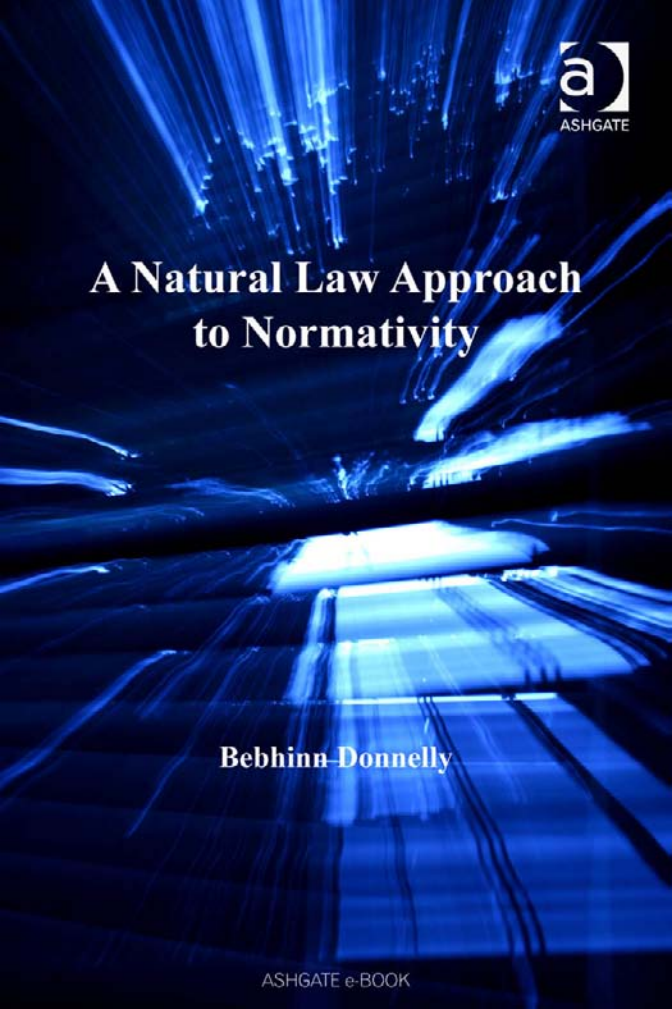
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A Natural Law Approach to Normativity
Bebhinn Donnelly
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A NATURAL LAW APPROACH TO NORMATIVITY

In Memory of my Grandmother, Margo

A Natural Law Approach to Normativity

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ASHGATE

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Bebhinn Donnelly

Chapter 1
Introduction

The Evaluative Viewpoint, External to the Institution of Law

Law, whatever else it does, has the effect of regulating human behaviour. It might be hoped that it would at least seek to perform this role well and morally. Certainly those citizens subject to law ought to be free to consider and to reflect upon whether law's aims are good and whether it meets them prudentially. This process of reflection and evaluation seems important enough to warrant a central role in legal philosophy too. Of course, to evaluate law in this way, legal philosophy requires support in the form of an accompanying theory of morality and a theory of its application to law. Law's institutions cannot be expected to supply this knowledge for, in the absence of an account of morality, it cannot be assumed, though it legitimately may be hoped, that existing legal systems meet or aim to meet, or efficiently meet moral ideals. In order to gain an insight into the qualities that a good legal system ought substantively to possess it is necessary, therefore, to first step outside the institutions to which we belong. This book adopts that viewpoint, one external to the institutions of law and from that position it suggests that a normative guide for law can be found in nature. The approach derives from the natural law tradition advanced by Plato, Aristotle, and the Old Stoics, an approach taken to a new level of sophistication by St Thomas Aquinas and given an epistemological twist by the modern natural law of Finnis, Grisez and Boyle.

The viewpoint that is external to the social practice of law is not one that theories of law usually prefer. Legal philosophy often amounts to an analysis of law as a social institution; it considers the contribution of description and evaluation (moral or otherwise) to *that* analysis and examines whether description does or must entail an evaluative component.[1] Generally, the discussion, whether descriptive or evaluative, occurs at a level *internal* to the institution of law.[2] In this way a bias can be discerned in favour of the view that law, conceptually, (and legal philosophy) is tied to the *thing* law *as* a social practice. Whilst the conceptual importance of law as a social practice is self evident, it does not follow that it is impossible or unimportant to conceive of law in a broader way, from a viewpoint other than the institutional.

To see how the broader perspective emerges as a conceptually important one it might be considered that having asked the question, 'what is your concept of law?' it is very likely that one will encounter responses that refer to the importance

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1 See for example Dworkin, Ronald, *Law's Empire* (Oxford: Hart, 1998) for a discussion of why description may necessarily entail evaluative commitments.

2 The internal viewpoint is defended most notably by Hart. See Hart, H.L.A., *The Concept of Law* (Oxford: Clarendon, 2nd ed., 1997).

of justice and fairness and morality. People it seems do conceive of law as an ideal; they think that law, whatever it is in fact, *ought* to reflect principles of justice and fairness and morality. These entailed concepts do not, by necessity, represent a mere process of abstraction from the practice of law nor do they necessitate taking a view on the 'science' of law; indeed they may be held with commitment, by someone subject to a wholly corrupt legal system. The people who conceive of law in this way may even be as numerous as the 'bad' men (defendants) of Holmes' realism, who want a practically useful 'prophecy' of what the 'courts will do in fact', however unfair that may prove to be, and 'nothing more pretentious'.[3] Indeed the 'bad man' himself may have a concept of law as an ideal, one emerging from a belief that law *as it is*, is unjust or inconvenient to the individual. Of course, to hold a concept of law as an ideal is not to be illogical; it is not at all to conclude that the ideal *will* be manifest in the positive law of legal reasoning. The 'bad man' will most likely expect the Judge to decide his case according to the law and its principles (or according to what he had for breakfast) and that may bear no relation to his 'ideal' concept of law.

'The' concept of law admits of more than one possibility; it may refer at least to law as an ideal and to law as a human institution, and to each in manifold and varying ways. Both broad ways of conceiving of law have value.[4] The importance of the ideal and of the perspective external to the institution again comes in to view when it is acknowledged that substantive normative meaning is derived *by* law from features of the world that are external to it. This has implications for the *scope* of the concept of law for it suggests that conceptual meaning flows not only directly *from* law as a practice, it flows from elsewhere *to* law as a practice. Judicial reasoning, in the UK, for example, however open textured, operates either under actual legislative limits or is always potentially limitable by legislative enactment, a potential recognised by Austin in the strongest possible terms.[5] Whilst legislation *is* given meaning by law, (through judicial interpretation) it is most fundamentally given prior meaning by the political world. It is useful to question, in an account of *law*, whether external domains, like

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3 Holmes, O.W., *The Path of the Law*, 10 Harv. L. Rev., pp.457-478, p.172/3.

4 The dual perspective is alluded to famously by Bentham: 'To the province of the *Expositor* it belongs to explain to us what, as he supposes, the law *is*: to that of the *Censor*, to observe to us what he thinks it *ought to be*. The former, therefore, is principally occupied in stating, or in inquiring after *facts*: the latter, in discussing *reasons*... To the *Expositor* it belongs to shew what the *Legislator* and his underworkman the *Judge* have done *already*: to the *Censor* it belongs to suggest what the legislator *ought* to do *in future*.' In Postema, Gerald, J. *Bentham and the Common Law Tradition*, (Oxford, 1989), p.304.

5 See Austin, John, *The Province of Jurisprudence Determined* (Weidenfeld & Nicolson, 1968), 'A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated. The rules which he makes derive their legal force from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence. For, since the state may reverse the rules which he makes, and yet permits him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration.'

politics, give *good* law to the system or not. The familiar jurisprudential process of looking inwardly to the practice of law (at how normative meaning is imposed on legislation by judicial reasoning, for example) is central to our understanding of that practice. But to do only this is to undervalue the very important sense in which much normative meaning is already given to law from elsewhere. Law, as part of what something else means, can be as much an important concept of law as the concept of law as an institution undoubtedly is. For this reason a legal theorist may be justified in starting a project not with law but with history or politics or psychology or metaphysics or nature to show how meaning does flow or, in this case, propose how it ought to flow from these domains *to* law. The objection may be made that such methods will not identify law *as law* but equally it may be suggested that law *as law* exists because certain of its mechanisms incorporate and derive substantive content from these and other realms of knowledge. Current jurisprudence of course addresses 'external' influences but it does so starting from law as practice and moving outwardly to 'extensions' of that practice, from the process of adjudication to the internalisation of community *morality* for example.[6] Dworkin and Finnis, for example, for different reasons, consider that moral evaluation plays an important role in the concept of law. But they view evaluation to be relevant either because it exists as an actual feature of the *practice*[7] or because it is required to identify the central case example of law as an *institution*.[8]

In this book evaluation is considered central to the philosophy of law because the concept of law is taken to refer to *law as it ought to be* as much as to *law as it is*.[9] The viewpoint external to the institution of law[10] is adopted not to show how politics or history have informed or can inform law but for the purposes of examining law as an ideal. The position reflects commitment to the view that law cannot be understood merely as performing functions required by law. Law is, itself, something required by an other, the other being, simply, the world in which law exists, and in the same way that law has requirements that it must meet there are other features of reality that have requirements, one such requirement being law. The examination begins, then, not with law but with those natural features of the world, particularly man and his society, which require institutions of law to exist.

The substantive questions that may arise from adopting the moral viewpoint external to the institution, questions like, how, and when, and over which realms of human activity law ought to exert its authority are ambitious, but to the thinking, active human being they ought to be viewed as unavoidable. With unparalleled authority, law prohibits and demands certain actions over *human*

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6 See *op cit*., n.1.

7 See *ibid.*

8 See Finnis, John, *Natural Law and Natural Rights* (Oxford: Clarendon, 7th ed.).

9 These are not intended to be exclusive categories. The concept of law may also denote, law as it is *substantively*, or law as it is *formed* by external sources. Categories may be narrower than these broad ones or there may be overlap between categories.

10 Though as the conclusion to the book will indicate this does not amount to a viewpoint external to 'law'.

beings with a uniquely free reason. When it is abused, as an instrument of Platonic social engineering, for example, law can aim to and can be used to supplant human reason. In that way it can contribute to making the human being slightly less human. Part of the natural law ideal is that human beings are to be human to the fullest possible extent, both as individuals and in communities. It is important, from that perspective, that law acts via and in order to advance rather than to thwart man's reasoning nature.

The Role of Nature

The central claim advanced here, derived in part from the classical natural law tradition, is that *moral* meaning resides in very basic, essential natural *facts* about our existence as human beings. This amounts to a belief that the moral 'ought' is located within the 'is' and that it can be identified therein by reason.

If traditional natural law theory has a major flaw it lies in its failure clearly to distinguish 'nature' in its various senses. Nevertheless, some important qualifications on the use of the term 'nature' in the tradition need to be identified. First, nature is not, in its usual application, taken to refer uniquely to human desires, or to biological dispositions, or to abstract governing principles, though it sometimes held these meanings. Rather the term 'nature' is best understood to refer to the empirical world - to the world of fact - potentially in all its guises. This approach to the ancients' concern with nature whilst an oversimplification reflects best the level at which nature was, most fundamentally, relevant to normativity.

Sometimes traditional natural law theory uses the natural empirical world convincingly, particularly when it attempts to isolate natural *essentials* of man's being and to show how these can inform what man ought to be. It is least impressive when it attempts to derive moral information from man's contingent 'nature', like his being wise, or a shoemaker, or a slave, or a thief, without reference to 'governing' essentials. Indeed a tension is evident throughout natural law between contingent and essential natural facts. For this reason a division is made between the two theoretical stages: the emphasis in Chapter 4 is on the use of contingent truths (albeit juxtaposed with our *essential/universal* nature as a 'political animal'); the emphasis in Chapter 5 is on the identification and use of universal truths. The division is an artificial one undertaken to reflect the undoubted theoretical superiority of the latter approach.

Scheme of the Book

The idea that essential facts about our being can provide a normative guide for man and for law in particular is somewhat peculiar to the natural law tradition. Indeed there are important fundamental challenges to the view that the world of fact can contribute in any way to the attainment of moral knowledge.

The apparent inability of nature clearly to impart moral truth is reflected most notably in Hume's belief that one cannot, without explanation of some kind,

derive an ought-proposition from an is-proposition. For Hume in particular, this meant that facts about man and his world cannot be translated into a moral guide using the medium of human reason. The dichotomy between 'is' and 'ought' that Hume depicts is the subject of Chapter 2; it can be seen to represent, in the most condensed form possible, an essential (if not *the* essential) normative problem, that the world in which we *do* live does not appear to inform how we *ought* to live. Hume's view, that the problem is resolvable, is accepted. But in the Chapter a distinction is drawn between the problem itself and Hume's characterisation of the problem as deriving from the limitations of human reason and consequently solvable only by sentiment. Hume's sentiment–based solution follows from his understanding of the nature of the problem but that solution cannot be accepted as uncontroversial in the same way that the problem can. Uncritical acceptance of Hume's solution as correctly reflective of the problem has led many to proceed with undue reverence for his conception of the 'is/ought' dichotomy and in particular to undervalue the usefulness of facts in moral reasoning.

Chapter 3 examines Kant's alternative approach to morality, one that might prove equally fatal to the natural law tradition. *The Metaphysics of Morals* is the basis for a critique as it reflects closely the metaphysical questions of concern. Kant's attempt is to overcome the apparent moral vacuum left by nature by limiting (almost to zero) the *epistemic* role of nature in fundamental moral reasoning. But the attempt, it is claimed, has more in common with the natural law tradition than is sometimes imagined. This may be because Kant does use nature deductively (rather than pure reason's principles alone) more than he acknowledges. First, the incorporation of the universalisability requirement in the categorical imperative appears to follow from an unacknowledged attribution of moral relevance to natural facts. Second, even allowing for the moral substance of the imperative, it is incomplete as a normative guide without assistance from further fact-based principles. It is suggested that the imperative works best where there are, implicit in Kant's position, natural bases that transcend the limits of *a priori* reasoning.

From these two chapters, it appears that Hume's non–cognitivism demands too much from sentiment and Kant's appeal to autonomy demands too much from reason alone. Chapters 4 and 5 present the alternative position evident in traditional natural law theory. A central claim, of that school, in opposition to Hume, is that reason, not sentiment, has the primary role to play in solving normative problems. In opposition to Kant, the world of fact (albeit fact, represented by nature in a *pre–contingency* sense) is taken to be central to moral knowledge.

Chapter 6 considers the important 'new natural law' theory advanced by John Finnis. It is suggested that his position is in some important respects less in keeping with the classical tradition than is claimed. Additionally, it appears that Finnis, like Kant, utilises natural facts epistemically, despite denying the same.

If, as classical natural law holds, realities can be understood to work naturally toward ends that represent the *fulfilment* of their reality, the notion of what people ought to be and to do is inherent in the notion of what they are as 'complete'/fulfilled people. Realities, in this way, can be understood to contain a

combination of fact and value so that the derivation of value from fact, is not illicit, but, rather, amounts to the identification of an inherent quality of the fact. Chapter 7 explores this possibility and suggests how it might be of assistance to law in particular. Whilst the aim of the book is to indicate how nature might provide a normative base for law, the actual application of the theory to law is located primarily (though not uniquely) in this final Chapter. This reflects simply the nature of the analysis required in order to determine how natural law might assist positive law and a desire to return to its application in depth at a future stage.

Chapter 7 concludes with an examination of the contribution that natural law (or any theory of law as an ideal) can make to the *philosophy of law*. In particular it notes the importance of carefully delineating between the domain of 'law as an ideal' and the domain of 'law as a social practice'. In this respect it should be noted that the caricature of natural law ('bad law is not law') which sets it up in opposition to legal positivism is not accepted. The labels 'natural law' and 'positivism' in so far as they are used to illuminate the criteria for legal validity have become less and less helpful as the complex arguments entailed in the two terms are seen to overlap. So, for example, a natural lawyer may take the view 'this is what law ought to be but law that is not this way may still be law' and many, traditionally labelled positivists, seem to take the view that law as it is may sometimes most accurately be identified by reference to what law ought to be. Indeed for the purposes of the debate about legal validity, arguably the terms have evolved to such an extent that it is possible for a natural lawyer to be more of a positivist than a positivist.

Chapter 2

Hume and Natural Facts

Introduction

As human beings we are uniquely moral creatures. It can be difficult to resist the idea that somehow we are *made* moral by the qualities that make us, characteristically, human. It will be suggested in Chapter 5 of this book that classical natural law is committed to this idea fundamentally; it proposes that our unique possession of reason and reason's interplay with other essential facts of human nature, account for our capacity to be moral. A challenge to this central natural law position can be found in Hume's sceptical claim that *reason* is not the source of nor does it explain, our morality and in his belief that facts, essential or otherwise, cannot remedy reason's deficiency in these respects. Hume's scepticism appears powerfully in his discussion of 'oughtness', particularly in the connected claims (a) that there is a dichotomy between 'is' and 'ought', such that the latter cannot without explanation be derived from the former; and (b) that reason, which by its nature is unreceptive to morality, cannot explain how the derivation validly is to occur. We cannot, according to Hume, *deduce* simply from the fact/from the 'is' of life that life 'ought' to be preserved or from the fact/from the 'is' of an act of killing that the killing ought not be done; to reason from 'is' to 'ought' in this way is to commit the 'naturalistic fallacy'. In contrast to Hume, traditional natural law presents a factual, empirical, natural world *full* of moral information, the relevance of which is to be discoverable by reason. So, Hume's claim that without explanation an 'ought' cannot be derived from an 'is', may be viewed as a fundamental challenge to traditional natural law.

Facts about who we are/what we do and facts about the world we occupy indeed do not obviously appear to disclose the information we require about how we ought to be and what we ought to do. But for Hume the 'is/ought' dichotomy was not to be viewed as an insurmountable problem; rather, human *sentiment* was thought to provide a bridge between 'is' and 'ought', accounting for our attribution of 'goodness' and 'badness' to certain facts.[1] The discussion that follows is not concerned to doubt the centrality of the 'is/ought' problem to normative philosophy but to challenge Hume's characterisation of the dichotomy as deriving from the limitations of human reason and consequently bridgeable only via sentiment. Hume's sentiment-based solution to the dichotomy, it will be argued,

[1] 'Bridge notions' were first introduced by MacIntyre in his re–interpretation of is/ought. MacIntyre, Alasdair, 'Hume on 'Is' and 'Ought,'' in (Tweyman. ed.), *David Hume; Critical Assessments* (London: Routledge, 1995), p.494.

should not be taken to follow logically from or reflexively to define, the nature of the problem he correctly identifies.

The Is/OughtProblem

> In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes some observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention wou'd subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv'd by reason.[2]

There have been many and varying interpretations of this passage in which Hume outlines his position on 'is/ought'. Three issues are focused on below which bear upon the relationship between the 'is/ought' dichotomy and natural law theory.

1. It is examined whether Hume suggests here that reason cannot provide the 'ought' of moral *motivation* or makes the additional claim that reason cannot provide *knowledge* of morality. The latter position is the stronger objection to natural law theory wherein reason is taken to be the primary aid to attaining moral knowledge.

2. It is considered whether Hume has sufficiently demonstrated his belief that an 'ought' can *never* be derived from an 'is' by reason. If reason is not shown to be incapable of deriving an 'ought' from an 'is' then traditional natural law theory, which does attempt that derivation, may be valid, if it can be shown to be valid in its own terms.

3. It is asked whether Hume's sentiment-based bridge between 'is' and 'ought' can provide a good solution to the dichotomy, a solution that might stand alongside other approaches to normativity.

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[2] Hume, David, *A Treatise of Human Nature* (Selby-Bigge, ed.) (Oxford: Clarendon, 2nd edition), p. 469.

Motivation/Moral Knowledge

The claim that reason has an inactive nature, incapable of providing moral *motivation* is emphasised throughout *The Treatise*:[3]

> Morals excite passions, and produce or prevent actions. Reason of itself is utterly impotent in this particular.[4]

Despite the many references to reason's inability to provide moral motivation, it is clear that Hume is concerned also to examine reason's role, if any, in the attainment of moral *knowledge*. Indeed reason's inertness in respect of motivation was significant not so much in itself but because it tended to indicate reason's limitations more generally. Crucially, it appears to follow for Hume that *because* of its a-motivational nature reason is not, of itself, receptive to moral knowledge:

> The rules of morality … are not conclusions of our reason... As long as it is allow'd, that reason has no influence on our passions and actions, 'tis in vain to pretend, that morality is discovered only by a deduction of reason.[5]

Inevitably, we lack the *will* to act morally in the absence of motive-giving feelings (without the excitement of passions) to accompany our appreciation of what it means to be moral. But Hume's claim is not only that reason alone cannot motivate us to act morally (and that sentiment can); it is additionally that morality just is not knowable to reason and rather is obtained only through sentiment's experience of it. In this way our knowledge of what it means to be moral and our motive for being moral *coexist* in sentiment.

This approach to moral knowledge can be discerned in Hume's discussion of the 'is/ought' problem. When Hume claims that an 'ought' cannot be derived from an 'is' he is not claiming merely that when we understand the moral significance of the facts (the 'is') we still require an accompanying act of will (a motivational 'ought') in respect of those facts that reason cannot produce and sentiment can. He is proposing that we just cannot know the moral significance of the facts by operation of reason at all; that reason is, by *its* nature, incapable of translating 'is' onto 'ought'. Hume does not, in this way, fail to distinguish, or suggest that there is no analytical distinction to be drawn between moral motivation and the identification of moral principles. His claim rather is that it follows from reason's inability to motivate in respect of morality that it is also unable to identify morality. Sentiment is to perform *both* these roles that reason cannot.

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[3] It is worth noting that, Hume 'does not really *prove* … that reason cannot motivate.' See Korsgaard, Christine, 'The Normative Question' in *The Sources of Normativity* (O'Neill, ed.) (Cambridge: Cambridge University Press, 1996), p.12. Hume's critique is nevertheless well directed at those who did not think to show that reason *can* motivate.

[4] *op cit.*, n.2, p. 457.

[5] *ibid.*, p. 457.

According to Hudson this interpretation of Hume's position is inaccurate. His alternative suggestion is that Hume wants us to view sentiment as capable of providing moral motivation and even of creating moral 'notions';[6] he is not making the claim, however, that moral *meaning* resides in or is identifiable by sentiment. By analogy, Hudson suggests that although a footballer may be motivated by money to score goals for his team his motivation has no logical connection to the *meaning* of scoring a goal:

> If you score, you may win a bonus at football, and your motive in trying so hard may be desire, or need, for the extra money; but what scoring means in this game is logically distinct from the motives which induce men to try to do it or the profits they reap by doing it.[7]

However Hudson's analogy is not a good one because Hume's very point is that moral meaning is entirely *unlike* other types of *rationally* discoverable meanings such as the meaning of scoring a goal in football. According to Hume, motivation in respect of the 'rules' of morality and knowledge of those rules are *both* provided by sentiment. It is not just that men without sentiment will not play the game of morality; it is also that men without sentiment will not grasp the moral rules at all; indeed they will not know that the game is being played. They will lack such knowledge for the man without sentiment has no means to *receive* the moral knowledge that inheres *in* sentiment, reason being unreceptive to it.

The idea that Hume thought reason to be doubly unsuited to 'oughtness' (the oughtness of motivation *and* the oughtness of moral knowledge) can be discerned from Hume's suggestion that anyone seeking to show that a sense of morality *can* be acquired by reason must satisfy two conditions: (1) prove that reason can *move the will* to virtue *and* (2) prove that virtue can be *known* to reason.[8] Hume is clear that neither condition can be satisfied.

The question needs to be considered more carefully then, *why* the insistence that it follows from the fact that sentiment, not reason, provides moral motivation that morality cannot be *known* to reason? An idea of Hume's position in this respect can be gleaned from the analogy drawn between an act of parricide and the act of a sapling being killed by a parent tree. According to Hume reason perceives the two acts in the same way:

> 'Tis a will or choice, that determines a man to kill his parent; and they are laws of matter and motion, that determine a sapling to destroy the oak, from which it sprung. Here then the same relations have different causes; but still the relations are the same: And as their

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6 W.D. Hudson, 'Hume on Is and Ought', in *op cit*., n.1, p. 514.

7 *ibid*., p. 514. For Hudson it follows that Hume did not intend to bridge the gap between 'is' and 'ought' by the device of sentiment; to claim that passions produce moral motivation, is to show that the passions are the situation in which moral judgment occurs and this does not amount to an attempt to derive an 'ought' from an 'is' because the 'oughtness' of moral *meaning* is just not reached at all.

8 See *op cit*., n.2, p. 465.

> discovery is not in both cases attended with a notion of immorality, it follows, that the notion does not arise from such a discovery.[9]

In respect of each act of killing, reason produces a *belief* in the relationship of causation between the original act and the death. However, reason cannot produce an *understanding* of the additional movement of *will* that led to the act of parricide for the simple reason that (to Hume) motivation is just not susceptible *to* understanding. The act of will is *felt* and known by our experience of it. Objectively, a viewer's moral interpretation of the act is likewise *felt* in an emotional response; it is only via that response that the attribution of morality/immorality arises. We cannot reason from 'is' to 'ought', therefore, we can only feel from 'is' to 'ought'; there is no other context in which moral rules originate. Externalities, of themselves, give no indication of vice:

> The vice entirely escapes you as long as you consider the object. You can never find it, till you turn your reflection into your own breast, and find a sentiment of disapprobation which arises in you, towards this action.[10]

MacIntyre indicates that sentiment can be said to operate as a bridge between 'is' and 'ought' and that the bridge may be built by notions of wanting, needing, desiring, pleasure, happiness, and health. But in illustrating how these notions operate MacIntyre perhaps does not reach the fullness of 'ought' as Hume understood it:

> If anyone says that we cannot make valid inferences from an 'is' to an 'ought,' I should be disposed to offer him the following counter–example: 'If I stick a knife in Smith, they will send me to jail; but I do not want to go to jail; so I ought not to (had better not) stick a knife in him.'[11]

MacIntyre's 'ought' is the 'ought' of motivation only; moral knowledge or awareness is not attained. Indeed the actor here is not motivated to act morally, (he is motivated to act to avoid imprisonment); rather, his motivation happens to lead him not to act immorally. The undoubted production of a motivational 'ought' from a fact (an 'is') is significant but there is evidence to suggest that Hume intended the bridge of sentiment to do more than this; he intended it to produce moral knowledge. To illustrate the ambitious manner in which Hume intended sentiment to bridge the knowledge-gap between fact and moral value requires something surprisingly simple, like the following: 'If I stick a knife in Smith, I will feel a sentiment of disapprobation about the act'. For Hume there would be no need to reason 'therefore I ought not to stick the knife in Smith'

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9 *ibid.*, p.467.
10 *ibid.*, p. 468.
11 *op cit.*, n.1, p.494.

because here the actor has already *felt* that 'oughtness' which is only susceptible *to* feeling, not to reason:

> To have the sense of virtue is nothing but to feel a satisfaction of a particular kind from the contemplation of a character. The very feeling constitutes our praise or admiration. We go no farther; nor do we enquire into the cause of the satisfaction. We do not infer a character to be virtuous, because it pleases: But in feeling that it pleases after such a particular manner, we in effect feel that it is virtuous.[12]

Our feelings of approbation or disapprobation in response to facts constitute 'oughtness'; the bridge from 'is' to 'ought' may be built more quickly that MacIntyre indicates.

Those who ask whether the is/ought dichotomy refers to (1) reason's supposed inability to motivate from 'is' to 'ought' or to (2) reason's apparent inability to deduce moral knowledge ('oughts') from 'is's' perhaps fail to consider that Hume may have thought the two were connected in the manner indicated above. Finnis, for example, treats these interpretations as different ways of understanding Hume's claim, rather than positions that follow naturally from each other:

> The first and standard interpretation treats Hume as announcing the logical truth, widely emphasised since the later part of the nineteenth century, that no set of non–moral (or, more generally, non–evaluative) premises can entail a moral (or evaluative) conclusion. The second interpretation places the passage in its historical and literary context, and sees it as the tailpiece to Hume's attack on eighteenth–century rationalists (notably Samuel Clarke), an attack whose centre–piece is the contention that rational perception of the moral qualities of actions could not of itself provide a motivating guide to action.[13]

Finnis does not consider the possibility that Hume may have viewed the standard interpretation and the second interpretation as compatible. Indeed, the standard interpretation is not accurately reflected by Finnis's 'logical truth' that non-moral premises cannot entail moral conclusions; it is better seen as a *claim* that is-propositions do not entail ought-propositions so that the latter cannot be derived from the former by deductive reasoning. The claim is itself contentious, presupposing it to be logically true that is-propositions necessarily are *non-moral* and do not, therefore, entail ought-propositions.

Hume may not have viewed his claim as a contentious one, however, precisely because he believed that moral knowledge came from an internal sense (the same sense that produced motivation in the actor) and since that sense is not to be discerned in any fact or relation between facts but is experienced in human

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12 *op cit*., n.2, p. 471.

13 Finnis, John, *Natural Law and Natural Rights* (Oxford: Clarendon, 7th ed), p. 37.

sentiment, it could not be attributable to any process of reasoning from 'is' to 'ought'. It is not the inertness of the facts (the 'is') that leads Hume to his position that one cannot deduce an 'ought' from an 'is', therefore; more likely it is, reflexively, the view that moral knowledge *is* a product of sentiment and (subjectively often a product of the sentiment felt in motivation) that leads Hume to view facts as morally inert (as non-moral premises). The standard interpretation in this view follows from the second interpretation.

Traditional natural law can be seen to mount a fundamental challenge to the notion that is-propositions *necessarily* are non-moral. It is important to examine whether Hume offers any significant argument in support of this fundamental claim.

Hume's Demonstration of the Idea that Is-propositions do not Entail Ought-Propositions

Man, his institutions, his environment, his thoughts, his feelings, his laws, his actions can be represented, at base, by is-propositions. These is-propositions are just different in their nature to ought-propositions so that the latter, Hume claimed, cannot be deduced from the former. This is the real problem that the highly reductionist language of 'is' and 'ought' is intended to represent. By pointing out the apparent dichotomy between 'is' and 'ought', Hume was questioning, as part of his general sceptical enterprise, how we arrive at the idea of 'ought', when there is no obvious source for it in the world of fact. In the famous is/ought paragraph he criticises others for not doing the same and for too readily connecting the 'ought' to the 'is' without explanation.

Whilst making the strong claim that one cannot, without explanation, move from 'is' to 'ought' Hume was at the same time clear, MacIntyre suggests, that an explanation for the movement may be provided:

> He is first urging us to take note of the key point where we do pass from 'is' to 'ought' and arguing that this is a difficult transition. In the next part of the *Treatise* he shows us how it can be made; clearly in the passage itself he is concerned to warn us against those who make this transition in an illegitimate way.[14]

For Hume, is-propositions told us nothing about ought-propositions without some process of 'transition' to account for the connection between the two. (Hume accounts for the connection by sentiment.) To attempt to make the transition is to seek an explanation for our moral beliefs. We might believe firmly that it is wrong to steal from the poor but our belief needs something to be said in support of it. Support is required because the act of stealing from the poor is just itself, an is-proposition, and the belief that one ought not to steal from the poor, in its 'oughtness', is an entirely distinct proposition, that does not exist, it is claimed,

[14] *op cit.*, n.1., p. 495.

within the 'is'. This reflects the standard interpretation of the 'is/ought' dichotomy, the claim that is-propositions do not entail ought-propositions.[15] This apparently uncontroversial view accounts for the switch in conceptual emphasis from (a) the idea that an 'ought' cannot *without explanation* be derived from an 'is' to (b) the idea that an 'ought' can *never* by reason be deduced from an 'is'. If morality is not contained within the premise, the 'is', then, by no process of *deductive* reasoning, the idea goes, can it appear in the conclusion, the 'ought'. Since inductive reasoning is, to Hume, invalid, the transition from 'is' to 'ought' is not made by reason at all, therefore.[16]

Foot's illustration seems to reveal the strength in Hume's claim that since facts are just not norms and do not entail norms there is no obvious *reason* to take a particular type of fact to be morally relevant (or irrelevant) in a way that others are not:

> One man may say that a thing is good because of some fact about it, and another may refuse to take that fact as any evidence at all, for nothing is laid down in the meaning of 'good' which connects it with one piece of 'evidence' rather than another. It follows that a moral eccentric could argue to moral conclusions from quite idiosyncratic premises; he could say, for instance, that a man was a good man because he clasped and unclasped his hands, and never turned N.N.E. after turning S.S.W. He could also reject someone else's evaluation simply by denying that the evidence was evidence at all.[17]

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[15] It should be noted that Finnis, for example, whilst accepting the merits of the entailment thesis, does not tend to think that Hume was making a point about entailment in 'is/ought' (see *op cit.*, n.13, p. 37). In a similar vein MacIntyre explains, '… if the current interpretation of Hume's views on 'is' and 'ought' is correct, then the first breach of Hume's law was committed by Hume; that is, the development of Hume's own moral theory does not square with what he is taken to assert about 'is' and 'ought'', *op cit*., n.1, p. 486. It is suggested here that Hume, although he does not mention entailment directly, reaches his position on is/ought from a very clear acceptance of the entailment thesis. It may follow that the first breach of the thesis is made by Hume (and that may indicate flaws in the thesis) but this is nonetheless *his* thesis.

[16] Hume's position is that: '… nothing can appear in the conclusion of a valid deductive inference which is not, from their very meaning, implicit in the conjunction of the premises.' See Hare, R.M., *The Language of Morals* (Oxford: Clarendon, 1952), p. 32.

[17] Foot, P.R., 'Moral Beliefs' in *Theories of Ethics* (Oxford: Oxford University Press, 1990), p. 84. Foot suggests that internal moral beliefs may have a relation to external facts; it may be in our *interest* to *care* about justice, for example; the 'ought' of justice is related thence to the 'is' of our interests. (pp. 83-100). But it may still be asked 'in what does justice consist; what is good in justice and bad about injustice that marks the difference between the two; to which ends ought justice be directed?' Perhaps these questions are best addressed by looking *behind* notions like justice, at Foot's contention that 'the need a man has for justice in dealings with other men depends on the fact that they are men and not inanimate objects or animals,' i.e. at basic facts about man's nature and existence as *man*. Chapters 4 and 5 of this book suggest that it is this possibility that natural law takes to further analytical reaches.

There would, for Hume, be no failure of *reason* in the claims of the moral eccentric since the connection between 'is' and 'ought', whatever it may be, is not a connection *of* reason. If the claim, 'hand-clasping makes a person good' is a false one, something other than reason must account for the falseness therefore.

Hume would acknowledge of course that we do *know* there is *no* connection between clasping one's hands and a person being good and we do *believe* that there *is* a connection between helping an injured person and being good; we connect ought-propositions to is-propositions all the time. In fact, ought-propositions appear to be meaningless *unless* they refer to some existing or possible state of affairs, to some 'is'. When we claim that one ought to do X or ought not to do Y we are making a claim *about* X and Y ('is's'), without which the 'ought' has no sense. Hume recognised that 'oughtness' just does not exist except as a response to 'isness' and that human beings in fact lead their lives in response to their faith in that connection. Something must, in Hume's view, account for that connection when reason he believed could not. Hume sought to identify and to analyse the 'something' (sentiment) by which the connection could properly be made. His claim was not that an 'ought' can never be derived from an 'is', but that an 'ought' cannot be derived from an 'is' by reason. Hume can sensibly reject the claims of the moral eccentric therefore because facts *are* to Hume morally significant. Their significance is recognised by sentiment however not by reason.

It is important to avoid the temptation (natural to human beings *as* reasoners) to characterise the sentiment-based solution as a *type* of reasoning. Hudson appears tempted in this way by suggesting that if Hume really does attempt to solve 'is/ought', the solution must be one of inductive *reasoning*:

> But would it not be even more remarkable if, as MacIntyre seems to think, *Hume himself* had (a) suspected induction because he thought that arguments must be deductive or defective, and (b) at the same time been content to make the move from *is* to *ought*, even though that move is clearly *not* deductive?[18]

This would be remarkable if the move from 'is' to 'ought' is intended to be made by reason. However, it is possible to accept the view that Hume did attempt to bridge the gap between 'is' and 'ought' without claiming that the move is made inductively. Hume makes the transition by sentiment, neither deductively nor inductively therefore because sentiment admits of no such categories. The transition is one of natural response and would not fail, in Hume's scheme, as inductive reasoning, for the very point that the transition is not one of reason at all.

To accept that Hume did attempt to move from 'is' to 'ought' by sentiment is not, of course, to accept that such a move *can* be made. Nor does it follow from sentiment's supposed ability in this respect that reason does not have the ability to make the same move, deductively. It needs to be considered, independently, therefore, whether Hume establishes that reason cannot derive an 'ought' from an 'is' and that sentiment can account for our moral response to facts.

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[18] *op cit.*, n.6, p. 514.

The apparent impossibility of deriving 'ought' propositions from 'is' propositions by deductive reasoning is shown by Williams to flow naturally from the intangibility of human nature. Those who believe that ought-propositions *can* be derived from is-propositions do not suggest that one can come to moral conclusions from any premises, in the way that Foot's moral eccentric does. Rather their suggestion tends to be that *fundamental* facts about human *nature* are norm-giving; these truths, the argument goes, do have moral significance and reasoning deductively from 'is' to 'ought' may somehow be possible. An important task in these circumstances, therefore, is the identification of what human nature actually is. If discernable at all, human nature, according to Williams, is to be found in the history of human behaviour. We need to be able to identify from that history those aspects of our behaviour that really do represent our nature and are the normatively relevant aspects, therefore. The problem emerges that the history of human behaviour is of course the history of all that we do, not merely our fundamental nature. The historical record, therefore, offers, to reason, no means to identify what '*represents'* our nature and counts as relevant for the purposes of understanding the 'ought.'

Williams shows, in fact, that if the historical record did straightforwardly represent all relevant truths about human nature, the idea of normativity would collapse:

> It is only if we can read that [historical] record that we can discover some very important biological characteristics of human beings, since … it is through convention, convention which has a history, that human nature is expressed. It is not merely that without a hold on the representation problem we cannot discover the relevant content in the historical record; without understanding that problem, we cannot adequately control the idea that there is any relevant content at all. If a biologically grounded disposition showed up simply in the form of what human beings could not or would not do, then there would be no real problems of alternative behaviours. The alternatives will simply be absent from the record, and it is unlikely that anyone…would want to undertake them.[19]

If *all* that we do is relevant to the determination of what we ought to do then we just *are* always doing and being what we ought to do/be. 'Oughtness' loses its meaning if it is unavoidable. Williams's suggestion (even if some is-propositions *are* morally significant, reason is unable to determine which is-propositions those are) seems to give additional support to the claim that ought-propositions cannot be derived from is-propositions.

The possibility that Hume's claim (that *reason* is incapable of deriving ought-propositions from is-propositions) may not be a simple logical truth, however, and the impetus for exploring that possibility may be found in the deep underlying scepticism that the claim betrays; if Hume is correct in his view that

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[19] Williams, Bernard, 'Evolution, ethics and the representation problem' in *Making Sense of Humanity and Other Philosophical Papers* (Cambridge University Press, 1995), p. 108.

reason is unreceptive to moral knowledge then the characteristic that we view as making us distinctly human, (reason) appears to be *incapable* of explaining our distinctly moral nature; it seems that man is not at all made moral by the quality that makes him man. This is a profoundly counter-intuitive conclusion that, however unlikely, does seem to follow from Hume's position.

A manner of resisting the conclusion can be discerned in the new natural law theory of Grisez, Finnis and Boyle, which offers one demonstration of how it need not follow from the claim that we cannot deductively derive 'ought' from 'is', that reason is necessarily unreceptive to morality. John Finnis, for example, acknowledges the truth and significance of the view that it is impossible to derive ought-propositions from is-propositions but does not endorse Hume's stronger claim that 'distinctions between 'vice and virtue' are not 'perceived by reason'.[20] The position that Finnis advocates is a strong potential challenge to Hume's stance; practical reason it is said, *can* isolate human goods/non-instrumental ends naturally and self-evidently, without any process of derivation from fact to value, therefore. In this way Finnis defends a primary epistemic role for reason without offending the logic of the standard interpretation of 'is/ought'.

So, even if the 'is/ought' argument is a logical truism it does not serve to make reason impotent, necessarily, in respect of moral identification.[21] George indicates the apparent strength in this challenge to Humean non-cognitivism:

> … People can have and be aware of non-instrumental reasons for action. What distinguishes rationally motivated actions is precisely that people perform them for non-instrumental reasons. Someone who acts for a non-instrumental reason acts ultimately not on the basis of a brute desire, as non-cognitivists believe people always and inevitably act, but, rather because of his intelligent grasp of the intelligible point of performing the action. Such a person does not merely want, or want to do, something; he wants it, or wants to do it, for a … reason ... In other words, his desire to pursue it may be, not a brute desire, but, rather, 'reason-dependent'.[22]

George emphasises that in the new natural law scheme it is practical reason alone, rather than sentiment or brute desires, that determines the 'moral targets'/the goods that are to be pursued.[23]

A further challenge to the view that reason does not have a leading role in the identification of moral principles can be found in traditional natural law theory. But here the challenge is directly to Hume's position on is/ought. In traditional natural law there can be discerned a clear and sincere, if not always successful, attempt to derive ought-propositions from is-propositions *by reason*.[24] The attempt

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20 *op cit*., n.13, p. 37.
21 See Chapter 6 for a fuller analysis of Finnis's position.
22 George, Robert, P., 'A Defence of the New Natural Law Theory', 41 *Am. J. Juris*. 47, pp. 47-61, p. 49.
23 See *ibid*., at p. 48.
24 See Chapter 5.

is embarked upon from a position that recognises the complexity of the problem and because of commitment to the belief that 'oughtness' *is* entailed in 'isness'. Whilst there is no doubt an *apparent* dichotomy between 'is' and 'ought' it need not follow that the dichotomy arises from the inability of 'is' propositions to entail 'ought' propositions, therefore, or indeed that such is the case.

From Hume's perspective reason cannot bridge the gap between 'is' and 'ought'; 'is' and 'ought' are taken to be entirely distinct in their respective natures and by *its* own nature, reason would only be equipped to provide a bridge if is-propositions could be shown to entail ought-propositions, allowing deduction to occur. But, it appears that Hume simply *presupposes* it to be the case that inherently facts do not entail values. This attitude can be discerned from the 'is/ought' passage itself. In that famous paragraph Hume does not just present the 'is/ought' problem; rather he presents the problem in a loaded way by infusing it from the outset with his non-cognitivism. A theorist with no prejudice as to whether or how the movement from 'is' to 'ought' can be made would, for example, omit the final sentence, which rejected reason as a possible aid to resolving the dichotomy: the '… distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv'd by reason.' It was entirely reasonable for Hume to posit this rejection of reason within the context of the problem given his belief that such a position did in fact define the nature of the problem. But seen in this way, the 'is/ought' dichotomy does not contribute to proving the non-cognitivist thesis rather non-cognitivism is presumed to define the nature of the problem in the first place.

Hume fails to assess whether the rejection of reason as a possible solution to the 'is/ought' dichotomy really followed from the nature of the problem. MacIntyre, who does indicate a need to think about the problem and its proposed solution separately, is perhaps too willing to accept Hume's solution – 'the passions' – as reflective of the essence of the is/ought dichotomy:

> … the question of how the factual basis of morality is related to morality is a crucial logical issue, reflection on which will enable one to realise how there are ways in which this transition can be made and ways in which it cannot. One has to go beyond the passage itself to see what these are; but if one does so it is plain that we can connect the facts of the situation with what we ought to do only by means of one of those concepts which Hume treats under the heading of the passions and which I have indicated by examples such as wanting, needing and the like.[25]

The claim that Hume does not neutrally present the nature of the 'is/ought' dichotomy becomes more sustainable in the context of traditional natural law theory which suggests that 'ought-ness' is entailed in 'is-ness' and that it may be possible to resolve the apparent dichotomy via a bridge of reason therefore.

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[25] o*p cit.*, n.1, p. 496.

Hume's Solution to 'Is/Ought': The Bridge of Sentiment

The problem of 'is/ought' is real; we believe that there are certain activities that we ought/ought not to do but our world, which consists of facts, does not appear to be capable of providing the information that informs those beliefs. Hume's point is not that logically no 'is' can ever produce an 'ought' but that our world does not appear to tell us how to be moral beings and that reason cannot make it do so. If we want to understand morality we need, therefore, to look at how we experience it, i.e. in sentiment, he claimed, not in reason.

