, 4 **Legal Theory** 381, 413-20 (1998).

how Raz uses an aspiration that could easily be characterized as moral, the claim to possess legitimate authority, in a way which does not seem to "taint" the moral neutrality of his analysis.

Relevant to the above discussion, one should note a problem frequently overlooked, or at least under-emphasized, in legal theory: the extent to which the claims being made about law are special to law, or are rather only a particular instance of a more general truth – e.g., about all social institutions or all normative systems.[175] For example, consider the argument of critics of legal positivism, that it is inadvisable or impossible to separate the description of legal systems from their evaluation. If this argument is valid, it would seem likely (though by no means certain) that it would apply equally well to attempts to separate the description and evaluation of morality.[176] One should be suspicious of theories which offer claims that purport to apply solely to law. One should test these claims in the context of other social institutions and other normative systems; to the extent that the claims do not seem valid in those other or broader contexts, there would be reason to doubt their validity in the legal context.[177]

2. Modern Natural Law Theory and Inclusive Legal Positivism

A number of countries have judicial review of legislative validity based on written constitutions or

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[175] See, e.g., **Bix, Jurisprudence: Theory and Context** 7-8; Philip Soper, Legal Systems, Normative Systems, and the Paradoxes of Positivism, 8 **Canadian J.L. Juris.** 363, 373 (1995).

[176] Soper, Legal Systems, Normative Systems and the Paradoxes of Positivism, 373.

[177] Cf. **Raz, Ethics in the Public Domain** 238-43 (analyzing the general nature of rights: emphasizing some of the problems of building a theory based on what happens with legal rights, and discussing the question of whether legal rights are best understood as a sub-category of institution-based rights or, alternatively, as a sub-category of moral rights).

some other source of higher principle. Some critics of legal positivism, in particular Ronald Dworkin, have argued that legal positivism cannot account adequately for such practices, and what is needed instead is a theory which accepts the necessary intersection of law and morality.[178]

Evaluating the merits of the criticism depends in part on interpreting the legal positivist claim that no necessary or conceptual connection exists between law and morality. Does this mean merely that moral evaluation need not be part of the test of legal validity (but may be part of such a test in particular legal systems),[179] or does it mean that moral evaluation can never be part of the test for legal validity?[180] The first perspective is that of "inclusive" legal positivism[181]; the second is "exclusive" legal positivism. Both views are discussed at length elsewhere in this book, but for the moment it is worth noting that both views see themselves as forms of legal positivism, to be distinguished from natural law theory. While the difference between inclusive legal positivism and some modern, law-focused versions of natural law theory might seem slight, they are differences of theoretical significance.

G. Other Natural Law Legal Theories

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[178] See **Dworkin, Taking Rights Seriously** 1-130.

[179] A somewhat different perspective on the same inclusive legal positivist view is that moral principles can be part of the test for legal validity if and only if this is authorized by some social convention (e.g., a written constitution or an earlier authoritative judicial ruling).

[180] Of course, by the claimed separation of law and morality, legal positivists do not mean to deny that morality does and should play a role in the creation and evaluation of legal rules and legal decisions. See, e.g., **Hart, The Concept of Law** 203-06.

[181] This is also known as "incorporationism," "soft legal positivism," and "soft conventionalism."

There are a variety of other recent theories of law which might fit into the category of natural law. Late in his book, The Concept of Law, in the course of describing where law and morality overlap, H.L.A. Hart introduces the notion of "the minimum content of natural law."[182] The discussion occurred in the context of offering an overview of the various ways in which morality and law do overlap (overlaps consistent with the legal positivist dogma that there is no "necessary" or "conceptual" connection between the two). Hart speculates that any system of law or conventional morality that does not offer at least minimal protections (e.g., against violent assault) to at least some significant minority of the population (as might be done in societies where an elite minority rules, while the majority population is enslaved or otherwise treated as second-class citizens) could not long survive. While there is a slight resemblance, more in title than in substance, between Hart's discussion and traditional natural law theory, the similarities do not run very deep.[183] Hart was making an empirical prediction (and a fairly uncontroversial one at that), he was not offering a moral theory or a conceptual claim.[184]

Randy Barnett gives a provocative twist to the traditional natural law approach.[185] Whereas many writers in this tradition offer theories along the line of "given human nature and/or the nature of the

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[182] **Hart, The Concept of Law** 193-200.