It is possible, in a way, to represent the ought-propositions that arise from sentiment as is-propositions (my sentiment *is* a feeling, an '*is*' after all) and in that way to claim that the 'is' is never truly transcended but the implications of this possibility should not be overstated. Any translation from 'is' to 'ought', whether made by reason, sentiment, or divine assistance, can be recast as an 'is' in so far as it occurs through the substantive work of a translator. The argument might be made, for example, that where the original 'is' is an act of killing and the proposed translation to 'ought' is made by sentiment, the result: 'I feel a sense of disapprobation because of the act of killing' is still an 'is' from which the 'ought' of 'therefore people ought not to kill' cannot follow without reproducing the dichotomy; a further 'is' (a feeling) not an 'ought' is produced from the initial fact; any attempt to produce 'oughts' from the secondary 'is' will similarly produce 'is's', creating potentially an infinity of is-propositions. Similarly 'God commands, one ought not to kill' is an 'is' (a command) that does not in itself produce an 'ought', and a reasoned statement that produces the claim 'one ought not to kill', similarly exists as a statement and an act of reasoning (an 'is'). In its extreme form this argument suggests that an 'is' can never by any method of translation produce an 'ought', for 'is' is constantly reproduced by the act of translation itself.

It does not follow from the linguistic argument outlined above that the 'is/ought' dichotomy cannot be overcome. Any ought-proposition, however arrived at, has its own reality or sense which renders it capable of representation as an 'is', making 'oughtness', in a superficial sense, non-existent; even a decision of will; 'I ought to do X' is a *decision*/an 'is' from which it would not follow that really I ought to do anything. But there is, it seems, little meaningful in the linguistic re-representation of 'ought' by 'is'; normative claims may be shown to be false or impotent in many ways but normativity should not be taken to be diminished simply because linguistically it is possible to represent ought-propositions as is-propositions. It would follow from the linguistic approach to 'is/ought' that Hume himself must be said to breach the dichotomy by deriving morality from sentiment even though sentiment is itself a fact.[26] Hume attempted

[26] See Finnis, for example, *op cit*., n.13, p.37 (footnote 43): 'I should have to add that Hume himself conspicuously offends against the principle that 'ought' cannot be derived form 'is'. To the extent that his 'predominant' view … is that moral judgments are judgments about what characteristics and actions arouse approval or disapproval in men (so that as Hume puts it, systems of ethics should be founded on fact and observation). Hume

to solve the 'is/ought' dichotomy at the real level and although his solution may have failed it did not fail by recreating the problem linguistically.

'Is/ought' set out a real problem in a mechanistic manner; one cannot derive an 'ought' from an 'is.' Applied to the world of reality from whence it came the problem can be presented as the difficulty we experience in attempting to derive moral precepts from (apparently) morally neutral facts. One cannot dispute or overcome 'is/ought' in the mechanical sense by linguistic analysis but one can attempt to find a solution to the real problem by explaining how moral value might arise from facts despite the *apparent* inability of fact to inform. It is a weak argument to suggest that necessarily any solution to the dichotomy fails *by* reproducing the dichotomy; this amounts to the claim that 'ought' just does not have any meaning. It may be true however that Hume's solution in itself is incomplete, that sentiment cannot bridge fully the apparent gap between 'is' and 'ought'.

Reason, by its natural limitations, cannot, Hume claimed, direct us to knowledge of moral truth and perform the role that others tried so hard to give to it. But neither does reason need to perform this role. According to Hume each of us has a natural, internal sense of right and wrong. Sentiment (the label given to this 'internal sense or feeling'), not reason, makes us moral and enables us to know morality. We know wrong, ultimately, by feeling it rather than by understanding it:

> The final sentence, it is probable, which pronounces characters and actions amiable or odious, praiseworthy or blameable; that which stamps on them the mark of honour or infamy, approbation or censure; that which renders morality an active principle and constitutes virtue our happiness, and vice our misery: It is probable, I say, that this final sense depends on some internal sense or feeling, which nature has made universal in the whole species.[27]

To conceive of a human being with only powers of reason and no accompanying feelings in respect of reason's conclusions seems to be to conceive of a distinctly a-moral creature. I can conclude, by operation of reason alone, that if a given society permits killing, I may kill or be killed. Here there is an understanding of facts and consequences including an appreciation that should these facts pertain I may die. But there is nothing in the facts *alone* that allows me to understand, from my hypothesis, that it is bad/wrong that I may in these circumstances be killed, wrong for me/others to kill, and wrong to permit killing *per se*. Something else must enable me to discern the sense of wrong about killing/my death that makes the

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plainly attempts the logically illegitimate derivation.' It does not follow that Hume in this way breaches the dichotomy because for Hume 'oughtness' consists *in* the approval or disapproval; 'ought' has been reached at this stage and there is no further derivation of 'ought' from the 'is' of disapproval; reason/judgment merely represents what sentiment has already provided knowledge of.

[27] Hume, David, *Enquiries Concerning Human Understanding and Concerning the Principles of Morals* (Selby-Bigge, ed.) (Oxford: Clarendon, 3rd ed.), p. 173.

facts morally significant. Facts like these would never, in Hume's view, produce moral *understanding* because morality operated on the 'passions'; it just did not exert its power on reason. Indeed he suggests that if morality did not act on the passions we would be incapable of translating facts into norms, reason being impotent in this respect. In such circumstances rules would be futile:

> If morality had naturally no influence on human passions and actions 'twere in vain to take such pains to inculcate it, and nothing wou'd be more fruitless than the multitude of rules and precepts, with which all moralists abound.[28]

The deference to sentiment over reason seems at the outset to produce a highly subjective account of morality. People feel differently about the same stimuli, and if morality acts on feeling, there must be as many theories of the good as there are people but this is not how we respond to other experiences that we have. It is only experience according to Hume that leads us to believe that what has occurred in the past will occur again where circumstances are repeated; we expect rain to cause the ground to dampen today if it produced that effect yesterday and, famously, the sun to rise this morning when it has been doing so every morning in memory. We trust our (non-reason based) belief that the sun will rise tomorrow to be an accurate response to facts that we have experienced, not merely a subjective response. Whilst faith in the uniformity of cause and effect is well placed, it is a matter of *faith* and not, according to Hume, explainable by any process of reason:

> I have found that such an object has always been attended with such an effect, and I foresee that other objects which are, in appearance similar will be attended with similar effects. I shall allow that one proposition may justly be inferred from the other ... But if you insist that the inference is made by a chain of reasoning, I desire you to produce that reasoning.[29]

The false 'reasoning' favoured by some to explain cause and effect leads us to conclude, wrongly, that:

> … instances, of which we have had no experience, must resemble those, of which we have had experience, and that the course of nature continues always uniformly the same … [when in truth] … there can be no demonstrative arguments to prove, that those instances of which we have had no experience, resemble those, of which we have had experience. … it is impossible for us to satisfy ourselves by our reason, why we should extend that experience beyond those particular instances which have fallen under our observation.[30]

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28 *op cit.*, n.2, p. 457.
29 *op cit.*, n.277, p. 34.
30 *op cit.*, n.2, pp. 89/91.

Hume does not dismiss the validity of our experience of cause and effect. He is suggesting that the explanation of uniformity in cause and effect cannot be provided by reason but comes from our faith in it, a faith strongly reinforced by experience.

In the same way, sentiment, our experience of morality, was understood to be not just a subjective response but an accurate response to facts perceived/experienced. Hume does not show how it might be the case that universally we are accurate in this respect but does indicate that sentiment, however personal it feels, may have an antecedent cause, in the plan of a morally perfect divinity. For Hume the possibility of this external cause goes some way to explaining *why* our feelings may very often be a correct response to facts; the sentiment that leads us to approve or disapprove of a state of affairs is *felt* as *our* sentiment but ultimately is derived: 'From that supreme will, which bestowed on each being its peculiar nature, and arranged the several classes and orders of existence.'[31]

Hume rejected any argument attempting to *prove* the existence of a God and was critical of those who claimed that the revelations of a God might inspire our reason to grasp fundamental truths. [32] (He thought it more flattering to the supposed Deity to conclude that the creator had, from the beginning, understood the world on our behalf and that it remained for us only to experience and to learn from experience.) Despite Hume's scepticism about the existence of a divine creator, acknowledgement of the possibility that such a being exists appears to bolster his non-cognitivism; the meaning of the world, for all time, is interpreted to be fated at the point of Creation:

> It argues more wisdom to contrive at first the fabric of the world with such perfect foresight, that, of itself, and by its proper operation, it may serve all the purposes of providence, that if the great creator were obliged every moment to adjust its parts, and animate by his breath all the wheels of that stupendous machine.[33]

To think that God's 'machine' would adjust its reason every time facts demanded was to think of a God who had a lesser wisdom than Hume's did. Through our divinely ordained sentiment we are by *nature* able to identify good and bad, but we have neither the capacity nor the need to *understand* morality; this has been done for us; our reason only avows the knowledge of good and evil obtained by sentiment, it does not obtain this knowledge itself.

The challenge that this position presents to the natural law theories discussed later in this book is a fundamental one. Reason is to enable us to see the facts as really they are but fundamentally it is a servant to sentiment which does all the interpretive moral work. In natural law, where reason commands the appetitive

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31 o*p cit.*, n.277, p. 294.

32 'We have no idea of the Supreme Being but what we learn from reflection on our own faculties.' (*ibid*., p. 72).

33 *ibid.*, p. 71.

powers with a political rule, the order of priority between reason and sentiment is very much the reverse. But Hume's attempt to show that sentiment can comprehend morality is ultimately unconvincing:

> Reason is the discovery of truth or falsehood. Truth or falsehood consists in an agreement or disagreement either to the real relations of ideas or to real existence and matter of fact. Whatever, therefore, is not susceptible of this agreement or disagreement, is incapable of being true or false, and can never be an object of reason ...Now tis evident our passions, volitions and actions are not susceptible of any such agreement or disagreement; being original facts and realities, compleat in themselves, and implying no reference to other passions, volitions and actions. Tis impossible, therefore, they can be pronounced either true or false, and be either contrary or conformable to reason. This argument is of double advantage to our present purpose. For it proves *directly*, that actions do not derive their merit from a conformity to reason, nor their blame from a contrariety to it; and it proves the same truth more *indirectly*, by shewing us, that reason can never immediately prevent or produce any action by contradicting or approving of it …[34]

The argument above established (Hume suggests), that moral actions did not derive their merit from conformity to reason. However, the passage seems to *assume* an exclusive link between morality (merit/blame) and the passions. It does not contribute toward proving that same thesis; the 'ought' is simply *taken* to be evidenced in the passions which being neither true nor false, were not susceptible to reason. MacIntyre in *After Virtue* reaches a similar conclusion about Hume's standard of proof:

> What drives Hume to the conclusion that morality must be understood in terms of, explained and justified by reference to, the place of the passions and desires in human life is his initial assumption that *either* morality is the work of reason *or* it is the work of the passions and his own apparently conclusive arguments that it cannot be the work of reason. Hence he is compelled to the conclusion that morality is a work of the passions quite independently of and prior to his adducing of *any* positive arguments for that position.[35]

Hume's sentiment-based source is justified negatively by the presupposed absence of a role for reason rather than proved independently or positively. This creates as many difficulties for his position as the problem of induction creates for a position that relies on reason, to establish moral truths.

At best, the connection made between moral sentiment and moral principles, is unstable. If morality is simply an emotional response to facts then morality is tied to the individual and can become meaningless; we have no ground

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34 *op cit.*, n.2, p. 458.

35 MacIntyre, Alasdair, *After Virtue* (London: Duckworth, 1985), p. 49.

to challenge the morality of another since there is no criterion by which a sentiment can be held to be wrong or mistaken; sentiment is not capable of being evaluated by reason. For the individual as an individual this is not a problem. As a free agent he can live according to the 'oughts' that appear to him but this is merely another way of claiming that oughtness is meaningless; none of us is free in this way: we share the world with others. And sentiment may not be a natural response to a situation at all. Any actor may have little option but to feel as he does in fact feel; subjectively his feelings just are his feelings. But like the highly manufactured psyche of Plato's Republicans, our psyche may be to some extent a creature of society and environment. We may resist this conclusion but the very nature of the manufacture may prevent us from de–contextualising in order to investigate the possibility. Our sympathy that has 'force sufficient to give us the strongest sentiments of approbation'[36] may simply be misplaced.

George is strong in his condemnation of non-cognitivist enterprises like Hume's, suggesting that it provides no reason to invalidate the 'moral' judgments arising from an individual's sentiment:

> … People's judgment that, say, cruelty is wrong, like their judgment that certain forms of knowledge are valuable, is either rationally-based or is not. If there is no reason for such judgments, then it cannot be rationally legitimate for people to deny that 'cruelty is wrong only because I don't like it, or for them to affirm that 'cruelty is wrong irrespective of whether I, or anyone else, happens to like or dislike it.' These judgments can only be legitimate, from any standpoint, if people are correct in supposing that they have some reason not to like cruelty. And, of course if they do, then non-cognitivism is not only inadequate to explain our evaluative practices, it is false.[37]

Paradoxically, as George suggests, if Hume's theory does provide a *reason* to invalidate the subjective determinations of individual 'sentiment', it is by definition not fundamentally a sentiment-based theory at all.

Perhaps because of these difficulties and others, the theoretical prominence that Hume accords to sentiment is not matched by a practical dedication. Hume did not think that each could give vent to his own moral system. Nor was he a subjective emotivist like Ayer who believed that statements of value were only individual expressions of emotion, which can be neither true nor false.[38] But it was difficult for Hume to reconcile his apparent faith in objectivity with a sentiment–dependent morality. To show that sentiment might carry a status of moral rectitude seemed to require *evaluating* sentiment somehow and the process of evaluation, being a matter of reason, presented a significant problem for the coherence of Hume's position. It required him often to look to reason for his bridge between 'is' and 'ought' and thus to fail to practise the demands of his own solution to the dichotomy.

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36 *op cit.*, n.2, p. 618.
37 *op cit.*, n.22, p. 60.
38 See Ayer, A. J., *Language Truth and Logic*, (London, 1949).

Within the non-cognitivist thesis, Hume sought to show how our sentiments about morality also provided the only type of moral 'knowledge' attainable. He nonetheless wanted moral principles that could transcend individual sentiment and subjectivity. The possibility of such principles was facilitated by the concept of utility; the idea that we should act not in our own favour but in favour of that which was of general usefulness to mankind:

> We are naturally partial to ourselves, and to our friends but are capable of learning the advantage resulting from a more equitable conduct. Few enjoyments are given us from the open and liberal hand of nature; but by art, labour and industry we can extract them in great abundance. Hence the ideas of property become necessary in all civil society: Hence justice derives its usefulness to the public: And hence alone arises its merit and moral obligation.[39]

Justice has its foundation in the *advantage* of a more *equitable* conduct; it is to be *useful*. The point to note is that *justice* along with *advantage*, *equity* and *usefulness* must carry some moral force of its own in order to be *worthy* of preservation and to establish 'moral obligation'. It appears that it is reason that leads us to an appreciation (and Hume to the appreciation) of what that moral force entails. Hume goes so far as to connect justice to man's *end* in a near resurrection of the natural law positions that he rejects:

> If we examine the particular laws, by which justice is directed and properly determined we shall still be presented with the same conclusion. The good of mankind is the only object of these laws and regulations.[40]

The laws that properly direct justice may indeed be aimed at man's good and Hume's conclusion is compatible with the views of many before him. But we are unsure about what, for Hume, gave the good itself or justice alone or the laws of justice their moral character. It seems that it is the 'interest of society' that Hume had in mind but there is no suggestion that either justice or interest, morally significant terms, is to be discerned by sentiment. Our identification and evaluation of these qualities, we are led to conclude, is a function of reason.

Hume's view that reason could not provide moral knowledge seems to be contradicted often:

> We may conclude, therefore, that, in order to establish laws for the regulation of property, we must be acquainted with the nature and situation of man; must reject appearances, which may be false though specious; and must search for those rules, which are, on the whole, most *useful* and *beneficial*.[41]

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39 *op cit.*, n.277, p.188.
40 *ibid.*, p.192.
41 *ibid.*, p.194.

Hume did not propose that sentiment could reveal what 'useful' and 'beneficial' involve yet these are evaluative ('ought' laden) concepts that could not have been understood by reason (the above passage seems to suggest they should) if the requirements of Hume's own proposed solution to 'is/ought' are to be met. It seems that from an understanding of man's nature we are to obtain an *understanding* of what is to his *benefit*. In fact, the above passage would not be out of place in the work of Aristotle or Aquinas whose theories have been criticised for their apparent breach of Hume's 'is/ought' divide.

MacIntyre points out that Hume indeed does derive 'ought' from 'is' in this way:

> Hume clearly affirms that the justification of the rules of justice lies in the fact that their observance is to everyone's long–term interest; that we ought to obey the rules because there is no one who does not gain more than he loses by such obedience. But this is to derive an "ought" from an "is."[42]

Hume utilised reason frequently (with little reference to the passions) to determine first, from facts about our existence what our interests really were and to determine secondly, why the 'facts' of common interest were the basis of justice. It is difficult to see how MacIntyre can be untroubled by the latter derivation despite his assertion that moral notions are unintelligible apart from notions such as 'wanting, needing, desiring, pleasure, happiness, health'[43] and others. It may be argued that Hume's pronouncements on justice need to be treated differently to his analysis of an individual's moral beliefs. But the, admittedly, more universal reasoning here involves, no less, the derivation of 'oughts' from 'is's' and cannot be rendered compatible with the belief that moral principles were not discoverable by reason.

To have a coherent theory Hume must draw together somehow the strands of sentiment, moral principle and interest. He claims:

> The necessity of justice to the support of society is the sole foundation of that virtue; and since no moral excellence is more highly esteemed, we may conclude that this circumstance of usefulness has, in general, the strongest energy and most entire command over our sentiments.[44]

This confuses rather than assists in clarifying the boundaries between utility and sentiment. However conceptualised, it is difficult to see how Hume can avoid the charge that he uses reason here (and value-laden concepts: necessity, support and usefulness) to establish the value of justice, and, thus, offends his own solution to is/ought. We perceive something as useful (through acquaintance with the nature and the situation of man) and this perception engenders a sentiment of approbation. Consequently, if we feel a sentiment of approbation toward that, which is not useful or is in fact detrimental, our individual morality can be challenged and our

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42 *op cit.*, n.2, p. 489.
43 *op cit.*, n2, p. 494.
44 *op cit.*, n.7, p. 203/204.

laws are bad laws but, in fact, we cannot establish whether our sentiment matches the requirements of utility (as Hume seemed to demand we must) without first having a concept of utility. We can only accept the implication that the concept of utility is formed by reason if we reject the whole foundation of Hume's sentiment–based morality.

The concept of utility is riddled with reason–based evaluation. Hume breaches is/ought, not by attempting to derive an 'ought' from an 'is' without explanation (i.e. not by denying the *principle* of is/ought) but by suggesting an explanation other than the sentiment-based one that his theory recognises as the sole solution. He thus fails to meet the requirements of his own theory. This provides strong support for the suggestion that Hume's sentiment–based thesis is inadequate (alone) to resolve the 'is/ought' dichotomy. Hume does not manage to explain fully, through either sentiment or utility, or the interaction between the two, how the world can be morally didactic.

Conclusion

Hume believed that reason could not, from fact, unearth morality. One could not by reason move from 'is' to 'ought.' Instead, sentiment provided, at once, the bridge and the unarticulated 'ought'. But once examined the sentiment of 'ought' needed to be curtailed lest it became not morality but a mirror of every single 'moral' personality. The 'ought' was at last curtailed by utility, a reason-based concept that contained moral notions despite Hume's rejection of reason as a source of morality. Hume cannot show that either the bridge of reason or the bridge of sentiment is self–standing, and rather than bolster each other the interaction between the two serves to highlight the apparent inadequacies of both. This is not to reject the 'is/ought' thesis. Hume is right that it is not apparent how one can derive an 'ought' from an 'is' but there are as many problems with the bridge of sentiment as there are with reason in this regard. The problem lies not with the 'is/ought' thesis but with Hume's failure to resolve fully the practical problem it represented.

The 'is/ought' dichotomy has had and continues to have a profound influence on natural law theory. It informed early natural law which predicts the theoretical prominence accorded to 'is/ought' by implicitly making it the central question of concern. However, the traditional natural law approach to 'is/ought' could not be more different to Hume's. In that tradition is-propositions are thought to *contain* ought-propositions; in real terms what it means to be moral is centrally connected to what it means 'to be' and to what it means to be *human* in particular. The suggestion that follows, examined in Chapters 4 and 5, is that reason *can* derive ought-propositions from is-propositions.

The impact on new natural law theory has been equally significant. Here Hume's characterisation of the 'is/ought' problem as deriving from reason's limitations in the face of morally neutral facts is fully endorsed. Finnis's unwillingness to look within the 'is' of nature for any solution to 'is/ought' (and to rely, instead, on principles of reason alone) leads him to divorce reason from

nature in a way that the ancients did not, creating a tension between his work and the philosophical foundations of that work. New natural lawyers, generally, have abandoned the natural foundations previously accepted as epistemologically central to natural law theory. The 'is/ought' dichotomy is the impetus for this movement.

For Hume, nature provides us with a sense of morality and this sense is experienced in human sentiment; in new natural law reason itself tells us about moral principles and by that means we learn what really our nature is. (An obvious precursor to new natural law's epistemic reliance on principles of reason alone is the Kantian categorical imperative examined in Chapter 3.) Traditional natural law falls somewhere between the two extremes. Its departure from Hume lies in the claim that moral knowledge is attained primarily by operation of reason; its departure from new natural law is found in the implicit suggestion that moral rules are not discerned exclusively by a forward thinking enterprise of practical reason but are understood by reason *only* after reason has grasped fully the significance of human nature.

Chapter 3

Kant and Natural Facts

Introduction

Kant's moral position has been described as an *appeal to autonomy*.[1] The fundamental principle of morality (the moral law) is to arise from the condition of an autonomous, uncorrupted will constituted by pure but practical reason. In determining what the moral law is, reason does not derive any information from the *external*, natural world, therefore, nor is it guided by sentiment; instead it is to be entirely self-guiding.

The 'appeal to autonomy' has been juxtaposed usefully with competing normative positions. Korsgaard, for example, refers to *voluntarism*, according to which 'obligation derives from the command of someone who has legitimate authority over the moral agent', and *realism* which holds that 'moral claims are normative if they are true, and true if there are intrinsically normative entities or facts which they correctly describe' and the *reflective endorsement* view wherein morality is taken to be 'grounded in human nature.'[2] The purpose of this chapter is to assess how fatal or otherwise Kantian autonomy might be to the position adopted in *traditional* natural law theory. To this end, the focus will be on how Kant's fundamental principle of morality, the categorical imperative, is established. The concern is to compare Kant's analysis, not with competing moral positions generally, therefore, but, narrowly, with the traditional natural law suggestion that fundamental natural facts do inform reason morally and are epistemically significant in that regard.

Two themes are important to this task. First, the idea is explored that natural facts play an intrinsic, if unacknowledged, role in the production of the categorical imperative. The likelihood that the stated boundaries of *a priori* reasoning are thereby transgressed would indicate a greater affinity between Kant and traditional natural lawyers than is sometimes acknowledged. Second, the possibility is considered that a connection to traditional natural law may be found in Kant's application of the categorical imperative. The imperative can best direct human action it is suggested with the assistance of further moral principles, which relate to the natural world.

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1 Korsgaard, Christine M., 'The Normative Question' in (O'Neill, ed.) *The Sources of Normativity* (Cambridge: Cambridge University Press,1996), p. 19.

2 *ibid*., p. 19.

The Categorical Imperative: An Illicit Move from Moral Viewpoint to Moral Content

Morality Not a Product of Inclination

Neither Hume nor Kant accepts the early natural law view that fundamental facts can assist human reason to attain moral knowledge. For Hume morality is *felt* in sentiment. For Kant the attainment of primary moral knowledge is a function of reason alone.

Kant's search for moral knowledge begins with the idea of a good will: 'It is impossible to think of anything at all in the world, or indeed even beyond it, that could be considered good without limitation except a *good will*'.[3] When human will is influenced by factors external to it, by the contingencies of the factual world, by inclination, by Humean sentiment, or by other wills it acts, not morally, *by necessity*, but, at least in part, to satisfy the determinations and requirements of those externalities. Inclination, for example, may lead us to perform good acts but equally it may cause us to act *immorally*. It is not, therefore, good without limitation. Likewise virtues like 'courage, resolution, and perseverance in one's plans' can be 'extremely evil and harmful'[4] if the accompanying will is not a good one; these qualities may assist the thief to rob a bank very successfully, for example. Happiness too, according to Kant, may produce boldness and arrogance in the actor 'unless a good will is present'.[5]

An action done when the will is moved by these factors 'external' to reason, may be good but is not good by necessity. It follows, therefore, that moral knowledge is not to be derived from those many influences that *can* move or do in fact somehow determine the subjective will. Rather it is to be sought in the condition of will itself, a *pure* will, untainted by interests, or inclinations:

> The principles of a pure will that Kant wants us to examine are the principles of practical reason, that, in his view, can effectively determine our will apart from inclinations and natural desires, and direct it to its a priori object, the highest good.[6]

The will that is pure consists of nothing but practical reason:

> Everything in nature works in accordance with laws. Only a rational being has the power to act *in accordance with the representation* of laws, that is, in accordance with principles, or has a *will*. Since

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[3] Kant, Immanuel, *Groundwork of the Metaphysic of Morals*, in, *The Cambridge Edition of the Works of Immanuel Kant* (Mary J. Gregor ed.) (Cambridge: Cambridge University Press, 1996) p. 49.

[4] *ibid*.

[5] *ibid*.

[6] Rawls, John, *Lectures on the History of Moral Philosophy*, (Harvard: Harvard University Press, 2000), p. 150.

> *reason* is required for the derivation of actions from laws, the will is nothing other than practical reason.[7]

When the will is determined *only* by principles of practical reason its *autonomy*[8] is secured for such a will, by nature, is *self*-governing.

Relationship to the Is/Ought Dichotomy

The autonomy of will approach seems to suggest *some* common ground with new natural law theory. Finnis, for example, claims that human goods are known to practical reason, self-evidently.[9] (Although the basic goods are taken to correspond with natural inclinations, they are not in any way derived from or determined by inclination or nature more generally.) These approaches to morality share the view that there are no *facts* with which reason need conform in producing moral directives. Both divorce morality, epistemologically, from what Hare describes as 'factuality':

> Kant's programme was to find a way of so coordinating our prescriptions – our maxims and imperatives – that they did not contradict one another. He was not concerned with stopping them contradicting the moral facts; the idea of correspondence with moral reality is very far from Kant's thought. What he was trying to do was to find a kind of moral objectivity different from factuality – a kind which demands only that all who think rationally will agree in their prescriptions.[10]

In the Kantian scheme moral understanding is to be attained, *a priori*, from reason's own principles of rationality, not from the contingencies of man's nature, or actions, or the worlds into which he is born and produces.

> …The ground of obligation here must not be sought in the nature of the human being or in the circumstances of the world in which he is placed, but a priori simply in the concepts of pure reason; and that any other precept, which is based on principles of mere experience – even if it is universal in a certain respect – insofar as it rests in its least part on empirical grounds, perhaps only in terms of a motive, can indeed be called a practical rule but never a moral law.[11]

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7 o*p cit.*, n.3, p. 66.

8 'Autonomy of the will is the property of the will by which it is a law to itself …' (*ibid*., p. 89).

9 See for example, Finnis, John, *Natural Law and Natural Rights* (Oxford: Clarendon, 7th ed.), Chapters 3/4.

10 Hare, R.M., 'Objective Prescriptions,' in *Naturalism and Normativity*, (Enrique Villanueva ed. Philosophical Issues, 4, 1993).

11 *op cit*., n.3, p. 45.

Since the 'is'/nature is to have no role at all in the identification of the primary principle of morality there is no requirement directly to address/overcome the 'is/ought' dichotomy; indeed there just is no relevant dichotomy between 'is' and 'ought' where the 'is' does not provide moral information/the ought.

If some commonality with new natural law may be gleaned from Kant's appeal to autonomy, the approach seems to contrast starkly with classical natural law theory. The role of reason in the identification of the primary principles of morality was paramount in that tradition. However, the view was taken that reason was to know its own principles (to know itself) not *from* itself, or self evidently, but by looking to the place it occupied in the natural world and by deriving moral information *from* that world.[12] Very basically, pure reason is to interpret nature to determine what *right* reason requires. In this way consciousness of *sense* and consciousness of *reason* combine to produce a *single* determining ground of the will represented by the idea of *right reason in accordance with nature*. (The two levels of consciousness are not taken to be in different orders of determination in the way Kant suggests.) [13] In early natural law theory, moral information *is* sought in basic facts pertaining to the role of human beings in their world and the derivation of 'ought' from 'is' via reason is thereby attempted. It is worth exploring whether Kant's position is as different to traditional natural law as ostensibly it appears to be in this respect.

The Role of Natural Facts in the Production of the Categorical Imperative

The principle that constitutes and determines the autonomous will is the categorical imperative:

> Since I have deprived the will of every impulse that could arise for it from obeying some law, nothing is left but the conformity of actions as such with, universal law, which alone is to serve the will as its principle, that is, *I ought never to act except in such a way that I could also will that my maxim should become a universal law*. Here mere conformity to law as such, without having as its basis some law determined for certain actions, is what serves the will as its principle, and must so serve it, if duty is not to be everywhere an empty delusion and a chimerical concept.[14]

Kant's imperative seems to state a key, necessary relationship between morality and duty, that subjectively one is moral only when one acts out of a duty for/because of, objective morality itself. In fact it does much more than this; it is designed to determine, at the most fundamental level what, *substantively*, moral duty requires.

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12 See Chapter 5.
13 See *op cit*., n3, p. 103.
14 *op cit.*, n.3, pp. 56/57.

The concept of objectivity is useful in demonstrating why a substantive element might be said to exist within the imperative. A distinction may be drawn between two types of objectivity in principles. It is possible:

(a) That a principle will be objective, in a *simple* sense, if it can *apply* universally. The categorical imperative since it consists in and determines a will 'free from all non–rational influences'[15] will hold universally; it will possess simple objective validity, for this reason and others.

But the content element of the imperative, evidenced in the requirement not to act unless I can *will* my maxim as a *universal* law, represents a richer type of objectivity. To reflect this type of objectivity it might be said:

(b) That a principle will be objective in the *rich* sense when it requires the actor to be cognisant of other wills, when willing what she does.

It needs to be considered whether the richer type of objectivity is analytically distinguishable from simple objectivity and if so whether this type-(b) objectivity belongs naturally in an *a priori* imperative at all.

Kant's analysis of the nature of the will establishes the necessity for type-(a) objectivity in moral reasoning; this type of objectivity is essentially about viewpoint; a perspective of freedom from self and from other selves must be occupied before we can be sure that moral reasoning, by necessity, is enabled. But once the viewpoint of objectivity is established an important move is made from moral *viewpoint* to moral *content*; we are to act only on maxims that can be *willed universally*. The move occurs because it seems that for Kant, type-(a) objectivity is taken to entail type-(b) objectivity.

To inquire whether abstraction from self really does produce the content requirement, it is useful to investigate the method by which the categorical imperative is arrived at. In particular the apparent paradox in the very idea of a *free* will having a governing imperative needs to be examined. How can something that is free be determined at all? Essentially, free will is constituted by only practical reason and reason just does operate via principles rather than arbitrarily. So somehow the idea of a free will and a determined will must be reconciled. Korsgaard explains this idea clearly:

> …Since the will is practical reason, it cannot be conceived as acting and choosing for no reason. Since reasons are derived from principles, the free will must have a principle. But because the will is free, no law or principle can be imposed on it from outside. Kant concludes that the will must be autonomous, that is it must have its own law or principle. And here again we arrive at the problem. For where is this law to come from? If it is imposed on the will from outside then the will is not free. So the will must make the law for itself. But until the will has a law or principle, there is nothing from

[15] Goldman, Alan H., *Moral Knowledge* (Routledge, 1990), p. 95.

> which it can derive a reason. So how can it have any reason for making one law rather than another?[16]

All we have to work with at this point is will itself, pure practical reason, so the answer to Korsgaard's question about which law is made cannot come from outside will itself. Rather, the only law that can be selected is the law of acting on maxims that can be *willed to be laws*. To put it another way, it is of the *nature* of practical reason that it operates under laws/principles; that is the form that practical reason takes and we are constrained in our attempt to find a law by the purity of that form itself. The only law that reason can supply, *a priori*, therefore, is one provided by itself, the law of acting in accordance with laws. In that way the autonomy of the will is secured.

Once it is accepted that we are to act only on maxims that can be willed to be laws and that laws belong to the nature of pure practical reason we arrive naturally at simple objectivity; the pure will is by definition not attached to self (or to *anything*); it is free, and autonomous. But whilst Kant takes us successfully to objectivity he does not take us to the fullness of objectivity evidenced in the categorical imperative. The objectivity that we do attain is the objectivity of a non–attached perspective whereas the categorical imperative represents the richer type of objectivity, which consists not just in a non–attached perspective but in recognition that other wills are *relevant to* my willing. In this way it appears that the autonomy of reason may actually be subverted; reason loses its purity and becomes attached to a *particular* perspective, that of potentially each and every human being.

Pure practical reason is simply not self; in that sense it is simply objective. But just as reason is *of itself* unconnected to the idea of me as me so it is equally unconnected to the idea of others as others, it is just itself, the idea of being law directed. The movement that Kant makes successfully is from will via freedom and autonomy to the requirement to act in accordance with laws. The movement that Kant hoped to make, and did not, was the more ambitious one, from will via freedom and autonomy to the requirement to act in accordance with maxims that can be *willed* universally. Thomas Nagel perhaps makes a similar illicit movement. He says:

> … Once we observe ourselves from outside, and achieve the distance of which Korsgaard speaks, our choice becomes not just what to believe or do, but what *this person* should believe or do And that has to be a decision about what any person so situated should believe or do, since the external view does not give any consideration to the fact that the person is me …[17]

Nagel is right; the external view, that simple objectivity represents, does not give any consideration to the fact that the person is me but the point that seems to

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[16] See Korsgaard, C. 'The Authority of Reflection' in *op cit*., n. 1, at p. 67.

[17] Nagel, Thomas, 'Universality and the Reflective Self', in *op cit*., n. 1 at p. 203.

follow equally is that *neither* does it give any consideration *necessarily* to the fact that there are other people who are not me.

The external perspective is just perspective. With only the information of perspective we cannot draw any conclusions at all about how to view or about the significance of what ought to be viewed *from* that perspective. Rather, it is by understanding the nature of that which is *viewable* from the external perspective that we get to the moral law. No doubt the idea of universalizability is central to the moral law, central to the unity of human beings unified through reason but it may be that these conclusions do not follow from an *a priori* account of pure practical reason.

To examine the possibility that they do not so follow it may be asked whether *after* we adopt the correct *perspective* and with *only* the information of perspective we might come to the conclusion that self–interest and happiness are the origins of morality. Whilst we know intuitively that these are not its origins; the question is how we obtain the same appreciation intellectually. We must escape self in order to know and to be, by necessity, moral. But upon that escape (and without *attributing* moral relevance to the existence of other people, in the way that traditional natural law does, for example), we are at liberty to attribute moral significance to *whatever* it is that we discern to be relevant from the objective viewpoint, including selfishness. (By concluding that one should act always on the basis of selfishness, the (simple) objective will has not itself become subjective; it has merely become operational.) So *mere* simple objectivity does not, of *itself*, disqualify an imperative from selfishness.

Of course it does not follow from the fact that the primary principle of morality must be objective in the simple sense that self-interest does in fact form the substance of morality. But equally it does not seem to follow that universalizability is its substance either. In fact, we would never conclude that selfishness is the basis of morality, not because of the nature of the simple objective perspective alone but because of the nature of the *communal* world to which the perspective allows us access. And it may be that we come to know that universal willing *is* central to morality by a similar process of natural *observation*.

The key points to emerge are:

(a) The content element of the imperative, does not appear within the perspective of pure reason alone; rather it can emerge after the perspective is activated/from observation of the natural world.

(b) If the content element is removed from the categorical imperative, mere simple objectivity remains and there is no means to conclude from *only* this perspective that selfishness is not the fundamental substantive basis of the universal law.

Traditional natural law theory would tend to suggest that that it cannot be viewed as the moral law to act in accordance with maxims that can be willed universally (rather than merely selfishly), if the existence of other people is not in the first place somehow *relevant to* moral willing. In other words I may come to know

that I ought not to act merely on the basis of my inclinations *because* I know that the existence of other people provides a reason for me to act with regard for those others. We can come to know that universalizability *is* central to the primary principle of morality from acquaintance with the world in which we live. Kant's moral world consists of only pure reason; other people do not, in that world, obtain moral relevance any more than *I* do *as myself*. Their relevance needs to be established by observation and Kant will not allow this to occur; it seems, therefore, that the inclusion of the universalizability requirement in the categorical imperative is not wholly explained.

Kant's apparently seamless movement from objectivity to the categorical imperative may, in fact, be facilitated by a trespass on the empirical world. This is despite the contrary claim that practical laws:

> … absolutely must have objective and not merely subjective necessity and … must be cognized a priori by reason, not by experience (however empirically universal this may be).[18]

The claim is an uncomfortable one. The understanding that laws *must* have objective necessity (objective in the rich sense) cannot be reached through *a priori* cognition, which is blind to the requirement of rich objectivity. Only following a process of *reasoning*, specifically: (a) by identifying certain essentials that are empirically universal like: the existence of others, their shared possession of reason, their communicative and coordinated living and (b) by justifying these universals as morally relevant, do we get to the categorical imperative. Indeed, Kant does not ignore the fact that others exist when he formulates practical laws because *we* are the material with which reason works, to which it is undeniably attached. The examples he provides of acts which correspond with, or breach, the categorical imperative, illustrate the fact that Kant's moral actor is unable to escape fully the natural world:

> … he sees that others (whom he could very well help) have to contend with great hardships, thinks: what is it to me? Let each be as happy as heaven wills or as he can make himself; I shall take nothing from him nor even envy him; only I do not care to contribute anything to his welfare or to his assistance in need! Now, if such a way of thinking were to become a universal law the human race could admittedly very well subsist, no doubt better than when everyone prates about sympathy and benevolence and even exerts himself to practice them occasionally, but on the other hand also cheats where he can, sells the right of human beings or otherwise infringes upon it. But although it is possible that a universal law of nature could very well subsist in accordance with such a maxim, it is still impossible to *will* that such a principle hold everywhere as a law of nature. For, a will that decided this would be in conflict with itself, since many cases could occur in which one would need the love and sympathy of others, and in which, by such a law of nature

[18] Kant, Immanuel, *Critique of Practical Reason*, in *op cit*., n.3 at p. 160.

> arisen from his own will, he would rob himself of all hope of the help he wants for himself.[19]

It appears above that the moral content of the categorical imperative is informed *by* facts observed from the objective viewpoint and is not conceptually antecedent to those facts, which it then acts upon. From the objective position I may be able to discern that: I share the world with others; I sometimes require love; I cannot act reasonably with only myself in mind and without love for others, because, if others assumed that same stance, *my* requirement for love would never be satisfied. But here it is not the objective position itself but conclusions inferred from acquaintance with the natural status of man (he exists, he exists with others, he is an emotional being) – from activating the viewing potential of the objective position – that enabled the actor to conclude that selfishness is bad and that it is rational to will universalizable maxims in *this* way. It is not just that selfishness conflicts with the categorical imperative. It is rather here that, in the first place, the subjective actor learns the benefits of universalizability from *nature*. The actor's interpretation of circumstance produces and is not derived from the categorical imperative.

In contrast knowledge of the requirement to act in accordance with the determinations of pure reason alone (simple objectivity) can produce, of itself, no knowledge beyond itself. It is not sufficient to claim that an actor who wills selfishness has a will that is in 'conflict with itself' for such conflict arises only when the will has observed and determined the moral relevance of others' existence. The act of observing and of obtaining information from nature needs to be examined independently of the stance required in order to engage in that viewing. The richer type of objectivity is not inherent in our *a priori* conception of reason though it may emerge from an analysis by pure practical reason of the world to which it has access.

Kant believed he did not need to derive moral information from the world that was being surveyed, that his autonomous principles of the will could be applied to that world. But it seems that *something* other than principles of a pure will must inform the conclusion that the good of others is to be borne in mind in subjective willing. This is evident in Gewirth's formulation of Kantian rationality for example:

> … as a rational agent, I must demand as a right those conditions (freedom and material prerequisites) that are necessary for successful action of any sort. But if I must demand these as rights simply because they are the necessary conditions for successful agency, then I must, if rational, recognise the same demands as made by other rational agents. Therefore I must grant them the same rights that I must demand myself, and I must recognise that, simply as a rational agent, I ought not to interfere with the freedom of others, as reasonably exercised.[20]

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19 *op cit.*, n.3, p.74.

20 Gewirth, Alan, in *op cit.*, n.15, at p. 105.

The condition of pure reason does not of itself produce the determining ground of the will in Gewirth's formulation. Fundamental facts about nature (the need for successful agency, the existence of man in a world of other men, the active nature of man, the rational nature of man, the political nature of man, the subjectively imperfect nature of man) are determining the requirement for, and the requirements of pure reason which is then determining the will in accordance with these basic facts. Pure reason can only be said to require respect for the rationality of others if the existence of other rationalities is relevant to the determination of what pure reason substantively consists in. Kant does rely, epistemically, on natural foundations before positing his imperative. The bases may at first be elementary – man exists, man does not exist alone, man has reason, man has inclinations, these facts are important to morality, morality is important to man – but without them Kant could not arrive at the content of his imperative. This begs the question why not proceed by observing further the natural condition of man?

Such a detailed process of natural observation is central to traditional natural law theory where the attempt is made to find the basis of normativity in natural facts. It may even be claimed that the attempt is in part motivated by awareness of the limitations of pure practical reason alone. This is evidenced in the importance that traditional natural law places on the idea that reason is inseparable from the creature in which it exists. In traditional natural law to recognise reason's authority was to recognise in the first place that there is an entity, the human being, to which reason belongs, whose *specific* nature was formed *by* reason. Reason was not imposed upon the human world as a dictate rather other essential elements of the nature of the being in which reason existed; defined how reason *could* be applied to it and in effect what *reason meant substantively* in that world.[21] For Aquinas in particular *will* is linked inextricably to *nature*:

> The contrast between nature and will is one between different types of efficient causality; some effects emanate from the blind action of a cause, others issue from voluntary action. The will is master of its actions, and its proper mode of causing is over and above that which goes with nature, in which there is a determinism to one effect. All the same, because it is grounded on nature, it needs must share in the

[21] There is a further reason why an examination of the human nature, though it must be undertaken *by reason*, might be prior to an examination of reason itself. Just as, in the Kantian scheme, it is impossible to represent the absence of space and time so it is impossible to represent the absence of self. Kant is concerned with a pure, non-self, practical reason; his account of reason demands the absence of self. However, it remains true that I cannot attempt to represent a world in which 'I' am absent without first an, 'I,' that is doing the representing. Importantly, I cannot think of *pure* practical reason without a self and non-reason attributes of self to which, if attached, reason would be impure. My reason is contingent on me. This does not mean that, against Kant's wishes, we must adopt an external, non-reason-based, self-attached, perspective if we are to offer a critique of reason but it may mean that there is something to learn from an examination of reason as something that belongs to another entity as much as that which 'is' in its own right.

> natural working of its subject, and to this extent, that an element which belongs to an early causal stage of development remains in a later stage. Basically we are what we are by our nature and accordingly act as we do, and that comes before our voluntary acting.[22]

Aquinas notes here that human beings have the power to rise above nature and to *direct* their own activity, by free will. But he qualifies the importance of that conclusion by pointing out that however pure my reason, however free my will, it is nonetheless *my* reason; it is attached to me and 'I' am something. This is important because although I am free to will levitation for example, the law that deprives this of sense, or reason, is one that can be arrived at only through recognition of my nature; levitation is just not involved in what it means to be me. What reason means materially is, in the view of classical natural law, inseparable from the nature of the entity in which reason occurs. This is why natural lawyers understood that to act in accordance with reason just was to act in accordance with nature. There are ends that constrain my reason logically, by virtue of its attachment to me, and these ends in natural law formed the substance of the laws, which govern us naturally.

Natural lawyers were prepared to consider as logically constraining of reason empirical necessities or ends other than universalizability. In the Thomistic model the first was just reason itself. Human beings, whether they reject it or not, have reason; it is that quality that marks them as human, so if, through their actions, they are to be truly human they should act according to reason. But the human being also just simply is; he exists. Life itself is something that constrains reason. I cannot sensibly will becoming an oak tree as this is not involved in what 'I' am but neither can I *sensibly* will non–existence because that too is not involved in what 'I' am.

If there is a unifying principle of will in natural law, that brings the ends of human activity together, it is the idea that 'I ought to be what essentially I am'. The awareness of 'oughtness' arises from man's capacity as a thinker, the awareness of 'what I am' arises from his sense of nature and of his natural limitations. From that principle it follows that just as existence is part of what I am, so too is the existence of other people; if others did not exist, 'I' would mean something very different. This is how natural law gets to its equivalent to universalizabilty. My reasons for action are determined in part by the existence of other people who provide a reason for me to act in a particular (non–selfish) way. To so act constitutes an important part of morality.[23]

But just like Kant, traditional natural lawyers were (at least some of the time) worried about contingencies and were concerned to avoid drawing conclusions about what man ought to be and to do from facts about what he had *become*. A tension arose, therefore, between the necessity to look at what man really is to learn what he ought to be and the fact that what man really is may be

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22 Aquinas, *Summa Theologiae*, 1a2ae 10,1.

23 See Chapters 4 and 5 for a detailed discussion of these ideas.

hidden in a whole range of facts that may be said to be 'against' man's true nature. For this reason natural law accords normative import primarily only to those facts that exist regardless of what man has become. The primary goods of reason, existence and community correspond to the natural law precisely because they do not depend on being chosen; I must select other actions but these primary ends cannot change for they make me what I am whether I want them to or not.

Kant in fact provides a very good explanation of the task of a natural law theorist when explaining his own mission, suggesting that that the gulf between his position and traditional natural law might not be as great as he imagines:

> …Just because moral laws are to hold for every rational being as such [we ought]… to derive them from the universal concept of a rational being as such.[24]

For Kant the concept of man as a rational being, and in turn that rationality is the basis of morality. The ancients were similarly concerned to examine the importance of rationality for morality. However, they were influenced not just with characteristics of man, like his rationality, but also with other essential, natural features of his being and they sought to determine whether this information, in addition to man's rationality, held any significance for morality or even for reason itself.

There is much underlying Kant's theory that can be understood fully only by reference to nature. Kant trespasses on the methodological boundaries he sets for himself. The trespass is significant. With a pure will we will inevitably conclude that we can only act morally by rejecting self–interest but the conclusion is inevitable not just because of the nature of our will alone but also because of what the will perceives i.e. facts about our nature and the nature of the world we inhabit. A *moral* imperative must admit a minimum amount of information about nature.

The Limits of a Formulaic Principle

Kant's imperative was to apply to real beings that do not naturally possess the benefits of objectivity. Their wills do not exist in a pure form but are tied to human nature and to all that it means to be a human being:

> … The relation of objective laws to a will that is not thoroughly good is represented as the determination of the will of a rational being through grounds of reason, indeed, but grounds to which this will is not by its nature necessarily obedient.[25]

The other aspects of our nature (outside of reason), and their appeal, provide subjective motives to act against the moral law in spite of ourselves:

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[24] *op cit.*, n.3, p. 65.
[25] *ibid.*, p. 66.

> The human being feels within himself a powerful counterweight to all the commands of duty, which reason represents to him as so deserving of the highest respect – the counterweight of his needs and inclinations, the entire satisfaction of which he sums up under the name happiness.[26]

However, as Kant notes, it is not just the case that we may *choose* to act against the moral law even though our knowledge of morality is clear; rather our knowledge of what the moral law is/requires can *itself* become contaminated by the complexity of our nature as human beings. The appeal of inclination and selfishness may lead us to make self-accommodating adjustments to truth, for example, obscuring the essence of morality. From this possibility the very need for practical philosophy arises:

> ... there arises a natural dialectic, that is, a disposition to quibble with the strict laws of duty, to throw doubt on their validity or at least on their purity and strictness, and to make them, where possible, more adapted to our wishes and inclinations; that is, to pervert their very foundations and destroy their whole dignity, a result which in the end even ordinary human reason is unable to prove. In this way the common reason of mankind is impelled, not by any need for speculation.... but on practical grounds themselves, to leave its own sphere and take a step into the field of practical philosophy.[27]

This conclusion, perhaps better than any other, shows the strength in Kant's rejection of empiricism. But an understandable and necessary rejection of empiricism is taken to entail a wholesale rejection of nature as an aid to normativity. Kant does not propose that we attempt to overcome our mistakes and distortions and make a conceptual return to innocence whereby the truth of nature may be discerned. He believes innocence cannot be resurrected and instead opts for the primacy of *a priori* reasoning. The role accorded to reason is immense; it is to rely on its own principles of separation from self – purity, freedom and autonomy – to provide the moral law, the categorical imperative.

The task that the subjective individual must perform is similarly immense. She can be a moral individual only by aligning her will with the categorical imperative. By so doing her acts are done from duty, i.e. purely from the incentive of the moral law itself:

> An action done from duty has its moral worth not in the purpose to be attained by it, but in the maxim according to which it is decided upon; it depends therefore not on the realisation of the object of the action, but solely on the principle of volition in accordance with

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[26] *ibid.*, p. 59.
[27] *ibid.*, p. 70.

> which, irrespective of all objects of the faculty of desire, the action has been performed.[28]

It needs to be considered, however, *how* practically it is possible for this state of pure reason to arise in an individual, *how* her will can be determined solely by duty, i.e. by the categorical imperative; knowledge that it ought to be so determined of itself discloses very little to the actor about how this is to occur. In attempting to understand how the moral law is subjectively to be experienced, it is necessary to overcome those distortions of 'reason' that Kant speaks of and seek a reason pure in itself. But equally a fruitful moral law needs to be more than an analytic of pure practical reason. The categorical imperative *is* more than this because it has, perhaps illicitly, incorporated the universalizability requirement. For this reason the agent has minimal guidance about how to act. Even so it may be the case that the imperative is so formulaic that subjectively we cannot know if we have acted in accordance with it or not, without the aid of further practical principles.

Kant provides a metaphysic of duty and this is limiting; we are urged to act from the incentive of rightness but substantively we know only that rightness entails universalizability (and it may be that we know this via a trespass on empiricism). Rather than resulting from the very general categorical imperative MacIntyre suggests that Kant's own substantive moral conviction in fact came from within:

> Central to Kant's moral philosophy are two deceptively simple theses: if the rules of morality are rational, they must be the same for all rational beings, in just the way that the rules of arithmetic are; and if the rules of morality are binding on all rational beings, then the contingent ability of such beings to carry them out must be unimportant – what is important is their will to carry them out. The project of discovering a rational justification of morality therefore simply is the project of discovering a rational test which will discriminate those maxims which are a genuine expression of the moral law when they determine the will from those maxims which are not such an expression. Kant is not of course himself in any doubt as to which maxims are in fact the expression of the moral law; virtuous plain men and women did not have to wait for philosophy to tell them in what a good will consisted and Kant never doubted for a moment that the maxims which he had learnt from his own virtuous parents were those which had to be vindicated by a rational test.[29]

It is not just Kant's unquestioning confidence in the validity of his own tradition of maxims that raises doubts about the utility of his imperative. The empirical problems that Kant sought to overcome by his *a priori* reasoning reappear, in fact, when we attempt practically to close the distance between the objective and subjective will. Without discarding, and thus first identifying, our moral facades,

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28 *ibid.*, p. 65.

29 MacIntyre, Alasdair, *After Virtue* (London: Duckworth, 1985), p. 44.

(the facades that Kant is wary of), there is no means to identify those maxims that really comply with the categorical imperative. The legitimacy of my belief that I *can* will a particular maxim universally will be affected by the circumstances in which I am willing and by the moral mis-information that those circumstances may present. The objective will does not itself overcome the problems of moral misinformation. It merely represents a recognition that such misinformation may exist, that it may pollute our appreciation of good and that we must thus absent it from formulation of our moral principle. We can state the primacy of objectively pure reason and even of the categorical imperative yet admit that further principles are required to determine how the imperative successfully can be met.

Thus it may be possible to accept the validity of the categorical imperative, to believe that our maxims correspond with its requirement, and yet fail to meet that requirement for the reason that our faith in the rectitude of our actions is misconceived. The conviction that we act for mankind might flow from a variety of factors that we wrongly believe to be related to universal good. We might be absolutely sure that our will is free, that we act from duty toward all, yet as long as the contingencies of our world taint our reason we might fail to meet the categorical imperative every time.

Rawls provides an interesting explanation of the normative force of Kant's imperative but indicates at the same time how the problem of contingency may hamper its effectiveness:

> We are permitted to act from our rational and sincere maxim … only if two conditions are satisfied:
>
> First we must be able to intend, as sincere, reasonable, and rational agents, to act from that maxim when we regard ourselves as a member of the adjusted social world associated with it, and thus as acting within that world and subject to its conditions; and
>
> Second, we must be able to will this adjusted social world itself and affirm it should we belong to it.[30]

The problem with Rawls's two conditions is that we cannot meet them without knowing, fully, our *existing* social world, and how this determines our existing '*self*' and *its* view of which hypothetical social worlds are in *fact* desirable. Without this knowledge it may *appear* to me rational to will something universally only because my context has already informed (or misinformed) my rational understanding of what really is in the interests of mankind. Of course Kant's very point is that therefore we need to escape the contingencies but this is only likely if we possess additional principles to make the same possible. We live in the contingent world and when we are asked to make our maxims comply with the categorical imperative we cannot, without further assistance, divorce ourselves from what our *world* and our *self* tells us that universalizability should *substantively* demand. Thus I may be prepared to will certain maxims universally only because my 'free will' operates not freely, as I may believe, but under the restraint of contingencies that may be rationally inescapable. The categorical

[30] *op cit.*, n.6, p. 169.

imperative does not of itself enable our freedom from the contingent world; it tells us only that this is the position we need to occupy.

The suggestion that the problem of distortion is real is supported by the fact that the categorical imperative seems clearly to admit a number of possible and contradictory maxims. As Goldman indicates both Nozick and Rawls, for example claim that their contradictory understandings of distributive justice derive from Kantian concepts.[31] This leads Goldman to claim that the categorical imperative:

> … does not in itself distinguish between these diametrically opposed positions on this morally and politically crucial issue. If at most one of these positions can be right, then the Kantian framework appears unable to specify coherently a single property of rightness or set of moral constraints the same for all. Even if we grant … that rational agents must be motivated to honor in others the same rights that they claim for themselves, this does not suffice to indicate universally correct solutions to moral conflicts. There will remain different and incompatible ways to limit the autonomy of some in order to protect the autonomy of others. Which necessary conditions for free choice and action are viewed as more important will depend on the evaluators as well as on those whose actions or practices are being evaluated.[32]

Kant implicitly recognises the role of nature in his theory. Even the very recognition of the distance between objectivity and subjectivity is one such indicator; Kant *observed* that man has perfective capacities, possesses a rational desire to fulfil those capacities and is at the same time, by nature, imperfect. These are morally significant observations. He does not just analyse the condition of reason but considers the implication of the fact that reason belongs to a being with other (often imperfect) characteristics. These natural truths were not rendered inadmissible in the theoretical framework simply for being natural yet Kant stops at elementary natural truths and does not proceed further. The failure to reject nature completely, as Kant purports to, is no less significant because the nature that he does admit is elementary. It is traditional natural law that explores the possibility that much more can be said about the nature of the man that is morally significant than that he exists as a reasoning being.

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[31] 'From a variation on the universalization test, in which contractors unanimously choose rules of distributive justice from behind a veil of ignorance that bars knowledge of morally irrelevant differences, Rawls concludes that a rule would be chosen that maximises goods to the worst off. From a fundamental right to autonomy, to lead one's own life and not be used as a means to the welfare of others, Nozick concludes that no one has a right to the fruits of another's free economic agreements and activities …' *op cit* n. 15, at p. 124

[32] *op cit.*, n.15, at p. 125.

Conclusion

If Hume's moral theory was 'is' heavy Kant's was 'ought' heavy. The precision of his analysis leaves us with an unparalleled account of the metaphysics of duty. In this way the ghost of old Stoicism is ever present; it is not the individual's acts that are good/bad but his reason in respect of those acts or his 'aiming well' as the Stoics would say. But whilst we are left with a very complete sense of duty we are left with an incomplete sense of how Kant's imperative is arrived at and of what substantively it might require. In the natural law tradition there can be discerned an attempt to overcome the limiting but nonetheless necessary and central role of pure reason in moral theory; we are to act not only from pure reason but from an operational pure reason that defines itself by reference to what and to who it is that fundamentally we are as human beings. Chapters 4 and 5 examine the implications and feasibility of aligning nature and pure reason in this way.

Chapter 4

Early Natural Law: The Fusion of Fact and Value

Introduction

The previous Chapters have suggested that in the context of the 'is/ought' debate early natural law theory can be located somewhere between Hume and Kant. Alongside Hume, natural law takes facts to be normatively important but their importance lies in being wholly susceptible to moral interpretation by reason rather than by sentiment. Like Kant, early natural lawyers take reason to be the primary aid to the attainment of moral knowledge but, unlike Kant, they conclude that reason is not to work alone. Indeed reason is to be shown only really to know itself by looking externally to the entity in which it exists and at the world occupied by that entity. The role attributed to reason follows naturally from the fundamental belief that is–propositions entail ought–propositions, that the world of fact is also a world of norms which are derivable from it. This Chapter examines the theoretical origins of that belief and some of the contexts in which it operated.

It is important to say something about the role of nature in order to understand the way in which it constituted the facts from which norms were to be derived. 'Nature' has had several meanings in the natural law tradition, many far removed from understandings of it prevalent today and historically; ideas such as an Hobbesian human nature that highlight man's, often destructive *inclinations*, and the *higher* 'natural law' of religious doctrine do not at all capture the fullness of Aristotelian and Thomistic conceptions of nature. At its most basic, nature, in that tradition, was a simple term denoting mere existence and occurrence; it referred to man himself and to the world in which he lived as well as to his institutions, systems, actions and material possessions. It is nature as bare empirical fact that this Chapter examines.

The tangibles of 'nature' in the empirical sense were intended to guide man, and to inform the rules by which he and his societies would live. The art of exchange, for example, 'arises first from what is natural, from the circumstance that some have too little others too much'.[1] The natural end is having enough, hence usury and the retail trade when intended to expand wealth beyond the natural

[1] Aristotle, *The Politics and The Constitution of Athens* (Everson, ed.) (Cambridge, 1996), 1257a.

were derided by both Plato and Aristotle, 'for money was intended to be used in exchange but not to increase at interest'.[2]

The connection between nature and what 'is' at the moment of examination is fundamentally important to early natural law. What 'is' does not merely describe the world but is to inform what it 'ought' to be. There has been much criticism of early philosophy's tendency to validate, and to accommodate in theories of law, institutions such as slavery and the subjugation of women. At the root of the ability of theorists such as Aristotle to engage in such unfortunate justification is this connection between nature and what 'is.' For example, Aristotle justified slavery simply because a slave '*is*' a living possession:

> He who is by his nature not his but another man's is by nature a slave and he may be said to be another man's who being a slave is also a possession.[3]

Nature here is used in a descriptive rather than a normative way but ultimately the two are inseparable; what 'is' when properly understood describes and illuminates what ought to be. The conclusion that a slave ought to be a slave because his nature is that of belonging to someone else (or because he *is* a slave) is the result of the fusion. So long as slavery actually existed, theories having fusion as their base could accommodate that slavery with ease. The tendency to fuse facts and value in this way represents an implicit rejection of Hume's strict demarcation between 'is' and 'ought'. It will be suggested in this chapter that such fusion, though sometimes fruitful, could often be abused to validate norms simply in virtue of their perceived political desirability.

Indeed the potential for abuse is quite obviously strong. When 'ought' is located within 'is' without any qualifications on 'is', nature can be used/manipulated by human institutions (particularly legal) to justify the existence of any 'ought' that is claimed to have a 'natural' source. Furthermore, those same institutions can readily validate changes in norms/in law simply by creating a new 'is'. In this way an indefensible connection may emerge between morality and the status quo, or 'necessity' as Williams prefers,[4] and consequently between law and context. Through management of stability and change, nature (the 'is') can be used to justify whatever a commanding voice happens to require.

An examination of this first view of nature is important to an understanding of early legal theory in particular for the norms of nature were to become the norms of law too. It was nature that was to answer important questions about what man is and about what man ought to be in a world occupied by other men, where some govern and some are governed. Often it was found, however, that nature in the simple empirical sense could not provide all the answers needed and from this recognition a more sophisticated examination of nature emerged (discussed in Chapter 5).

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2 *ibid*., 1258b.
3 *ibid*., 1254a15.
4 See Williams, Bernard, *Shame and Necessity* (University of California Press, 1993).

The first section of this Chapter examines the significance of man's nature as a 'political animal'. The second section looks at the way in which more specific aspects of human nature were thought to inform how man ought to live.

Nature and the Political Animal

Introduction

If observation of the world is to provide answers to questions about how man should live then the most important focus of examination will be humanity itself; what is this man that is living? If it is possible to understand what man *is*, the idea goes, it might somehow also be possible to understand what he *ought* to be. Crucial to the understanding of man, in early theory, was the recognition that he existed alongside other individuals; he is a political animal. An important distinction is implicit in discussions of the political animal, between:

(a) man *as* an individual; and

(b) man *as* part of a political community.

The political animal was the *potential* in type–(a) man to be greater than a discrete unit and the fulfilling of that potential was the creation of type–(b) man. What 'is' described what 'ought to be' or the way in which (a) existed described how (a) could or ought to exist, i.e., as (b).

What is the utility of the analysis of man as a political animal? Finnis, writing on Aquinas, suggests that the concept was more limited than is popularly imagined:

> Contrary to what is often supposed Aquinas' many statements that we are 'naturally political animals' have nothing particularly to do with political community. So they cannot be pressed into service of implying that the state or its common good is the object of a natural inclination, or an intrinsic and basic good. Strikingly they do no more than assert our social not solitary nature.[5]

Finnis identifies the crux of the sense in which man is political, that his nature is *social* not solitary. This social nature has two basic elements. First, the individual possesses the capacity to communicate with others and is a naturally gregarious living creature; by nature he is emotionally *inclined* to sociability. Secondly, man, as an individual, lacks self-sufficiency. He lacks self-sufficiency simply because he in fact shares the world with other people who *can* provide for his needs. Self-sufficiency had another more important meaning however; it was thought that since man *has* the capacity to form unions he *ought* to act on that capacity (the 'is'

[5] Finnis, John, *Aquinas* (Oxford: Oxford University Press, 1998), p. 245.

informs the 'ought'); without doing so he is unfulfilled *as* man; he is not being fully what he *can* be. For this reason, as a discrete individual he can be said to be not at all a complete entity; in this respect he lacks self-sufficiency; the most important consequence of man's political nature is that it establishes the need for the community which is part of how man is formed as man. So if institutional community, as Finnis suggests, is not an intrinsic or basic good it may actually, in a sense, be more fundamental than this. 'Community' is fundamental in that it helps to *create* the full human being and it thereby informs the practical reason that is used to direct that being's action toward basic goods. This section identifies four ways in which political community was believed to be a function of nature and crucial to the existence of man as such.

(1) The Factual Community

Man shares the world with others who together form a de facto community of human beings. In the natural law account, man, as part of this community, is to strive to perfect the manner of his participation in it. The institutional 'state' denotes the 'end' to which such participation ought to be directed. The movement is from capacity to actuality (from type–(a) man above to type–(b) man). It was thought that an individual's good cannot be referable *solely* to her own existence just because the individual does not *in fact* inhabit the earth in isolation. Rather the individual (and her creations) are a *part* of the 'common good', which encompasses all. Aquinas makes this clear:

> As a human being is part of a household so a household is part of a state, which according to Aristotle is the complete community. And as one individual's good is not an ultimate end, since it is subordinate to the common good, so the good of a household is subordinate to the good of a political community.[6]

The good of the individual is 'subordinate' to the common good simply in the sense that the individual cannot be fulfilled *as* an individual without instantiating in her actions the common good to which she belongs. Additionally, her individual fulfilment may require community protection, usually in the form of law. (Though as noted in Chapter 7, where a community element is absent, there is no rationale for the state/the common to interfere with individual autonomy.)

(2) The Community as Formative of Man

It is natural to develop communities, to perfect our participation in the community of humankind that we in fact, by necessity, belong to. However, in the natural law account, from a conceptually different angle, the product of this development, (the community), is viewed as more than a mere product. Reflexively it is itself a natural creator. This can be seen to follow for without the formation of

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6 St Thomas Aquinas, *Summa Theologiae* (Gilby, ed.) (Blackfriars, 1966), 1a 2ae, 90;3.

communities man remains in the potentiality mode; the community enables the metamorphosis from type–(a) man to type–(b) man. In perfecting the manner in which he inhabits the world with others, man is engaging in *self*–creation, therefore. Without communities there is only a pre–man man.

The theorists this Chapter will discuss are greatly concerned with and have as a theoretical focal point the notion of 'good,' representing the end of the perfective capacities of realities. For the purposes of discussing the political animal the reality concerned is man. As an individual man lacks self–sufficiency and cannot properly be described as being in that state that is perfective of his being. Without such perfection part of the nature of man is missing, an intrinsic or basic good is lacking. That which provides sufficiency for man, i.e. the community, is not merely a factual end for man in the manner represented by (1) above; it is in fact formative of man *as* man.

The fact that political community is viewed as natural, together with the notion that individual good is subordinate to common good should not be seen to detract from the importance of the individual *as* an individual. The individual is not really fully herself without taking account of the common existence to which she belongs. But, equally, neither is common existence fully what *it ought* to be without instantiating and enabling the fulfilment of each individual's *own* reality. To properly respect the individual, a good community will in some contexts have *no role* in the life of the individual, for the same reason that it will sometimes have a very significant role.[7]

(3) The Community and the Instinct for Self–Preservation

Whilst initial natural inclinations and desires may be devoid of the notion of *institutional* community there may be said to be an indirect natural inclination to community that begins with the individual's instinct for self-preservation. The instinct is community-directed for whilst it begins with 'self', it evolves into an instinct to preserve, also, the family, the household, the city and the community at large.

(4) The Community and the Instinct for Friendship

In addition to the natural instinct for self-preservation there is a natural instinct to socialise with others and to form friendships. Facilitating this is the natural ability to communicate. The state represents the friendship of an entire community and the international politic, the friendship of states. Again, the grounding rule is fact: man *is* by nature friendly therefore he *ought* to be a friend to others.

These four senses in which it was considered natural for man to form communities are prevalent to varying degrees in natural law theories from Plato through to Aquinas, discussed below.

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[7] See Chapter 7 on the personal/political for an elaboration of his point.

Plato

Plato viewed man not as a discrete unit but as part of a complete reality. The divine authority commanding this reality demanded that man's role was to further the whole (the community) rather than the part (the individual):

> He who provides for the world has disposed all things with a view to the preservation and perfection of the whole.[8]

Indeed, for Plato, we are by nature *designed* to act on account of community; we are *made* to serve and to advance the whole:

> The purpose of all that happens is to win bliss for the life of the whole; it is not made for thee but thou for it.[9]

The way in which we are made to serve the community is explored in some depth in *The Republic*. Primarily, it is our lack of self-sufficiency as individuals (our natural inability to supply our own needs), that explains the need for political community: 'Society originates then, said I, so far as I can see, because the individual is not self-sufficient, but has many needs which he can't supply himself'.[10] Through community, ultimately the *polis*, our needs are satisfied.

> And when we have got hold of enough people to satisfy our many varied needs, we have assembled quite a large number of partners and helpers together to live in one place and we give the resultant settlement the name of polis or state. [11]

We become individually self-sufficient as part of a self-sufficient unit/the community. Institutionally, the state ought to aim to perfect the way in which people can provide for each other's needs.

However, the belief that as an individual man lacks self-sufficiency did not reflect merely the fact that individuals often need assistance to survive; more meaningfully, it reflected the idea that the human being is not fully a human being until his natural capacities are activated; in that sense without exercising the capacity to form communities the individual remains lacking in self-sufficiency; the *self* is not fully realised. So when Plato refers to our lack of self-sufficiency, it is not, in the main, the obvious and self-evident inability of an abandoned child to survive, for example, that he has in mind. Rather the chain of reasoning was (1) man can form communities therefore, (2) man ought to form communities therefore, (3) without such formation the pre-community man must have been in some way lacking self-sufficiency. It is irrelevant, therefore, if individuals exist who can and prefer to provide for their own needs; this does not invalidate the argument on self-sufficiency. Even these individuals cannot provide all the 'needs'

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8 Plato, *The Laws* (Taylor, ed.) (London), at 903.
9 *ibid.*, at 903.
10 Plato, *The Republic*, (Penguin), at 369b.
11 *ibid.*, at 369c.

that *can* factually be provided by others for them. The concept of 'need' develops because we evolve to provide a method of fulfilling needs. So, for example, housing is not a need until there is at least some conception of house and it becomes a requirement generally when as a community we can factually provide housing for others. The need to be housed becomes one of those needs that factually creates the condition of people living, working and communicating together in a community. The basic idea is that without engaging in those types of activities that make us the best community we can be, we are not being what each of us ought to be as individuals; we are neither fulfilled nor self-sufficient.

Aristotle

Like Plato, Aristotle believed that the state was a creation of nature and once again the notion of self-sufficiency is central. Our lack of self-sufficiency as individuals was the key to Aristotle's belief that the community was in fact conceptually *prior* to the individual; 'the individual when isolated is not self-sufficing and therefore is like a part in relation to the whole'.[12] Indeed man was not truly deserving of the status 'man' at all unless he existed as part of a community, just as 'a hand is not really a hand when separated from the rest of the body'.[13] Man's own reality as a human being is incomplete without establishing a connectedness to other human beings and Aristotle explained:

> But things are defined by their function and power and we ought not to say that they are the same when they no longer have the proper quality, but only that they are homonymous.[14]

Without the proper quality, i.e. community, man remains type-(a) man; by perfecting his participation in community he can become type-(b) man.

Aristotle accorded significance to another sense in which the state was a natural end for the political animal – that: 'a social instinct is implanted in all men by nature'.[15] In *Ethics* he argues:

> For no one would choose to live without friends even if he had all the other goods. For in fact rich people and holders of powerful positions, even more than other people seem to need friends.[16]

Primal instincts also have some role in forming man's institutions. This is most clearly revealed in Aristotle's *Politics*:

> In the first place there must be a union of those who cannot exist without each other; namely, of male and female, that the race may

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12 *op cit.*, n.1, at 1253a 25.
13 *ibid.*, at 1253a 20.
14 *ibid.*, at 1253a 20.
15 *ibid.*, at 1253a 30.
16 Aristotle, *Nicomachean Ethics* (Irwin, ed.) (Hackett, 1985), 1155a 5.

> continue (and this is a union which is formed, not of choice, but because, in common with other animals and with plants, mankind have a natural desire to leave behind them an image of themselves).[17]

Man's inclination to leave behind something of himself can be seen as a foundation for community for it requires a union between man and woman. Following from this, family unions are established, then villages and when the community becomes large enough to be self-sufficing the state emerges:

> When several villages are united in a single complete community, large enough to be nearly or quite self–sufficing, the state comes into existence, originating in the bare needs of life and continuing in existence for the sake of a good life. And therefore, if the earlier forms of society are natural, so is the state, for it is the end of them and the nature of a thing is its end.[18]

Plato and Aristotle may have described the state both as the product of a natural inclination and a good precisely because of the limitations of *real* human beings who possess the capacities of the 'political animal'. Political community is a natural end for social creatures, who, as individuals, *lack* self–sufficiency, who are unfulfilled as discrete units and desire kinship. The institutional community does not exist upon man's creation but it reflects the way in which man can best realise his communal nature; it is, in this respect, an end for the political animal.

If there is any normativity contained in the theories discussed thus far it is simply that 'we ought to be what we are'; this is evidenced in the distance between actuality and capacity, between type-(a) man and type-(b) man. Above all it is suggested that we ought to form political communities because we are *human* and being human *properly* is what fundamentally we are urged to be. We cannot be human properly the idea goes without acting in accordance with our natural social disposition. Without forming alliances with others the human being is not fully what, by nature, a *human* being really is; the idea goes that we are resisting ourselves if we resist community.

Stoicism

The Stoics significantly refined the sense in which political community can be understood as a natural end for man. Plato and Aristotle had described man's natural evolution to community in great detail, particularly in the opening sections of *The Republic* and *Politics*; alongside this there was emphasis on the natural *instinct* to community. The Stoics illustrated the connection between these two aspects of nature (evolutionary and instinctive) in a sophisticated way. Their theory of *oikeoisis* demonstrated the link between the sociability of man and the need for community around which economic, governmental and legal institutions

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17 *ibid.*, at 1252a 25.
18 *ibid.*, at 1252b 30.

would naturally form. In Stoicism the four artificial divisions above are present in a unified theory of the political animal.

Oikeoisis imparted the belief that man should take (or make part of himself) all that is appropriate to him as man. This process of self–creation began with self–awareness, which, according to Stoic teaching, formed the basis of man's first instinct toward self–preservation. The instinct to self-preservation represented the disposition appropriate to man as a self–aware living creature and was extended to the parent's love for their children and to the formation of unions, societies and states. Hierocles explained the ultimate extension of *oikeoisis* by use of concentric circles, extending from self at the centre to family in the next circle and at the outermost to fellow countrymen:

> It is the task of the well–tempered man to draw the circles together somehow toward the centre. It is incumbent on us to respect people from the third circle as if they were those from the second circle. The right point will be reached if, through our own effort, we reduce the distance of the relationship with each person.[19]

The need for community, in the Stoic account, is natural also in the sense that man is not just affected by his own will but by the will of a greater unifying power, beyond his control:

> The world is governed by divine will. It is as it were a city and state shared by man and Gods and each one of us is a part of this world. From this it is a natural consequence that we prefer common advantage to our own.[20]

Here there is a parallel to Plato's assertion that there is, in human beings a pre–ordained draw toward community.[21] Although the impact of divinity clearly takes the examination of man as a political animal, beyond 'nature' in the empirical sense it is used to serve as a source for our natural instinct toward community.

Aquinas

The Thomistic political animal has much in common with the theories covered thus far; he is Stoic in possessing the primal instinct for self–preservation:

> The order in which the commands of nature are ranged corresponds to that of our natural tendencies, first a tendency toward the good he has in common with all substances; each has an appetite to preserve its own natural being.[22]

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19 Long, A.A., & Sedley, D.N., *The Hellenistic Philosophers*, v.1 (Cambridge: Cambridge University Press, 1987), p. 349.

20 *ibid.*, p. 348 (Cicero on Cato).

21 See above at p. 50.

22 *op cit.*, n.6 at 1a2ae, 94;2.

However Aquinas's primary debt is to the Aristotelian and Platonic idea that since the community is part of what fulfils man's being, it may be considered conceptually prior to man as an individual actor. Alongside this is recognition that undeniably man *is* an individual; the individual is to be reconciled with the community, by the institution of law:

> Since the subordination of part to whole is that of incomplete to rounded–off reality, and since a human individual man is part of the full life of the community, it must needs be that law properly speaking deals with this subordination to a common happiness.[23]

Here the idea is once again encountered that man is 'incomplete' as an individual without participating in the 'full life of the community'. There is scope to doubt the assertion found in Finnis's discussion of Aquinas that the state is simply an end for other communities and is not a natural end in a way that is relevant for man as such. The state *can* be viewed both as an end for man himself and as part of his natural development, or at least the institutionalised representation of a natural development. Finnis says:

> So the Civitas could be called natural if participation in it (a) instantiates in itself a basic human good or (b) is a rationally required component in or indispensable means to instantiating one or more basic human goods. Aquinas' opinion rather clearly is that it is the latter.[24]

The conclusion drawn here rests on the particular usage of the term *natural*:

> In human affairs which are matters of deliberation and choice, what is natural is settled by asking what is intelligent and reasonable. That in turn is settled by looking to the first principles of practical reason, to the basic human goods.[25]

However, the Civitas can be described as natural in another, pre–practical reason sense. The community is part of the context within which man makes decisions. Its importance lies in the fact that it is both prior to man and formative of man. Without being human *as* part of humankind, there is not yet in place an agent acting on account of an end which 'carries the meaning of to be good'.[26] An agent only becomes what he ought to be, as an agent, in the context of an already existing community.

The conceptual question being asked at this juncture is not what ought man *do* as man but what *is* man as a man and therefore what should he *be*? The *Civitas* is natural not in the sense reserved for practical reasoning but because it

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23 *op cit.*, n.6, at 1a2ae, 90;2.
24 *op cit.*, n.5, p. 246.
25 *ibid.*, p. 246.
26 *op cit.*, n.6 at 1a2ae, 94;2.

perfects the essence of man (as social) and is the end of man's factual circumstance (he is not alone). If the two are combined, as they were by the Stoics the state may be viewed as the ultimate development appropriate to the self–aware human being as a political animal. Finnis explains that the state is instrumental to securing human goods. However, community may also be viewed as a good in itself, not in the sense apprehended by practical reasoning (that Finnis refers to), but because it represents in fact part of the completion of man as man. In this respect it can be viewed as a pre–practical reason good.

The state's role is a limited one nonetheless, as Finnis suggests. It exists to advance human goods when the individual acting alone may not be able to achieve this protection:

> And so their instantiation of basic goods is less secure and full than it can be if public justice and order are maintained by law and other specifically political institutions and activities in a way that no individual or private group can appropriately undertake or match.[27]

Finnis correctly identifies the sense in which political institutions contribute to securing human goods. However, the significance of the institutional community in a pre–practical reason sense extends beyond this. Though it comes into existence in part to assist in the instantiation of basic goods, the state does not simply provide for man; rather it is part of what *makes* man who he is. Without community man simply does not exist as man. In a critique of political society it needs to be considered then not only whether and how far the state legitimately assists us to reach human ends; it needs to be considered also the *type* of person to emerge from the societies that exist and in particular whether the state's influence extends too far into the realm of self–creation, as Plato's proposed state, for example, undoubtedly did.

Finnis, having emphasised Aquinas' limited usage of the term 'political animal', uses the concept as a basis to identify the *role* of the state, and provides a convincing illustration of what this role may be. However the link between existence and role is problematic; we may conclude from the fact that man is a political animal that states ought to *exist*. But nothing about the state's role, a conceptually discrete matter, can be inferred from the nature of man as a political animal alone. The analysis of the political animal and the fusion of 'is' and 'ought' upon which it relies is the basis for the creation of statehood. But the 'ought' that emerges from this fusion is a rather limited one for it represents the point of origin of the concept of statehood. There is, as yet, no subject matter to give the state meaning beyond conceptual existence. All the state needs to do is be/survive.

The concept of the political animal does not refer to man as a fully formed actor; rather it indicates his ability, through community, to become that actor. The end for the political animal, who is not yet a doer, is not what appears to him in practical consciousness, therefore; rather it is what is factually necessary to fulfil him, i.e. community. The examination of man as a political animal is theoretical

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[27] *op cit.*, n.5, p. 247.

rather than practical, establishing, from observable facts about man's nature, *just* that statehood should exist.

Having gone this far there remain unanswered many important questions, not least, what laws should regulate the state and its inhabitants? In the attempt to find a normative guide for law, nature was once more consulted. However, nature in this context was a developed nature in which change and stability existed, where state and state structures were already formed and where nature was all that happened in a man–made world.

A Dynamic Concept of Nature

Introduction

There were limitations on what a fairly abstract concept like the political animal could reveal about man's role in the world. But traditional natural law saw no requirement for the discussion of nature to be restricted to a discussion of the political animal as considered in the above section. The world these theorists inhabited was a developed one. This development had been itself natural and a discussion of nature, intended to shed light on how man should live, could, potentially utilise all existence: man, his institutions, the products of his creation, his habits and his laws. At this second stage nature became an active, dynamic concept, referring to man as an evolving being. There was no explicit division made between the two stages but it is useful to discuss this developed view of nature as a second methodological phase.

The essential normative question that emerged in the attempt to find a useful moral guide for the conceptually developed political animal and his society might have been framed as follows:

> Can authoritative norms be found *within* man's natural and logical requirement to *be as he is*?

The fact that this question impliedly is asked indicates a strange affinity with Kant on the issue of the source of normativity. Kant explains:

> This much only is certain: it is not *because the law interests* us that it has validity for us (for that is heteronomy and dependence of practical reason upon sensibility, namely upon a feeling lying at its basis, in which case it could never be morally lawgiving); instead, the law interests because it is valid for us as human beings, since it arose from our will and intelligence and so from our proper self…[28]

In natural law our interest in moral law is likewise taken to be wholly subservient to and dependent on the validity of the moral law and reason has a fundamental

[28] Kant, Immanuel, *Groundwork of the Metaphysics of Morals* (Gregory, ed.) (Cambridge: Cambridge University Press, 1996), p. 130.

role in establishing that validity. The 'will' in natural law enables the subjective being to *feel* the lack of his true self. In this way it becomes natural for man to pursue/to desire the ends that are appropriate to him, that enable the true self to come into being. Natural law *interests* us, therefore, because it *is* us; in other words to say that natural law is valid, is to say that it really does represent who, at best, we are. But moral validity in natural law is shown to arise not *solely* from human reason and from our *proper* self in that way; rather it is believed to arise from our ability to use pure reason to reach a substantive conception of what our proper self really is. So whilst both Kant and the natural lawyers connect 'what I ought to do' to 'who it is that I am', in the natural law account the *essentials* of *what I am* are taken to extend beyond reason itself.

Korsgaard acknowledges the contribution that natural law ethics can make to understanding where the source of normativity may lie:

> According to the teleological ethics of the ancient world, to be virtuous is to realize our true nature, to be the best version of what we are. So it is to let our own nature be a law to us. And the Greeks thought that since our own good would be realized in being the best version of what we are, we have every reason to be virtuous.[29]

In the ancient Greek account to be virtuous, as Korsgaard suggests, is to let our nature be a law to us and the desire to be the best version of what we are provided an intrinsic and subjective reason to submit to law's authority, making virtue realisable. However, there may be another explanation of why 'our true nature' *objectively* has any authority in the first place. The authority of our good came, first, not from our interest in being the best version of what we are but from the inescapability/necessity of our being what we are. Natural *law* arises logically from our inability to transcend our proper form and become other entities, this is what natural law essentially is about, entities being constrained, being governed by their own nature. For this reason the fact that we ought to be what we are (i.e. that we ought to pursue our own nature) is taken to be conceptually prior to the fact that reason makes us what uniquely we are. To one who asks, for example, 'why ought I act according to reason?' the answer is 'for reason makes you who you are' and to the question 'why ought I be what I am?' the answer is 'because you cannot be other than what you are.' Where the human being is unique is in his capacity, by virtue of his possession of reason, deliberately to pursue his own reasonable nature. Unlike the Aristotelian acorn that reaches or fails to reach the oak tree stage naturally the human being must and ought to *deliberate* about how to attain his ends and about what his other ends are. The central normative task in the natural law tradition is to determine from an understanding of what human beings are, how these beings ought to live, to identify the human ends and the method by which they morally can be attained. The difficulty in performing this task in a developed

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[29] Korsgaard, C., 'Reflective Endorsement' in (O'Neill, ed.), *The Sources of Normativity* (Cambridge: Cambridge University Press, 1996), p. 66.

world is that man's nature is complex and the normatively relevant 'essentials' are not easily discerned.

Indeed, the sophisticated recognition that nature needs to be used carefully if it is to be used at all as a normative guide rests alongside a tendency carelessly to use nature in *all* its guises to justify whatever the respective theorists require. Accompanying the laudable and complex attempt to find normative truth in the essentials of nature (in what it is that really we are) is a willingness to call *anything* normatively true simply in virtue of it being 'natural'. Used in this way nature does not at all represent what really we are; rather it represents potentially all that we have become.

Plato

The norms of Plato's society are not identified, they are made. The rules that are to govern us do not come from nature directly but from deeply embedded social control facilitated by the magnificent myth,[30] by careful control of the arts and education,[31] and by insistence on the absolute primacy of law and the state at any given point in time. This can be viewed as a deeply sceptical position; rather than a sincere attempt to find universal norms in nature, Plato advocates the establishment, by philosopher rulers, of 'desirable' laws.

Within Plato's socially engineered state the primacy of law is paramount. Indeed the principle that law should be obeyed is perhaps seen as the highest norm (and by securing the survival of the state, possibly the only norm) to be derivable from man's nature as a political animal. Obedience is so important that to secure it the lawgiver can even attempt to persuade the citizens that law is in fact more pleasurable than injustice. Plato knows this may be often a fiction but perceives it to be a useful fiction nonetheless:

> … Could a legislator of even moderate merits, supposing him to have ventured on any fiction for the sake of its good effect on the young, have devised a more useful fiction than this, or one more potent to induce us all to practise all justice freely, and without compulsion?[32]

As man's world evolves so too does man, the 'is'. Plato understood that, for this reason, law needs to be flexible. It is part of Plato's task to show how the political animal can survive his own development. Hence, what man ought to do is defined in part by what he is, not just as a primitive natural creature, but as a developed, sophisticated being living in and producing ever changing factual conditions. There

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[30] *op cit*., n.10, at 414/415. The magnificent myth is designed to carry conviction to the whole community. Citizens are told that gold is in the composition of rulers, silver in auxiliaries and iron and bronze in farmers. The guardians must watch the mixture of metals in the character of children to select the appropriate category that they will belong to.

[31] See for example *op cit*., n.8 at 659 '… education is in fact, the drawing and leading of children to the rule which has been pronounced right by the voice of the law …'

[32] *ibid*., at 663.

is a clear recognition that since man is *by nature* an evolutionary being the norms which govern that being must evolve also.

The problem that emerges is that evolution can be represented simply by what humanity 'is' at any given point in time. If every 'is' constitutes a normative truth then all that we are and all that we do is, by nature, in accordance with what we ought to be and ought to do. To resist this conclusion natural law would attempt to find truths (essential is–propositions) that might provide a normative guide for evolution itself. Unfortunately it looked also directly at the 'is' for such a guide when that was desirable. And for Plato it was highly desirable that in his socially engineered state, law was seen to be valid whatever form it took. There was thus no attempt to find out whether slavery really is of man's nature, for example, rather the conclusion drawn was that slavery since it exists, *is* of man's nature. Used in this way 'nature' is interpreted to be in accordance with whatever the philosopher rulers deem to be expedient.

Aristotle

Aristotle, like Plato, was wary of the danger that with change and evolution, the 'is' of the human condition would become something undesirable. Order and obedience to law was, therefore, of paramount importance:

> In all well balanced governments there is nothing which should be more jealously maintained than spirit of obedience to the law, more especially in small matters; for transgression creeps in unperceived and at last runs the state, just as the constant recurrence of small expenses in time adds up to a fortune.[33]

At first glance it seems strange that so much attention is given to obedience to law without many qualifications as to the type of law to be obeyed. But Aristotle viewed order as crucial to man's survival and law as the primary means by which order, and hence survival, could be secured. (Of course the meaning of survival is determined by laws which emanate from and preserve the state so that the state's interpretation of what constitutes 'survival', however abhorrent or detrimental to the survival of some, will prevail.) The goods of man, those apprehended naturally by practical reason, will not be examined at this point but it suffices to say that their attainment may be frustrated without the institution of law, as Finnis emphasises.[34]

However, the tendency to give *moral* validity to legal norms deriving from potentially any 'natural' source is contrary in spirit to the search for objective moral validity that Plato and Aristotle were committed to clearly. If law follows what happens, (the evolutionary 'is'), it is trapped in the status quo – what 'is' represents or constitutes what ought to be. If law is itself a changing agent the trap is merely removed to another location and law becomes the 'is' which validates

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33 *op cit*., n.1 at 1037b.

34 Finnis, John, *Natural Law and Natural Rights*, (Oxford: Clarendon, 7th ed.) p. 1.

what ought to be. Law interprets what happens or becomes what happens. Either way there is self–validation by nature. 'What substantive laws does the world require? Is legal stability or change to be preferred? What type of change should occur?' These are questions which are not resolved by the observation that man *ought to be* what he *is* because essentially man *is* a developing being and therefore what he ought to be is potentially anything or nothing.

The distinction that might resolve this problem is between essential truths and contingent truths, a distinction that the ancients make but at times fail to observe in their own inquiry. In the examination of the political animal Plato and Aristotle sought normative guidance from truths about man that were incontrovertible. They sought to establish, by this examination, the need for community, and, in practice, the need for an institutional community, the state. But to seek further moral guidance for the state and for man they looked toward a contingent, evolving world and asked it to guide in the same way that the essential world had provided guidance. It is a step too far to ask not only essential truths but potentially all that man has become to inform, without external guidance, what man ought to be. The ancients, by their fusion of 'is' and 'ought', hint at how Hume's problem is resolvable by reason. But in locating that fusion in *contingent* truths they recreate the scenario that led Hume to identify the dichotomy (and to reject reason as an aid to its solution) in the first place. Aristotle hoped that human law might remedy the possibility of nature developing along immoral lines; by instantiating normatively nature's true requirements, it could require 'natural' development to be moral development. However, if nature is simply what happens and if what happens is law's only guide to nature's requirements then potentially all that happens can be validated by law; 'slaves exist therefore the law must preserve the institution of slavery.' Aristotle does try to derive norms from aspects of 'nature' that are not normatively relevant, in this way. At the same time, however, he seeks epistemological limits (see Chapter 5) to curtail such manipulation of nature. This more sophisticated search represents an implicit theoretical realisation that the solution to the problems of normativity cannot be found in the entirety of the political animal's empirical world.