[183] For an interesting presentation of a different view, developing Hart's discussion in the direction of a more substantial (and more traditional) natural law approach, see Kenneth I. Winston, Introduction, in **Lon L. Fuller, The Principles of Social Order** 24-26 (Kenneth I. Winston, ed., 1981); see also **Randy E. Barnett, The Structure of Liberty** 10-12 (1998).

[184] See **Bix, Jurisprudence: Theory and Context** 43-44.

[185] **Randy E. Barnett., The Structure of Liberty: Justice and the Rule of Law** (1998). For a detailed critique, see Lawrence B. Solum, The Foundations of Liberty (book review), 97 **Mich. L. Rev.** 1780 (1999).

cosmos, certain things follow (prescriptively)," Barnett's analysis follows the argument structure, "given human nature, if one wants to obtain certain generally accepted social goals (security, prosperity, liberty, etc.), certain institutions and rules should be established." What results is a liberal-libertarian programme that will not be to every person's liking, but one might nonetheless appreciate the novel adaptation of a natural-law-like method of analysis and investigation.

A number of other approaches merit mention, though can only be summarized briefly. Lloyd Weinreb has tried to reconstruct the original (that is, ancient Greek) understanding of natural law theory, natural law theory as viewing a normative order within nature.[186] Ernest Weinrib analyzed private law in terms borrowed from Aristotle and Kant — that private law has a set form from which we can determine, generally if not exhaustively, the moral obligations parties owe one another and the proper doctrinal rules and institutional structures that should be established.[187] Derek Beyleveld & Roger Brownsword put forward a legal theory based on Alan Gewirth's writings in moral philosophy.[188] And Richard Dien Winfield[189] and Alan Brudner[190] have offered theories of law grounded in a Hegelian view

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[186] **Weinreb, Natural Law and Justice**. For a critical analysis of Weinreb's approach, see Robert P. George, Recent Criticism of Natural Law Theory (book review), 55 **U. Chi. L. Rev.** 1371, 1372-1407 (1988).

[187] **Ernest J. Weinrib, The Idea of Private Law** (Cambridge, Mass.: Harvard University Press, 1995).

[188] **Deryck Beyleveld & Roger Brownsword, Law as a Moral Judgment** (London: Sweet & Maxwell, 1986).

[189] **Winfield, Law in Civil Society** (1995).

[190] **Alan Brudner, The Unity of the Common Law: Studies in Hegelian Jurisprudence** (Berkeley: University of California Press, 1995).

of society and law's role within it.

III. Overview and Conclusion

Two basic questions should be asked when evaluating the writers and debates summarized in this essay: (1) What criteria could be offered to judge the debates? and (2) What is at stake in the debates? In the arguments for and against most traditional natural law theories, the terms are relatively easy to locate. Those natural law theorists are offering (a) the moral claim — this is how one should act; (b) the meta-ethical claim — this is how one goes about deciding moral questions; and/or (c) the meta-theoretical claim for Jurisprudence -- one should approach the study of law through a perspective of practical reasoning or some form of teleological analysis. In evaluating arguments made within or against natural law theories, one must determine which sort of claim is at issue in the theory, and only then can one determine the grounds for evaluation.

Much of the natural law tradition is grounded in moral philosophy, a point too easily forgotten when natural law theory is brought into debates in other areas, and this forgetting has caused much of the misunderstanding of natural law doctrines within the jurisprudential literature. Natural law theory, in all of its permutations, does have things to say to and about legal theory. Perhaps its most important argument for these purposes is that views of law which take into account law's moral aspirations offer a fuller, and thus better, understanding of that social institution, compared to views that ignore or marginalize such considerations.

See also: The Classic Natural Law Tradition; Exclusive Legal Positivism; Inclusive Legal Positivism; Methodology

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