Stoicism

Awareness of the role of evolution in determining man's behaviour is evidenced again in Stoic thought. Man is to perform right actions and the 'right' of right actions would change along with the changing nature of man. In this evolving world Epictetus explains that man's 'proper functions' are dictated by his nature; 'son, brother, councillor, young, old are titles that when rationally considered always suggest the actions appropriate to it'.[35] (The 'is' again informs the 'ought'.)

The pre–virtuous Stoic had as his first task on the road to virtue the selection of 'proper functions'. The issue whether or not a particular function was proper could be resolved by reference to the nature of the individual at any stage in his progression. There was no requirement to look at fundamental conceptual

[35] *op cit.*, n.19 at p.364 (Epictetus, Discourses).

truths about man; rather it was considered appropriate to look directly at who the individual is *now*. Thus it could be said simply that the shoemaker ought to make shoes because that is his nature and the wise man ought to rule because that function naturally befits his wisdom:

> Man is created with a view to protecting and preserving his fellows; it is in agreement with this nature that the wise man should want to play a part in the governing of the state.[36]

To govern is the highest point to which the wise man's wisdom can ascend. It represents what he can do for others better than they can for themselves and in this way it contributes to the self–sufficiency of the community. The shoemaker, likewise, should make shoes because this is what he is able to do for others (it perfects his shoemaking 'nature') and they are unable to do for themselves. Similarly, in Stoic thought, man ought to employ right reason because unlike other animals he 'is' a reasoning creature and 'right reason' perfects his reasonable nature. (The role of reason itself will be considered in Chapter 5.)

But in Stoicism the 'ought' of proper functioning was a pre–moral ought. (The epistemic difficulty associated with the identification of *moral* norms was so great that, according to Stoic thought, they remained largely hidden from men; see Chapter 5.) That proper functions were pre–moral is revealed by the lack of insight required of the actor performing them; the wise man need not *know* that it is a proper function for him to govern, but, being wise, he will naturally want to do so. Neither will the shoemaker *know* that it is a proper function for him to make shoes but, being a shoemaker, he will similarly want to perform this act. Nature in the Stoic thesis provides a simple interpretative tool to establish whether a function is proper or not. The theoretically undesirable validation of potentially any 'is' is once more apparent, however, and the inoffensive circularity present in the conclusion that 'a shoemaker ought to make shoes' is obviously more worrying if used to validate, on this basis, equally strong claims like 'a thief ought to commit acts of theft for that is the proper and natural function of a thief'. The Stoics, like their predecessors, would, of course, look to higher validating sources to overcome such problems of circularity but again like their predecessors, they were willing to use that same circularity where it was politically or theoretically expedient.

Stoicism like earlier theories certainly reveals some reverence for the 'is/ought' dichotomy. The analysis of man as a political animal, for example, represents a sophisticated attempt at a solution to the dichotomy; an 'ought' can be derived from an 'is', the idea goes, where there is a distance to be bridged, *within* 'is', between man in an incomplete sense, and man as a complete being. Here, it is proposed that 'ought' can rationally be derived from 'is' because it is part of the 'is'; it exists in the distance between capacity and actuality. But the dichotomy is sometimes conveniently ignored when 'nature' (the 'is') is pressed into service of validating whatever 'ought' happens to require validation. Natural law, in this

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[36] *ibid.*

way, straightforwardly breaches the 'is/ought' dichotomy by deriving ought–propositions from is–propositions *without* explanation.

In part, the tendency to breach is/ought reflects the inherent complexity of nature, a concept broad enough to encompass the primitive man, the developed man, man as an individual, man as part of a community, man's society, his institutions, his creations his environment, his desires and his needs. In all respects, nature is inseparable from the 'is' of human existence. The complexity of nature is evident in Marcus Aurelius's plea to have regard to nature in all its guises, whatever we do:

> Thus thou must always bear in mind, what is the nature of the whole and what is my nature and how this is related to that, and what kind of a part it is of what kind of a whole; and that there is no one who hinders them from always doing and saying the things which are according to the nature of which they are a part.[37]

The British Constitution has convincingly been described as 'what happens':

> The Constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional and if nothing happened that would be constitutional too. [38]

Nature, according to Marcus Aurelius, is to be understood in this way too; it is simply what happens. Change is as natural as the absence of change. Consequently we are urged almost just to accept the 'is', whatever form it takes:

> To be vexed at anything, which happens, is a separation of ourselves from nature in some part of which the natures of all other things are contained.[39]

The essence of the problem of attempting to utilise nature, in the empirical sense, as either an interpretative tool or a norm creating concept is that nature in this sense cannot, alone, coherently distinguish between the moral and immoral. Like the constitution of the United Kingdom it is simply what happens.

The Ius Gentium

The concept of nature discussed thus far is not a clearly defined one. What is clear, however, is that nature was intended to refer only to the empirical world. The Roman Law concept of *ius gentium*, likewise, was not an appeal to a higher order immutable set of principles but was itself a factual concept. As such, it was not so

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[37] Marcus Aurelius, *The Meditations*, (Long, George, ed.) http://classics.mit.edu/Antoninus/meditations, Book 2.

[38] Griffith, J.A.G., *The Political Constitution*, 42 Mod. L. Rev. (1979) pp. 1-21, p. 19.

[39] *op cit.*, n.37, Book 2.

far removed from the natural law discussed thus far as might be believed. A higher order law may have been the perceived source of the *ius gentium* for it was believed to be of *universal* application. However, in truth, reference to the *universal* nature of Roman natural law was really an acknowledgement that there existed laws that *in fact* happened to be shared by different societies:

> For the law which each people establishes for itself is peculiar to it and is called *ius civile* as being the special law of that state (civitas) but the law which natural reason establishes among all mankind is observed equally by every people and is called *ius gentium* as being the law applied by all nations.[40]

As Nicholas says the Romans did not develop:

> What may be called the revolutionary aspect of natural law as a higher law capable of invalidating the positive law.[41]

The role of what happens – the fact – in establishing norms is evident in the *ius gentium* also. A comparison with theories discussed thus far is possible in this respect. Nicholas stresses the importance of the connection between nature and normativity:

> The nature of a thing was often its intrinsic character and the jurists sought to derive their rules from this character. It is the nature of some animals to be wild and therefore we can only truly own them so long as we have physical control of them. It is the nature of the sea to be open to all and therefore it is not susceptible to private ownership and so forth. In a similar way it was held that certain methods of acquiring ownership were natural or derived from natural law or natural reason, because they seemed to flow inevitably from the facts involved. If, for example, I wish to make you the owner of a thing, the natural way of doing so is to hand it over to you.[42]

Methods of acquiring properties in a more sophisticated world would no doubt prompt change in the law to allow for the changing nature of the concept of ownership; the law could evolve as the world evolved. From this perspective, the normative power of evolution and the demands of circumstance could be so significant as to subvert even the 'natural law' of man's original condition:

> For through force of circumstance and human needs, peoples have developed certain measures for themselves; wars have arisen with

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40 Nicholas, *Roman Law*, (Oxford, 1962), p. 54.
41 *ibid.*, p. 55.
42 *ibid.*, p. 57.

> subsequent activity and slavery – which is contrary to natural law (for by natural law, originally, all men were born free).[43]

The *ius gentium* was a natural law in having as its source the existence of a naturally *evolutionary* creature. Thus slavery was not invalidated by the fact that man was *by nature* a free animal. Rather the man–made institution of law, men's needs, and the *natural* process of change in human affairs were believed to validate the institution of slavery. This illustrates precisely how nature can be abused to validate norms in whatever way is required. It can justify slavery either because it is of the *nature* of a slave to belong to someone else, or because it is of the *nature* of man to evolve and slavery may be naturally 'appropriate' to evolving circumstances.

But evolution may prompt further change in the law, allowing the law of nations to permit manumission, in line with man's changing circumstances:

> Freedmen are those who are manumitted from lawful slavery. Manumission is the granting of liberty: for so long as someone is a slave he is subject to physical and legal authority and, by manumission is released from that authority. The institution had its origin in the law of nations. For by natural law, all are born free and manumission is virtuous: but the law of nations introduced slavery and there followed the benefit of manumission.[44]

Slavery is validated or invalidated depending on what the 'is' of human evolution, as interpreted by the will of the ruling elite, dictates. As yet there is no attempt in natural law to determine how evolution might itself be normatively constrained, by man's nature or otherwise.

Aquinas

Acknowledging his debt to Aristotle, Aquinas roots the justification for law's existence simply in man's requirement for such an institution:

> Consequently we see the need for man's virtue and peace that laws should be established; as Aristotle says man when perfected by virtue is the best of animals, but when separated from law and justice he is the worst. For he can use the weapons of reason, which other animals do not possess to get rid of lusts and brutalities.[45]

It is natural for human beings to act in a reasoned way; that is the quality which makes them human. Law exists to put into practice coherently the reasoning of a community of human beings, in civilised society. But this coherence is difficult to attain; dispute about how man ought to behave would be inevitable in a quickly

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[43] Justinian, *The Institutes of Justinian* (Thomas, J.A.C., ed.) (Oxford: North Holland Publishing), 1975), at Book 1, Title 2.

[44] *ibid*., Book 1, Title 5.

[45] *op cit*., n.6, 1a2ae 95;1.

developing world. With regard to disagreement over particular, as distinct from general principles, Aquinas says:

> With respect to general principles of both theory and practice what is true or right is the same for all and is equally recognised. With respect to particular conclusions come to by practical reason there is no general unanimity about what is true or right and even where there is agreement there is not the same degree of recognition.[46]

As conditions develop so must the interpretation of principles; the 'is' which at one time was sensibly governed by a particular 'ought'/interpretation may change to such an extent that the 'ought' cannot any longer claim to govern or accurately reflect the changing fact. A parallel process may happen in judicial reasoning; as human interaction (the 'is') becomes more sophisticated or novel, existing legal reasoning may be inadequate to explain the legal meaning (the legal 'oughtness') of those interactions. Aquinas explained that a principle determining when it is right to return a deposit, for example, will become inadequate when unusual or new factual scenarios are encountered:

> The greater the number of conditions accumulated the greater the number of ways in which the principle is seen to fall short. So that all by itself it cannot tell you whether it be right to return a deposit or not.[47]

Institutional law arises from the need to instantiate and protect man's nature in a community context. However, the particular laws that man in fact posits will depend on the advanced nature of man in a developed environment. Diversity is required:

> Owing to the great variety of human affairs the canon principles of natural law do not apply stiffly to every case. One outcome is the diversity of positive laws.[48]

Positive laws are to be informed by the world in which man lives, by establishing the good, of the particular manner of existence under consideration. Nature informs what nature should be and by aiming to fulfil his nature as completely as possible man can make his own reality most real, most fully itself. This way of being and acting, according to Aquinas, can be applied to any aspect of human existence, to essentials of nature that are universally true and to elements of the individual's nature that are peculiar to him:

> Every mode of existence is determined by some form, and so condition, form and order accompany every mode in which a thing exists. Thus man has one condition, form and order as a man, and

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46 *ibid.*, at 1a2ae 94;4.
47 *ibid.*, 1a2ae 94;4.
48 *ibid.*, 1a2ae 95;3.

> another condition, form and order as white, or as virtuous, or as knowledgeable or as anything else he is.[49]

At its theoretical best, the centrally important issue in natural law is how essentials of man's nature/basic goods, like his possession of reason and life, can normatively be brought to bear on contingencies of his nature, like his ability to make shoes well or his being white, or his being a thief. And Aquinas, like his predecessors, in reconciling the contingent and essential, proposes that there is an inherent morality in man's *true* nature which meant that those 'goods', such as the good of the thief, that merely perfect the 'bad', *could* be dismissed as contrary to nature. Thus while it is possible, in a sense, to speak of the 'good' of theft, theft could be understood to be bad in itself:

> This manner of being good can be found even in things bad in themselves as when we speak of a good thief when referring to his skill and success.[50]

How natural law attempts to invalidate certain contingent truths like theft will be the concern of Chapter 5. But the search for absolute, universal norms that Aquinas skilfully engages in rests alongside a desire for order in a developing, uncertain world. The tension that emerges is between the desire to promote the possibility of metaphysical moral truth and the conflicting desire conveniently to justify law and order however far it departs from moral truth. Indeed Aquinas insists on a near Platonic allegiance to the system, the good of which law upholds. Law is to create compliant subjects who become:

> … so habituated that they come to do of their own accord what earlier they did from fear and grow virtuous. This schooling through pressure exerted through the fear of punishment is the discipline of human law.[51]

There emerged a virtue in giving allegiance to the law of the time, apparentl, regardless of what form the law took:

> Now the virtue in being a good subject consists in being well–subordinated to the governing principle, thus virtue in our emotional powers of desiring and contending lies in our being well under the reasons control. So Aristotle's mention of a subject's virtue is corresponding to what the ruler requires of him.[52]

As an individual we are to act according to our reason. As a subject we are to act according to the communal reasoning of our state, which effectively means the reason of our ruler. But, as yet, an examination of man as a political animal in a

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49 *ibid.*, 1a 5,1 5;4.
50 *ibid.*, 1a2ae 92;1.
51 *ibid.*, 1a2ae 95,1.
52 *ibid.*, 1a2ae, 92;1.

developed society is insufficient to demonstrate the potential for *immorality* in the unrestrained fusion of 'is' and 'ought.' Aquinas hints at the possibility that there is some sort of good that transcends circumstance but does not fully escape circumstance himself; his 'morality', at this theoretical juncture, is trapped in the 'is' of the everyday.

Conclusion

Neither man's nature as a political animal nor facts about his existence can provide anything more than a basic structure to inform how man should live. However, further attempts to build upon this structure rest on the assumption that more substantive truths capable of genuinely guiding man are discoverable. The movement to grounding limits that would escape the circularity of empirical analysis is one that all the theorists would make. Such limits, discussed in the Chapter that follows, would mean, for example, that a good legal system prohibits theft on *moral* grounds.

Chapter 5

Early Natural Law: Principles of Practical Reason

Introduction

The previous Chapter has indicated that early natural law theory did not always succeed in its attempt to demonstrate the relevance of nature to normativity. The aim in this Chapter is to show natural law in its best light, to suggest that despite its flaws, it offers, at times, a sophisticated and challenging account of how nature can inform human action.

The essential problem that had to be tackled before nature could become normatively informative can be categorised as an extreme form of relativism; if nature informs morality and if it is natural for man to develop and to evolve, perhaps even beyond his 'nature,' then potentially any 'is' can claim moral status, even the 'is' of theft, for example. To overcome this problem natural lawyers sought truths about nature that could invalidate actions in virtue of their 'unnaturalness'. 'All things ought to be what really they are', remained the governing imperative and the relevant question became 'what, really, is man?' To find truths about man's nature that might answer this question, a Kantian distinction was drawn, between contingent facts and universal facts transcending time, place and context. And in a way, natural lawyers, like Kant, sought by this method, principles of reason that would determine a *pure* will. Man is to be moved in his actions not by his contingent circumstances, nor by unrestrained desires, but by his true self, by his nature. The point to note is that above all else, that nature is constituted *by* reason. Man can only be what really he is by acting in accordance with reason, therefore, the characteristic that makes him human.

Unlike Kant, however, natural lawyers did not believe that pure reason could produce morality from its own purity, without an operational guide. Reason defines who we are but, reflexively, is to learn its defining principles by aligning itself to our nature. It is to be guided in its task of determining the will by the essentials of the nature of the entity in which it exists. In this way it can be seen that it makes little sense for me to claim that my attempt to levitate is reasonable, for levitation is just not involved in what it means to be me; my 'reason' is invalidated by my nature, by who I am. Deciding how I ought to behave with regard somehow to the effect of my actions on others may, on the other hand, be deemed reasonable, for it is undeniably a feature of humanity that it comprises of more than one being.

It is not the condition of a pure will itself that produces these conclusions; rather they are obtained by reason from its understanding of our nature. Traditional natural law attempts to obtain moral information from as much universal truth as possible, not just from reason's principles alone. The incidental benefit that arises is that natural law necessarily has more data to work with at a metaphysical level than Kant does, for example.

The Priority of Reason

Directing Activity

The theorists discussed thus far all agreed that, like other entities, man should be as he is as fully as possible. For the human being, in particular, this means *directing* his activity towards his ends because it is reason and hence deliberation in respect of his action that *does* make the human being, who he is:

> Of the actions a man performs those alone are properly called human which are characteristically his as a man … Now he is master through his mind and will, which is why his free decision is referred to as an ability of reason and will. Therefore those acts alone are properly called human which are of his own deliberate willing.[1]

Comparison with non-human beings illustrates the distinctiveness of human activity. Non-rational entities may attain or may fail to attain their goods. An acorn, for example, may never come close to becoming an oak tree. However, in so far as it *is* active the acorn's ends are pursued *naturally*; it does not choose to do a bit more growing today; this just happens or fails to happen. The absence of choice can be seen to have two implications. First, it establishes that non-rational entities, in so far as they are active at all, *must* pursue their ends. (To say that the acorn *ought* to become an oak tree really only reflects the objective, human expectation that the rules of nature will work in this way. The acorn does not possess that sense of *oughtness* and we cannot occupy its subjective self whatever that may be.) Second, it can be said that an entity without a rational nature must pursue *its* ends. The acorn cannot, at least without substantial human intervention, grow to become a sycamore tree, for example. To have ends, then, is first to be compelled to pursue one's own nature and second to be constrained by that same nature. That is what natural *law* involves, entities being governed by their own nature.

The overriding requirement for the human being is to pursue humanity to its most complete extent. For the individual, the requirement is to pursue humanity in the manner befitting his capabilities. Individuality aside, however, there are certain, universal, defining traits that together make us the *human* entity that we

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[1] Thomas Aquinas, *Summa Theologica* (Gilby, ed.) (London: Blackfriars, 1966), 1a2ae. 1,1.

are, that, in turn, determine the boundaries of individual action. In particular, each human being is a reasoning being. For all human beings there is a requirement to act according to reason, the quality which defines humanity. But, according to traditional natural law, the determinations of reason are always in the last count restrained by the nature/the other goods of the entity in which reason exists. Human goods, like the ends of other entities, are definitive of that particular entity. As such they do not depend on being selected; they are known *to* but not themselves shapeable *by* reason. Reason, in this sense, is not free; rather it might be said that human nature determines the bounds of the reasonable. I am not free to choose to be a cat for example, or at least it would be questioned whether really it is *reason* that makes such a choice. Acting according *to* reason requires man to act in accordance with other fundamental, defining natural characteristics (goods) that together with reason make him the being that he is. [2]

Human goods can of course be pursued in a number of ways; through irrationality, through desire and animalistic qualities, or through arbitrariness. The coexisting, counter-factual possibility of pursuing the ends in an unreasoning way (the possibility of the 'unnatural') means it is possible to say that man '*ought*' to pursue his ends. The rational pursuit does not happen by nature; it has to be chosen. Morality arises from man's ability to attain his ends according to reason *and* from the lack of necessity in the same. Aquinas explains that 'the moral good was judged with reference to the reason':[3]

> Now when we speak of good and evil in human acts we take the reasonable as our standard of reference; as Dionysius remarks, man's good is to live according to reason and his evil to live outside. For to each thing that is good which is in keeping with its form and that is evil which is not in keeping with its form.[4]

Man was considered to be *moral* then because of his possession of reason: 'A human act which we term a moral act, has its specific character from an objective which is in relation to the source of human acts namely the reason'.[5]

Reason and Desire

Human beings are moral beings partly because their possession of reason is combined with their possession of desire. If we were *purely* reasonable creatures morality would have no meaning for it would hold naturally and thereby negate its normative quality; if we were *purely* appetite driven creatures, morality would have no meaning for we would have no capacity for it. Reason makes us what peculiarly we are; desire may drive us either toward that and other ends or take us

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2 For this reason, in new natural law theory, practical reason is both a good and the means by which the other goods morally are to be pursued. See Chapter 6.

3 *op cit*., n.1, 1a2ae 18,9.

4 *ibid*., 1a2ae 18,5.

5 *ibid*., 1a2ae 18,8.

away from them. Morality arises then, in part, because we have the capacity to be reason driven but subjectively are both reason and appetite driven.

Like Kant, Aquinas understood that for morality to be practically realizable, reason must not be distorted by other influences. The most likely source of corruption was the emotions and for Aquinas it was of the 'utmost importance that sometimes the passions and dispositions of the appetitive part do not cause the use of reason to be impeded'.[6] Reason enabled us to identify moral principles: 'it is by the virtue of understanding that naturally known principles in both speculative and in practical matters are perceived',[7] but this ability would be practically useless unless we *chose* to act morally:

> … there is some truth in the saying of Socrates that as long as man is in possession of knowledge he does not sin: provided, however, that this knowledge includes the effective application of reason in an individual matter of choice.[8]

Here Aquinas indicates that reason has a dual role: first, in identifying the moral law, and second, in presenting us with the means to act for that law/to choose it. This suggests awareness of the Kantian idea of aligning the subjective will with the objective law. The alignment is most likely to occur when reason is uncorrupted by desire or contingency. Ultimately, therefore, the appetite is to be *subject* to reason, 'reason commands the appetitive part by a political rule'.[9]

This is further acknowledged in the idea that to act well, man required not only intellectual rigour but emotional control:

> And so, for a man to act well it is requisite that not only his reason be well disposed through a habit of intellectual virtue, but also that his appetite be well disposed through a habit of moral virtue.[10]

Aquinas suggests here that the appetite is not to be viewed just as a corrupting influence. Rather the appropriate, 'virtuous' disposition would contribute to making morality practically realizable, assisting the individual to achieve that state where he *can* be motivated to act as pure reason demands.

Kant was critical of the Old Stoics, in particular, for he believed that their concept of desire entailed heteronomy of the will; a will tied to desire is necessarily impure. But, actually, desire can be seen to have had two implications in the early natural law tradition, neither of which entailed heteronomy. First, a positive appetite enabled the actor to reach, in fact, the ability to act in accordance with reason. This did not in any way imply that inclination was a *basis* for morality or that the individual acted in *order* to satisfy the inclinations rather than for good itself. It meant rather that the appropriate inclination was required in order,

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6 *ibid.*, 1a2ae. 58,2.
7 *ibid.*, 1a2ae. 58,4.
8 *ibid.*, 1a2ae. 58,2.
9 *ibid,*. 1a2ae. 58,2 (citing Aristotle, Politics, 1, 5. 1254b4).
10 *ibid.*, 1a,2ae. 58,2.

subjectively, to achieve the requirements of reason. Second, and perhaps more importantly, it is perhaps true to say that desire was, in an objective sense, satisfied by doing good; to act in this way caused a sense of fulfilment/happiness in the actor. This is where Kant's criticisms really appear to bite:

> When a thoughtful human being has overcome incentives to vice and is aware of having done his often bitter duty, he finds himself in a state that could well be called happiness, a state of contentment and peace of soul in which virtue is its own reward. Now a *eudaimonist* says: this delight, this happiness is really his motive for acting virtuously. The concept of duty does not determine his will *directly*; he is moved to do his duty only by *means of* the happiness he anticipates. But since he can expect this reward of virtue only from consciousness of having done his duty, it is clear that the latter must have come first, that is he must find himself under obligation to do his duty before he thinks that happiness will result from his observance of duty and without thinking of this. A eudaimonist's etiology involves him in a *circle*; that is to say, he can hope to be *happy* (or inwardly blessed) only if he is conscious of having fulfilled his duty, but he can be moved to fulfill his duty only if he foresees that he will be made happy by it. But there is also a *contradiction* in this subtle reasoning. For on the one hand he ought to fulfill his duty without first asking what affect this will have on his happiness, and so on *moral* grounds; but on the other hand he can recognize that something is his duty only by whether he can count on gaining happiness by doing it, and so in accordance with a *pathological* principle, which is the direct opposite of the moral principle. [11]

Many have pointed out that Kant's criticisms may not be sustainable, for example, because of the fact that happiness was thought to *consist in* virtue and was not something other than virtue for which virtue was done. Aristotle, for example viewed virtue as man's end and happiness as that *same* end, experienced in human consciousness. As Aquinas put it, referring to Aristotle's distinction between the end itself and the condition of reaching and holding it, 'happiness … means actively possessing the ultimate end'.[12] To say that happiness determines the will *is* to say that the natural *law* determines the will; in this way heteronomy of the will may be avoidable.[13]

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[11] Kant, Immanuel, *The Metaphysics of Morals* in (Gregor, ed.) *The Cambridge Edition of the Works of Immanuel Kant*, (Cambridge: Cambridge University Press, 1996), at 6:377.

[12] *op cit*., n.1, 1a2ae. 1,8.

[13] Kant thinks this is insufficient to resolve the heteronomy of the will problem because happiness and virtue remain as different elements of the highest good. See Kant, *Critique of Practical Reason*, in *op cit*., n.11 at 5:112. But happiness may be considered to play a role in natural law not too far removed from the role played by 'consciousness of ones freedom' in Kant's moral philosophy and in this way his objection may be countered. See *op cit*., n.11 at 5:42. For an excellent commentary on the relationship between happiness and duty see *Aristotle Kant and the Stoics, Rethinking Happiness and Duty* (Engstrom and Whiting, eds.) (Cambridge: Cambridge University Press, 1996).

The coincidence between happiness and man's end can better be understood if happiness is equated with fulfilment. We desire fulfilment, in our being, whether we know truly what fulfils us or not. Because our true nature does, in fact, fulfil us, it is in that state that we really do *feel* fulfilment/happiness. The will has an enabling role here; it can be understood to be the *sense* of absence of fulfilment that causes us to move towards our true nature. The absence is most powerfully felt when it is the absence of morality, for this (being the absence of humanity itself) divorces us most dramatically from our nature. Only by acting in accordance with reason, and morally therefore, can this profound absence be filled. We do not act well because we know that to do so will make us happy, therefore; rather it is only when we are motivated by right reason that we do feel happiness/reach fulfilment; this is just the state in which fulfilment exists. Paradoxically, if we acted 'morally' *in order* to attain happiness we would fail either to act morally or to attain fulfilment. This would be true particularly in Stoic ethics wherein morality just was our virtuous disposition to act well. The reasoning of the virtuous and happy Stoic would be something like 'if I act only for the goodness of the act I will be happy.' In this way the reward has to be in a sense ignored as a reason for action before it can be earned as a result of acting well.

Irwin indicates that Kant's argument on heteronomy is not a good objection to Platonic or Aristotelian ethics either. Neither takes the view that morality is determined by happiness:

> Plato recognizes that a virtuous man will not always be concerned with future benefits and consequences of actions he thinks worth while, but will still choose the actions, as part of the life he chooses. He can follow the deontologist, and agree that he has sufficient reason to do the virtuous action apart from its consequences.
>
> Aristotle develops this view further. He thinks happiness is the goal of virtue; but he does not say that the virtuous man's dominant motive in acting virtuously is his desire for his own happiness; the virtuous man will choose virtuous action for its own sake. … The virtuous man will do what the deontologist expects of him. … he decides on his action because it is admirable, not because it will promote his own happiness.[14]

Perhaps his similarity to Greek ethicists is greater than Kant would admit. Korsgaard suggests that, for Kant, reason thwarted inclination:

> When the moral law commands us not to do an action to which we are inclined, it thwarts the inclination, and it humiliates our self–conceit. These feelings are painful. At the same time, however, we experience an awareness of our freedom, which is revealed by our capacity to set inclination aside. We experience freedom as a sense of independence

[14] Irwin, Terence, *Plato's Moral Theory*, (Oxford, 1977), p. 261.

> from the neediness of inclination, a sense that is akin to pleasure in that it resembles the divine bliss.[15]

This interpretation of Kant is largely in keeping with how the ancients saw pure reason. However, they did not so much view reason as thwarting inclination. Rather they thought that inclination needed to be properly trained by reason in order that pure reason could be reached in fact. Happiness was indeed the result envisaged by the ancients also and this happiness did correspond to divine bliss since it resulted from acts which properly met man's nature and hence brought his being into harmony with a commanding divine will.

In his examination of the interaction between reason and the emotions and the command of the former over the latter, Aquinas sought a mean, represented by the condition of *right reason*. The correct use of the appetitive and intellectual powers would result in the achievement of this mean. But as yet, we know only that we are to act according to reason without knowing much (beyond the semantics of terms like wisdom and justice, in which Aquinas thought the mean consisted) about what this requires. Aquinas needed to define what right reason could demand in practical terms. Such meaning was to be provided by the self–evident principles of practical reason.

The First Principle of Practical Reason/The First Precept of Natural Law: 'Good is to be Done and Pursued and Evil Avoided'

The first principle: a practical principle The first principle that 'good is to be done and pursued and evil avoided' is a principle *of practical* rather than *theoretical* reason. Goldsworthy usefully distinguishes between the two. He describes the perspective of practical reason as 'the internal, engaged perspective of an agent wondering (even if only hypothetically) what to do'.[16] Theoretical reason, in contrast, is 'the external, detached perspective of a scientist studying such agents'. In Finnis's interpretation of Aquinas, specifically, *practical reason* refers to 'one's ability to relate one sort of benefit to another, and to reason about the effectiveness of means and the respective merits of alternative plans'. (It is about *how* to do.)

Aquinas, as McInerny explains, pointed out an analogy between the operation of practical and theoretical reason:

> Just as being is the first thing that without qualification the mind grasps, so the good is the first thing grasped by the mind in its practical function of directing to some work. An agent acts for an end which has the note of goodness. So the first principle of practical reason is going to be grounded on the notion of goodness. What is the

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[15] Korgsgaard, Christine, M., 'From Duty and for the sake of the Noble' in *Aristotle Kant and the Stoics, Rethinking Happiness and Duty, op cit.*, n11, p. 213.

[16] Goldsworthy, Jeffrey, 'Fact and Value in the New Natural Law Theory', 41 *Am. J. Juris.* 47, pp.21-46, p. 25.

> concept of the good? The good is that which all things seek. That is what "good" is taken to mean.[17]

The first principle indicates that human beings, like all natural entities, do seek their goods. It is preceded by a detailed *theory* of the idea of good; so we already know at this point that 'good' means the perfection of their form of being, which all things seek. Indeed without a theoretical understanding of good, we would fail to appreciate that it is for *good* that practical action is done. The first principle is itself practical rather than theoretical, however, because man, unlike other creatures, 'seeks' his goods *through* practical reason. Practical reason denotes the quality by which human goods are sought.

Moral or pre-moral? According to McInerny, the first principle does not merely point out the notion that we do in fact act for ends. It is *prescriptively* urging us to pursue *our* natural ends. As such, at a formal level, it encompasses, without specifically describing, all that the human being is required to do in order to be fully human:

> Something is sought in so far as it is completive or perfective of the seeker. Thus "good" does not simply designate an object of pursuit, it suggests the formality under which the object is pursued: as completive, as perfective.[18]

The implication, for McInerny, is that the 'good' of the first principle, by entailing the propriety of form, requires morality in human action. This explains the incorporation in the first principle of the avoidance of evil: 'good is to be done and pursued *and evil* avoided.'

It is not universally accepted that the *good* and *evil* of Aquinas's first principle are moral in nature. Grisez claims for example:

> ... the *good* pursued by practical reason is an objective of *human* action. But to grant this point is not at all to identify the good in question with moral value, for this particular category of value by no means exhausts human goods.[19]

It is easy to see how the universal concept of 'good' – which can apply to the good thief as much as the good alms giver – might be said to be pre–moral. It is more difficult to see how the pre–morality condition can be thought to apply to the first principle, which, in its appeal to the *perfection* of form (referred to in the supporting theory of good) and by its distinction between good and *evil*, is surely intended to overcome the problem of the universality of 'good' discussed in

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[17] McInerny, Ralph, 'The Basic Principles of Natural Law,' 25 *Am. J. Juris*., pp.1–15.
[18] *ibid*., p.3.
[19] Grisez, Germain, G., 'The First Principle of Practical Reason' 20 Natural Law Forum, 1965, pp.169–201.
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Chapter 3. By indicating that the human being is to fulfil his form (that good/the perfection of our form *is to be done* and *pursued*) the first principle requires us to do only activities that contribute to fulfilment; immoral actions can never meet that requirement. Nevertheless Grisez, in opposition to McInerny, believes that the 'good' of the first principle is broad enough to encompass immoral actions. He suggests that the good of life, for example, can be preserved immorally without offending the sense in which that life itself is a good:

> The preservation of human life is certainly a human good. The act which preserves life is not the life preserved; in fact they are so distinct that it is possible for the act that preserves life to be morally bad while the life preserved remains a human good.[20]

Life *can* of course be preserved immorally as Grisez suggests. But the first principle of practical reason in its appeal to the perfection of form (for this is what good is taken to mean), is urging *moral* goodness. The requirement is to preserve life *only* in a manner appropriate to our *rational* form, i.e. to preserve life well or morally.

If Grisez is right and the good of the first principle is pre–moral then it is difficult to see how the first principle (or its constituent principles) can be a useful guide for moral action, specifically. If McInerny is right there remains the problem of discovering what does perfect the human form substantively. The first principle is in a sense, therefore, both moral and pre–moral. It is moral because it is intended to direct us to pursue that which is perfective or fulfilling and it is pre–moral in its inability to dictate what morality substantively requires. We are told that there are (moral) ways of being and acting appropriate to human beings without knowing what they are. The possibility of distinguishing between the good and the bad in nature, of resisting the conclusion that every 'is' can be taken to determine what 'ought' to be is indicated without an accompanying account of how the distinction may be made.

Whether the perspective of Grisez or McInerny is preferred, we need further direction. Grisez says:

> … first principles must be supplemented by other principles and by a sound reasoning process if correct conclusions are to be reached.[21]

McInerny, also, sees the need for further precepts:

> What we need is knowledge of goods which truly save the formality of goodness and which ground more informative precepts.[22]

Grisez may be wrong to think that the good of the first principle was not *intended* to entail morality, 'the first principle of morally good action is the principle of all

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[20] *ibid.*, p. 184.
[21] *ibid.*, p. 189.
[22] *op cit.*, n.17, p. 5.

human action …'[23] but is surely right to claim that it cannot in fact alone provide moral guidance.

The first principle and the derivation of fact from value One effect of the first principle (*Good is to be Done and Pursued and Evil Avoided*) is to detach the idea of 'good' from its natural/empirical base in order to recognise that for man it has coexisting status as a *governing* principle. The idea that man 'ought' to be what he 'is' (the fusion of 'ought' and 'is') is no longer simply a descriptive natural truth but a practical *law*, reflexively, intended to guide reason in its attempt to ascertain how and what man ought to be. But the admission that there is a connection between man's nature and human morality, and the prominence accorded to the same, does not of *itself* assist our knowledge of what in fact man's nature is. We have not yet discovered how to isolate, from nature generally, those facts of our existence that represent human ends. The first principle is substantively limited (though no more so than the categorical imperative minus the universalizability requirement) but the fact that it suggests the fusion of 'is' and 'ought' is of immense significance.

From the perspective of practical reason, 'good' is that *which it is to be done and pursued*. 'Doing' and 'pursuing' are legitimately incorporated in the principle of practical reason for this is how human beings, uniquely, do seek their goods, i.e. through reflective willing, rather than by necessity. *Our* 'goods' do not simply happen or fail to happen, as is the case for the acorn; rather we must consciously make them the object of our will and determine from among the many alternatives how they are to be pursued. This is equivalent to claiming that for human beings 'good *ought* to be done'. But since 'good' refers to the fulfilment of our form to say that good ought to be done is to say that we *ought* to be who essentially we *are*. The first principle tells us that 'what we ought to be' is centrally connected to 'who we are', that 'good' is immanent in being; to put it another way, traditional natural law does not merely tell us that good is to be done, it tells us via theoretical reason, what 'good' *means*. Understood in this way, the first principle succinctly gives normative form to the fusion of 'is' and 'ought' which pervades the natural law tradition. It is an acknowledgement that the 'is' always informs the 'ought'.

Grisez understands the significance of the first principle to be the very opposite:

> Precisely the point at issue is this, that from the agreement of actions with human nature or with a decree of the divine will, one cannot derive the prescriptive sentence: "They ought to be done."
>
> Aquinas knew this, and his theory of natural law takes it for granted. *Good is to be done and pursued, and evil is to be avoided,* together with the other self–evident principles of natural law, are not derived from any statements of fact. They are principles. They are

[23] *op cit.*, n.19, p. 189.

> not derived from any statements at all. They are not derived from prior principles. They are underivable.[24]

Grisez is right to point out the underivable nature of the first principle. The principle is underivable because essentially it is a principle of logic. It relies on the theoretical conclusion that natural entities seek their goods/their true form, a logical truth in the sense that entities are compelled to be what they are; they cannot be other than what they are. However, the contribution of the principle to the 'is/ought' issue is great because, in this way, it alludes to the essential origin in nature of the very fusion between 'is' and 'ought'; any entity 'ought' to be what really it 'is'. The first principle tells us something *about* the relationship between nature and normativity. What it tells us is exactly opposite to what Grisez suggests; it indicates that acts complying with our nature are exactly those acts that should be done and that when reason directs the actor accordingly, the actor is moral. It points out the ontological connection between fact and value, therefore, but more than this it indicates that we ought always to be aware of 'who we are' in deciding how we ought to behave; epistemologically, the derivation of 'ought' from 'is' is positively encouraged. We can only know what we ought to be by knowing who we are.

Practical reason is to direct our action but there is no suggestion, from Aquinas, that it ought to do so without reference to a theory of who we are. (Indeed the suggestion seems peculiar in the context of an intensely empirical theory.) The underivability of the first principle certainly does not make good Grisez's claim that norms are not to be derived from human nature and that Aquinas believed the same. Aquinas, in his first principle, urged exactly what Hume warned against and what Grisez is afraid of, the derivation of 'ought' from 'is'. Furthermore, in his attempt to locate the 'ought' within the 'is' Aquinas, perhaps more convincingly than any other theorist, indicated how given the innate, value–laden nature of fact, the process of derivation might, after all, be deductive. Good is at one with being and we only know being by reflecting on what we are. Nature and reason are to determine moral behaviour but it is not yet apparent how. Further, more substantive, principles of natural law were required.

Further Principles of Natural Law

The first principle urges us to pursue our goods but alone is insufficient to determine what good means or how it is to be attained. The other principles, outlined in *Summa Theologica*, introduce more substantive goods.

> (a) First there is in man an inclination according to the nature he shares with all substances, namely, insofar as every substance seeks to conserve itself in existence according to its nature. Following on this inclination those things pertain to natural law, which have to do with the conservation of human life and the avoidance of the opposite.

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[24] *ibid.*, p.194/195.

> (b) Secondly, there is in man an inclination to more special things according to the nature he shares with other animals. Following on it those things are said to be of natural law 'which nature teaches all animals,' such as the joining of husband and wife, the education of children and the like.
>
> (c) Thirdly, there is in man an inclination according to reason, which is proper to him, as man has a natural inclination to know the truth about God and to live in society. Thus there pertains to natural law what looks to this inclination, for example, that he should not offend those with whom he must live, and other like things.[25]

Basic goods and the fusion of 'is' and 'ought' The goods indicated by the above principles might be reduced to life (and its preservation), family (extending to the community generally, see Chapter 3) and reason (which includes knowledge and living a rational life). Whilst the goods are perceived naturally by practical reason, they are known also to theoretical reason as necessary, universal truths that determine who we are; traditional natural law provides a theory of what the human being is (particularly a detailed theory of the significance of our unique possession of reason) in the same way as it provides a theory of what the acorn is. The coincidence of practical and theoretical knowledge of first principles is most likely an indication that metaphysically, practical and theoretical knowledge are not discrete; to know fundamentally who I ought to be is to know who I am, to know who I am is to know who I ought to be. Unsurprisingly therefore the first principles are a further indication of the normative fusion between 'is' and 'ought'; they state what ought to be, yet are a definition of the human self, referring to our essential nature as existing, communal, reasonable beings.

According to Finnis the principles of natural law cannot be deductions from propositions such as 'One should act in conformity with human nature'.[26] They are self-evidently known *to* practical reason. However, this does not undo the fact that natural law undeniably produces a theory of 'good' and 'goods'. 'Good' means the fulfilment of form/our nature; it is this 'good' that is to be done and pursued and these are our 'goods'. To say that we ought to pursue our goods is to say that we should act in conformity with our nature; that is the very meaning of the first principle. The other principles of natural law are not deductions from this proposition, but they do instantiate it and are equally discoverable by theoretical reflection on what the human form essentially is. This is necessarily true for, in the traditional natural law account, the human goods are definitive of the human being; they are its essential truths (the 'ought' is contained within 'is'). It does not follow from the fact that the basic goods are self-evidently known to practical reason, therefore, that they are not discoverable by theoretical reason or indeed that the two processes are readily divorceable.

The relationship between the good of 'reason' and the other goods can provide further evidence of the fusion between 'is' and 'ought' upon which

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[25] 1a2ae, 94.

[26] Finnis, John, *Aquinas* (Oxford: Oxford University Press, 1998), p. 89.

traditional natural law is built. Reason is a unique human good in that it is at once a good and the means by which man is directed to his other ends:

> Now the rule and measure of human acts is the reason … since it belongs to the reason to direct to the end …[27]

Indeed the other goods are not properly considered to be *human* goods, unless they are pursued in accordance with reason:

> … goods which are not peculiar to men come to be constituents of the human good insofar as they come under the sway of the distinctive mark of the human agent; reason.[28]

As O'Connor indicates human beings uniquely have the ability reflectively to pursue the natural *law* (and to treat it as *prescriptive* therefore) that naturally (*descriptively*) applies to them:

> As parts of nature, we are subject to the laws of nature. If I jump out of a window, I am subject to gravitational forces as any other unsupported physical body. But as a rational animal, I can follow the law in another way by my understanding of it. … St.Thomas could have argued that the two senses of 'law', prescriptive and descriptive, can be seen to have a common origin, and are therefore not so disparate as modern criticism makes them appear.[29]

The very possibility of reasoning in a world of natural laws gave nature a kind of necessary prescriptivity, therefore.

The principles as a guide for institutional law Reason's task, to move from the universal principles of natural law (the very *general* goods outlined above) to precepts that would guide every day human action, is immense. The generality problem was one Aquinas appreciated:

> ... to the natural law belongs those things to which a man is naturally inclined: and among these it is proper to man to be inclined to act according to reason. Now the process of reason is from the common to the proper … The speculative reason, however, is differently situated in this matter from the practical reason. For, since the speculative reason is busied chiefly with the necessary things, which cannot be otherwise than they are, its proper conclusions, like the universal principles contain the truth without fail. The practical reason, on the other hand, is busied with contingent matters, about which human actions are concerned: and consequently, although there

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27 *op cit*., n.1, 1a2ae, 90.1.
28 *op cit*., n.17, p. 4.
29 O'Conner, D.J., *Aquinas and Natural Law* (MacMillan, 1967), p. 60.

> is necessity in the general principles, the more we descend to matters of detail, the more frequently we encounter defects.[30]

The problem for law is vast. Positive law, like man's behaviour generally, is to be a participation in the general principles of natural law. The institution of law has a particularly important role, for without it there is little chance that human goods will be efficiently or morally pursued. It is particularly unlikely that the goods will be secured in a communal sense without the coordinating force of law and indeed Aquinas' claims that the whole of law is summed up in the commandment to 'love thy neighbour as thy self'.[31] Thus the common good can be advanced by law (the lawmaker subserves the common good[32]) through rational recognition of the (Kantian) idea that other individuals have ends in just the same way that I do.[33]

The principles of natural law outlined above are intended to guide reason, and law, in its determinations. They set out at a very high level of generality what the human goods (that are to be done and pursued) in fact are (preservation of life, kinship with others and reason). The principles are certainly more informative than the first principle because they tell us something about the (universal) *nature* of 'self' but they do not, in themselves, give much guidance to reason, or to law, in its task of determining how man ought to behave in pursuit of the very basic human goods. Although we may know that we should preserve life morally, for example, we do not know what moral preservation requires. A process of deduction is to enable the understanding that we require but it is not at all clear how the deduction is to occur. Aquinas suggests that the taking of human life is forbidden so far as it is 'undue', for example, but he does not explain how he determines that sometimes it may *be* due.[34] McInerny, in his attempt to identify more particular precepts, cannot overcome the generality problem:

> Consider first negative precepts. Thou shalt not murder. Thou shalt not steal. Thou shalt not commit adultery. Why not? Because such actions always and everywhere thwart the human ideal. There is no way that you can murder well, steal well or commit adultery well ...[35]

McInerny may be right to note that murder and theft thwart the human ideal but the conclusion does not follow by a process of reasoning from the 'common' to the 'proper'. In his examples of negative precepts, McInerny uses the language of criminality rather than descriptions of the acts involved; in fact all that can legitimately be claimed from this type of interpretation of the principles of natural law, is that one should not kill, take from another, or have an affair. Murder is simply the name given by societies to what they interpret as *bad* killing but McInerny does not succeed in showing how the institutional interpretation of 'bad'

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30 *op cit.*, n.1, 1a2ae, 94.4.
31 *ibid.*, 1a2ae 99.1.
32 *ibid.*, 1a2ae 100.8.
33 This is already acknowledged in the theory of man as a political animal. See Chapter 4.
34 See 1a2ae 100,8.
35 *op cit.*, n.17, p.7.

can be derived from the formulaic principles of natural law. We may conclude, thus far, that a rational being should preserve himself in a manner appropriate to a rational being. However, on its own, this cannot be a basis for concluding that killing in war is moral (sometimes), for example, but killing intentionally without a defence recognised by the law is immoral. Man might never be able to steal well or murder well but he *may* in limited occasions be able to take from another well or kill well. The principles of practical reason do not, of themselves, dictate when it is possible to kill well and when to kill amounts (or should amount) to murder.

Finnis indicates (in the field of human rights) the limitation of Aquinas's position:

> The moral norms which answer the question what human rights every person has, and what responsibilities one has in relation to oneself and others, must be specifications of that supreme principle of practical reasonableness, love of neighbour as oneself. Indeed Aquinas, says, they must be deductions from it. But he never sets out such a deduction. He has no general discussion of the way from the highest moral principle(s) to moral norms such as the exclusion of killing the innocent, adultery, perjury. [36]

The problem remains of how to derive substantive principles of right and wrong from these basic tenets of natural law. Finnis points out Aquinas's claim that the way is 'short'[37] in this respect but the real problem may be that the way is anything but short. It is as immense a task to derive moral norms from general tenets, perhaps just as immense as the identification of those tenets in the first place.

Reason in Other Theories

Plato's Theory of Forms

The themes explored by Aquinas in his examination of reason are apparent in the work of his predecessors. Plato's understanding of good as, 'the end of all endeavour, the object on which every heart is set',[38] clearly is comparable to the Thomistic conception. The highest good for Plato was the *form* of the good or good itself. Forms, in any domain, represented the essence of realities or what each thing 'really is'. But forms existed independently of the realities they described; they were abstract or intangible truths. The *form of the good* was the most important form, for it represented the end of *all* endeavours, our reason for being. For Aquinas, we are to identify appropriate actions by reasoning from the general principles of natural law to particular acts. For Plato it is the form of the good that by itself is to enable particular acts to become clear. It is to supply the knowledge of *real* rather than apparent good and to allow all realities – beauty,

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36 *op cit.*, n.1, p. 138.
37 *ibid.*, p. 138.
38 Plato, *The Republic* (Penguin, 1987), 505 d.

justice, law etc – to be viewed in *their* own form, good or essence. The role of reason in Plato's philosophy is left largely implicit but this 'theory of forms' can be viewed as an attempt to show how right reason might be attainable.

The simile of the cave described how forms were to be accessed. (Essentially the sun is the source of sight/visibility in the same way as the good is the source of knowledge/truth.) Men imprisoned in a darkened cave are shown *false* shadows and hear *false* sounds, which they believe to be emanations of the reality surrounding them. This represents the central human epistemological problem; all around us appears real; every 'is' has its own 'truth'. The job of the lawgiver is to encourage the best minds to escape from the cave [the empirical world] and to ascend to the sun [the form of the good]. The sunlight they then encounter produces visibility [intelligibility or the power of knowing]:

> When the mind's eye is fixed on objects illuminated by truth and reality, it understands and knows them, and its possession of intelligence is evident; but when it is fixed on the twilight world of change and decay, it can only form opinions, its vision is confused and its opinions shifting, and it seems to lack intelligence.[39]

Having accessed the sun, [the good] *true* reality would become apparent to these seers and the shadows that produce darkness would disappear. The seer [who would rule] would then return to the cave and share his knowledge with the cave dwellers, 'the object of legislation being not the special welfare of any particular class in our society but of the society as a whole'.

The form of good was intended to enable phenomena to be understood as properly they should be and to expose imperfect representations of the good. It was the philosophers who were equipped to access true knowledge rather than opinion and the idea of the philosopher ruler was thence born: 'a man will not be a very useful guardian of what is right and valuable if he does not know in what their goodness consists ...'[40]

Whilst the form of the good is to make knowledge a possibility it is accorded, itself, a status even higher than truth:

> Then what gives the objects of knowledge their truth and the knower's mind the power of knowing is the form of the good. It is the cause of knowledge and truth, and you will be right to think of it as being known, and yet as being something other than, and even more splendid than, knowledge and truth, splendid as they are. And just as it was right to think of light and sight as being like the sun, but wrong to think of them as being the sun itself, so here again it is right to think of knowledge and truth as being like the good, whose position must be ranked still higher.[41]

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[39] *ibid*., 508 d.
[40] *ibid*., 506.
[41] *ibid*., 508 e.

Plato seems to accord the form of the good a kind of independent reality (one Aristotle was clearly dismissive of). In Augustine a strikingly similar concept of truth appears:

> Physical beauty whether of an immobile object – for instance, the outline of a shape – or of movement – as in the case of a melody – can be appreciated only by the mind. This would be quite impossible if the 'idea' of beauty were not found in the mind in a more perfect form, without volume or mass, without vocal sound, and independent of space and time.[42]

For Augustine, we appreciate beauty only because in the mind we have a pre-existing concept of the *form* of beauty. It is not surprising that Plato's ideas are repeated, in this way, for his theory of forms can be regarded as an attempt at epistemological sophistication.[43] Plato's aim is to identify the essence of any reality using a single illuminating light. There is no need to engage in a reasoned, reflective examination of my nature and my place in the world; rather I identify truth, via the external illuminating form of the good. (Though, in fact I allow the philosopher ruler to do this for me and I accept his determinations as valid.)

Despite an apparent attempt at epistemological success Plato failed to convince that the form of the good has its own reality and failed to provide any practical advice about how it might be accessed. In its intangibility, the form of the good represented an 'ideal' that could not be disproved. (For Plato, the original social engineer, this was an undoubted advantage.) Ultimately, the theory of forms recreated subjectivity; we either accept the philosopher's ideals or we do not, much in the way that we either accept or not the commands of institutional religions. The divide between faith and knowledge was perhaps not so great for Plato as it appears to us now.

Aristotle's Theory of the Mean

For Aristotle the good was the end of action:

> ... It is that for the sake of which the other things are done; and in medicine this is health, in generalship victory, in house–building a house, in another case something else, but in every action and decision it is the end, since it is for the sake of the end that everyone does the other things.[44]

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[42] Augustine, *City of God* (trans. Bettenson) (Penguin, 1977), p.308.

[43] Less generously, it may be viewed as a philosophical short cut that does not lead to the desired destination.

[44] Aristotle, *Nicomachean Ethics* (Irwin, ed.) (Hackett, 1985), 1097a 15.

Aristotle's good like the Thomistic good was inherently moral: 'The human good is activity expressing virtue'.[45] Our end, as a human animal, was to be human to the best of our ability, to perfect what we are:

> (a) We have found then that the human function is the soul's activity that expresses reason [as itself having reason] or requires reason [as obeying reason]. Now the function of F e.g. of a harpist, is the same kind, so we say, as the function of an excellent F, e.g. an excellent harpist …. (c) The same is true unconditionally in every case, when we add to the function the superior achievement that expresses the virtue; for a harpist's function, e.g. is to play the harp, and a good harpist's is to do it well. (d) Now we take the human function to be a certain kind of life, and take this life to be the soul's activity and actions that express reason. (e) [Hence by (c) and (d)] the excellent man's function is to do this finely and well. (f) Each function is completed well when its completion expresses the proper virtue. (g) Therefore [by (d), (e) and (f)] the human good turns out to be the soul's activity that expresses virtue.[46]

Aristotle, like Aquinas concludes that: we are reasoning by nature, we ought therefore to reason well and to reason well *means* to reach proper virtue.

What did proper virtue involve? For Aristotle guidance, on virtue's requirements, was provided by intelligence, intelligence being 'a state grasping the truth, involving reason, concerned with action about what is good or bad for a human being'.[47] But before virtue was knowable actions had to demonstrate a kind of pre–reason goodness. This initial good was gained through habituation:

> Refraining from pleasures makes us become temperate, and when we have become temperate we are most able to refrain from pleasures. And it is similar with bravery; habituation in disdaining what is fearful and in standing firm against it makes us become brave, and when we have become brave we shall be most able to become firm.[48]

In this way we are to become virtuous by being virtuous. (The process of virtuous habituation recalled Plato's division of the soul and the importance of not allowing one part of the soul to become dominant over another.)

The aim in habituation is to reach the *mean*, that condition wherein excess and deficiency are avoided: 'Temperance and bravery, then, are ruined by excess and deficiency but preserved by the mean'.[49] To reach the mean we are to 'choose the intermediate condition, not the excess or the deficiency…' In turn, 'the

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45 *ibid.*, 1098a10.
46 *ibid.*, 1098a10.
47 *ibid.*, 1140b5.
48 *ibid.*, 1104a30.
49 *ibid.*, 1104a25, Aristotle's theory of the mean was the source of Aquinas' theory mentioned earlier.

intermediate condition is as correct reason says'.[50] Aristotle was aware that it may not immediately be apparent to reason, where the mean in a given scenario properly does lie. Reason needed further assistance if it was to identify the mean. To this end *correct* reason was further defined as reason that expressed intelligence. Intelligence, finally, enabled the doing of actions, which promoted only those goals which were good. Unfortunately the good goals were apparent only 'to the good person; for vice perverts us and produces false views about the origins of actions. Evidently, then, we cannot be intelligent without being good'.[51] The Aristotelian road to good is complex:

1. We become good by *being* good.
2. We can *be* good by avoiding excess and deficiency.
3. The mean between excess and deficiency is identifiable by correct reason.
4. Correct reason is reason that expresses intelligence.
5. To be intelligent we need to *be* good.

Ultimately circularity appears to be unavoidable; in order to be good we must know how to be good but we cannot know how to be good without being good already.

Conclusion

Plato, Aristotle and Aquinas were profoundly concerned to determine how fundamental truths about man could be ascertained and how the same could guide his action. Philosophical recourse to the immortal world might be considered historically inevitable, in the age of natural law. If reason, by interpreting the human world, could not reveal what acts were proper to man then perhaps it would have to search for truth in that original source; the immortal world. Divinity and the associated concept of happiness are the final links in the epistemic chain.

The Divine Order

There is, in many theories of natural law, a belief that nature has greatness beyond that which we can control and that once the commands of this greatness are grasped they are omnipotent. Such a belief operates to remove nature from the purely human role examined thus far. It represents a hope that the relationship between nature and what happens (see Chapter 3) is no more than part of the truth. It requires that humanity and its institutions, particularly law, subject themselves to the restraints of a perfect reason whose commands are believed to shape our natural world and yet exist entirely outside and above that world and its contingencies. The existence of God/s created the possibility that in an otherwise

[50] *ibid.*, 1138b20.
[51] *ibid.*, 1144a30.

seemingly uncontrolled human world there could be order. At least faith in an immortal world created the convenient belief that such order was a possibility.

Plato

In *The Republic*, despite Plato's many attempts to stress the importance of allegiance to man's law, (regardless of what that law might be, see Chapter 4) there remained, 'for Apollo and the Delphic Oracle laws of the highest importance and value to make'.[52] More than this, however, Plato stressed that law *just is* our participation in immortal reason:

> When a community is ruled not by law but by man, its members have no refuge from evils and we should do our utmost to reproduce the life of the age of Cromus and therefore should order our private households and public societies alike in obedience to the immortal element within us giving the name of law to the appointment of understanding.[53]

For Plato there was a duty on the lawgiver to obey the divine order. It followed that the laws of Zeus concerned with wisdom, sobriety of spirit, righteousness and valor, ranked above human 'law'. However, one cannot really view Plato as being committed to the supremacy of divine commands for such a position implies a *duality* between the law of the gods' and the law of man and for Plato there was no such distinction. Law *just was* the name given to the understanding of immortal laws and aimed at the common good (the 'common good' condition was believed to be demanded by the immortal law).

There are two ways to interpret this fusion between man's law and the immortal law. First, one could take the view that since law just was the name given to the understanding of the immortal, any rule described as a 'law' was necessarily as it ought to be. Otherwise the label 'law' could not have been attached to it; law, would be seen to provide always a correct definition of the common good. Adopting this stance, it becomes meaningless to talk of a *law* contrary to the common good for the statement would be self-contradictory. Alternatively, one could take the view that if a 'law' did not in fact aim at the common good it was not truly law; from this perspective it is the 'common good' that provides the account of what can accurately be described as 'law'. The religious skeptic may take the view that whichever is preferred is a matter of legal or theoretical convenience. The former validates the 'is' of law and the latter relies on the *human* interpretation of an unrevealed divinity which can validate/invalidate according to what the interpreter requires of 'common good.' These possibilities mirror the criticisms of natural law that HLA Hart attributed famously to Bentham:

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[52] 427b, these laws related to our relationship with the 'other world' inhabited by Apollo, 'the interpreter of such matters to men'.

[53] Plato, *The Laws* (trans., A.E. Taylor) (London, 1934), 713.

> Bentham had in mind the anarchist who argues thus: "This ought not to be the law, therefore it is not and I am free not merely to censure but to disregard it." On the other hand he thought of the reactionary who argues: "This is the law, therefore it is what it ought to be," and thus stifles criticism at its birth.[54]

Plato in favouring the view that human law is at one with the immortal will tends to suggest the reactionary position. Law is valid just because it is. Indeed, Stalley suggests that one way of interpreting *The Laws* is to view it as a systematic attack on the *nomos* (law or convention) – *phusis* (nature) distinction:

> … law is the reflection within the human sphere of the rational order that governs the universe as a whole. In keeping with this there is a vehement attack on those who see law, together with moral and religious beliefs, as a product of human invention rather than of nature.[55]

Stalley is similarly critical of Plato's stance and acknowledges that accepting the role of divine reason tells us nothing about the laws, which ought to be adopted by human communities: 'the order of the heavens tells us nothing whatever about what we, as human beings, ought or ought not to do'.[56] He places greater faith in modern concepts. 'Plato can make good his position only if he can show that his moral recommendations are in some way derivable from self-evident principles of reason'.[57] However, as earlier sections in this Chapter have suggested, the self-evident principles of reason do not themselves appear readily to enable the derivation of moral recommendations. Indeed recourse to divinity is in some ways a symptom of that deficiency.

The Stoics

The role of divinity is central to Stoic epistemology. Man's nature was part of the divine nature; he existed in a spiritual world and in his actions he was to perfect the manner of his participation in that world. Ultimately, the term 'nature' in Stoic thought denoted not what happened but what should happen in accordance with the divine plan (since this was, ultimately, the source of man's nature). To be a moral being man is to ally his reason with the perfect reason of Zeus:

> Further living in accordance with virtue is equivalent to living in accordance with experience of what happens by nature for our own natures are part of the whole. Therefore living in agreement with nature comes to be the end, which is the right reason pervading

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[54] HLA Hart, 'The Separation of Law and Morals', 71 *Harvard Law Review* (1958), p. 598.

[55] Stalley, *Introduction to Plato's Laws*, (Oxford, 1983) p. 29.

[56] Long, A.A., & Sedley, D.N., *The Hellenistic Philosophers*, v.1 (Cambridge: Cambridge University Press, 1987), p. 29.

[57] *ibid.*, p. 29.

> everything and identical to Zeus, who is the director and administrator of all existing things.[58]

The Stoics were perhaps more successful than others at showing how such right reason (reason in accordance with nature/the immortal world) might be a possibility. There were no shortcuts to virtue. Man became virtuous only by acting in agreement with nature, first in natural ignorance of the choiceworthiness of these actions, and then by knowing their value. Importantly, to act in agreement with nature, man did not, it seems, need to know, fully, what nature meant. Rather he perceived harmony and happiness resulting from the performance of a particular *type* of function (proper functions) and naturally desired to retain the harmony, through repeating that same type of function. Happiness was the reward gained by the performance of proper functions:

> The man who progresses to the further point performs all proper functions without exception and omits none. Yet his life he says is not yet happy, but happiness supervenes on it when these intermediaries acquire the additional properties of firmness and tenor and their own particular fixity.[59]

The process, like the Aristotelian process, was one of learning by doing and of reaping a reward when one had done correctly. Epistemologically, the Stoic did not trespass onto another level, therefore, and witness the knowledge otherwise hidden in the immortal world. Rather it was as though the performance of proper functions created illumination. As more proper functions were performed a pattern emerged which the actor, in order to keep his path through life illuminated, naturally desired to complete. When the pattern was complete man knew how to live virtuously and had reason to continue to do so, harmony being intrinsically preferable to discord. Hence, it was not such an extraordinary belief, as claimed by Plutarch, 'that having got virtue and happiness a man does not often even perceive them but eludes that he has now become prudent and happy'.[60] This was in fact the key to Stoic ethics and to understanding the nature of the virtue they described.

The purported link between happiness and virtue did not however permit a hedonistic virtue. The sinful but 'happy' Stoic was in fact an impossibility because such a sinner had merely a mistaken concept of happiness or was not truly 'happy'; he could not therefore be described as virtuous in spite of his 'sin'. Only the *truly* virtuous man was really happy. By appealing to this universal truth the Stoics can avoid Kantian objections of heteronomy. Virtue did not depend on what happened to make a particular individual happy; rather the attainment of happiness (*eudaimonia*) could *only* occur when man had become virtuous; i.e. by pursuing his true nature.

Engstrom and Whiting make the point well:

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58 *ibid.*, p. 395.
59 *ibid.*, (Stobaeus), p. 363.
60 *ibid.*, p. 382.

> We have reason to pursue our eudaimonia not because we desire it, but because it is our ultimate good which depends on the sort of being we are not on what we happen to desire.[61]

Although Stoic theory was in no way intended to be linked to the individual, selfish pursuit of happiness it is incapable of describing what 'true' happiness really consists in and, therefore, cannot wholly escape such criticism. The sinner has no way of knowing that his happiness is false and that he is therefore a sinner; nor can the virtuous man recognise his happiness as the 'real thing'. Aquinas too merely stated the link between happiness and virtue and did not satisfactorily illuminate either substantively. Without knowing what virtue means, I do not know if I am truly happy or only mistakenly happy. Without knowing in what happiness truly consists I do not know if I am actually virtuous or merely reasoning incorrectly about what virtue entails. The link between happiness and virtue is difficult to maintain:

> It seems, therefore, that the move from unobjectionable trivialities like 'happiness is what everyone wants' or 'happiness is what satisfies all human desires' to giving a description of happiness or a recipe for it is beset with difficulties. We can, of course, reject our opponent's counter–instances. We may say, for example, that the apparently happy man who is poor or ill or the apparently happy criminal or tyrant is not *really* happy. But then we are turning our seemingly empirical and informative *description* of what it is to be happy into a mere verbal proposal to call only those people happy who satisfy our conditions.[62]

Neither their conception of divinity nor the role accorded to happiness releases Stoicism (or Aquinas) from the charge (or at least the remaining theoretical possibility) of moral relativism. Nevertheless, the skill with which the Stoics attempted this release reveals at least an awareness of the problem. At most it represents a deliberate attempt to point to the difficulty of knowing truth intellectually and is an appeal instead to the merits of an instinctive awareness of moral right, supposedly inherent in the human condition by virtue of its participation in a divine order.

Aquinas

Divinity and moral knowledge In Thomistic natural law theory God's actuality is the source of the good for all other realties:

> ... The only perfectly good thing in existence is God, who is pure actuality. But anything else is good to the extent that its potentialities

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61 See, *Aristotle Kant and the Stoics, Rethinking Happiness and Duty, op cit*., n11, p. 6.
62 *op cit*., n.29, p. 25.

> are brought to actuality. A fully developed oak–tree is better than a warped or stunted one.[63]

Human nature was, for Aquinas, part-illuminated by the 'pure actuality' of eternal law. In fact, the very reason why the principles of natural law did not include a reference to man's participation in divine reason is that natural law *was* man's participation in divine reason. We know how to participate in divine reason - we know our natural law - because of what we are: 'Natural law is promulgated by God's so instilling it into men's minds that they can know it because of what they really are'.[64] The crux of Thomistic natural law is (as O'Connor acknowledges) the difficult position that, 'if we know what human nature is we shall know what our natural inclinations are. And so we shall be in a position to know what our duties are in light of the natural law'.[65] It still remains to be considered how we can know this human nature with any precision.

The eternal law was intended to provide some information about 'what we are'. It provided a metaphysical limit to the reaches of human activity: 'the eternal law is not subordinate to an outside end'.[66] Aristotle had seen the significance in this; there had to be an end good, a conclusion to the chain representing that for the sake of which *all* else is done:

> Suppose then that (a) there is some end of the things we pursue in our actions which we wish for because of itself, and because of which we wish for the other things and (b) we do not choose everything because of something else since (c) if we do, it will go on without limit, making desire empty and futile; then clearly (d) this end will be the good i.e. the best good.[67]

The problems with this analysis are well documented. If, for example, satisfying hunger can be viewed as a human good (part of what fulfils man) then growing vegetables and cooking might be seen as goods subordinate only to the good of satisfying hunger – there is no need to find a higher good since the chain is already complete. There may be many other such chains and thus many 'best' goods. However, such criticisms may be overcome for the possibility of many 'chains' does not undercut the sense in asking the question, or the need to consider the question, 'why satisfy one's hunger in the first place'? An answer to this type of question is always possible. We satisfy our hunger ultimately to be fulfilled as the type of being that we are, i.e. in part a being who (a) requires food and (b) feels the lack of it; we do other activities for the same reason (whether the activities conform with fulfilment objectively or not). All our actions are capable of being viewed as participations in the general idea of good which is the idea that we seek the completion of our being in whatever we do. The chain of doing is complete

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63 *ibid.*, p. 19.
64 *op cit.*, n.1, 1a,2ae, 90.
65 *op cit.*, n.29, p. 61.
66 *op cit.*, n.1, 1a2ae 91.
67 *op cit.*, n.44,1094a10, 20.

only at the point when our being is complete; the 'best' good simply denotes this point.

Aquinas's 'good' does possess this character of completion/fulfilment. However, rather than allow the idea of ultimate good to vest totally in the concept of fulfilment, Aquinas locates it finally in a divine source. The divine good is the essence of good that enables us to discern good more generally. In a sense Plato's simile of the sun is recalled:

> No one except God himself and the beloved who see him in essence can know the eternal law as it is in itself but every rational creature can know about it according to some dawning greater or lesser of its light. For every knowing of truth catches some radiance from the eternal law which is the unchangeable truth as Augustine says, and everybody in some manner knows truth, at least as regards the general principles of natural law.[68]

Whilst we are not equipped to trespass on the immortal realm, we are told by Aquinas that: 'The light of natural reason by which we discern what is good and what is evil is nothing but the impression of divine light on us'.[69]

Aquinas tackled epistemological problems with some competence. However, he sought, ultimately, to resolve them (much like the Stoics) by appealing to the possibility of knowing without really knowing. Our knowledge of divine reason could never be complete because we simply could not access that higher level but there was, nonetheless, a partial, twilight zone of knowledge left by God's impression and falling short of actual knowledge:

> Where he can lay a law is upon the rational beings subject to him, in that by a precept and warning he impresses on their minds a certain rule which is a principle of how they act. By such a pronouncement a human authority imparts a kind of inward principle of activity to its subjects; so also God impresses in the whole of nature the principles of the proper activities of things.[70]

Our spirituality provided another half way house, a further explanation of the unknowing nature of our knowledge; because of it we were *naturally* inclined toward virtue:

> In some manner they have a notion of the eternal law and there is also within each of them a natural bent to what is consonant with the eternal law. It is remarked in the Ethics that we are, 'adapted by nature to receive the virtues'.[71]

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68 *op cit.*, n.1, 1a2ae 93.
69 *ibid.*, n.1, 1a2ae 91.
70 *ibid.*, 1a2a3 93.
71 *ibid.*, 1a2ae 93.

But although we were not expected to understand truth directly this did not preclude the existence in fact of such truth nor did it prevent the applicability of such truth as a governing principle:

> We enter into the eternal law according to some general principles without knowing all individual directives though these are comprehended in the eternal law.[72]

In fact this very inaccessibility explained the need for human law, 'hence the need for human reason to proceed further and sanction particular enactments of law'.[73] Aquinas does not indicate exactly how to proceed from general principles to individual principles. The route appears to be somewhat hidden from him and the role of divinity, our half-light sharing in divine knowledge can be seen as a representation of this inaccessibility.

It should not be forgotten, however, that fundamentally natural law is *natural* law as Finnis emphasises:

> Consider a norm or precept indubitably moral in type…: for example, the norm prohibiting killing innocent people, or… the norm against adultery. These appear in the Decalogue of Jewish and Christian faith, but Aquinas is clear that (if true) they are in any case truths of practical *reason*, of natural law knowable in principle by anybody without appeal to any divine revelation.[74]

Divinity and law The enactments of human law are to be aimed at compliance with natural law, which was man's way of participating in the eternal law. Law that complied with the natural law made man moral whereas law which contravened natural law would produce only men who are 'good' as subjects, good in a non-moral sense:

> If the law maker's intention bears on true good, namely the common good regulated by divine justice, the consequence will be for men through the law to become quite simply good. If however the intention is not for good without reservation but something that serves his own profit or pleasure, or against divine justice, then keeping the law will make men good not simply but relatively, namely amenable to the regime.[75]

But Aquinas did not necessarily dismiss the validity of a-moral laws:

> A human law has the force of law to the extent that it falls in with right reason: as such it derives from the eternal law. To the extent it falls away from right reason it is called a wicked law: as such it has

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72 *ibid.*, 1a2ae 93.
73 *ibid.*, 1a2ae 93.
74 *op cit.*, n.26, p. 125.
75 *op cit.*, n.1, 1a2ae 93.

> the quality of an abuse of law, rather than of law. Nevertheless even wicked law keeps some trace of legality, since it is backed by the established order which is supported by the eternal law.[76]

Aquinas seems to suggest here, not so much that wicked laws are not laws (though they are an abuse of laws); rather that there may be reason to treat wicked laws as binding. The suggestion is that human reason may be limited to understanding the human world; it cannot fully grasp the commanding divine plan which may on occasions utilise 'bad' laws to serve in the attainment of some greater good.

Aquinas's conclusion can be compared to Marcus Aurelius's suggestion that if life seems unjust there might be an overarching divine reason for that apparent injustice that human reason cannot comprehend:

> If the Gods have determined about me and about the things which much happen to me, they have determined well, for it is not easy even to imagine a deity without forethought; and as to doing me harm, why should they have any desire towards that? For what advantage would result to them from this or to the whole, which is the special object of their providence? But if they have not determined about me individually, they have certainly determined about the whole at least, and the things that happen by way of sequence in this general arrangement I ought to accept with pleasure and to be content with them.[77]

The implication of these statements by Aquinas and Marcus Aurelius is that whatever happens, however unfortunate, can be interpreted as having been planned. Law that is contrary to natural law, can, therefore, be considered wrong for *a reason* and thus right, in a sense (the position of Hart's reactionary is recalled).

Conclusion

Despite natural law's final recourse to divinity, it can stand or fall in virtue of being *natural* law. In the following Chapter its epistemological strengths are examined systematically, via comparison with the approach evidenced in new natural law theory.

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[76] *ibid.*, 1a2a3 93.

[77] Marcus Aurelius, The Meditations, (trans. Long, George) www.classics.mit.edu/Antoninus/meditations, Book 6.

Chapter 6

New and Traditional Natural Law: Epistemological Comparisons

Introduction

New natural law theory identifies basic human goods alongside principles of practical reasonableness that determine how the goods can be pursued morally. In *Natural Law and Natural Rights*[1] Finnis recognises the following seven goods: life, knowledge, friendship, practical reasonableness, play, aesthetic experience and religion. The goods are *basic* in the sense that they are worthwhile in themselves, rather than merely for the attainment of other ends. As such they provide non-instrumental reasons for action meaning that any human activity can be made sense of in terms of being aimed ultimately at one of these *ends*. This approach reflects the classical natural law ideas (a) that all aspects of nature seek the ends/goods that fulfil their particular manner of being and (b) that uniquely man can pursue his ends through reason.

In new natural law the human goods are considered to be known to practical reason naturally and self-evidently.[2] It is not humanly sensible the suggestion is to deny that life or play or knowledge are good; we just know, when sincerely we reflect on human action, that these ends have fundamental worth. This central claim of new natural law, that the basic goods are known to us *self-evidently*, without reasoning deductively from other premises, has led Weinreb to claim that the theory is 'natural law without nature'.[3] In contrast, traditional natural law theory, whether it succeeds in its aims or not, grounds human goods firmly in a theory of human nature. Critics of new natural law see it as divorced from its classical origins by the insistence on non-inferential reasoning as a way to identify human goods.

The new natural law method is influenced strongly by Hume's claim that ought-propositions cannot be derived from is-propositions. It is a simple logical flaw, the idea goes, to deduce from the fact/from the '*is*' of me killing someone, that the killing is a morally bad act, that it '*ought*' not to be done, or equally from the '*is*' of my life that it '*ought*' to be preserved. In the same way, at the most fundamental level, a theory of what the human being *is* and of the place he

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1 See, Finnis, John, *Natural Law and Natural Rights* (Oxford: Clarendon, 7th ed), Chapters 3-4.

2 For a discussion of the nature of practical reason see Chapter 5.

3 See Weinreb, L., *Natural Law and Justice* (Cambridge, Mass., 1987), Chapter 4.

occupies in his world cannot, it was thought, provide our understanding of what he *ought* to be and how he ought to behave. For this reason new natural law does not embark on a theoretical study of nature at all; neither, therefore, does it attempt to derive moral norms from facts about man's being. Instead new natural lawyers seek to avoid the apparently illicit derivation of ought-propositions from is-propositions. Interestingly they make the claim that classical natural law avoided this to.

Building on the analysis of the previous two Chapters the aim here is to demonstrate the contrary view. By comparison with new natural law the suggestion is made that facts were of *epistemic* importance to traditional natural law theory in the following four ways:

1. In developing a theory of good.
2. In formulating the first principle of practical reason (Aquinas).
3. In positing the specifically human goods.
4. In determining how goods should be instantiated in human activity.

It is an important project of new natural law to show that human goods are known through non-inferential understanding '… if one attends carefully and honestly to the relevant human possibilities one can understand, without reasoning from any other judgment, that the realization of those possibilities is, as such, good and desirable for the human person …' [4] This Chapter will suggest that new natural law does utilise facts about nature as the epistemic basis of goods and values despite its claim to the contrary. In this way the gap between new and traditional natural law is bridged but only by a common feature that new natural law would attribute to neither school.

The *Theory* of Good in Natural Law

Robert George points out an apparent flaw in the idea that new natural law is natural law without nature. He suggests that the criticism fails to observe a distinction between *ontological* and *epistemic* grounding in nature:

> Neo-scholastic critics of the position Finnis defends have ignored the distinction between ontology and epistemology to which he appeals. They seem to have assumed, gratuitously, that anyone who maintains that our knowledge of human goods is not derived from our prior knowledge of human nature must hold that human goods are not grounded in nature. The assumption, however is unsound. There is not the slightest inconsistency in holding that (1) our knowledge of the intrinsic value of certain ends or purposes is acquired in non-inferential acts of understanding wherein we grasp self-evident truths, and (2) those ends or purposes are intrinsically valuable (and thus can

[4] *op cit.*, n.1, p. 73.

> be grasped as self-evidently worth while) because they are intrinsically perfective of human beings, i.e., beings with a human nature.[5]

Finnis, indeed explicitly acknowledges the ontological point, that the human goods depend for their existence on the ontologically prior, the human being, which, if different in nature, would produce different goods. At the same time he holds that we come to know the goods, not via an understanding of their source: ('epistemologically, (knowledge of) human nature is not the basis of ethics') but, naturally and self-evidently. The process of reflecting on the human goods is thought to contribute to, rather than being derived from, our understanding of human nature ('ethics is an indispensable preliminary to a full and soundly based knowledge of human nature').[6]

Nature does have a role in new natural law theory, then, an ontological not an epistemic role. But the point, in a way, is trivial; it would be a peculiar view that held facts about human nature to be of no significance, ontologically, in determining how the human creature ought to behave; if we did not have aesthetic sensibilities, aesthetics would play no part in the human good; if we had more in common with animals than with the reasonable creatures that in fact we are then we ought to behave more like animals; what we ought to do, what we are able to perceive as worth doing, and how we perceive the same, is informed by the type of creature that we are, by our natural characteristics, abilities and limitations. To say that nature is ontologically relevant, in this way, seems to attribute no special importance to nature.

Traditional natural law, like new natural law, shows that when we contemplate and reflect on our actions, human goods are known to us naturally. But, unlike its modern variant, it is concerned also to demonstrate, by reference to a theory of 'good'[7], why the objects of practical reason, the human goods, really are 'goods' and why they represent human participation in the 'good' of nature generally. To this end it is profoundly concerned to account for good as an idea in itself.[8] The implication is not that individual goods are derived by deductive reasoning from the idea of good; rather, it is considered important and beneficial to account for the relationship between human goods and the idea of good. The nature of the relationship may help explain *why* it is, for example, that knowledge

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[5] George, Robert, P., *In Defense of Natural Law* (Oxford: Oxford University Press, 2001), p. 35.

[6] Finnis, John, *Fundamentals of Ethics* (Washington: Georgetown University Press, 1983), 1.1.

[7] It is worth noting from the outset that a theory of good does not serve as a tautologous 'what is the value of value?' type of inquiry; it provides rather a metaphysic of good wherein the meaning of good becomes knowable to human reason. Maybe 'good' is simply the whole of the sum of the human goods but even then there is something that each of the goods possesses that enables recognition that they are all commonly good; that common feature must in itself be independently explicable in terms of a theory of what good is.

[8] The theoretical inquiry as distinct from the parallel practical inquiry takes place in e.g. *Summa Theologiae*, 1a.5; 1a2ae, 1; 1a2ae 18.

is naturally perceived as a good (rather than that the same is true). It may be noted therefore that new natural law emphasis on practical reason should not be taken to undercut the need to address, or at least the possibility of addressing, a theoretical question like; 'what is it that makes the 'goods' that are known to practical reason, good?' that underpins traditional natural law theory. In terms of ontology and epistemology the relevant questions, addressed at this theoretical juncture were 'what is good itself?' and 'how do we come to know good itself?'

The answers to both these questions were found by examination of the natural world in which good existed. Aristotle, the Old Stoics and Aquinas made a common observation about that world, that in it all aspects of reality were true to their particular manner of existing; each natural entity sought to be what, in a latent sense, it was already. A fire, factually hot, gave heat, an acorn, factually a young oak tree, became an oak tree, a shoemaker, factually a maker of shoes, made shoes. The potential, buried in the fact, was realised in the active state. It is important to note that fire 'sought' heat in the same way as the shoemaker 'sought' to make shoes. To seek, therefore, did not suggest a level of desire or consciousness about the end that was sought. Regardless of any consciousness or feeling in that regard, we naturally sought our end just by virtue of the fact that it was natural and logical for any entity to be in fact what it is supposed to be/what it naturally is. This process of natural and logical realisation produced the idea of good. Not only did fire give heat naturally, therefore, but by so doing, it was at once disseminating the meaning of and acting in accordance with the good of fire.

'Good' is not divorced from being, therefore, but denotes the most complete form of a being that exists within itself: 'Being good … adds merely the notion of a desirability and perfection associated with the very existence of things, whatever kind of things they be'.[9] Aquinas's suggestion is that there is a kind of duality between incomplete and complete forms of reality: 'To exist without qualification is to achieve an initial actuality, and to be good without qualification is to achieve a complete actuality… Being good describes a mode of existence when used without qualification to mean achieving complete actuality'.[10] Lisska indicates the importance of the relationship between being and value for our understanding of the naturalistic fallacy (the idea that and ought-proposition can never be derived from an is-proposition):

> … if one takes seriously what can follow from a dispositional view of essence, one has a way around the naturalistic fallacy. With a static view of essence, a value is necessarily added to a fact – the set of defining properties. … With a dispositional view of essence, the value is the development of the dispositional properties. It is not an extrinsic property joined to a fact. Therefore a dispositional view of essence with the *telos* being the actualization of the disposition renders the naturalistic fallacy irrelevant.[11]

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9 Aquinas, *Summa Theologiae*, 1a5, 1 5:3.

10 *ibid*., 1a. 5.

11 Lisska, Anthony, J., 'Finnis and Veatch on Natural Law in Aristotle and Aquinas, *Am. J. Juris* (1991) p.70.

Lisska points out that in traditional natural law the reasoning is not: (from the fact) 'X is alive' to the (value) 'X's life ought to be preserved'; the value is not inexplicably *attached* to the fact. Rather the reasoning is more likely to be something like: 'X is alive', 'life is an essential element of X's being', 'X (and other x's) *can* perceive the value in being alive and *can* preserve that life', 'X's life ought to be preserved'. The preservation of life is seen to follow from the capacities to value and to preserve that define the type of life we have.

The importance of this connection between fact and good in traditional natural law should not be understated; good existed because of and in the movement from being to completion of being and we only had knowledge of good as an idea because of our abilities to perceive and to understand that movement; the knowability of good was certainly secondary to and dependent upon prior knowledge of the significance of basic facts; because we know that fire *must* give heat we know, therefore, that it is proper or natural for fire to give heat, that one good of fire is to give heat. We can come to know 'good', as an idea, more generally, through our ability to perceive in action these natural movements from beings to different forms of beings.

To seek to know what good is requires, necessarily, therefore, knowledge of how nature in fact works; good just does have its origin in a process of nature. To put it in Humean terms 'ought' is that more complete form of 'is' which the natural 'is' can attain within itself and we know that there is an ought/a more complete form of is by observing generally the fact of the activity of 'is's' towards more complete 'is's'.

A possible objection to nature's epistemic role in this regard lies in the suggestion that perhaps we may come to know good, as a concept, not by starting with good itself but by somehow working backward from *goods* known self-evidently to human beings. But if the purpose of enquiry is, in the first place, to demonstrate philosophically that what human beings take to be self-evident goods really do amount to their participation in 'good', to do more than describe the workings of positive human morality, then such an approach is undesirable. If the meaning of good is entailed in the meaning of being, it is difficult to see how we can come to know good itself without knowing something about the beings to which good is absolutely connected.

New natural law does not participate in the enquiry into good as an idea to the same extent that traditional natural law does and by underplaying the importance of the concept of good itself it misses the opportunity to provide a continuing theoretical support for its practical ethics, a support evident in traditional natural law at the three conceptual levels outlined below.

Nature and the First Principle of Practical Reason in Natural Law

Despite the importance of nature to his theory of good, Aquinas does not leave all the difficult normative work to a theory of nature. When it comes to *human* activity he believed that it was practical reason that did much of the work, apprehending as representations of good, 'goods,' those ends to which we were naturally inclined.

This does not render the preceding analysis conceptually obsolete. To recognise, in the first place, the connection between the ends to which practical reason is directed and the notion of good, Aquinas required a theory of good. That theory, as shown above, was based upon recognition of the goodness inherent in nature. (1) The theory of nature served (2) the theory of good, which, in turn, served (3) the theory of practical reason.

The three theories are integrated in Aquinas's first principle of practical reason/natural law: 'good is to be done and pursued and evil avoided'. The first principle represents the meaning of good translated into normative form. Although the principle stood alone as a principle naturally known to practical reason it was nonetheless possible to explain how the practical principle was grounded in the notion of goodness. The parallel theoretical question, therefore, was what is it that connects this self-evident practical principle to the *idea* of good; more particularly why does the theoretical conclusion that good *is* the fulfilment of aspects of existence (see above), entail the normative principle, naturally known to practical reason, that good is to be done and pursued and evil avoided? Why does 'good is our end' require for us humans that good/our end *ought* to be done? To attempt to answer this question is to offer an account of the first principle by reference to its theoretical foundations; in modern philosophical terms it is to provide a theory of the source of normativity.

The early natural law theory of good itself had established only that good is the complete actuality that can be attained and is sought by initial actualities. This translated, for human beings, into a requirement that good ought to be pursued because that particular actuality takes the form of a uniquely reasonable creature. 'Oughtness' and pursuit are required in the human good specifically because these conscious directions towards good represented reason at work and made actions truly human, therefore:[12]

> One ought to keep in mind that the nature of each and every thing is chiefly determined by the form whereby it is specified. Man is specified by his rational soul, properly speaking, and therefore anything contrary to the order of reason is contrary to the nature of man as such.[13]

The human goods (whatever they may be) represent for us, as they do for other realities, what really, naturally we are (that is what the idea of good refers to). But for human beings '*ought'* is applicable in respect of goods rather than '*must'* because it is reason and then willing that, in terms of our specificity, does make us what really naturally we are. Without understanding that natural entities are drawn toward the perfection of their form, then attributing to that movement the notion of good, and then making the connection between the naturalness of good (that occurs

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[12] 'The cause and root of human good is the reason.' Aquinas, *Summa Theologiae,* 1a2ae, 66, 1.

[13] *ibid.*, 1a2ae, 71,2.

because of the inescapability of one's form) and the normativity of good for the human creature in particular, the first principle of practical reason would not be known as a principle that participates in good. Knowledge of how nature works is required all the way down to grasp the unique need for normativity in human action:

> … things possessing intelligence set themselves in motion towards an end, for they are masters of their acts through their own free decision, of which they are capable through reason and will, whereas things without intelligence tend towards their end by their natural bent stimulated by another, not by themselves; they do not grasp what being an end means, and therefore cannot plan, but can only be planned for a purpose as such. ... Our conclusion is that to be self-acting and bringing oneself to an end is proper to rational beings, whereas non-rational beings are acted on and brought there …[14]

This conclusion may act, later in the *Summa Theologiae*, in the service of a practical enquiry but is itself theoretical, dependent for its success on understanding of how natures in fact work and, more so, on the observation that the human good is tied to human reason since it is reason that gives man his unique humanity.

The idea that the source of normativity can be found in nature is acknowledged in modern philosophy. Christine Korsgaad, for example, finds the origin of normativity in the human condition of reflectiveness, which is not so far removed from the traditional natural law grounding of normativity in unifying human reason. The view is shared that in virtue of our common reason/reflective nature, we are naturally inclined to oughtness as is the acknowledgement that, at its most basic, the human condition just entails value as much as it entails fact. It is the capacity to value that makes us, us and we are only properly us, therefore, if we do in fact act through valuing. Being is not just 'is' it is also 'ought' (necessitated by reason); both are equally what we are. Korsgaard claims accordingly: '… there is something left of the fact/value distinction, although it isn't much. … It is the natural condition of living things to be valuers, and that is why value exists'.[15]

The Connection Between Nature and Human Goods

Aquinas, like the new natural law school, makes the claims that we are *naturally* inclined towards our proper ends, that those ends are *naturally* apprehended by practical reason as goods. This tempts us to conclude that the true nature of man – his goods – can be known through an exclusively forward thinking exercise of practical reason, that although good is tied to being, its constituent elements are

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[14] *ibid.*, 1a2ae. 1,2.

[15] Korsgaard, Christine, M., 'The Origin of Value and the Scope of Obligation', in (O'Neill ed.), *The Sources of Normativity* (Cambridge: Cambridge University Press, 1996), pp. 131-166, p. 161.

fully discernable through our apprehension of the ends of being. Primary being need be of no epistemic relevance.

There is good reason to support the idea that primary being, *as displayed in action*, can be of no assistance to obtaining knowledge of human goods specifically. An acorn may fail to be what properly it can be; it may wilt and die as a fledgling oak tree. But every stage in its development that it does make is nonetheless towards its proper end. By looking at its activity we can observe something of the nature of the complete entity. However, activity towards their proper ends is not a *necessary* part of being human (if it was a theory of good would arguably be superfluous). It is not a necessary part of being human because right reason, at once one of our goods, and the manner by which they ought to be pursued, is not by *necessity* involved in our action. So, as Kelsen warned, we cannot observe simply the fact of human activity to instruct our idea of what form human activity should take.[16]

There appears, for this reason, no means to divine an epistemic link between human nature (evidenced in action) and particular human goods. But promisingly, we have two faculties, inclination and reason, that acorns do not have. Our good may be linked ontologically to facts about our nature that really do represent our form but perhaps these faculties themselves do the epistemic work. This is indeed the conclusion reached by new natural law; practical reason naturally and self-evidently isolates the ends that are truly manifestations of the proper human form. But in traditional natural law there is an accompanying parallel theoretical enquiry that preserves the epistemic link between good and being. The link is preserved in a number of ways.

The first principle of practical reason demanded that good is to be done and pursued and evil avoided and good as a concept had meaning in itself; it represented the fulfilment of our being. The other principles of practical reason participate in this meaning i.e. they represent what really our being is and therefore determine most generally what we ought to be and do. Since the goods do in fact represent our participation in a natural process they may also be discernible in nature. Good was connected absolutely in traditional natural law to what makes entities those particular entities and indeed we can and do talk sensibly about distinct natural entities; we can differentiate intelligently between facts of nature like fires and oak trees and human beings. There is a sensible differentiating core that makes it possible to have such clear definitional lines between distinct natural entities. For human beings it can be claimed that reason must surely form a significant part of the core; according to Aquinas and Aristotle this specific quality of reason marked us out as human and in doing so became in many ways the fact that was to be of primary moral significance. So the question 'how is the human form defined?' was answerable, in part, from knowledge about what it is that makes that being, human.

But it was not only the specifically and uniquely human facts that Aquinas viewed as morally significant. To establish other morally significant facts he did

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[16] Kelsen, Hans, *What is Justice?* (California, 1957), p. 181. See Chapter 7 for a fuller discussion of the point.

not look toward facts displayed in actions as a guide; these contingencies as Kant acknowledged were likely to distort rather than to represent the proper form of the human being. Rather, Aquinas was often more concerned with the normativity of facts that pre-existed any activity, with essential facts about the nature of the entity in which action took place. These facts are of the type that cannot represent a distorted view of human nature because they are about what essentially we are pre-activity, pre-development, prior to any contingency that is capable of distorting a theory of human nature. The work of traditional natural lawyers is perhaps most convincing (though most criticised) when they dissect and investigate the normativity of these pre-activity facts like: we exist, we exist alongside other people, we exist in a world of resources necessary for the continuance of our existence, we exist as animals, we exist as part of a natural world, and we exist as rational animals.

These types of pre-action facts relate as much to man's situation in the world as they do to qualities inherent in him. For example, one thing that was observed about the human condition, conceptually before any activity was embarked upon was that the human creature is not alone. He inhabits the world with others. Indeed nothing more complex than *the fact* that we share the world other people informed Plato, Aristotle and the Old Stoics that community is a natural end for man; we are, prior to any activity, already, in a de-facto community; community is part of what makes us human. Reflexively, the community, once formed, contributed to the completion of the human creature for without activating the capacity to community man is not as properly he should be. In this way facts that seem remote to man were indeed considered central to a concept of human nature. The existence of other people is part of what makes each human being what he is whereas the pre-community man is only part of what it means to be man.[17] The foundational fact (the part) informed the notion of the complete entity (the whole).

The invocation of 'alien' facts in a theory of human nature may seem strange but it is not so strange if the view is taken that man is formed in part, by his relatedness to these alien facts; if other people did not exist, 'I' would mean something very different. The other-people focused theory of individual human self, rather than reason's own principles, provided the basis for the early natural law equivalent to universalizability; other people are already involved in what makes me, me, given that being good means being what I am as fully as possible, I am only good if I act, not on the basis of self-centredness, but, on the basis of communality.

In fact those conditions that make man, man are undeniable and indestructible in moral theory because they constitute the subject of that theory; to destroy them is to destroy normativity. Precisely the same explanation underlies Kant's rejection of suicide; where the subject of morality is the human being suicide must be wrong for 'to annihilate the subject of morality in one's own

[17] See Chapter 4.

person is to root out the existence of morality itself from the world'.[18] Korsgaard makes a similar point about the implications of rejecting our normativity:

> If value is the fact of life, then a rejection of all value takes the form of a rejection of life. The most straightforward expression of complete practical normative scepticism would therefore be a form of suicide.[19]

In traditional natural law the subject of morality is of course, likewise, life, but that subject, pre-activity, was defined by more than mere life. Existence, communality, and reason (at the very least) together made man, man and to deny any one was to annihilate the subject of morality and hence to deny morality any place in the world. For Kant a human being is bound to preserve his own life simply by virtue of his quality as a person. For natural law 'quality as a person' is more than just life, it is life, communal life and reasonable life and the human creature, being all three, is bound to preserve all three or to risk losing humanity.

The facts that traditional natural law takes to be normatively significant are of the most elementary kind and the theory of human nature that emerges is, in many respects, an unusual and modest one therefore. The modest aims at this stage arose from an awareness of the 'modification' issue that Machan suggests is a problem for natural law:

> To know human nature must … mean that one is in a state of completed awareness of an object. To modify one's understanding of human nature, would then be impossible – if one does know human nature. And if one does require such modification, or if that possibility must be admitted, then the claim to knowledge must be withdrawn.[20]

Traditional natural law theory was concerned, first, with the human nature that was beyond modification, with only the facts that made man, man, and would withstand any type of evolution. Because of the necessarily elementary nature of these facts, evolution and human nature in a secondary (the usual sense) sense had a lot of space to work within. The nature of the evolving, modifying creature continued to inform particular norms but did so within the constraints of an elementary, primary

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[18] Kant, Immanuel, *The Metaphysics of Morals* (Gregor ed.), *The Cambridge Edition of the Works of Immanuel Kant* (Cambridge: Cambridge University Press, 1996), p. 547.

[19] *op cit*., n.15, p. 161. Korsgaard points out that of course not every act of suicide has this meaning: 'I believe that there can be good reasons for committing suicide. … Most people would rather die than completely lose their identities, and there are various ways to do that. Violating your own essential principles, failing to meet your deepest obligations, is … one, but there are others over which we have less control. The ravages of severe illness, disability and pain can shatter your identity by destroying its physical basis, obliterating memory or making self-command impossible. Suicide, in such cases, may be the only way to preserve your identity, and to protect the values for which you have lived.'

[20] Machan, Tibor, R., 'Metaphysics, Epistemology and Natural Law Theory,' 31 *Am. J. Juris*. (1986), pp. 65-77, p. 67.

good-producing, human nature. Modification and claims to knowledge could, therefore, be reconciled.

To be good means to be what properly we are and early natural lawyers sought to discover what we are by looking at our natural condition and the essentials of that condition. The epistemic quality of nature arises, once more, from that governing connectedness between value and fact; to be good is to be what essentially I am, these qualities make me what essentially I am, therefore, these are my goods. In this way the moral 'ought' is not derived from the first principle that 'good is to be done and pursued and evil avoided', but it is derived from the nature of the being to which the 'good' of the first principle refers. The 'ought' can be derived from the 'is' of theoretical truth simply because essential 'is's' embody moral norms; they are, at its foundation, what morality is.[21] For this same reason Aquinas's principles of practical reason whilst normative are reducible to a definition of the human self as an existing, rational, communal animal. Here, the gulf between new and traditional natural law is at it most stark; the possibility of this type of deductive reasoning being denied by Grisez, Finnis and Boyle.

Theoretical conclusions, like these, did not operate alone. They were confirmed by natural inclinations; there is in man a natural draw toward community; he is objectively naturally a political animal in the same way as fire is naturally a provider of heat. There was a reflective equilibrium at work between the theory of good – that linked good to natural facts - and our natural inclinations to ends apprehended as goods by practical reason. Basic facts supported the philosophical identification of goods. So, although Aquinas would no doubt agree with Finnis that 'ethics is an indispensable preliminary to a full and soundly based knowledge of human nature' he would not wholly agree that, epistemologically, (knowledge of) human nature is not 'the basis of ethics'.[22] His theory of good demanded a consideration of the distance between the actual and complete human actor; it was preliminary knowledge of the essential human form that allowed a complete ethical account of true human nature. Furthermore, without this preliminary knowledge we may fail to recognise the significance (goodness) of natural inclinations towards ends that were truly ends. The natural base was of crucial epistemic importance.

Facts and the Instantiation of Good in Human Activity

Aquinas's principles of practical reason were intended to be morally instructive, to guide the human creature, the only creature that consciously, by virtue of his faculty of reason, could be led by and infringe practical principles. Reason was, itself, part of the essential human form, and, therefore, in accordance with the first

[21] For the counter-argument see Grisez, Finnis and Boyle, 'Practical Principles, Moral Truth and Ultimate Ends', 32 *Am. J. Juris.* (1987) pp. 99-151, p. 102.

[22] Finnis, John, *Fundamentals of Ethics* (Washington: Georgetown University Press, 1983), p. 21.

principle that urged the perfection of form in action, man ought to act according to reason; reason was itself to be done and pursued.

In order to direct us towards the proper ends, to which we are naturally inclined, as it must if we are to be truly moral, reason must understand our nature. It is our contingent natures that drive reason toward our non-contingent natural goods. The circumstances of the environment in which we find ourselves, our personal attributes, our age and many other factors, along with reasons own principles, will provide the data from which reason will determine how the goods are to be instantiated. Practical reason is at work here but it works not only toward and within the limits of particular ends, but toward ends through an appreciation of the nature of beginnings. Health may be a good contained within the good of life but our ability to act in furtherance of health will be determined by human evolution; a good health system will be required to do much more to advance health now than would have been asked of it in the eighteenth Century. As our capacities evolve so does 'who we are', and our ability to pursue our goods improves as a consequence. So, whilst there is co-stability between the necessary facts about human nature and the necessary immutable human goods, there is a co-variance between the contingent facts about man and his instantiations of the goods in his action, a co-variance normatively constrained by the foundational goods. It is perhaps only at this point that traditional and new natural law theories converge on how nature is relevant to normativity:

> For instance one cannot effectively promote health without knowing biology, nor can one effectively pursue friendship with God without knowing (by reason and/or faith) at least some truth about God. Moreover one needs theoretical knowledge about one's powers and actual situation to know what one might choose to do.[23]

Facts in New Natural Law

Critics of new natural law claimed to have exposed its apparent incompatibility with traditional natural law on the issue of ontology. New natural law is said to occupy a deontological position, irreconcilable with early natural law dependent, for its success, on ontological foundations. Finnis, Grisez, and Boyle (and George, who defends their position) seem a little puzzled by the interpretations of their theory in terms of ontology. They accept that their account of natural law differs from early natural law in many respects but believe that it is not divorceable from its scholastic origins in terms of ontological commitment. The confusion seems in part a result of the problem alluded to by George; new natural law does in its own way acknowledge the ontological priority of facts,[24] it is their epistemic importance that is disputed. The lack of significance accorded to the epistemic value of nature

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[23] *op cit*., n.21, p. 111.

[24] They reject explicitly the deontology charge because of the role allowed for natural *desires* in determining morality. *ibid*., p. 101.

results in part from under-representation of the unity in early natural law, (examined above), between theoretical and practical perspectives and in part, independently, from a desire to avoid the pitfalls of the is/ought problem. Veatch puts the point strongly. Finnis, he claims:

> … like so many English philosophers of recent years. … would seem to be inordinately concerned over the impossibility of ever deriving an "ought" from an "is." To which the obvious reply is, "True enough, no 'ought' can ever be derived from an 'is', or no values from facts." And yet this surely does not mean that facts may not be so read and construed that values will be recognised as being no less than an integral part of them. Likewise, that man's very nature can be seen and understood to involve certain inescapable and undeniable obligations that are integral to such a nature – this in no wise entails any unwarranted inference from "is" to "ought."[25]

Veatch indicates the worth in at least examining the possibility that value is inherent in being. But it is worth noting that of course Finnis's practical stance does not lead him to ignore nature/the 'is' totally; any normative theory will take all sorts of facts about nature into account and will utilise these facts in many ways that do not offend the is/ought dichotomy and do not bear at all on the identification of good or goods. Finnis explains, for example, that: 'While awareness of certain 'factual' possibilities is a necessary condition for the reasonable judgment that truth is a value, still that judgment itself is derived from no other judgment whatsoever'.[26]

To bypass facts in the way that new natural law does, as George points out, need not be a problem; a human nature based ontological support does not create the necessity for the same fact-based epistemic support. The goods of new natural law represent self-evident aspects of human flourishing that are identified by adopting the internal, practical position. Being is ignored as a conceptually foundational tool:

> The most direct way to uncover the basic goods is by considering actions and asking, "Why are you doing that?" and "Why should we do that?" and so on. Persisting with such questions eventually uncovers a small number of basic purposes of diverse kinds. These purposes arouse interest because their intelligible aspects are instantiations of the diverse basic goods.[27]

New natural law acknowledges that there will be a corresponding natural base that makes the goods what they are. In *Natural Law and Natural Rights* the natural supports might be as follows: (1) existence (life); (2) the existence of other people (sociability/friendship); (3) the existence of God (religion); (4) the existence of

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[25] Veatch, Henry (review of *Natural Law and Natural Rights*), 26 *Am. J. Juris.* (1981), p. 257.

[26] *op cit.*, n.1 p. 73.

[27] *op cit.*, n.21, p. 106.

human emotion (play/aesthetic experience); and (5) the capacity to reason (knowledge/practical reasonableness).[28] Finnis need not, and does not view it as possible to derive his goods, that are known self-evidently, from the natural supports. But it is interesting that the ontological bases, underlying Finnis's goods, resemble closely the theory of human nature advanced in traditional natural law theory; Finnis's 'oughts' are equally reducible to essential 'is's' and the question might legitimately be asked why not at least explore the route taken in early natural law and begin with a theory of what the essential 'is' is?

The ontological base ('as animate', 'as rational', 'as simultaneously rational and animate') is actually expressly referred to in the first three goods outlined in Finnis's collaboration with Grisez and Boyle:

> 1 *As animate*, human persons are organic substances. Life itself – its maintenance and transmission – health, and safety are one category of basic good.
>
> 2 *As rational*, human persons can know reality and appreciate beauty and whatever intensely engages their capacities to know and to feel. Knowledge and aesthetic experience are another category of basic good.
>
> 3 *As simultaneously rational and animal*, human persons can transform the natural world by using realities, beginning with their own bodily selves, to express meaning and serve purposes. Such meaning-giving and value-creation can be realized in diverse degrees. Their realization for its own sake is another category of basic good: some degree of excellence in work and play.[29]

The facts referred to above (we are animate, we are rational, we are simultaneously rational and animate) are facts that make us what we are, living, reasonable and creative creatures, they are again essential 'is' representations of 'ought' propositions. The goods may be known to practical reason, self-evidently, but a theory of what we are, (where 'what we are' is taken to involve our good), must have the potential to offer an alternative route to reaching those same goods.

Grisez, Finnis and Boyle claim that the basic goods are 'aspects of the fulfilment of persons' that 'correspond to the inherent complexities of human nature'.[30] This reflects the theory of good itself as manifest in traditional natural law theory, where good refers to the completion of actualities. It is surely possible to utilise that theory further and to identify the human goods not only by internalising the process and asking: ' "Why are you doing that?" and "Why should we do that?" and so on',[31] but by asking in the first place from an external, philosophical perspective, 'What is it that I am as a human being?' In fact, the first three goods

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28 Finnis's goods are parenthesised.
29 *op cit.*, n.21, p. 107.
30 i*bid.*, p. 107.
31 *ibid.*, p. 106.

(above) seem more likely to emerge from this latter type of question than they do from the former. '*As rational*' (see above), for example, is directing us to something essential about human beings, that reason belongs to our nature. It may even be that involved in the reflective process that enables us to appreciate a basic good, like reason, is prior acceptance of the moral significance of basic facts. The purported movement from the internal perspective to aspects of well-being may actually require the adoption of an *external* perspective; I know my quality of rationality is a good, primarily, not by reflecting on my acts and considering that reason is the final quality that makes sense of a certain kind of acts, but, by knowing, in the first place, that it is reason that makes me what I am; the moral relevance of that conclusion becomes apparent in the context of a general theory of good that connects the notion of 'what I am' to good. A nature-based theory of good and goods is not only helpful; it appears to be philosophically and reflectively irresistible.

A further way of viewing the fact as being at least latently important to new natural law theory is through the concept of 'potentiality.' It is claimed that:

> Human persons have natural dispositions toward what will fulfil their potentialities…These natural dispositions, insofar as they are experienced, provide data for the insights in which one knows the first, self-evident principles of practical knowledge corresponding to the substantive goods.[32]

This reflects entirely the view of Aquinas, whose goods also corresponded to natural inclinations. But for Aquinas the founding potentiality was as important as the disposition. Only if the potentials that reflected the *true* nature of man were first identified was it sensible to talk about the (proper) fulfilment of potentials. Disposition did not exist independently of potential but flowed from potential to fulfilment of potential. It was the task of Aquinas to show how reason could make that same move, which inclination, by its self-tied nature, would in fact, fail to make. It seems strange that under the new natural law formulation we should be required to be reflectively aware of inclination and ignore the founding potentiality; to think practically, from an internal reflexive position, does not require us, necessarily, to reject the source of inclination to be of mere historical significance. I may have an inclination to levitate but to rule levitation out as a rational end involves not just a grasp of inclination and the end that makes the inclination (un)intelligible, more importantly, I must admit the *natural* impossibility of attaining the end. This requires knowledge of my limitations as a human actor. The censor on inclination is not just the rational questioning of the intelligibility of the end, it is equally the questioning of the beginning; levitation is not a rational end because *I* cannot levitate, levitation is not involved in what it means to be a human being/to be me. In fact there must be a strong case for suggesting that to be viable the beginnings must support the end; I first must know what I am in order to know what I should be. New natural lawyers do not ignore

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[32] *ibid.*, p. 108.

the foundational fact (it is, in a sense, unignorable). Via the notion of 'potentiality' they acknowledge it, but, in a desire to avoid the 'is'/'ought' problem they fail to explore the possibility that the fact of the founding potentiality may be normatively as didactic as the disposition that flows from it.

Finnis hints sometimes at the early natural law theory of 'good': '… the basic forms of good are opportunities of being; the more fully a man participates in them the more he is what he can be'.[33] Being what we can be as fully as possibly is to be good; this is what 'good' involves. But what, in the first place, is this being that has opportunity? Finnis does not answer this question for he is concerned with the movement from opportunity to fullness of being and not with the movement from *being* to *opportunity* and then to completion of *being*. Finnis's assertion above is, nonetheless, a convincing statement about the nature of our participation in good. The notion of each thing *being what it can be* is the nature of good itself; it provides the goodness in the most specific of human actions and it is only properly instantiated by those actions following careful reflection on our nature, on what 'we can be'.

But even to allow that the 'forward' thinking approach of new natural law may lead to the identification of the human goods is not to concede the point that their examination is a-theoretical:

> One does, as Finnis suggests, consider what kinds of activities would best develop one's "human nature." But is this not a form of theoretical reason? One considers reflectively the kinds of activities which best develop the dispositions comprising a human essence. Practical reason enters once this has been accomplished.[34]

Reflecting on my action, whether from the essentials of my being or otherwise, appears to be an intensely theoretical exercise.

Ironically, in Grisez's clarification of his position in this very respect, a factual base is discernable. Grisez says:

> Some hold that the principles of practical reason must somehow be derived from theoretical knowledge about human nature. That view confuses priority in reality with priority in knowledge. Human nature is prior in reality to the basic goods that fulfil it. However, because nothing is known except insofar as it is in act, we can come to know human nature only by knowing the whole set of human capacities, and those capacities are manifested only by their functions and the proper objects of those functions. So, relevant aspects of human nature can become known only by reflecting upon the principles of practical reason and the basic goods to which the principles direct human action, and those principles and goods can be known reflectively only by considering human acts.[35]

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[33] *op cit*., n. 1.

[34] *op cit*., n.11, p. 67.

[35] Grisez, Germain, 'Natural Law, God, Religion and Human Fulfillment', 46 *Am. J. Juris*. (2001), pp. 3-36.

Is there not something significant in the fact that according to Grisez the goods are to be known only by reflecting on *human* acts? It appears that 'human' is to have priority not only in reality but also in knowledge; we are not to look at our animalistic acts to know the relevant aspects of our nature, only to '*specifically human*'[36] acts, when perhaps the 'true' nature of man might be manifest in those acts that reflect our animal nature, maybe our 'human' acts are all wrong for us. This is not a trivial objection to Grisez's analysis for it requires consideration of the not easily answered questions 'why peculiarly human acts?' and 'by what standard is an act judged truly human?' Doesn't the identification of acts as human require a prior account of human?

It may seem that to pre-acknowledge the *human* nature of morally significant acts is so elementary as to warrant no criticism. However, it is for this very reason that early natural lawyers are criticised - for their too ready attempt to derive norms from very elementary, inert facts like the fact that we are human and the fact that we are not alone on the planet. Similarly, Grisez suggests the derivation of a norm (that specifically human acts ought to be done) from our essentially human nature; he leaves an unexplained premise that it is the specifically *human* acts that are to count so far as normativity is concerned. Precisely the point made in early natural law theory was that we ought to perfect our form. Much more can be said about the human form, before any activity is embarked upon, than that it is human and there seems to be no good reason to acknowledge the normative significance of only that most elementary of facts. It is certainly not self-evident, that the features of our nature that make us what we are (at its most basic our humanity), are the facts of primary moral significance; it needs to be demonstrated that what is good for humans is not the same as what is good for other animals or for other matter, but is referable to their particular form of being. That demonstration relies on a theory of good.

Translation from Pre-Moral Goods to Moral Activity

Finnis's basic goods and the goods of new natural law generally, are pre-moral; by representing the irreducible ends of human action they are thought to make sense of all sorts of human activity, good and bad. But when the goods are instantiated in human action in accordance with requirements of practical reasonableness, those representations of the human good are said to be moral representations. How does this movement from pre-moral to moral occur? Clearly the goods cannot be utilised deductively; one cannot deduce from the proposition that life is a good, in the pre-moral sense, that capital punishment is a just punishment for some perpetrators of murder, which is a moral claim. New natural law argues that it makes no attempt to derive an 'ought' from an 'is', illicitly. This may be semantically correct but there surely is an attempt to elicit from pre-moral oughts, which contain within themselves no self-reference to moral oughts, a peculiarly moral core. To put it another way, Finnis must derive from the 'is' of basic values the 'ought' of *moral*

[36] *ibid.*, p. 9.

action, an 'ought' not evident in the premises. However technically sophisticated the requirements of practical reasonableness, they cannot, by acting on basic goods, produce something, namely morality, that is not there in the first place. Morality cannot be the result of the action of the mechanical (principles of practical reasonableness) on the morally neutral (basic values). The 'bringing to bear' on these values, the 'participation in' or the 'working out'[37] if attempted by principles of practical reason will result in the supposedly illicit derivation of ought-propositions from is-propositions. If moral 'oughts' are, in fact, proposed we are, consequently, led to question the method that reaches them. In particular, scrutiny of the principles of practical reason reveals that they are much more than the mechanics of practical reason that one might expect from a list of such principles. Rather these principles are themselves substantively normative.

Nowhere is this normativity more evident than in Finnis's third ('no arbitrary preferences amongst persons') and seventh (the common good) basic requirements of practical reasonableness.[38] In these requirements the need for impartiality between persons is presented. No doubt any moral position must similarly acknowledge the impartiality requirement. However, that the position is unavoidable makes all the more important the examination of the basis of its centrality in moral discourse. It is only a requirement of practical reasonableness to have regard for the existence of others if the existence of others is presupposed to be relevant to my reasonable behaviour; why isn't reasonable action, selfish action?[39] Common existence is only relevant to reasonable action in a way that self-centredness is not if the fact of others' existence is considered normatively relevant in a way that the fact of my autonomy is not. No doubt the existence of other people is wholly relevant to what is reasonable but that relevance needs demonstration and a process of reason in support of it. The demonstration, in new natural law, is absent. In contrast, early natural law suggested that essential facts, like the fact of common existence, *do* support our theory of morality and they *can do* because a metaphysic of morality is inseparable from a metaphysic of existence. In that account, what it means to be reasonable is absolutely connected to what it means to *be*, which in turn is absolutely connected to the existence of other human beings.

Finnis does not *demonstrate* that the existence of other people is relevant to determining the scope of moral action; rather the essential *fact* of others' existence implicitly informs that conclusion. Finnis denies, expressly, this form of reasoning and the denial must follow if the is/ought problem is to be avoided. But the reasoning is also exactly what Aquinas and Aristotle would have commended. From the fact that we necessarily exist in the world with other people we ought to perfect the manner of our existence with other people. The 'is' informs the 'ought.' It can so do because of the commanding first principle that 'good is to be done and pursued and evil avoided,' good denoting the perfection of existence. Finnis's requirements of practical reasonableness are convincing but they convince

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37 *op cit.*, n.1, pp. 101-103.

38 *op cit.*, n.1, pp. 106-125.

39 See the analogous argument in respect of the categorical imperative. Chapter 3.

because the requirements repress essential facts like the fact of others existence, within them. To make the role of the fact more transparent might lead Finnis into problems with is/ought but reflection on the classical roots of his theory show that the problem may not after all be fatal to the natural law position.

Some Benefits of the Theory of Good

The theoretical approach to the identification of goods has its benefits. First, its conclusions provide a parallel philosophical support to the conclusions of practical ethics, like those reached in new natural law. Second, a theoretical approach is taken, necessarily, in the study of the action of other natural entities. A similar methodological approach to human action will ensure consistency, therefore, and may enable observations to be made about our role in nature generally; in particular it may emerge from these observations that human action need not always be defined anthropocentrically. Cicero points out the need for harmony with nature:

> Nor can anyone judge truly of good and evil, save by knowledge of the whole plan of nature as well as of the life of the gods, and of whether the nature of man is or is not in harmony with universal nature.[40]

However, when goods are defined by reference to what practical reason perceives as ultimate reasons for human action those goods necessarily will be human-centric; they will *benefit* human beings *uniquely*. This is accepted by new natural law. George claims for example:

> Ends or purposes which provide basic reasons for action (i.e. basic human goods) are known in acts of understanding by which the practical intellect grasps the intelligible point of possible actions, judging them to be not mere possibilities (i.e. things which could be done, however pointlessly), but, rather opportunities (i.e., things which are worth doing precisely in as much as they promise some intelligible benefit.)[41]

Goldsworthy has criticised this perspective, suggesting that new natural law wrongly connects the idea of 'good' with what is good *for* human beings. In natural law, he says, 'to believe that something is good is to believe *both* that it is something that people have reason to seek *and* that it is good *for* people'.[42] For Goldsworthy, on the other hand, reasons for action may exist in good (*simpliciter*).

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[40] *De Finibus*, III, 73 quoted in Finnis, John, *Aquinas* (Oxford: Clarendon, 1998), p. 375.

[41] George, Robert P., 'A Defense of the New Natural Law Theory' 41 *Am. J. Juris.*, pp. 47-61, p. 52.

[42] Goldsworthy, Jeffrey, 'Fact and Value in the New Natural Law Theory' 41 *Am. J. Juris* (1996), pp. 21-46.

This he claims 'is confirmed by the fact that some people believe they have reasons for action – that they can achieve something worthwhile, or good – even when human well being is not at stake'.[43] He uses the environmental example specifically; some environmentalists, he says, 'value nature for its own sake, and say that its conservation is good independently of its effect on the well-being of people or even of other creatures. It is therefore not necessary that people believe that something would be good for someone in order to believe that they have a reason for action'.[44]

When I am contemplating my activity, without theoretical reflection on who fundamentally I am, or what fundamentally my world is and how these relate, I will perceive as worth doing only those activities that benefit me, or my fellows, in some way. Human ends, identified from the internal, practical reasoning perspective in this way, by definition, fulfil the human creature; anthropocentricism is necessarily entailed. George's defence of new natural law denies the possibility of a distinction between 'good for somebody' and good (*simpliciter*) that Goldsworthy makes. He suggests that:

> … people in truth never have reasons (though they may have subrational motives) to do things which promise no intelligible benefit to anyone, and always have reasons (though not always conclusive ones, and indeed sometimes merely defeated ones) to do whatever provides an intelligible benefit for themselves or others.[45]

George's claim may be accurate but only in virtue of the perspective of practical reasoning that new natural law adopts. The perspective that tends to favour anthropocentricsm is simply affirmed in George's view that:

> Environmentalism has its rational appeal because people grasp the value for themselves and others (including members of future generations) of preserving nature. Unsurprisingly, environmentalists' arguments characteristically appeal to human values: possible damage to human health, the potential loss for science and aesthetic experience, injustice to future generations and so forth.[46]

George makes no concession to the possibility that there may be a reason to protect the environment that does not depend upon the enrichment of specifically human goods. Similarly in the Kantian scheme, moral standing may be attributed to non-rational beings but only by way of human benefit. Kant suggests: 'If a man shoots his dog … he does not fail in his duty to the dog, for the dog cannot judge, but his act is inhuman and damages in himself that humanity which it is his duty to show toward mankind'.[47] A human-centred bias is strongly suggested for whilst

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43 *ibid.*, p. 29.
44 *ibid.*, p. 29.
45 *op cit.*, n.41, p. 52.
46 *ibid.*, p.54.
47 Kant, Immanuel, *Lectures on Ethics*, 240.

there is a duty not to shoot the dog this duty is not owed *to* the dog. (It is not referable to the goods of the dog.) The duty is owed, rather, to other human beings. This approach understandably emerges in the context of theories that make morality referable *solely* to our communal possession of reason. We are not afforded the opportunity to consider the relevance of our actions on nature directly only on nature via other rational creatures.

Traditional natural law theory does not occupy merely the perspective of practical reasoning. It observes and posits a theory of the human creature and his place in the world. In particular it recognises that whilst other natures relate to and integrate with one another via natural dispositions, man interacts with his environment through reason. Whilst it is proper for other entities to relate to the environment in the way they do in fact; it is proper for man to relate to his environment deliberately. *Thinking* about our environment is inevitable.

It is natural for man, as it is for other entities to be what he is, to exercise his capacities in the manner appropriate to him. The point to note is that man's capacities include the ability to appreciate other beings' feeling of pain. Even if sometimes it can be said to be natural for man to cause the death of other animals, always he is capable of restricting the pain felt by these creatures to some extent. As he evolves he will develop more and more ways in which he can restrict his need to kill and restrict the pain he causes to other creatures. Simply because he can do he *ought* to so do; only in this way is he being as the human being ought to be. This is what man brings to nature that other entities by and large cannot. To act in this way can be viewed, in the natural law scheme as an imperative for man for it contributes to him being as he is as fully as possible.

The reason for man to act responsibly toward the environment is not because necessarily it is good *for* him, therefore, but rather because it is an activity that emerges from *who* he is, an understanding that we obtain from the accompanying *theory* of human nature. My capacities are not exhausted by my inclination to benefit myself, by what I naturally perceive as good for me. Rather they are exhausted by being what I am as fully as possible. This may require me to play a role in respect of my place in my environment regardless of the benefit to me.

A theory of our role in nature generally has further important implications for normativity. To imagine a world bereft of greenery, of water, of foods as we know them, of birds and animals is to imagine a different *human* being. We need to take care how we interfere with nature, not just because of the implication for our future material or aesthetic well-being (not just because of *our* goods) but more fundamentally because to change nature is to change who it is that we are. To ignore nature's own reality for its own sake can lead us to interfere with our own reality. This may be a real challenge to the deontologists. Reason emerges from beings with a nature. (Finnis recognises that our perception of the human goods depends ontologically on who we are without being derived epistemically from our nature.) In this way practical reason does all the knowing but what it knows is predetermined by who we are. If fundamentally we become something different then it may be that the truths we come to know will be different too.

Finally, the theoretical approach may counter the thin concept of *good itself* that emerges from a purely practical ethics. A thin concept of good results from the practical perspective because the reliance on the self-evidence of practical principles, (providing that such reliance can be supported epistemologically), brings forth the knowledge *that* certain goods are good but cannot impart any knowledge of what their *goodness* consists in. The *fact* that goods are self–evidently apparent does not deprive good of independent meaning nor does it make the search for that meaning superfluous. So, for example, whilst perhaps we self–evidently recognise *that* play is a good, such self-evidence does not render an explanation of the link between that particular end of human activity and the *idea* of good unnecessary. Lisska argues that in moral philosophy it is metaphysically inadequate to account for good only in relation to the completion of essences (that practical reason perceives):

> Finnis suggests correctly that we come to know an essence by considering the completion or perfection of that essence. But this is a methodological issue which does not undercut the need for essence as the metaphysical ground for moral philosophy.[48]

In the absence of the metaphysical grounding that Lisska refers to, we are unlikely to be able to *know* the completion of an essence at all; an essence is only *complete* and knowable *as* complete by reference to its *incomplete* form. Indeed arguably the very concept of good only arises from reflection on the link between incomplete human nature and the completion of that nature.

This objection to new natural law suggests that the ends of human nature are just not identifiable without reference to the structure of the human being in the first place:

> In Aristotle and Aquinas, the human goods, as ends, are connected with the structure of the human person. The relation of final cause to formal cause holds there. It is not possible, in the eyes of Aristotle and Aquinas, to determine the final cause without knowing the formal cause.[49]

It is the theory of good that allows us to identify the link between being and good; between our ends and our structure/our nature. In this sense, it may be claimed that life is self-evidently good but only because it is self-evidently connected to 'who/what we are.'

Conclusion

Early natural law theorists did not fear the moral didacticism of nature in the same way as their modern counterparts do. Critics of new natural law have attempted to

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[48] *op cit.*, n.11, p. 64.
[49] *ibid.*, p. 58.

show how fact can inform morality but they have perhaps tended to consider the wrong type of fact as potentially norm-giving. This, in part, is the fault of traditional sources, which isolated morally significant facts but ignored their importance in practice; they did not reason as they claimed, from the common to the proper but very often, from the proper in the first place. The institution of slavery was justified by Aristotle, for example, not because of any metaphysical underpinnings but simply because 'naturally' slavery existed.

The tendency to focus on uninformative facts, displayed by their critics, makes it very easy for Finnis and Grisez to mount a counter-position. In reply to McInerny, for example they say with some justification that:

> …if McInerny wishes to justify a conclusion such as
> Joe ought to go on a diet
> He had better not be content with premises such as
> Joe weighs two hundred and fifty pounds
> And
> It is not healthy to be overweight.
> One must assume a more basic practical premise
> 'Health is a good to be pursued and protected'.[50]

Here Finnis and Grisez show the seemingly insurmountable nature of the 'is/ought' problem; the *fact* that it is not healthy to be overweight creates of itself no connection between health and good. New natural law theorists claim to defeat the problem by relying, as they say did Aquinas, solely on self-evident principles like, 'Health is a good to be pursued and protected.'

However, there is some ground for believing that this was not the route taken by Aquinas whose principles actually allude to the 'ought'-laden nature of facts. His first principle of practical reason that good is to be done and pursued and evil avoided, rather than bypass it, is founded on the link between good and being that had been established by the *theory* of good. So, although McInerny's deduction may not be valid the following is:

> All things ought to be what essentially they are.
> Life and its value exist essentially in man.
> Man 'ought' to exist/life is good.

There may be flaws with the deductive process, particularly its reliance on 'essentially,' but it does better represent Aquinas's theory of good. It is important to note that we do not need to pre-suppose any underlying principle, e.g. that 'it is good to be what essentially we are' because our basic premise, that all things ought to be what essentially they are, constitutes the meaning of good; good and being coexist. By acknowledging the significance of the specifically *human* act Grisez acknowledges similarly the importance of our essentially *human* nature and in a very fundamental way he, like Aquinas, cannot avoid making the fact preach.

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[50] Finnis, John and Grisez, Germain, 'The Basic Principles of Natural Law: A Reply to Ralph McInerny', 26 *Am. J. Juris.* (1981), p. 24.

The origin of this unity between 'is' and 'ought' is evident in the Thomistic idea that there is a single, ultimate good for man. This single good is not a substantive good that would particularise man's end in one, specifically, human activity; rather it is nothing but the *idea* of good itself. In essence, the possibility of the ultimate good arises because the answer to the question, 'what does it mean to say that X is good?' is the same whatever X represents. In other words, the idea of good is instantiated in *all* 'good' human activities; this does not undo the sense in which each human good is an end in itself. However, it remains meaningfully true to say that each particular human end contributes to the essential structure of the human being, and to the fulfilment of that structure. This fulfilment is sought in whatever we do; it is an end instantiated in every single, good, human action but one that stands above them all. The good of fulfilment, of being fully the entity that we are (i.e. the first principle of practical reason) represented the metaphysic of good and its status as a singular unifying good inevitably follows. So, the good of the shoemaker *as a* shoemaker will be making shoes, the goods of the shoe-maker as an *individual* who enjoys his craft and its beauty may be play and aesthetic experience but, in the Thomistic account, whether he internalises it subjectively or not, his ultimate reason for making shoes together with his reason for performing all the other actions he performs in life is fulfilment itself.

Grisez claims the contrary but it can be said to be true that 'at any one time a person's will must have a single ultimate end in willing whatever it wills'.[51] The single, ultimate end is 'good': the unity between 'is' and 'ought', the requirement to be what naturally we are. The notion of good itself stands over all the goods and commands us always to look at what we are in determining what we should do, both in terms of our common, essential, existence and our contingent existence, which operates within the confines of the essential. This is entirely compatible with the 'reality of free choice'.[52] And rather than creating constraints[53] for us by his idea of an ultimate good, Aquinas is thereby urging us to attain the full freedom of what really we are, to pursue our existence to its absolute limits.

As a metaphysic of good, the principle that 'all things ought to be what they are', can be seen to have important critical implications for new natural law. The principle:

(a) represents the logic/inescapability of the link between good and being (*its* self-evidence);
(b) overcomes the 'is/ought' problem by showing that the 'ought' ultimately is located within the 'is';
(c) precedes Finnis's principles, which merely participate in the basic principle.
(d) as a *prior, ultimate* principle, poses some problems for the characterisation of Finnis's principles as self-evident;

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[51] *op cit.*, n.36, p.29.
[52] *op cit.*, n.21, p.101.
[53] *op cit.*, n.36, p.29.

(e) preserves Finnis's belief that there is a principle, analogous to the principles of theory that underlies practical inquiry, and, provides such a principle;
(f) casts some doubt on Finnis's belief that commitment to (e) above means that an examination of fact is not essential to moral discourse;
(g) shows precisely why an examination of fact *is* essential to moral inquiry.

Chapter 7

Natural Law's Contribution to Normativity and Law

Introduction

The human being is a reasoning, active being who inhabits a world of facts that does not readily supply a reason to act one way rather than another. This is the practical upshot of the 'is/ought' problem.

The gulf between 'is' and 'ought' can in some way account for our inquisitive approach to human activity. Fundamental normative questions, however difficult, are, to human beings, unavoidable; our reasoning nature dictates the need to base our activity on principles rather than solely on emotion or on arbitrariness. To seek out such principles leads us naturally to seek the moral significance of facts about nature, reason, law and our behaviour. The 'is/ought' dichotomy highlights the inherent difficulty, even the seeming impossibility of this, uniquely human search.

Despite its centrality to morality there are limitations on how far the 'is/ought' dichotomy *in itself* can inform normativity. It does not assist someone who wishes to enable man to fly, to say your problem is, apparently 'man cannot fly'; by embarking on his task the flight enthusiast is necessarily acknowledging that basic limitation. Neither, in a way, does it assist the normative theorist who wishes to obtain moral information from the empirical world to say your problem is the world contains *apparently* no such information; by his search the philosopher has already accepted that restraint. Indeed if moral knowledge were immediately and obviously visible the task of identifying it would be largely a-philosophical. It follows that the 'is/ought' dichotomy is both centrally important and yet so important that it simply begs the question 'how are human beings to behave?' rather than contribute to resolving it. The dichotomy is perhaps best seen as part of the fabric of moral inquiry; it is one of *the* fundamental problems that needs to be resolved rather than itself a solution or insight into any particular problem.

In the mechanical language of 'is' and 'ought' it is difficult to envisage a solution to the problem for all that exists is two sparse terms which merely reproduce each other in any potential solution. But if we move away from a linguistic approach to the dichotomy the possibility of a solution is at least viable, as the analysis in Chapter 2 sought to show. We now know of course that man, in his various aircraft and by numerous means, does fly. In a sense, therefore, he always had the potential for flight and the assertion 'man cannot fly' turns out to have been based on appearance rather than reality; the potential for flight had been

inherent somewhere in our capabilities. And just as it is sensible to ask 'how can we enable man to fly when it *appears* that he cannot?' it can be asked 'how can we enable the derivation of moral principles from a world of fact that *appears* to lack such information?' The world may after all contain no such information but the question, at least presumptively, is a sensible one and this appears most likely to have been the question that concerned Hume.[1]

Any reflection on the nature of the gulf between 'is' and 'ought' will prompt a realisation that there is an information gap that either needs to be filled (through sentiment, reason, divinity etc) or is insurmountable (requiring a search for 'oughtness' outside the empirical world entirely). Indeed, much normative theory will have implications for our understanding of the naturalistic fallacy,[2] whether explicitly addressing it or not. (Chapters 4 and 5 of this book suggest that, in fact, a good deal of Hellenic and Thomistic philosophy was intended to provide an explanation of how the deduction of 'ought' from 'is' logically could occur.) The reductionist terms of 'is' and 'ought' created, unfortunately, a mechanical language obscuring the very real problems faced by theorists including Hume.[3]

New natural law is among those schools that take the 'is/ought' dichotomy to be insurmountable. Early natural lawyers, in contrast, did implicitly attempt to resolve the dichotomy by seeking to derive 'is' propositions from 'ought' propositions via reason. Their idea that we should look to 'who we are' to solve problems about 'what we ought to be and do' instinctively is difficult to resist. Indeed, there is merit in not resisting the instinct and in exploring whether the traditional natural law enterprise does indeed provide insights into how Hume's problem can be overcome. One side issue may be mentioned if only to show that it does not pose a significant challenge to such an exploration which is the claim of religious skeptics that if there is no deity, the whole natural law scheme falls. Whilst it is true to say that the existence of a divine order served to close up epistemic gaps in traditional natural law, largely the theory stands or fails as *natural* law. This Chapter explores how far nature can be on its *own* normative and addresses in that way the challenge of religious skepticism.

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1 See Chapter 2.

2 For example if Kant is correct then the dichotomy needs to be understood as an irresolvable problem; the world of fact cannot inform either reason or sentiment in the way some may hope.

3 The concept may appear more useful at an institutional level but this is precisely because of the institutional, rather than natural, character of the facts involved. The fact that 'is' just is not 'ought' can explain why a posited 'is' (an act of will of a lawmaker) requires a higher 'ought' (to give the act of will validity) and, by regress, ultimately a grundnorm (a hypothetical, presupposed norm). See, for example, Kelsen, Hans, *Pure Theory of Law* (Translation from the 2d rev. and enl. German ed. by Max Knight) (Berkeley: University of California Press, 1967). However, if what is sought is, in the first place, substantive norms that will by their moral character, instil in law a moral authority (that extends beyond any innate morality that legal authority might have), then the institution must be transcended. This does not invalidate Kelsen's task of course but just points to another possible task, in which the mechanical conception of 'is/ought' does not assist.

But perhaps the most compelling reason to take the traditional natural law scheme further is found in the unique manner by which it connects normativity to human fulfilment; according to the classical school, we only know what fulfils us by knowing who we are. This allows us to explore the outermost possibilities of human fulfilment; it is only, by reflection on 'who we are' that, for example, we may come to understand and to see the value in actions that, fulfil our being yet do not provide a direct benefit to us (ecocentric actions for example).[4] By considering only what we perceive as worth doing (the new natural law method), we will miss these possibilities. And if there is a synchronicity (of natural or divine origin) between the world and its parts then performing the actions that go to making us the most complete form of what we are, to the maximum of our capacities, may be an way effectively to preserve our own and nature's existence.

Four Central Natural Law Concerns

The aim in this section is to posit an approach to normativity that draws on the natural law tradition and necessitates addressing the *real*, normative problem that 'is/ought' represents. The objective is not to formulate fully a normative base for law, rather to suggest a method by which the same may be achieved. Four important features of human nature (that sometimes overlap) are regarded as fundamental to this task. Each contains two (conceptually opposed) elements.

(a) Being/good
(b) Capacity/Activity
(c) Subjectivity/Objectivity
(d) Personal/Political

The four features and their elements represent the sense in which value can be seen to be present in fact or 'ought' to be entailed in 'is'; they are the analytic of the claim that human nature *is* value as much as it *is* fact.

The 'is' or fact part of our nature is represented in the above elements by *being* (existence), *capacity* (the abilities we have as human beings), *subjectivity* (the perspective of the individual) and the *personal* (our individuality). The 'ought' part of our nature is contained in the corresponding, opposing element: *good* (denoting the substance of 'ought'), *activity* (accounting for the way in which 'ought' is instantiated), *objectivity* (referring to the perspective from which 'oughtness' is to be perceived) and the *political* (constituting the essential condition – of common existence – without which 'oughtness' has no meaning). The suggestion will be made that a natural law attempt to bridge the gap between 'is' and 'ought' must minimally show how the opposing elements of each of the four features (a) – (d) can be reconciled. It must show how *being* informs *good* being; how capacity informs how we *ought* to be active; how subjective beings can reach the perspective of objectivity and how personal and common existence can be reconciled.

[4] See Chapter 6.

Being/Good

Introduction

Our search for a way to live that will in part be regulated by law makes assumptions. It assumes that we desire to select a good way of living, and that the 'good', whether it has its own reality or not, is knowable and attainable. But the problem identified by Hume is very real. All that appears to inform us, in this task, are facts, which seem unable to perform the role that we seek very often to attribute to them. (Even Kant in his insistence on the absolute primacy of *a priori* reasoning cannot escape the role of empiricism in formulating his theory.[5])

Part of the reason for the apparent limitation of facts in this respect can be found in humankind's natural processes of development and in the products of that development. If we wish to be taught by what exists, (if we want the 'is' to inform the 'ought') we are most immediately informed by the *contexts* that our development has given rise to, be they temporal, geographical, legal or other. The danger is that we tend to judge morality relative to *our* community, *our* time, *our* culture, and in this way to justify our actions in the same way that the ancients justified slavery. It follows from a tendency to found morality on our particular place, culture and time, that we may validate retrospectively the wrongs of other times and the current wrongs of other places and cultures. Such validation occurs because it is part of the relativist's *own* standard of morality that justification just does arise in virtue of time, place and culture.

The sense in even speaking of right and wrong, of a good way for human beings to be, quickly evaporates, where we are guided *only* by contexts. If, however, we seek to escape contingencies, we may find that as a product of contexts, we are unable truly to de–contextualise, or to recognise whether we have done so successfully. In order to discover what really we are, outside of contingencies and contexts, we might, therefore, seek to set aside the role that development has played in forming what we have *become*. This requires an identification of what we can say to be absolutely true about our nature, regardless of what path our development has taken. The analysis here follows the traditional natural law method in this respect.

The coherence of this approach to normativity relies on the fact that to reject contingency in this way *does not* lead to Kant's rejection of empiricism or to an abandonment of the naturalistic enterprise, therefore.[6] To illustrate the point it is useful to refer back to how Kant actually mirrors this approach to morality and accords significance to essential natural facts (whilst denying the same) in his search for the categorical imperative. Whilst Kant clearly and justifiably seeks to reject contingency as a basis for morality, it appears that the rejection is itself deduced, in part, from the *fact* that earth is home to more than one human being. Kant fails to avoid attributing moral significance to a basic feature of human

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5 See Chapter 3.
6 See Chapter 5.

nature, i.e. that human existence is *communal*. The empirical presence appears in O'Neill's explanation of the categorical imperative:

> Which principles have unconditional authority in thinking and acting? Where could self–discipline either in thinking or in acting begins? At least one negative point can be made. One corollary of refusal to bow under an alien yoke is that what count as the principles of reason cannot hinge on variable and contingent matters, all of which, however intimately human, are alien causes. Would–be reasoners must then at least adopt the strategy of not acting on principles that accept such alien authorities. They must act only on maxims on which others whose contingent circumstances and characters differ can also act.[7]

O'Neill explains exactly why the autonomous will (the will that is not determined by an alien yoke) was believed to entail the universalizability requirement (the requirement for the agent to take into account other 'wills' when formulating her maxims). A will determined by nothing other than the condition of will itself is not susceptible to influence by contingent matters. The agent, in formulating her maxims, must, therefore, divorce her reasoning from contingencies. But this is not the only significance of contingency in the formulation of the categorical imperative. As O'Neill implies, the need for the will to be free from contingency is taken to impose a positive *requirement* that the individual agent, in her maxims, attributes normative relevance to the *fact* that other willing agents exist. To look at it the other way around, the contingent factor that is hereby removed is the tie of subjectivity. The act of attributing moral significance and objectivity to communal existence is taken to be part of what autonomous willing entails and for this reason the universalizability element is included in the categorical imperative (act only on the maxim that can at the same time be willed as a universal law of nature).

But this inclusion seems to indicate that the Kantian conception of contingency (and autonomy) derives some of its meaning from *prior* acknowledgement that the *empirical* fact of communal existence is morally relevant. A will determined by individualism is taken to be a heteronomous will and consequently unsuited to serve as a ground for the moral law. The conclusion is no doubt correct but it can be understood to be valid only by admitting the significance of communal existence in moral reasoning and hence by reasoning other than from the perspective of pure will alone. To put it another way, the fact that my will is connected to me as an individual only has the effect of making *me* a contingent determining ground of the will if the existence of other wills is considered relevant for the purposes of determining the meaning of a non-contingent, pure, autonomous will.[8] So it may be the case that even Kant's rejection of contingency is motivated by the normativity *inherent* in the basic fact that we share the world with other people.

The analysis above serves to indicate: (a) that essential natural facts seem to serve moral theory whether the same is desired or not and (b) that the imposition

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[7] O'Neill, Onora, *Constructions of Reason* (Cambridge, 1989), p. 58.

[8] See Chapter 3 for an elaboration of this argument.

of moral relevance on those facts seems irresistible. The method here is deliberately *not* to resist the imposition of moral relevance on natural facts but to show how the same can be achieved legitimately. The normative richness of facts is precisely what is to be utilised, therefore, rather than avoided. But of course it remains to be asked, *why* natural truths, even essential natural truths like the existence of other people, are of *any* relevance to normativity at all, particularly given Hume's contention that facts are – to reason at least – morally neutral. This question underlies most of the remaining analysis in this Chapter. An attempt is made to indicate why fundamental natural truths obtain relevance (including epistemic relevance) in a theory of human action.

Fundamental Aspects of Being

As human beings we cannot be other than what fundamentally we are. In a very simple way this means that we cannot be earth or inanimate matter or plants or animals, for example. Neither, as human beings, can we do more than 'be what we' are as fully as possible. Our 'being' establishes the limits of our existence and the natural law that applies to us. If the notion of human 'good' is taken to require that, at the very most, human beings are to be the best from of what they *can be* then human nature, at its boundaries, determines the limits of *good* existence as well as mere existence. In this very simple way 'good' is commensurate with nature[9] and achieving 'good' in this broad sense can mean nothing other than pursuing our nature to its fullest possible extent, in the manner befitting us. To identify *what* it is that we are to pursue/the 'good' or 'goods' that define our nature we may seek to reflect practically on our action (as is the method of new natural law) and isolate those ends that provide ultimate reasons for action. Alternatively, we may seek to identify essential truths about our being and to demonstrate, theoretically, how they contribute to the human good. This approach is favoured here (a) in virtue of its tendency more accurately to discern the richness of human fulfilment (the danger in relying solely on practical reason is that we focus on benefit rather than fulfilment[10]) and (b) because a theory that is not committed to the view that there is an insurmountable gulf between 'is' and 'ought' *can* at least examine whether facts may offer normative guidance.

There are aspects of human nature that can be said to be true regardless of individual circumstance. This list is not intended to cover them all nor is the theory contained here intended to be complete. What is sought is a method that might facilitate a fuller theoretical investigation of normativity and it is hoped that by beginning to employ that method some important conclusions may emerge. In this respect, the following facts seem difficult to dispute:

1. The human being exists.

2. He exists alongside other people.

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9 See Chapter 6, p. 98.
10 See Chapter 6.

3. He has the *capacity* to interact and to communicate with those people.

4. He inhabits a natural world and requires (often scarce) resources from the world in order to stay in existence.

5. He possesses reason.

6. He possesses sentiment.

7. He has a body and a mind that are vulnerable.

The above are selected as the characteristics of an active being; they explain what makes him a particular type (human) of active being. But they are not activity itself – rather they are the structure within which activity operates – they are truths that define what man is, in a pre–activity setting.[11]

Many theorists arrive at the stage where the positing of essential truths is required but the truths selected and the nature of what the truths describe vary in accordance with the route taken in order to reach that stage. Finnis's truths are already, at this stage, 'goods', for example, and represent *reasons* for action rather than characteristics that are definitive of our nature as active beings. Finnis explains this in respect of the good of knowledge:

> Is it not the case that knowledge is really a good, an aspect of human flourishing, and that the principle which expresses its value formulates a real (intelligent) reason for action? It seems clear that such is indeed the case, and that there are no sufficient reasons for doubting it.[12]

Finnis can progress directly to goods for he believes that goods just are directly self-evident to practical reason.[13] Unlike Finnis's goods, the truths listed above are not yet normative (or at least their normative relevance has not been demonstrated).

The conceptual link between truths about nature and human goods is by no means self–evident. Indeed, Hume would dismiss entirely the worthiness of any enterprise that views natural truths as morally significant, particularly when a deity is invoked to translate from truth to 'good':

> You find certain phenomena in nature. You seek a cause or author. You imagine that you have found him. You afterwards become so enamoured of this offspring of your brain, that you imagine it impossible, but he must produce something greater and more perfect than the present scene of things, which is so full of ill and disorder. You

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[11] The truths selected here contain a few that might be deemed external to man and therefore out of place in a theory of human nature. For an explanation of why they are included see Chapter 6, pp. 103-104.

[12] Finnis, John, *Natural Law and Natural Rights* (Oxford: Clarendon, 7th ed.), p. 64.

[13] See Chapter 6 for a discussion of this position.

> forget, that this superlative intelligence and benevolence are entirely imaginary, or, at least, without any foundation in reason and you have no ground to ascribe to him any qualities but what you see he has actually exerted and displayed in his productions, Let your gods, therefore, O philosophers, be suited to the present appearances of nature: And presume not to alter these appearances by arbitrary suppositions, in order to suit them to the attributes, which you so fondly ascribe to your deities.[14]

In fact the quality of the truths identified above is such that we avoid the horrors of reasoning that Hume warns against. Certain phenomena are indeed found in nature but the phenomena found are not illness and disorder but conceptual features of human being that *precede any* activity, positive, negative or neutral. In this sense the truths (and emerging goods) are pre-practical reason truths. Certainly there is no need to seek a God or other cause to explain their selection; they remain true whether or not a divine realm exists. The point to note is that the task of this Chapter is to discern the normative significance of human nature as it is manifest in a pre–contextual setting; there is no attempt to derive a perfect reality from an imperfect appearance. (In the same respect the challenge of religious scepticism is not well directed at traditional natural law for at its theoretical *foundations*, it relies epistemically and ontologically on *nature* rather than divinity.[15])

Being and Good

The presumption behind the identification of basic natural facts is that they are somehow meaningful for normativity. But it needs to be established how this meaning arises. The translation from 'truth' to 'good' depends on acceptance of an underlying principle that *each thing ought to be what it is.* The principle in a sense is easy to accept because things have no option but to be those things; they *must* be the *thing* that they are. However, whilst it is not possible to be other than the human being that we are, it is possible, by failing to exercise our capacities, to be less than *fully* human. In natural law 'oughtness' arises precisely because human beings are uniquely capable of deliberately seeking to bridge the gap between what they are and what they are *as* fulfilled, moral beings, between 'is' and 'ought'.

The principle that '*each thing ought to be what essentially it is*' is a metaphysic of 'good'. It corresponds quite closely to the Thomistic understanding of 'good' which denoted the perfective qualities of any aspect of existence that (a) go to making it the kind of entity that it is and (b) the entities naturally seek. 'Seeking' in this sense has an idiosyncratic meaning referring not to a conscious desire toward natural ends, rather to a logical tendency, evident in natures, to move from incomplete or latent to more complete or active forms of being. It is important to understand seeking in this way, particularly in respect of human action. Aquinas notes accurately that we seek fulfilment in our lives whether we

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[14] Hume, David, *Enquiries Concerning Human Understanding and Concerning the Principles of Morals* (Selby–Bigge, ed.) (Oxford, 1992), p. 137.
[15] See Chapter 5.

know what fulfils us or not, whether we in fact seek what *really* fulfils or not. The implication is that although individuals may not in fact yearn for truly perfective qualities (in any deliberate way) this does not invalidate the sense in which the good/fulfilment naturally is sought. The question can still be asked 'why ought we to pursue our fulfilment?' but the question loses its strength when recast legitimately as 'why ought we to be what we ought to be?' To be coherent, any normative inquiry must sensibly attribute sense and humanness to oughtness.

The Thomistic first principle of practical reason (that good is to be done and pursued and evil avoided) is not ideal for the model posited above because it represses the underlying premise that all things ought to be what they are, presupposing in a sense, therefore, the goodness of aspects of being. It is the repressed principle that enables the translation from truth to goods without such a pre–supposition. The principle, at first may seem to be an empty tautology but its significance for normativity is as follows:

1. We are imperfect beings.

2. Being imperfect means being less than what we *can be* as human beings.

3. By identifying essential truths about our condition as human beings, it is possible to ascertain what we are/can be in a perfective (albeit highly general) sense.

4. We are naturally normative beings.

5. Therefore, w*e ought to be what essentially we are* / pursue our nature fully.

6. The truths can thus be described as goods.

Our ability consciously to pursue our 'good' is what makes us capable of being moral.[16] It enables us to *give* to ourselves the principle that we *ought to be the best form of what we are*. The principle constitutes the sense in which 'ought' is located within 'is'; it is our being that we use to tell us *how* to be. Kelsen recognised that this was what dynamic natural law entailed:

> … (dynamic natural law) maintains that reality and value are not – as dualistic positivism assumes – two separate spheres but that value is immanent in reality and that consequently it is not – as positivism assumes – a logical fallacy but a legitimate operation to infer from that what is what ought to be or be done. Since value is immanent in reality, value judgements – judgements referring to these immanent values – are as objective, that is, verifiable by experience, as judgements about reality.[17]

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16 See Chapter 5.

17 Hans Kelsen, *What is Justice?* (California, 1957), p.174.

Having suggested a link between 'good' and 'being' it is possible to frame the truths in the language of goods. The following emerge as goods to be aimed at absolutely for they represent, most basically, our fulfilled form as human beings: life, community, individuality, communication, reason, health, sharing, synchronicity with the natural environment, and feeling of fulfilment. Each of these goods is the normative translation of a pre-contextual basic fact: life is included because we exist, community because we exist with other people, individuality because just as being what we are acknowledges that we are part of another so it must acknowledge that we are autonomous beings, communication and reason are included because we can and therefore, in line with our basic premise, ought to reason and to communicate, health is included because it corresponds with our form as *physical* beings, sharing because it is necessitated by the circumstances of a world of scarce resources necessary for continuance of life, harmony with nature because that contributes in a distant but fundamental way to making us who we are and feeling of fulfilment because we do have emotions and their perfect form is not realised if we experience and understand the other goods without feeling their value. The goods are to be pursued because each is essential in order for us to be what we are as fulfilled human beings.

Kelsen, having offered a good summary of how natural law might purport to explain the movement from fact to value, proceeds by suggesting that the explanation necessarily fails. His criticism of teleology has important implications for the approach adopted here:

> Then it is impossible to distinguish within existence good and evil, because the one as well as the other coincides with existence. Such a distinction is possible only if a norm is presupposed prescribing what ought to be. Only then is it possible to judge that an entity is complete, which means that it is as it ought to be; or that it is not complete, deprived of something which means that it is not as it ought to be.[18]

Kelsen's criticism is one that relates to the 'is/ought' debate but it is also much more important than that. Kelsen is not merely stating that one cannot derive an 'ought' from an 'is'; he is attempting to show how the particular attempt to do so by natural lawyers fails; he attacks their proposed real solution to the real problem that Hume articulated. For Kelsen evil exists (it 'is') just as much as good exists ('is'). If we are to be guided by what 'is' therefore, any 'is' can assert a claim to represent what we ought to be. Korsgaard points out in a similar vein: 'this is once again the problem of normative naturalism. There is no normativity if you cannot be wrong'.[19]

The suggestion, by some, that there are *perfective* 'is's' (untwisted tendencies) does not, for Kelsen, remedy this fundamental problem with the natural law position:

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[18] *ibid.*, p. 181.

[19] Korsgaard, Christine, M., *The Origin of Value and the Scope of Obligation*, in (ONeill ed.), *The Sources of Normativity* (Cambridge: Cambridge University Press, 1996), pp. 131-166, p. 161.

> Referring to the fact that our tendencies may be twisted or distorted, Wild says: 'Hence we cannot infer that what is, is right, which means that we can infer only that right is what is the realisation of an untwisted, undistorted tendency.' But how can we know that what is, is the realisation of a tendency which is not twisted or distorted, and as such good, if that what is evil, too, 'is,' that is to say is as much existent as that which is good.[20]

Kelsen suggests that the notion of perfective tendencies is fallacious for we have no means to discriminate between the perfect and the flawed using only the 'is'/facts an epistemic base. By natural law reasoning any 'is', he suggests, including one that we commonly accept to be evil, can be interpreted as a 'perfective' tendency. In pointing out the equal claim of evil to existence, Kelsen denies that good can be identified through being.

Kelsen takes what he understands as a basic flaw in the natural law account to its logical conclusion by suggesting that pursuit of the link between 'is' and 'ought' may lead us to consider that goodness exists in death as much as in life:

> … There exists not only a tendency towards life but also a tendency toward death; and if – as the dynamic theory of natural law assumes – the realization of a tendency is good, the realization of the tendency toward death is as good as the realization of the tendency toward life.[21]

The principle that *all entities ought to be what essentially they are* can provide a response to Kelsen's objections. Kelsen is correct to observe that before we utilise facts to guide human behaviour we require a norm 'prescribing what ought to be', one that enables a differentiation between all facts and normatively relevant facts. But the principle that *all entities ought to be what essentially they are* is not one that is presupposed nor is it apart from the attempt to use nature epistemically. Rather it is both a prescription and a description; it is an observation of nature's inherent normativity that at the same time reflects the gulf between (a) the necessity in any entity being what it is and (b) the lack of necessity in entities being what they are as fully as possible. The principle looks toward non-contingent, essential characteristics to determine the 'perfective' qualities of the human form and such qualities *are* identifiable. To even admit the possibility of talking about human beings as a discrete form of being is to acknowledge that 'human' means something or is something. The basic goods referred to above represent that meaning; they are the normative translation of non-contingent truths about human nature that enable normativity fully to address the being it seeks to guide.

Another way to discern the normativity of basic facts and to meet Kelsen's objection, is to look towards normativity itself. It can be seen that the question that is central to our humanity: 'how ought we to be' ceases to have any sense in the absence of the essentials of *life* (*oughtness* requires being), *reason*

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[20] *op cit.*, n.17, p. 185.
[21] *ibid.*, p. 181.

('ought' ceases to have any meaning without this defining human trait) and *activity* (there is no sense in asking 'how ought we to act' unless activity is entailed in who we are). Other forms of being do not deliberate about the merits of their action. To be normative is to be different therefore; it is to seek *deliberately* to fulfil one's *specific* (reasoning) form of being. Naturally this requires us to treat reason and life as fundamental goods; 'oughtness' just demands that minimally *reason* and *life* are pursued. To put it another way, the attribution of the status 'good' to these defining characteristics arises naturally from our normativity.

The analysis above suggests that Kelsen is wrong to claim that from a natural law perspective 'good' might be as applicable to death as it is to life. To be normative, as inescapably we are, is to accord fundamental, 'perfective' status to life. (A search for a good way to *live* must presuppose goodness in the bare condition of life[22]; it cannot sensibly be asked 'how can a (good) dead man live well?') Indeed in his criticism of natural law, Kelsen comes curiously close to stating that human existence is not essentially involved in the existence of a human being:

> … A tendency constituting human existence is essential or natural only because its realisation is in conformity with the pre–supposed norm that human life ought to be preserved and promoted, and not because it is necessarily involved in the existence of a human being.[23]

To be compelled to seek a good way to live is to accept the formative, *good* role of, reason, action, and life; in this way the preservation of human life is entirely consistent with the existence of human life; from being one ought to be.

Subjective/Objective

The subjective viewer is not by nature in a position to obtain knowledge of the basic human goods for his reason is tied to him and to his actions, contexts and feelings. The viewpoint selected to attain knowledge of human goods must therefore be the objective viewpoint of a person who is pre–development, on the border between a pre–active and an active world. The knowledge obtained from that viewpoint will inform how that active world constitutes itself. This hypothetical viewer is first an observer of the essentials of nature, second an interpreter of what these essentials demand of us in formulaic terms (i.e. an identifier of the basic goods) and finally, inter alia, a lawmaker who must discover what the goods demand by way of particular norms.

In the natural law tradition it is not a troublesome step to require the objective perspective; the perspective is just the absence of self (necessitated by the fact that no connection between self and morality by necessity obtains). From that

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[22] Korsgaard makes a similar connection between life and normativity. See Chapter 6 at p. 104.

[23] *op cit.*, n.17, p. 190.

perspective the essentials of the empirical world are *observable* and hence the richer type of objectivity that acknowledges the centrality of other people to moral action (evidenced in the good of community) can be discerned. For Kant, in contrast, the mere perspective of objectivity is pressed into service of accommodating itself the richer type of objectivity.[24]

The goods referred to above were by necessity divined from the perspective of objectivity since they arose out of the need to strip aside contingent realities in the first place. But the goods are to be sought by *real* subjective beings; whilst naturally we *ought* to desire and participate in basic goods, we do not attain this stage by natural *necessity*. Of course, individuals will in fact often recognise the importance of fulfilment and seek it out but many factors, including those listed below, contribute to producing a discord between the subjective and objective approaches to fulfilment:

1. The level of *intellectual* consciousness of fulfilment may be slight. Indeed awareness of one's participation in goods may be *felt* as much as thought. In this way it is wholly possible to participate very fully in the basic goods without recognising, intellectually, that we have so done, neither is such recognition necessary or necessarily desirable. (We are, of course, required to act in *accordance* with reason, which may not, however, always require us to act *through* reason.) This type of discord between objectivity and subjectivity is not to considered a weakness; rather it represents the necessity that human beings do not engage in a philosophical discourse before performing moral acts.

2. People do not inhabit an ideal, conceptual world where basic goods are perfectly realised but live in contexts. This has two important implications: (a) in an 'ungood' context the meaning of fulfilment may become distorted so that the goods (or some of them) just cannot be appreciated as good. Any conscious tendency toward good would, therefore, not correlate with our innate tendency toward fulfilment, properly speaking. This is likely to occur where a corrupt regime has power and influence; (b) however, it is more likely that the context within which people live will have a respect for basic goods but the manner in which that respect is manifest will fail to meet the conceptual target as closely as possible so that the real end is missed. (See analysis below on capacity/activity.) A further possibility is that a governing authority will recognise its failure to aim fully for a basic good and pass that failure off as legitimate. There may be a consciousness of good, therefore, without the appropriate level of commitment to attaining it.

3. Subjectively, individuals and normative systems may promote or engage in acts / omissions *mistakenly* believed to be aimed toward basic goods. There may be a consciousness of good as a target, therefore, without an accompanying prudential awareness of how to choose the correct means under the end, (an awareness required by the very notion of good, i.e. by the good of reason).

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[24] See Chapter 3.

4. The individual, like the state, will not always *desire* the pursuit of basic goods, though objectively such a desire is natural. People and states will in fact sometimes desire to thwart human goods; if they did not the case for the existence of legal systems would be much less compelling.

The individual does not possess the benefits of perfect awareness, perfect motive, and an uncorrupted reason, that by necessity are accorded to the objective viewer. It is the perspective of objectivity that enables the identification of the basic goods and that will facilitate the translation of goods into more specific actions (see capacity/activity and personal/political below). However, it is the subjective individual that must act and know how to act without engaging in a philosophical treatise every time she faces activity.

The fact that the individual is not a natural participant in the basic goods (though it is natural for her to so participate) can explain the relevance of *bad* in teleological theory. Contrary to Kelsen's claim, a natural law account *is* equipped to deal with the existence of tendencies toward 'wrong':

> It is, however quite understandable that the dynamic theory of natural law does not recognise the existence of tendencies toward the wrong. Such recognition would annihilate its attempt to found the norm of right behaviour on existential tendencies, its fundamental thesis that existential perfective tendencies are 'norms or moral laws'.[25]

The tendency toward 'good' is a representation of the foundational principle that all things *ought to be what essentially they are*. However, this principle operates, *normatively*, i.e. as a governing principle. In respect of human beings, for example, the tendency toward 'good' is natural only in the sense that it is natural *for us* to seek to be fulfilled. Natural law does not however attribute the tendency, by necessity, to subjective, real beings. Indeed, *by our nature* the principle is met, uniquely, by conscious pursuit. The subjective being, of course, has tendencies toward the *bad* but is nonetheless capable of participating in the principle that urges her to seek what fulfilment really requires.

Capacity/Activity

The identification of essential natural truths provides somewhere for normative discourse to begin. It is natural for human beings to constitute themselves and their world by their activity, to move from this latent, conceptual condition of a pre–active being into an active, living, evolving being – a being nonetheless constrained, normatively, by defining/essential goods. In this account the capacities of human beings are to be activated in a way that is informed by basic goods and does not transcend the limits contained therein. The most problematic stage in a theory that relies on basic goods as a normative foundation is not the

[25] *op cit.*, n.17, p. 185.

identification of basic goods but the derivation of particular practical tenets (including legal tenets) from those goods. The goods identified above place logical limits on anyone who seeks to fulfil their being. But the goods are pre–practical reason or pre–activity goods that define human nature in a very basic sense. Whilst they are intended to provide a moral guide for the active being, it is not yet apparent how they so guide.

Since the subjective being is not by necessity what he ought to be, a distance can be seen to exist between real beings and the objectively complete human being. Our goods, therefore, are at once the characteristics of the complete being that is to be governed and the principles by which the real being is governed. The problem of how to translate these principles into action can be addressed in part by the basic principle that *all things ought to be what essentially they are*. There is in fact a contradiction in that principle. Human beings are necessarily imperfect; to ask us to attain perfection – to reach our essential nature – is actually to *contradict* the principle that each thing ought to be what essentially it is. This follows because imperfection is an *essential* element of the thing that we are. This is an important fact because it places a limit on our ability to reach complete fulfilment/'is-perfect'. Since the attainment of 'is-perfect' is impossible, it will henceforth be referred to as a conceptual end. The problem is highlighted below:

OUGHT?

IS-IMPERFECT ⟶ **IS-PERFECT**

Given that we cannot be other than imperfect, the question that arises is 'where on the above line should 'ought' be located?' In other words, 'how far do we have to go to reaching our conceptual end?' We can say with certainty that we can go no further than our capacities allow. Whilst there are ends that define the perfection of our nature conceptually, we are not conceptual but real beings unable, because of our humanity, to reach conceptual perfection. Consequently, it must be acknowledged that to locate the 'ought' at 'is'-perfect does not in fact correspond to our basic premise that each thing ought to be what it is; the 'is' refers to 'who we are' and *we are* limited by *capacities* that do not allow the realisation of 'is'-perfect. As human beings the most we can do is: s*eek absolutely to attain the conceptual end*. This commitment represents our *real* as opposed to our conceptual end. The idea of being a perfect representation of what we are allows us to be, in so far as is necessary, an imperfect representation of our conceptually perfect form.

The notion of self-defence can illustrate the moral validity of aiming fully toward the conceptual end of life and missing it completely. We can never preserve life absolutely but to say that we preserve life by killing in self–defence, for example, is to make nonsense of life as a basic truth. As Finnis explains:

> The exceptionless moral norm for private individuals or groups is not: I may not choose to kill the innocent, but rather: I may never choose to kill any human being, innocent or guilty, harmless or harm causing {nocens}.

> Indeed, the same goes for intending and choosing precisely *to harm* anyone.[26]

Finnis's claim does not of course undermine the sense in which we can aim absolutely for the good of life yet *practically* be prevented from reaching that end. A system of law that permits a defence of self–defence, for example, recognises that there are real limits on our ability to protect life as a basic good. One significant limit is that others, for whatever reason, will in fact actively aim for 'is'-imperfect by attempting to take life away. That negative aim will impact on our ability to meet the target good of preserving life because it may necessitate a response of self-defence that results in depriving the offender of his life. The point of importance, however, is that by killing in self–defence the deliberative response to life as a good has not altered; the *respect* for life as a basic good has not been diminished. By killing in these circumstances it is undeniable that we have *factually* missed our conceptual target of preserving life. The miss may be legitimised by law, however, in recognition of the existence of a *factual/real* barrier to achieving the end of life.

Finnis attributes a similar type of reasoning to Aquinas:

> Have I then no right to resist the vicious or insane killers attack? On the contrary, I can rightly resist the attack, preserving myself (or one or more others) by using whatever means are reasonably necessary for, and part and parcel of, repelling it. I do not lose this right just because I can foresee that these means will probably or even certainly have as their side-effect the assailant's death. For in doing what I do, I need not – and must not – be intending to kill (or indeed to harm). I can – and should – be intending and choosing no more than to do what it takes to stop the attack {repellendi iniuriam}. That is the object {obiectum: finnis} or purpose of my acting; and the effect on my assailants life is a side- effect, outside the intention {praetor intentionem} or set of intentions from which the action gets its *per se* character as a morally assessable act.[27]

Finnis's point is that by killing in self-defence my *purpose* is not to kill, though undeniably the death of the attacker is the result that follows from a decision I make. My action is justified in virtue of my aim; I have done no more than is necessary to preserve *my own life* and I have acted *for* that purpose. In the scheme advanced here the conceptual end of life *is* missed when someone kills in self-defence. (The life of the aggressor is *in fact* taken away.) The miss is in these circumstances legitimate, however, because the *aim* is to do no more than is necessary to preserve one's own life (a basic good). *That* valid aim represents a real barrier to preserving the life of the assailant.

Indeed conceptual ends will often be missed in fact; being *perfect* representations of our form they are naturally unreachable. This might be considered undesirable because we expect to be able to attain the ends that are

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[26] Finnis, John, *Aquinas* (Oxford: Clarendon, 1998), p. 276.
[27] *ibid.*, p. 276.

applicable to us. Attainability is achieved by substituting the conceptual for the *real* end, which becomes in substance *aiming for* the conceptual end. The real end/*aiming for the conceptual end* requires minimally that we never aim to act against conceptual ends. Applying the real end model to the self-defence example it can be shown that the real end is *not* defeated. By the defensive action, because the *aim* of the person repelling the attack is not to take life away; it is rather to repel an attack and preserve a basic good (one's own life).

It must be noted that an aim can of course be construed as an attempt to harm or to kill if *excessive* force is used. I cannot claim that I aim only to defend myself if I do much more than is required to achieve that result, in fact. For this reason, current UK law, for example, entitles someone acting in self-defence to use only the level of force that is *necessary* to avert an attack. As Simester and Sullivan point out:

> Force cannot be justified to prevent a crime or to defend against an attack unless it was a necessary means of doing so. If D is aware that a safe alternative to the use of force is available, ordinarily she should take it. So, if D can prevent the entry of V, a burglar, by locking a door, she should do that rather than allow V to enter and then subject him to force.[28]

Only by using the minimum force necessary can we claim that sincerely we act *in order to* preserve our own integrity rather than *in order to* interfere with the integrity of the aggressor. By using only reasonable force in repelling an attack we preserve the idea that we ought to aim to advance conceptual ends and therefore we meet our real end accordingly.[29]

Simester and Sullivan indicate that we are not, however, expected to go to ridiculous extremes to meet the reasonableness requirement.[30] For example, we are not in all circumstances expected to retreat rather than react to an attack. In *Julien* the Court of Appeal decided that a failure to retreat is merely a factor to be taken into account when determining the reasonableness of D's conduct.[31] The approach is welcomed by Simester and Sullivan for the reason that:

> … It allows due weight to be given to Ds right to autonomy. If D is behaving in a non-threatening, law-abiding, manner in a place where she has a right to be, she should be under no duty to exert herself at the unlawful behest of V. The question of necessity to use force should take as its baseline, Ds right to autonomy. This is reflected in the important case of *Field*,[32] which rules that D may remain at a place of lawful resort notwithstanding his knowledge that V may attack him should he stay

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28 Simester and Sullivan, *Criminal Law Theory and Doctrine* (Oxford: Hart), p. 624.

29 The entitlement to use reasonable force in evidenced in Section 3 of the Criminal Law Act 1967: (1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

30 *op cit.*, n.24, p. 625.

31 [1969] 1 WLR 839.

32 [1972] Crim LR 435 (CA).

> there. By electing to visit a place of known danger, he does not forfeit his right to defend himself once there.[33]

The relevance of autonomy to the model advanced here is to denote the sense in which each human being has capacities that she is entitled to exercise within the boundaries of defining human goods. Indeed it might be said that an individual has a duty to herself to exercise the capacities that make her the person she is. So long as these capacities are instantiated in activities that do not infringe the goods of others she ought to be at liberty to pursue them and importantly to determine for herself how, when and where to so do. Autonomy clearly is undone when an individual cannot act in the desired way because of the illegitimate threat of attack. So long as the aim in deciding not to retreat is to preserve autonomy rather than to harm the attacker and that only necessary force is used, self-defensive actions will not infringe the real human end.

The partially realisable nature of the goods helps explain why, although the perfect conceptual form can never be realised, it is, nonetheless, correct to aim for that conceptual form. We cannot prevent, absolutely, natural disasters from destroying life but we can aim to minimise their effect, we cannot achieve the perfect form of the Golden Age man but we can aim to have good health, we cannot physically divide the world into equal measures of resources necessary for life but we can aim to eradicate inequality so far as is possible. Because we *can* have these aims and the aims accord with goods, we *ought* to have these aims. These examples represent barriers to our conceptual end that will never fully be surmountable. It is unlikely, for example, that we will ever be able to prevent natural disasters from destroying life. Such occurrences are legitimately considered to be barriers, therefore, for so long as and in so far as human beings do not have the *capacity* to overcome them.

However, it is important to distinguish between real and convenient barriers to aiming for our end. Human beings sometimes kill in anger for example and in that way offend 'is'-perfect, by taking away the basic good of life. But of course the mere fact of killing in anger does not in any way validate the act of killing. There is no *real* limit on *can* that permits the act; we *can* (in so far as we are capable of rationality) and therefore *ought* to curtail our anger and respond in a way that does not destroy life or offend other basic goods. Whilst it may be true that our capacities are limited in fact when we are angry, the point to note is that we may retain complete or at least some responsibility for reaching a state of anger in the first place. This is evidenced in the defence of provocation (a *partial* defence to murder) which, if successful does not result in an acquittal, but in a substituted conviction from murder to manslaughter. For the defence to be successful, the accused is expected to exercise *reasonable* powers of self-control. Hence, if a homosexual man is taunted for his homosexuality it is for the jury to consider whether a homosexual man having ordinary powers of self-control might, in

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[33] *op cit.*, n.28, p. 625.

comparable circumstances, be provoked to lose his self-control and react to the provocation as the defendant did.[34]

So when is a barrier real? If I kill in self–defence my aim, my final purpose in acting is not to take life away (though I may intend to kill) but to preserve the good of life; my act is therefore justified. I do not, of course, preserve life *by* taking life but I do take life *in order* to preserve life (my own life is a good that is to be pursued after all). If on the other hand someone asks me to be quiet, I perceive this as an attack on a basic good, and kill as a consequence my action is illegitimate. There was no *real* barrier that necessitated the taking of life; it is clearly not the case that the act perceived to be against my basic good could have been prevented only by killing the person asking for my attention. Finnis indicates the same:

> … If my assailants attack, though utterly unjust, threatens only some rather slight injury or invasion of my rights, and I respond with lethal violence, I may well be violating the Golden Rule even if I have no motive of hatred or revenge and so no intent to kill or even to harm: my response will not have been proportionate to its legitimate purpose, its proper intention {portionatus fini}.[35]

It will indeed be rare that killing is a proportionate response to any act as really only the threat of imminent death will risk depriving us of goods in such a way that only killing can preserve them.

In war also it will be rare that anything other than immanent, direct aggression will be a barrier to the preservation of life. Even if there is such aggression there is no barrier to life preservation if the aggression can be halted by means other than the taking of life. Natural law clearly can provide only a limited rationale for war and Kelsen, because of his unwillingness to admit a distinction between a–contextual natural truths and the entirety of the empirical world, wrongly concludes that natural law reasoning leads us to validate all war:

> The moral systems which are at the basis of the positive legal orders of our time recognise war as a legitimate action and, hence, do not pre–suppose that the life of human beings belonging to the enemy ought to be preserved and promoted. If all these social orders are or have been actually effective, how could they be considered to be against human nature, if human nature is taken as it actually is and manifests itself in the social life of men; and where else could human nature manifest itself if not in the way the overwhelming majority of men actually behave in their mutual relations, and in the way they morally evaluate their behaviour.[36]

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[34] See A-G for Jersey v. Holley [2005] UKPC 23. Lord Nicholls of Birkenhead, para.11. Citing as authority, the glue-sniffer case of R v. Morhall [1996] AC 90.

[35] *op cit.*, n.26, p. 227.

[36] *op cit.*,n.17, p. 197.

The analysis above has sought to show that the contingent world is escapable. In the essentials of our nature there can be discerned goods (conceptual ends) that can and ought to be pursued to the maximum of our capacities. War can be said to be valid *only* when it is entered into to as a consequence of real barriers to man attaining his conceptual end and only in so far as the target is missed by no more than the degree represented by that real barrier. A nation that is attacked defends itself because it is seeking, legitimately, to preserve the life of its citizens. When an aggressor offends the good of life their aggression represents a practical barrier to the preservation of life. The barrier is not to saving the life of one's own citizens – this can be achieved, in fact, by repelling the enemy attack – rather, the barrier is the necessity of taking the life of the enemy. By acting in this way life is destroyed and thus the conceptual end is missed but the aim remains that of preserving life/health. The aggression is a real barrier to attaining that end because it may necessitate taking the life of the enemy. But the response is valid just in so far as the act done to repel attack is necessary to that end.

The question that needs to be considered, when deciding how to act is: 'how can basic goods best be preserved in the face of an attack on goods?' It will often be the case that the goods of an offender will have to be restricted in some way, but, the *real barrier* to preserving *those* goods, (i.e. the goods of the offender), entitles us to miss our conceptual end *only* so far as is necessary to preserve the goods of others. Only such a response corresponds to us aiming for our conceptual end so far as our capacities permit. So, if we impose a sentence of life imprisonment for petty theft we exceed the real barrier and the superfluous nature of our action represents us aiming against the basic goods. There is no real barrier to the general preservation of good that means we can preserve goods only by depriving the thief of almost all his goods for much of his life. There may be a real barrier of some sort because some restriction on the liberty of the offender may be required – even if it is a rehabilitative measure– to ensure that the good of others is not continually breached. The framework below illustrates the scope of legitimate response to the infringement of goods:

1. Conceptual end

2. Breach of conceptual end by offender aiming toward the bad and consequently breach of the real end also

3. Goods of others restricted as a result of breach

4. Action required to restore goods of others

5. Action will offend goods of offender

6. Offenders action thus represents a barrier to attaining conceptual end

7. Legitimate restorative action is that which misses conceptual end only so far as is necessary. Aim and response remains focused on conceptual end.

8. Response thus in accord with principle that all things ought to be what they are as the conceptual end is missed only because of a real barrier that places a restriction on 'can'.

9. Response that exceeds the barrier does not accord with the restriction on 'can' and thus represents an aim toward the bad. (Of course the authority taking such an action might think it is aiming toward the good but their thought does not in fact make the aim good.)

In conclusion, the contexts and systems that permit the wars Kelsen refers to might indeed signify what nature has become at any point in time but they will not always accord with nature in a pre–contextual sense. It is that nature that can and should have normative significance. Laws should reflect only real barriers toward meeting our conceptual end and legal systems ought not to posit merely convenient or expedient barriers.

Personal/Political

Our way of living must reconcile the personal and the political. We cannot be other than one person but neither can we be other than a person who shares the world with other people. Conflicts between goods may arise and our manner of resolution must be cognisant of the *common* good of man as part of mankind as well as the individual pursuit of good.

The important good of community also serves to illustrate the fact that none of our other goods is likely to be absolute. Even life itself is incapable of absolute protection. We might aim absolutely for the preservation of life yet kill in self–defence in order to preserve life. This is not to assert that the community good can trump individual will, rather it is to point out another ideal that is to be sought, i.e. the commensurability of the good of each individual with the good of the whole. Indeed the analysis below suggests that the good of the whole (as well as the good of the individual) *requires* substantial individual autonomy.

The goods mentioned above are applicable to the entire realm of existence – given that they are in fact existence – and it remains to be discovered the role of law in protecting those goods. Law arises because goods will in fact be offended. If we were only autonomous beings this would not be a significant fact but our nature as human beings determines the need for mutual living. We are political animals, members of a community of people even before community exists in any institutional or political sense. Chapter 4 (section on the Political Animal) suggests that implicit in the good of the individual is the community and implicit in the good of the community is the individual. Any attempt to reconcile the individual and the community in institutional law will be difficult. For, whilst it is contrary to *self* to deny community, above all else it is contrary to self to deny *individuality*.

To deny all authority to the community is to return to a state of isolation which offends the basic good of community (and thus offends self). But the good of individuality entails the entitlement to be self-creating and to *choose* how one

lives. Furthermore, the act of choosing one's path in life is perhaps central to the good of *feeling* of fulfilment. To meet one's end as a human being is an empty achievement without a realisation that one has so done, without reaching an emotional end also. Thus to have one's ends imposed – even in an absolutely ideal form – by a benevolent dictator, for example, would frustrate the required sense of participation in one's own ends. The two positions of personal and political are best reconciled where, so far as there is no impact on the community, the choice of how to be active remains with the individual. The community proper and its institutions arise only as a natural development of the *de facto* community of men. There is no obvious rationale to permit the community to interfere in a community–free situation.

Finnis emphasises this point in reference to Aquinas:

> So, although there is no [type of] virtue the acts of which cannot be prescribed by law, *human law does not make prescriptions about all the acts of all the virtues, but only about those acts which are relatable {ordinabiles} to the common good*, whether *immediately* (as when things are done directly for the common good) or *mediately* (as when things are regulated {ordinantur} by the legislator *as being relevant to the good education* {perninentia ad bonam disciplinam) *by which citizens are brought up to preserve the common good of justice and peace.*[37]

The human goods can be pursued individually and in common. Law's role is in respect only of the common good. Thus, the state does not, (or at least ought not) in the absence of a community element, impose penalties on the lazy person who does not seek to advance personal fulfilment, on the smoker who risks his health, on the cult member who denies self absolutely (though it may on the cult), on the brilliant mathematician who works as a bad gardener, on the liar. These might be considered as failures to exercise personal responsibility, which might offend many goods, yet leave the good of community (and hence the goods of other individuals) untouched. It is only at that point where the failure to be responsible does impact on others sufficiently that the state intervenes. Thus, the drunk driver who is endangering others and is abusive to his family, the cult member who kills at the request of his leader, the lazy landlord who neglects to repair his tenant's gas appliance, the liar who becomes a fraudster and the smoker who injures the health of others may all face legal consequences. Law will intervene only when there is damage to the goods of others and when that damage is significant enough to warrant action.[38] This is compatible with the Thomistic position that, none of us stands to our neighbour as end stands to means, so there is no need, and no

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[37] *op cit*., n.26, p. 225.

[38] Of course law will do much more than permit, prohibit and penalise. It will also, among other functions, facilitate the *efficient* realisation of goods. The discussion is not intended to be a complete analysis of law but is designed to assess law at the point of its coming into being where, primarily, foundational issues are at stake.

justification, for rulers to make rules requiring us to conform our dispositions or our self-regarding conduct to the interests of our neighbours.[39]

Nevertheless, the distinction between personal responsibility and political morality may be difficult to ascertain. It may be adjudged that permitting personal irresponsibility creates such a risk of harm to community goods that the irresponsible behaviour must in itself be prohibited. Such a rationale might be said to lie behind laws prohibiting Class A drug use, for example. The implication may be that there are few realms of human activity over which conduct (however personal we feel it is) *objectively* can be construed as truly self-regarding.

Yet it seems unlikely to be the case that law can legitimately intervene potentially in so many domains of human activity. The mere fact of a real or potential impact on others may be seen to be a necessary but not sufficient condition to give law a regulating role. In this way an individual's failure to pursue their brilliant artistic abilities may frustrate family and friends. It is not only the obligation to *oneself* to develop the capabilities one possesses that is frustrated here. Rather the frustration is experienced also by the wider community, which feels the absence of a benefit that may be filled by the artist. But any duty to the community is not of the type that law ought to enforce. The reason is best explained by reference to individual autonomy. The individual is best placed to judge the feasibility and desirability of pursuing this aspect of their being in light of other elements of their nature, other capabilities and other responsibilities they have. So law ought not to have a role just because a community element is present.

Peculiarly, law may sometimes have a legitimate role, however, notwithstanding the fact that the state itself may be to blame for turning an otherwise individual activity (over which it ought ideally to exercise no jurisdiction) into one that has community consequences (and requires legal intervention, therefore). Societal factors and the way in which a community (including the state and its laws) seeks to realise its goods or fails to do so, may help, in the first place, to *establish* a link between drug use and the community, for example. If a community, by poor management, fails to enable (or worse frustrates) the individual's desire to reach, properly, his ends then it may share responsibility for the decision to seek fulfilment elsewhere, in heroin use etc. Ironically the impact on the community is then heightened, by increasing crime, etc, and the community–based rationale for prohibition follows. Where a society meets its goods more prudentially, the association between the exercise of personal choice – involved in the decision to take Class A drugs (though possibly also the likelihood of the decision) – and the infringement of community goods might be lessened substantially. Thus, it may be determined that the degree of risk of harm involved would not be such as to warrant prohibition. It can be seen, therefore, that the way in which goods are pursued through legal norms will differ from one society to another; in one system it may be right to criminalise heroin use whereas in another (where the conceptual ideal is more advanced) decriminalisation may be warranted. Contexts differ and norms should reflect this difference. However, the

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[39] *op cit.*, n.26, p. 240.

normative significance of changing contexts ought not to be taken to entitle infringement of basic goods, which are a-contextual.

It is part of the *nature* of man to develop and he ought always to strive to perfect and develop the *manner* in which he participates in basic goods. We accept law's authoritative role in determining how the goods are to be pursued in a community context. However, we are only willing to accept that role because we expect the state to be a further instantiation of our end as individuals who share the nation with other individuals. The notion of achieving our conceptual end so far as is possible is unlikely to be realised by a complacent state that does not seek to instantiate, truly, in a community the nature of its parts[40] or by a state that interferes unduly with the personal lives of its citizens.

There is perhaps one further way in which personal responsibility may enter the realm of political morality. The notion of empathy necessarily brings together the individual and other individuals. So, perhaps laws that prohibit heroin use and suicide recognise our respect for the goods of others as individuals like ourselves. We simply do not want our community to be a place where people desire self–destruction because such desire emanates from those whose individuality is in part shaped by us. In a very distant sense the destruction by an individual of his good is a destruction of our good also. To prohibit such acts is to express a desire to encourage participation rather than regression. Of course the response to acts like heroin use need not necessarily be punitive rather the manner of assessing an appropriate response detailed above should be applied. The restriction on the goods of the offender must be the minimum required to restore the good's that have been infringed.

Hume believes that the central normative task is to make visible the nature of a morality that is, to reason, invisible. Kant believes it is to escape from the contingent world. In fact much of what both theorists are struggling with, centrally, Hume in his appeal to utility, Kant in his (illicit) invocation of universalizability, is the connection between individual and political morality, a relationship tackled convincingly by Aristotle and Aquinas.

Conclusion

It has been suggested here that moral meaning resides in very basic, essential facts about our existence as human beings. Such a broad location means that there is much to be done before the connection between morality and nature can illuminate human practice. Nevertheless, the firmness of the origin may mean that it is possible to overcome some of the problems that have beset normative theory; there may after all be a natural base against which our reason and our sentiment can come to rest to reflect our moral nature. The analysis above is limited to its own ends of indicating how an understanding of nature can assist an understanding of human action. A theory of human emotions is surely essential before any normative philosophy can really descend to the practical (in that sense reason is

[40] How it is to properly do so is of course a vast issue. The aim here is to establish the origin of the duty and to indicate some ways in which it may be met.

understood to be *of itself* motivationally inert; we need at least to *feel* the freedom from other determining grounds of the will if we are to act according to principles of reason).

It is impossible to ignore nature – in a very basic sense – in normative theory. By even undertaking such a theory we admit the significance of man's nature as an *existing*, *active*, *reasoning* being. There is no good reason to thenceforth ignore that significance and to look instead to the pure reason of Kant or to Humean sentiment. Rather, to be fully human and moral we may seek to pursue our goods/our nature through our reason. This may seem a position close to that adopted by Finnis for whom practical reason is both a good and the means to determine how the goods are to be pursued. However, the point of departure is crucial. It has been argued that it is impossible to understand *fully* how human beings ought to act without first understanding the nature of those beings. We can only know what makes the human moral by knowing what makes her human.

The Place of Natural Law in Legal Theory

The theory advanced here, in its application to law, represents a theory of law as an ideal. The field of inquiry of 'law as an ideal' is not one that legal theory usually promotes. Indeed where jurisprudence addresses normative ideals it often does so only in virtue of their connection to *actual* social practices and adjudicative *realities*. The tendency to avoid normative analysis, unless it is central to the institution of law, may be evidence of the view that legal theory necessarily refers to *a* single subject matter, inextricably bound up in 'law as a social practice'. It is a central commitment of this book that it is both possible and valuable to offer a free-standing account of what substantively law ought to aim to achieve. Whilst an exploration of law as an ideal may eventually be brought to bear upon actual institutions it is not necessary to justify this type of inquiry by *reference* to normative truths about existing institutions.[41] The discussion below seeks to illuminate and to explain the implications of this commitment and it reflects a return to the themes explored in the introduction to the book.

The Subject Matter(s) of Law

Legal theory, unsurprisingly, is replete with theorists' challenges to one another on the basis that arguments made do not stand up to scrutiny. However, it also displays another type of challenge which is a challenge to the *type* of inquiry that legal theory may properly engage in. In this way HLA Hart's concept of law has been criticised not merely in respect of its central claims but in virtue of the fact that his theory, it is said, just *cannot* adequately capture law as a concept. Sometimes this claim is made to illustrate that a theory does not do what it purports to do, for example, that Hart does not adequately account for law in the way he intends because, it may be suggested, the *rule of law* and other *principles* are

41 See Chapter 1.

considered central to most legal systems; to conceive of law as a *system* of *determinate* rules that derive their legitimacy from a rule of recognition is to ignore these influences and is to fail, therefore, to describe the system properly. The argument follows that for Hart properly to describe law he needed to engage in a different type of inquiry. Sometimes, however, the more fatal claim is made that because of a theory's *subject matter* it does not even have the potential to account for law as a concept. The claim is not: 'this theory does not do what it intends to do' but rather, 'a theory which intends to do this cannot describe law'.[42] It is Hart who is among those regarded as making this claim: 'In its claim to generality, legal positivism asserts a priority over other kinds of inquiry into law by setting out what is being studied when we study law.'[43] Underlying a claim of this nature may be commitment to the view that there is *a* concept of law or *a* field of inquiry of law that is the *correct* one to describe.[44] It follows that analyses based on a different subject matter do not account for 'law' whatever their claims.

This claim to epistemic priority that Hart (and others) make may be challenged. The question in this respect is not, for example, whether Hart succeeds in positing a theory of law as a social practice that is both general and descriptive; it is rather whether he is correct to assert that the role of *the* concept of law and the role of legal theory is to illuminate law *as a social practice*. Like Hart, Finnis, appears committed to a single subject matter; so, epistemic *priority* is accorded to the viewpoint of the practically reasonable man *because* that viewpoint alone can illuminate truths about *actual institutions* and expose flaws in our *practices* as contingencies and myths. This not only asserts the supremacy of the field of enquiry of 'law as a social practice' over others but also represents a confusion of the institutional and ideal fields of inquiry.[45] Dworkin takes the view that the task of jurisprudence is to account for judicial practice and seeks to demonstrate the

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[42] This objection to Hart's enterprise has been made by Dyzenhaus, Fuller, and Dworkin among others.

[43] Dyzenhaus, David, *The Demise of Legal Positivism*, 119 *Harvard Law Review Forum* (2006), pp.112-121, p. 113.

[44] The following types of statements can be seen to instantiate or entail this view:
(a) 'My aim in this book was to provide a theory of what law is which is both general and descriptive.' (Hart) (Suggests that it is *possible* to provide *a* theory of *what law is*.)
(b) 'There is no reason to reject the conceptual choices and discriminations … offered by the practically reasonable point of view wherein legal obligation is treated as at least presumptively a moral obligation.' (Finnis.) (Suggests that there is a point of view that is conceptually superior to all others, and leads to the suggestion that such a point of view can identify truths about actual institutions of law.)
(c) 'General theories of law, for us, are general interpretations of our own judicial practice.' (Dworkin.) (Suggests that general theories of law must be theories of judicial practice.)
(d) 'What, then, counts as an explanation of a concept? It consists in setting out some of its necessary features, and some of the essential features of what it is a concept of The correct criteria are those that people who think they understand the concept or term generally share, i.e. those that are generally believed to be the correct criteria are the correct criteria.' (Raz.) (Suggests that there is *a* concept to be explained.)

[45] See Dickson, Julie, *Evaluation and Legal Theory*, (Oxford; Hart, 2001) for an interesting critique of Finnis's moral evaluation/moral justification thesis.

priority of this account over others. Although acknowledging that people do not share one concept of law, Dworkin does not consider extending the *domain* of law beyond the limited one he identifies. Raz's preference for the singular approach to the concept of law is perhaps more explicit; from the outset the aim is to explain *the* concept of law by reference to a set of shared beliefs about that concept.

Essentially, Finnis, Dworkin and Raz who hold concepts of law that differ in important respects seem to share the view that the concept of law (most broadly) refers *exclusively* to *law as a social practice*. Each attempts and struggles to defend this exclusivity and a tension is evident between attempts to show that a particular field of inquiry is *exclusively valid* and, competing, acknowledgments that judgments of importance and significance are central to legal theory[46] (such acknowledgements seems to suggest the possibility of other legitimate fields of inquiry that may be selected depending on what one considers important). The tension is symptomatic of resistance to the possibility: (a) that there are fields of inquiry other than 'law as a social practice', that may equally (if not always as insightfully) represent 'law'; and (b) that the selection of a particular subject matter within or outside the broad field of inquiry of 'law as a social practice' may be a matter of subjective choice.

Koller notes the different approaches to the concept of law evidenced by positivists and non-positivists:

> *Legal moralism* contends that the law as a normative system is so closely connected with moral ideas that the concept of law must necessarily include a reference to morality (connection thesis). By contrast, *legal positivism* maintains that the law as a real social phenomenon is separated from morality so that the concept may and should be defined exclusively with regard to empirical facts without reference to morality (separation thesis). Each camp seeks to define the concept of law in a way that supports its own view and excludes the other one. This may even suggest a distinction between two different concepts of law, a moralist and a positivist one. However, I think that such a distinction is neither necessary nor helpful. It would be necessary only on the assumption that the two camps actually refer to completely different objects when talking

[46] Dickson suggests that Hart and Finnis acknowledge adequately this feature of legal theory: '… Hart explains that the construction of any explanatorily adequate legal theory involves evaluative judgments regarding which features of law are important to explain.' Similarly: 'Finnis points out that legal theorists – like any other theorists - must make evaluations of significance and importance in order to construct explanatorily adequate theories rather than merely offer miscellaneous lists of information.' Julie Dickson, *Methodology in Jurisprudence: A Critical Survey*, 10 *Legal Theory* (2004), pp. 117-156, p. 123. However, the concession that theorists make evaluative determinations about matters of significance and importance is itself less significant if there are objectively correct determinations to make, i.e. where it is claimed 'this is significant and important in fact' not 'this is significant and important to me or to audience x.'

> about the law. But this assumption appears highly implausible, since it would make the whole dispute pointless.[47]

Koller is correct to note the claim to exclusivity that each camp seeks to make and he observes accurately that each purports to describe the *same* phenomenon (though this may not always be acknowledged), i.e. most broadly, the social practice of law. The debate that occurs is one that is wholly internal to that field of enquiry and it is at least worth questioning (a) whether there are other useful fields of enquiry and (b) whether some of the apparent confusion between the moralists and positivists is a result of unacknowledged *fusing* of fields of inquiry i.e. most often 'law as an ideal' and 'law as a social practice'. Koller, himself, is unwilling to recognise the existence of more than one field of enquiry and states, *inter alia*, that a concept of law must; 'characterize the law as a *social practice* with normative authority that differs from brute force and predatory practices'[48] (emphasis added). The aim here is not to criticise the theoretical focus on law as a social practice rather it is to show how an appropriate acceptance of subjectivity may encourage the exploration of important fields of inquiry beyond law in that sense, i.e. in this instance, 'law as an ideal'.

Subjectivity and 'Law'

We cannot determine what is to count as law without having some pre-existing ideas about what law is or where it is to be found i.e. without, in some way, knowing law already. Since law just is something that almost everyone is familiar with, inevitably, we also possess such pre-existing ideas. It is possible furthermore that a more self-conscious and critical concept of law will be determined in part by the unreflective, pre-theoretical concept of law that we bring to the inquiry.[49] Of course in the continuing reflexivity of the process a more learned view of law may cause one to revise pre-theoretical commitments and consequently revise what we consider 'law' to be too.[50] The point is not that conceptual bias must play a role in

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[47] Koller, Peter, 'The Concept of Law and its Conceptions', *Ratio Juris*, June, 2006. pp. 180-196.

[48] *ibid.*, 184.

[49] Bix shows how difficult it is to absent these commitments from our inquiry and begin the task of legal theory by, for example, looking instead at law as a sociological fact: '… Should someone suggest that the investigation of the nature of law be purely empirical/sociological, that claim would be vulnerable to the argument ... :how can one have a 'sociological theory of law' if one does not have at least a rough prior notion of what is or is not 'law'? There is thus a sense in which conceptual work must be prior to empirical work. For the focus is inevitably on the boundaries of the category – here, what makes something 'law' or 'not law'?' (Bix, Brian, 'Raz on Necessity', 22 *Law And Philosophy*, (2003) pp. 537-559.

[50] Halpin illustrates the possibility: 'For example, we commence with municipal, institutional law as our field of inquiry, but the concept of law that our conceptual analysis provides leads us to broaden our field of inquiry to include public international law.' (Halpin, Andrew, 'Concepts, Terms, and Fields of Enquiry', 4 *Legal Theory*, (1998),

determining what counts as law but that it can. *Some* of my pre-existing ideas and *some* of who I am will very likely play *some* role in determining what, from law most generally, I view as important to explain. Of course the potency of conceptual bias may be mitigated by self-reflection, experience, learning, and through a willingness to challenge the assumptions that one brings to theory. It is unlikely however, that the role of 'who we are' can ever be absent completely from any significant conceptual inquiry.

Subjectivity appears more obviously than this when one becomes aware of the pitfalls of bias and seeks deliberately to *choose* a field of inquiry. For the self-reflective theorist, for whom the setting of boundaries is not wholly a matter of conceptual bias, a number of choices need to be made. Faced with a broad, dynamic subject matter the theorist may wish to consider: 'What is it about this very general subject matter that is significant and important and whose view in this regard do I consider to be authoritative? What is it about this broad domain that I *wish* to describe? What is the purpose of my analysis? To what extent ought the needs of my audience feature in my decision about what is to count as law? If the audience's needs are relevant, which audience? How do I decide who counts as a member of the audience and assess which of its needs truly are relevant without risking reflexive recourse to the law that I am using the audience to identify in the first place?[51] Where the thing 'law' changes a view will have to be taken also on how much of the change can be accommodated by the field of inquiry. It may be asked: Is the aim to describe a social phenomenon concretised in society x at point y, to account for how the thing evolves, or to describe abstract, unifying features only? An additional consideration is whether something more than law as a practice will be accounted for? There are many wrong answers to some of these questions but the theorist is free to *choose* a particular path and of course the answers will always be limited by the questions that are actually asked.

This is not to say that one cannot be critical of a selected field of inquiry. The claim may be made, for example, that a particular field of inquiry is uninteresting or unimportant or that it fails to satisfy the needs of an audience, that

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pp.187-205, p.193. In this way the field of inquiry may really only be fully concretized at the end of the theoretical enterprise where the boundaries of legal concepts are most clearly understood. Nonetheless, one cannot identify relevant legal concepts without a fairly strong idea about which field of inquiry relevant material is to be located in. So although the field of inquiry may be amended as one learns more about the subject, this continuing reflexivity is consistent with the idea that the selection of a field of inquiry does or ought to come before substantive conceptual work.

[51] Of course the success or otherwise of a particular concept may be gauged in part by reference to its *reception* by a relevant audience. (See, for example, Raz, Joseph, 'Two Views on the Nature of the Theory of Law: A Partial Comparison', in *Hart's Postscript: Essays On The Postscript To The Concept Of Law*, (J. Coleman ed.) (Oxford: Oxford University Press, 2001), pp. 1-37. 'An explanation is a good one if it consists of true propositions that meet the concerns and the puzzles that led to it, and that are within the grasp of the people it is (implicitly or explicitly) addressed.') The issue here is the different one of whether the commitments of a particular audience *should* play a role in determining where one draws the boundaries of conceptual analysis at all.

boundaries are peculiarly defined, that the field of inquiry is one not worth bothering with or as Bix says: '… one can … criticize the theory's purpose (e.g. on the basis that it is not ambitious enough) …' However, because the setting of a field of inquiry is, to some extent, a matter of choice, it will be difficult to sustain a fundamental criticism that *because* of the boundaries and purposes these are not concepts of law at all. When boundaries are set and objectives formulated the aim is to conceptualise law *as* X or Y or Z, a matter of choice. (To aim to present a *comprehensive* concept of a multi-layered phenomenon like law seems impossibly ambitious.) Only if hardly anyone recognises X, Y or Z as meaningfully connectable to 'law' may the claim 'this is not a concept of law' easily be sustained.[52] Of course some choices may not be considered helpful, for example, a concept of law that focuses on buildings associated with law. Here the expert has a role which is to assist in introducing and explaining fields of inquiry that the non-expert has not considered. But neither should the expert be viewed as necessarily epistemologically privileged. The repeat offender may have a concept of law that the theorist or Judge does not possess, that however intangible may be considered as much 'true' and important about law as a theoretical or adjudicative account.

It is Raz who most strongly promotes the idea that there is a single concept of law. According to his criterial explanation thesis, a concept is said to consist of shared rules that contain the criteria for the identification of the thing that the concept is a concept of. Raz indicates that 'the correct criteria are those that people who think they understand the concept or term generally share, i.e. those that are generally believed to be the correct criteria are the correct criteria'. In this way, a particular linguistic community might share the understanding that 'table' includes the condition (set by the criteria) 'any item of furniture up to 4 feet high with a flat top normally used to place things on …'[53]

Because of its tie to a linguistic community the criterial understanding of concepts may appear to avoid the subjectivity of choice and pre-theoretical conceptual bias. (*My* concept of table does not appear to play any explanatory role where the shared rules of a linguistic community, not my beliefs, identify the field of inquiry of law.) But commitment to the criterial thesis does reveal a number of conceptual presuppositions. In particular a view must be taken on who counts as a member of the community, (anyone or experts only, for example), and on what constitutes the *relevant* community if there is fundamental disagreement within a broad community about the nature of a particular concept.

The fact of deep and important disagreement about the concept of law is arguably the most important meta-issue that needs to be addressed by the theorist who subscribes to the criterial explanations model. Yet to answer the question 'which community/sub-community counts for the purposes of my explanation of

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[52] Despite the importance of choice, it is no doubt true that for explanatory clarity the meta-theoretical virtues of 'simplicity, clarity, consistency, and comprehensiveness' are, as Dickson acknowledges, to be encouraged. (See, *op cit.*, n.46, p. 125.) It should be emphasised, however, that there cannot be principles to determine the subject matter in respect of which these virtues ought to be directed.

[53] *op cit.*, n.51, 16-7.

law?' takes the theorist outside the linguistic community, into a consideration of: 'Which community's perspective is the *right* one?'; 'Which has the *better* interpretation of the concept of law?; 'Who counts as an expert?'; or imperialistically; 'Which community does have access to law itself?'[54] To answer these questions requires an existing concept of law *independent* of the communities' respective concepts; if I decide that the view of group Y is to count, *I* must have an idea of law in mind in order to determine that it is indeed *law* that this group's view is a view of and not 'law' that other groups' views are views of. At a more basic level, the criterial explanation thesis reveals commitment to the claim that the beliefs of a given community do in fact determine the matter of what counts *as* a concept. In reality, the *fact* that beliefs *may* be shared of *itself* discloses nothing about the relationship between those shared beliefs and the nature of concepts.[55] Raz does show that for sensible debate about concepts to occur it is necessary either that those concepts are shared or that agreement can be reached about what the subject matter of debate is.[56] This does not show, however, that the concept of law *is* shared generally. Indeed such unity appears to be unlikely, at least in respect of the *theoretical* 'linguistic community' where expressly theorists claim to have different concepts of law. As Coleman and Simchen indicate '… disagreement among experts – namely judges, lawyers, and jurisprudents – about what law is is a salient feature of our linguistic and legal practices both.'[57]

The selection of a relevant viewpoint from which to identify the appropriate field of inquiry does not offer a way to bypass the role of pre-existing conceptual commitments and/or subjective choice, though it is invoked often for precisely this purpose. Hart, for example, does not independently substantiate what he takes to be the unique internality of officials in the legal system. Rather, from *faith* in the view that 'law' is law as a social practice, the internality of officials is established, and, reflexively from commitment to the view that officials in the system, therefore, occupy an epistemologically privileged position the field

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[54] Bix points out: 'Raz's references to the concept of law … seem to assume that there is only one concept of law (or, perhaps more precisely, only one concept of law for us in the present era), but the view is, of course, not self-evident.' (*op cit*., n. 49, p. 555).

[55] The fact that it is possible to disagree theoretically about concepts that may be shared (as Raz suggests in his refutation of the semantic sting argument, see *op cit*., n.51) does not show that the concepts are in fact shared.

[56] *ibid*., 22: 'If someone claims to be my blood relation because I donated blood to him before an operation, or if someone says that entrenched constitutions are consistent with democracy because trenches are dug by working people, there is little one can do but point out that the other is talking about a different concept from the one commonly referred to by these words. But such cases are the exception rather than the rule. If you deny that a certain feature is a necessary feature of a concept and I assert that it is, we will proceed by appealing to clear examples, to analogies or to agreed conceptual connections, and will pursue their implications. When one defines 'a table' as an item of furniture made to put things on, the typical response is not: 'This is not how the term is used'… but: 'By your definition a drawing-board is a table, therefore the definition is mistaken. The sharing of the rule is assumed. It is not part of the argument.'

[57] Coleman, J.L., and Simchen O., '"Law"' 1 *Legal Theory* 22 (2003), p. 22.

of inquiry of law as a social practice inevitably gains *supremacy*. Even if it is granted to be demonstrably true that the internal point of view is superior to any other, it may be asked: 'in virtue of what is the view of *officials* in the system the internal (or most internal) viewpoint to law?' At this point circular reasoning appears unavoidable, for the answer seems irresistibly: 'it is *law* that this point of view is a point of view of.' To know that this is *law* is to identify law already. The 'prior' identification will be evidence of pre-theoretical conceptual commitment (or choices made in respect of what is important about law) and ought merely to be acknowledged rather than avoided.

Principles designed to isolate the viewpoint from which a correct field of inquiry may be identified, when directed at subjects that are conceptually multi-faceted, inevitably fail. Hart's circular reasoning appears also in Raz's rejection of 'external' points of view; Raz may be correct to note that to conceive of law as an ideal or as a product of history, psychology, chance or politics is to adopt a viewpoint external to the institution of law. However, it does not follow that such viewpoints are external to 'law'. These types of accounts select fields of inquiry that are not usually chosen but the viewpoints adopted may be as much internal to *those* fields of inquiry as the viewpoint of a Judge is to the field of inquiry of law as a social practice. To dismiss such points of view as being external to law is to accord unjustifiable precedence to one's own *selected* field of inquiry. Raz says that, 'external accounts are not concerned with elucidating the way those subject to the law view it' as such they 'miss the purpose of a theory of law, they miss its point'.[58] However, there is much to be valued in a theory of law that is, at least in part, external to the institution of law; it can capture much that an exclusively internal institutional viewpoint will miss. Moreover, to adopt a position internal to a field of inquiry that is not (exclusively) law as a practice may not necessitate to the same extent an understanding of the views of those subject to the institution; a different position will suggest a different 'point'. This is not to claim that Raz's concept of law is flawed but it is to suggest that it reflects his subjective purpose and his point rather than *the* purpose or *the* point of a theory of law.

The reflexivity, evidenced in Raz's rejection of external points of view can also be discerned in the opening Chapter of *Natural Law and Natural Rights*. It is here that Finnis notes the importance of the practical point of view in legal conceptual identification:

> … when we say that the descriptive theorist…must proceed, in his indispensable selection and formation of concepts, by adopting a practical point of view, we mean that he must assess importance or significance in similarities and differences within his subject-matter by asking what would be considered important or significant in that field by those whose concerns, decisions, and activities create or constitute the subject matter.[59]

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[58] Raz, Joseph, 'On the Nature of Law', 11 (1996), *Archiv Fur Rechts-Und Sozialphilosophie*, p. 3.

[59] *op cit.*, n.12, p. 12.

The problem with the passage is not the prominence given to the practical point of view but the suggestion that the *relevant* practical point of view is identifiable by reference to those whose decisions constitute the *subject matter* of law when that subject matter is to be itself identified *from* the point of view. In other words, to know that it is *law* that is the subject matter of *this* practical point of view and to know that these 'decisions' and 'activities' create or constitute *law* is to know and to identify *law* prior to the identification of viewpoint. It is this original identification of law that represents the foundations of theory not the apparently neutral selection of viewpoint and there is no reason to fail to make the basis for that identification apparent. Rather than do so Finnis seeks to justify his own particular field of inquiry by reference to principle, a justification that is both unnecessary and impossible to achieve.

It may not be possible to avoid the reflexivity that emerges from identifying a field of inquiry in light of one's own beliefs about what is important in law to explain. However the reflexivity ceases to be a problem if there is no attempt to accord exclusivity to one's own conceptual determinations. It may be sufficient merely to acknowledge the influence of one's self, to claim that 'this viewpoint is most important for my purposes, for the audience I am addressing and questions I am considering,' to allow therefore that other audiences, purposes, questions, and contexts permit different emphases and may admit other possible fields of inquiry. Certainly it is desirable to avoid confusing fields of enquiry; whilst there may be a sense in which ideals *are* central to law as an institution there is evidence in legal theory of an improper fusion of law as an ideal and law as a social practice. The discussion below seeks to suggest where this occurs and to explain the precise nature of the distinction between the field of inquiry of this book and the field of inquiry of 'law as a social practice'.

Law and Ideals

Law's 'Inner Morality'

Lon Fuller tries 'to discern and articulate the natural law of a particular kind of human undertaking … described as "the enterprise of subjecting human conduct to the governance of rules"'. His enterprise can be conceived of, in part, as an attempt to discover law's own nature; in that specialised respect Fuller may be characterised as a natural lawyer. Fuller claims that in order effectively to guide human behaviour, law must meet eight requirements; it must be clear, prospective, general, capable of being carried out, consistent, understandable, faithfully applied, and relatively constant;[60] it must correspond, in other words, to the rule of law. Legal systems that do not exhibit these qualities, according to Fuller, lose their claim to authority. (At least they lose their proximity to legality depending on the degree of departure from the rule of law.) Fuller's approach to legal obligation has

[60] See Fuller, Lon, *The Morality of Law* (revised ed., Yale University Press: London, 1969).

been criticised. The argument goes that it appears strange to admit the authority of a substantively immoral law which respects the formal requirements of the rule of law whilst disqualifying another (perhaps otherwise moral) law because it does not meet law's 'inner morality'. So, whilst Fuller may be correct to note that the rule of law is entirely bound up with justice it certainly does not represent all that justice entails and there does not appear to be any clear reason to distinguish the authority of a law that fails to meet the rule of law from one that fails to meet other substantive requirements of justice, like equality, liberty, privacy etc.

Fuller observes that when we use the word 'law' we have in mind values (that may be represented by the ideal of the rule of law) as much as institutions; where these values are absent, institutions cannot properly attract the label 'law'. He says that '… a total failure in any one of these 8 directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all …'[61] However, Fuller's observation about what people want from law might be taken merely as evidence of the fact that people do possess a concept of law as an ideal. Furthermore, such people do not expect the ideal to be replicated in the law of actual institutions nor do they tend to amend their characterisation of those institutions as 'legal' simply because the practice does not meet their ideal. Nor do people find anything strange in using the word 'law' in two different senses; the ideal is a field of inquiry distinct from the real and one person may possess a concept of law in both (and other) senses. It may be that where institutions flagrantly breach the rule of law *or* substantive morality they *ought* to be disobeyed but then the issue at stake is not merely one of semantic categories; rather it is a question of when it is *right* to disobey law or when is it *right* to refuse to call something 'law' and hence be under no obligation to obey it? In respect of Fuller's position, the issue is more particularly, why draw a distinction between procedural and substantive morality in either respect? There is little beyond semantic value in refusing to recognise procedurally wicked 'laws' as law.

Fuller appears to accord priority to formal over substantive morality in virtue of the fact that the formal morality of the rule or law can claim to belong to law's nature; however, it may be claimed that just as a good legal system will respect law's inner morality so too will it respect substantive morality. Each represents qualities that a legal system ought to but may not possess and *neither* can claim to be specifically legal in nature; one would expect any good football code, for example, both to be moral (or at least not immoral) and to respect the requirements of the rule of law. Fuller fuses two fields of inquiry: law as a (procedural) ideal and law as an institution. Moreover, the fusion is to have practical implications; it is to lead us to view some, formally immoral laws as having no (or less) authority. However, the moral desirability of viewing law in this way, or another is not a reason to view it in such a way. We may semantically withhold the label law from certain of our institutions that claim to belong to that category but then we run the risk of being punished under a 'law' that actually is, whilst denying its entitlement to be called law.

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61 *ibid.*, 39.

Finnis

The importance of law as an ideal is acknowledged most strongly by Finnis but instead of providing an account of law as an ideal, simply as a matter of choice, Finnis seeks to justify his ideal as representing the central case example of law as an institution. His point is not that the concept of law can *make* the institution something that it is not; rather he seeks to show that law as it is in practice can be deemed more or less law depending on its proximity to the ideal. However, it is a simple matter of explanatory truth that the central case example of law as it is can only be identified by reference to *law as it is*. To identify it by reference to law as an ideal is not to be practically reasonable and is to run the risk that few institutions are found to be what they are deemed centrally to be. The need only arises to justify the ideal by reference to the real, where an unrealistic view of the holism of legal theory and legal fields of inquiry is held.

Finnis does note that those who describe and claim to be descriptive theorists describe differently and that these differences stem from different evaluative stances:

> It is obvious then that the differences in description derive from differences of opinion, amongst the descriptive theorists, about what is *important* and *significant* in the field of data and experience with which they are all equally and thoroughly familiar.[62]

The theorist must, as Finnis notes, come to a decision about what is important or significant in their field, and in that sense the theoretical task does not begin from 'non-evaluative identifying criteria'[63] rather it begins *with* the individual; it is subjective. The acknowledgement that the starting point for jurisprudence is an act of evaluation becomes less significant, however, when the type of evaluation evidenced in jurisprudence, is examined. It is surprising to find that conceptual claims are not of the type: 'this is what is important and significant to me and this is the aspect of law that I choose to explain therefore.' Rather the claims are more likely to be of the type: 'this field of inquiry *is* in *fact* the most important and significant and must be explained in preference to something else.' It appears, therefore, that matters of importance and significance are to be resolvable objectively; what begins as a matter of choice turns out to have an underlying descriptive justifier. In this way for Finnis 'there is no reason to reject the conceptual choices and discriminations …' offered by the practically reasonable point of view wherein 'legal obligation is treated as at least presumptively a moral obligation'.[64]

For Finnis, the morally evaluative determinations of the practically reasonable man allow us to identify what really *is* important and significant about

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62 *op cit.*, n.12, p. 9.
63 *ibid.*, p. 9.
64 *ibid.*, p. 14-5.

law.[65] Despite assurances about the role of opinion Finnis implies, therefore, that he can neutrally determine *the* field of inquiry of law. However, Finnis does not convince in attempts to justify the priority accorded to the moral point of view. In the main this is because the moral point of view can provide, at most, an understanding of law as an ideal. It cannot be utilised to tell us what is *true* about law as an actual social practice, as Finnis intends. The perspective of course is valuable in exposing moral flaws in our practice. However, these flaws cannot be labelled as 'contingencies, misunderstandings and myths'[66] if they are, however undesirable to the good man, the central case or part of the central case of the social reality that actually exists. Finnis is constrained by the view that there is *a* concept of law that is inextricably connected to existing social practices. This leads to a cumbersome attempt to unify, in one concept, the institutional and the ideal concept of law.

Dworkin: Law as an Interpretive Concept

Dworkin's theory of law has as its foundation the claim that law is interpretive; people, including judges, just do have different theories of law, which through the process of adjudication, constitute part of the meaning of law.[67] The point of *Law's Empire*, is to make the case for the absence of necessary neutrality; law cannot be explained by reference to a set of shared beliefs about the concept of law since law just is, itself, interpretive.

However, Dworkin does set a number of impliedly neutral boundaries around his subject matter. One of the boundaries set clearly is a substantive

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[65] This obviously leads to a further need for evaluation of a different type by suggesting an overlap between moral philosophy and the philosophy of law. This is what leads Dickson to characterize Finnis's theory of law as directly evaluative whereas Raz's theory is indirectly evaluative. (See *op cit*., n.45, Chapter 3.) Raz picks out important and significant features of law without being committed to the claim that these features are morally supportable; Finnis's claim is that the important and significant features can be identified only by reference to what is in fact morally supportable from the viewpoint of the practically reasonable person.

[66] *ibid.*, p. 15.

[67] The present author shares the view that Judges like anyone else disagree fundamentally about the concept of law, for, inter alia, the reason that there is not one correct concept of law (even in respect of our legal system). Furthermore, where consensus is reached on the relevant concept of law for the purposes of debate Judges like anyone else may agree or disagree about the nature of that concept. However, it is disputed that Judges' own concepts of law play a necessary role in the adjudicative process. A Judge's concept of law may be a concept of what law ought to be as much as a concept of what law is. These two ways of conceptualising law may not at all overlap and only the latter is likely to play any role in adjudication (though it may play no role). In deciding what the law is the Judge may have to take a view on what his interpretive role ought to be (for that is not wholly determined by rules). Likewise, where legal data is expressly moral in nature or can be applied in more than one way a Judge may have to take a view on 'what law as it is ought to be' but these types of interpretation are much more constrained than the interpretation that surrounds a freely held view of what law ought to be.

definition of the point of law. For Dworkin, law, like courtesy, is not a static practice but an interpretive concept and to understand it we need to understand the process of constructive interpretation that occurs within and constitutes the practice.[68] However, constructive interpretation can only sensibly be held out as distinctly *legal* constructive interpretation if there is some static element against which interpretation occurs, otherwise if 'law' were to evolve to become more akin to religion or politics or chess there would be no reason to refuse to recognise these 'constructive interpretations' as law. To resist this conclusion, Dworkin suggests a base/'a point of law' against which interpretation is to operate:

> Our discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.[69]

We can accept that the practice of law evolves through, and that the meaning of the concept of law is correspondingly constituted by, constructive interpretation without, however, being committed to the claim that law's purpose is substantively as Dworkin claims it is. His claim may be correct in respect of some legal systems but it is hardly an 'uncontroversial preinterpretive identification of the domain of law'.[70] In the absence of any significant argument in support of it we may conclude that the moral justification thesis represents Dworkin's personal pre-theoretical (and substantive) concept of the domain of law rather than a neutral starting point that we may all readily participate in.[71]

A further consequence of Dworkin's attempt to *fix* the substance of law's point is that he thereby misses the opportunity to explain why the boundaries of legal theory should not be set more narrowly or more broadly. Dworkin locates law's point at the boundaries of *law as a practice*; in this way, to adjudicate upon even a very specific legal point is to take a view on 'law's' point, law, meaning the whole of legal practice. But it is not clear why *law's point* could not be located at a broader or narrower level of abstraction than the whole of legal practice. If, in the course of adjudication, a Judge appears to be making a metaphysical claim

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[68] 'Roughly constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.' (See Dworkin, Ronald, *Law's Empire* (Oxford: Hart, 1998), p. 52).

[69] *ibid.*, p. 93.

[70] *ibid.*, p. 92.

[71] Dickson indicates: '… it should be evident that Dworkin's idea of law's function has far-reaching ramifications as regards which methodological stance a theory of law should adopt. However, one would not necessarily suspect that this is the case from the way in which Dworkin introduces that thesis in *Law's Empire*, where he seems keen to play down its significance and possible ramifications, presenting it merely as a starting point which is necessary in order to get us all into the same interpretive ballpark.' (*op cit.*, n.46, p. 107.)

about the nature of community rights and responsibilities or about his alternative conception of law's point then why not locate law's point ultimately in nature or metaphysics? If to take any view on law is to take a view on law's point then arguably to take any view on law's point is to betray metaphysical, existential or moral commitment that goes beyond peculiarly legal/community considerations. The boundaries here against which constructive interpretation would occur are much broader than the 'point of' legal *practice* informed by community rights and responsibilities. Rather legal theoretical issues, including issues of community rights and responsibilities, would be resolved ultimately in metaphysics or nature or positive morality.

Alternatively, the Judge might be oriented by laws at quite a specific level; when a Judge takes a view on an individual law, guided by the more general norm/s *directly* referable to it, why not accept this as the level at which law's point is manifest? The boundaries here against which constructive interpretation occurs would be much narrower than the whole of legal practice. Any particular legal scenario is capable of belonging to different domains depending on the level of interpretive abstraction considered appropriate/relevant. Even if we do accept that law works in a constructively interpretive way we need not accept that Dworkin has provided an authoritative and neutral account of where the domain of law may properly be said to lie. Dworkin's own approach to the appropriate level of abstraction sets conceptual boundaries accordingly.

Law as *an Ideal*

Finnis, Dworkin, Hart and Raz disagree about the task of jurisprudence, about whether and to what extent it is possible to have a descriptive, value free account of law and about the nature and role of evaluation. But they share the view that their, very different concepts of law provide an understanding of law *as a social practice*. The field of inquiry that determines, at a very high level of generality, what is to count as law is the same for each. However, it may at least be considered that the thing to which a concept of law may refer is not just legal practice and a set of beliefs/attitudes about that practice, it is equally law as an ideal and a set of *independent* beliefs/attitudes about what law ought to be systemically and substantively.

The important point in this context is that the concept of law admits of more than one possibility; it may refer *at least* to law as an ideal and to law as a human institution (and to both in a number of possible ways). Law may be somewhat unusual in being viewable both as an ideal and, in appropriate circumstances, as a corruption of that same ideal. It may be contrasted with a concept like virtue, for example, which is capable of being conceived of only in a morally positive light; we may not have a fully formed concept of what virtue demands but we will just not recognise its instantiations as 'virtuous' unless the positive element is in some way present. Normative systems, like law, are different. Whilst we hope that the morally positive element is present, we *expect* only that our human institutions and conventional arrangements meet their own normative and systemic constraints. Generally we do not refuse to recognise a

legal system or a law as 'law' because we disapprove of it, for example; at least we will not respond with surprise when, if our disapproval manifests in disobedience, we are punished according to the law that actually *is*. Law is unlike virtue, therefore, in that it may manifest itself in a way that is not positive; the real may not instantiate the ideal. Importantly, the central case example of the real may not instantiate the ideal either. Finnis and Fuller in seeking, minimally, to suggest that a legal system is more or less law/or more or less meets the demands of legality fuse illegitimately the fields of inquiry of law as an ideal and law as a social practice.

Neither is law like a giraffe, for example. To say that giraffes ought to be a certain way is to say that animals which are not that way (subject to scientific revision) are not giraffes; the 'ought' and the 'is' are united.[72] In contrast, if we hold a concept of law as an ideal the claim that, 'ideally law is X but here is an example of law, Y, that counts as law despite being fundamentally unlike X', is an entirely sensible one. X and Y denote different (but not isolated) fields of inquiry; X is law as an ideal and Y is law as an institution. The 'ought' and the 'is' of 'law' are unlikely ever to be fully united particularly where the 'ought' is a substantive moral 'ought' not merely a systemic one.

Schauer has a different understanding of the relationship between the concept of law as an institution and the concept of law as an ideal. Schauer's claim is not simply that there is value in positing a theory of what it would be good for the institution of law to be (i.e. that there is value in the development of a concept of law as an ideal). Rather the suggestion is that since positive moral consequences may follow from conceiving of some facts as law and others as not law, these consequences ought to inform our concept of what law *actually* is.[73] Schauer claims Hart as an ally in this respect because of Hart's claim that his positivism best contributes to a clear decision about when it is right to disobey a morally iniquitous law; for Hart, to recognise bad law as law in fact is to be best equipped to decide when to disobey such laws. However, if Hart's positivism stands it stands by being true; the beneficial moral consequence of his concept of law is not the *reason* for accepting it. Schauer's view is that Hart's social thesis is correct (at least in part) because it is morally beneficial for law to be viewed in *that* way. Hart's position is that the social thesis is correct for it best represents law as it is; naturally this will tend to be a morally beneficial position.

Whilst there is much value in formulating a concept of law as an ideal and in debating the alternative concepts that have been suggested, to have a concept of

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[72] The *institution* of law may be similar to a giraffe but only for a certain period of time; we may refuse to recognise certain institutions as law unless they conform to what we take the institution of law to be but since institutions are human constructs what the thing is and consequently how we define the thing is liable to change. So even in a purely institutional sense law is unlike giraffes; the 'ought' and the 'is' are only fleetingly united.

[73] See Schauer, F., *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, *Oxford J. Legal Stud.* 11 (2005).

law as an ideal in order to identify what is true about an institution is fallacious.[74] But importantly, the concept of law as an ideal should not be taken to depend for its validity on mirroring or impacting upon actual institutions. The concept of law as an ideal is a valid concept of law simply because it is itself a concept of 'law'. To put it another way, the 'thing' law *is* the ideal just as it *is* the social practice. There is more than one field of inquiry and it is worth exploring the value that domains other than 'law as a social practice' can provide.

Conclusion

This book has suggested a possible approach to law as an ideal, one that admits rather than rejects our intuitive urge to base what we ought to be on a deep appreciation of who we are. However, there are very significant limitations to the account thus far, both philosophically and in terms of law as an institution. Most fundamentally, the discussion has operated usually in the realm of the metaphysical and much needs to be done to make the ideas realisable in terms of specific human choices and actions. Although Chapter 7 has indicated how such realisability may be achieved in law, it has selected arenas and examples that do not pose the big challenges to this type of natural law account. Perhaps the most important issue that may need to be addressed is that of evolutionary 'change'. Natural law must consider whether, if it is natural for man to evolve and to do so via reason, it may also be natural for him to evolve to such an extent that the *thing* he is changes quite fundamentally. The answer according to natural law theories generally, particularly in the realm of genetic manipulation, has emphatically been 'no' but much more needs to be done by this and by other theories examined here to address the issue fully.

In terms of its application to law, the book has indicated how natural law may inform substantively good law. However, it has not considered the conceptually complex question of to what extent positive law can depart from the sincere pursuit of human goods before disobedience is warranted. Clearly it has not been the contention herein that natural law in any way invalidates contrary positive law. However, any society of communities and individuals cannot expect to flourish against the backdrop of a morally corrupt legal system and there must

[74] Nor can we re-construct the institution of law merely by having a concept of law as an ideal. Schauer comes close to implying that we can in his claim that: 'A society, might, for example, create its understanding of law such that it understood law in an inextricably morally soaked way, with morality being a condition for legality in all possible legal systems in all possible worlds.' Schauer's suggestion here is not that the society has a concept of law as an ideal, one that it will use politically to promote institutional change, for example. Rather he suggests that the society could, by altering its concept of law, make morality a condition of legality in fact; in terms of action this would entitle disobedience of an immoral 'law', thereby leading arguably to positive moral consequences. (See, ibid., p.7.)

be a point at which disobedience is warranted. However, such an issue cannot adequately be addressed without a level of detail beyond the scope of this text.

The ideas contained herein are also limited in terms of the psychology of the individual; how is a metaphysical account of this type to be internalised by individuals? In this respect natural law may pose less of a challenge then other approaches to 'good'. Arguably, we are all attuned to fulfilment and natural law urges us to seek that fulfilment in *whatever* we do. So, not only are we to pursue the basic, universal goods, we are to do so, in part, via pursuit of our *individual* being. In this way, natural law is burdensome but it represents a liberating rather than a restricting burden; the artist in natural law is to be, and is to be valued as, an artist, for example; creative pursuits that instantiate an individual's nature are appreciated, just in the same way as the talents of the scientist or Judge.

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