Chapter 4 Classical and modern natural law theory

Contents

Introduction 61

4.1 The rise of natural law in ancient Greece and Rome 62

4.2 The natural law of Aquinas: structure 65

4.3 The natural law of Aquinas: legal reason, human law, and the obligation to obey the law 67

4.4 Modern natural law theory I: Finnis 69

4.5 Modern natural law theory II: Fuller 71

4.6 The continuing debate over the connection between law and morality 72

Introduction

From the time of the ancient Greeks up until the sixteenth or seventeenth centuries, there really was only one kind of 'legal theory' – natural law. The essence of this legal theory was that the law must be understood as a practical application of morality; hence law and morality are intimately connected. Accordingly, much of natural law theory sought to show how legal authorities such as princes, states, and so on, could lay down laws which reflected the true dictates of morality, and were, therefore, just. Why is natural law no longer the only theory of law? In a word, the answer is **positivism**. Legal positivists deny that the law is simply a matter of 'applied' morality. Positivists note that many legal systems are wicked, and that what is really required by morality is **controversial**. For example, some people view a woman's right to have an abortion as an essential human right, while others think of it as tantamount to a right to murder. Yet the law carries on, laying down rules for behaviour, even when the rules are immoral, or when no one can demonstrate to the satisfaction of all whether a rule is moral or not. What positivists conclude from this is that the law is a kind of **social technology** which regulates the behaviour of its subjects and resolves conflicts between them. The law has no necessary moral character.

The philosophy of law, then, according to positivists, is the **philosophy of a particular social institution**, not a branch of moral or ethical philosophy. In working through this chapter, you must always bear in mind this positivist challenge, and ask yourself whether natural law theory is capable of responding to

positivism whilst keeping its character as a plausible moral philosophy.

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- describe the origins of natural law in ancient Greece and Rome and the basic ideas which inform the natural law tradition
- explain the natural law theory of Aquinas, in particular the relation of natural law to divine law and human law, and the importance of the distinction between *specificatio* and *determinatio* in the generation of law
- explain Finnis's modern natural law theory, in particular his employment of the 'focal meaning' or 'central case' to determine the subject matter of legal theory, his reference to self-evident basic values, and his characterisation of practical reason
- explain in detail Fuller's 'inner morality of law'
- critically assess these various versions of natural law theory in light of the attack on natural law by legal positivists.

Essential reading

Either of the following:

- Penner et al., Chapter 2: 'The evolution of natural law', pp. 35–90.
- Freeman, Chapter 3: 'Natural law', pp. 89–198.

4.1 The rise of natural law in ancient Greece and Rome[1]

The term 'natural law' is misleading, for it sounds as if it denotes some kind of theory of the law, a 'natural' one, whatever that is. It does not. Originally, 'natural law' was a general moral theory which explained the nature of **morality**, not the nature of **law** *per se*. The basic idea was that man, using his reason, and possibly with the help of the revelation of the gods or God, could come to understand how he should act rightly in respect of his fellow man. This morality of reason and revelation was a morality which purported to take account of man's **nature**, hence the title 'natural'. And because this combination of revelation and reason laid down rules for behaviour, the word 'law' seemed appropriate, hence 'natural law'. Natural law, then, is principally a theory of morality in general, not a theory of law.

But part of the project of acting rightly, of course, was the project of rulers who laid down law for their subjects, and so the claims of natural law morality applied just as much to them as to individuals generally. So a part of natural law (obviously a very important part) explained what it was to rule and legislate and judge cases rightly; so part of natural law was the morality of 'law', narrowly construed as the laws passed by legislation and the legal system of courts, judges, and so on. Nowadays, 'natural law' is generally taken to mean only that part of the original moral theory which explains the way that the law, narrowly construed, operates as part

[1] This passage uses 'man', 'his' and 'he' as they would have been used by earlier writers on natural law. Today we would want to emphasise that the human race is not exclusively male, and would probably say: 'The basic idea was that **human beings**, using **their** reason, and possibly with the help of the revelation of the gods or God, could come to understand how **they** should act rightly in respect of *their* fellow **humans**.'

of the broader moral life of human beings. (As we shall see, however, the most important living natural lawyer, John Finnis, emphasises that the philosophy of law is continuous with general moral or ethical philosophy.) That narrowing of focus has to do with the way in which the nature of morality as explained by natural law theory was drawn upon to justify existing legal authorities.

It has been argued that in small, close-knit, primitive societies, the inhabitants make no distinction between what is morally right and the way they think it right to do things. They do not stand outside their own practices, looking at them from an external standpoint to judge whether they are correct or not; rather, they just 'do what comes naturally', typically treating their rules as timeless and revealed and enforced by the gods. In short, they lack a critical perspective on the standards of behaviour they uphold. Whatever the truth of this quasi-anthropological assertion, it is clear that when different cultures come into contact and are forced to live with each other, a clash of customs will almost certainly occur. The philosophical tradition that began with Socrates, Plato, Aristotle, and the Stoics, and was carried via Rome throughout the West, was faced with this sort of conflict, as the different city states and empires sought to provide workable rules which might govern everyone within their jurisdictions. This philosophical tradition made one of its central questions 'How ought a man to live?', and the answer was sought not in the particular customs or practices of particular cultures, but in our common nature.

The obvious advantage of this approach was that, if successful, all subjects of the state or empire could appreciate the resulting rule of behaviour as appropriate to each of them, rather than constituting the imposition of odd and foreign practices against which they would naturally rebel. Different philosophers adopted different ways of explaining the common nature of man which might deliver a common morality. Very briefly and roughly, Plato believed that those who were properly philosophically instructed might come to grasp – perhaps always imperfectly – the true form or idea of 'justice', and other absolute values. For Aristotle, it was essential to understand man's *telos* (goal, or purpose), which reflected his nature; in particular, Aristotle thought that man was social, political, and sought knowledge, and only when in a position to fulfil these aspects of his nature could men flourish and achieve the 'good life'. The Stoics[2] accorded primacy to man's reason – by reason man could determine those precepts of right conduct which transcended particular cultures, and therefore were universally applicable. The 'law on the books' that most directly resulted from this intellectual activity was the *jus gentium*, which started life as a second class legal order, a stripped-down Roman civil law which applied to foreigners, but which came to be regarded as a higher or superior legal order, in some sense akin to international law, a kind of common law of citizens which applied throughout the Roman Empire.

[2] Stoics: an ancient Greek school of philosophers who believed, among other things, that the mind is a 'blank slate', upon which sense-impressions are inscribed. It may have a certain activity of its own, but this activity is confined exclusively to materials supplied by the physical organs of sense.

The single most important theoretical issue which this philosophical tradition generated, and which forms the core issue of the natural law tradition today, is how this critical, universalistic perspective is properly to be employed to judge the laws of any particular society. In its most extreme form, one can adopt the Latin maxim *lex injusta*

non est lex, i.e. an unjust law (unjust, that is, according to the principles of morality, i.e. natural law) does not count as a law, is not a law. Thus if the legislature passed a statute that required everyone to kill their first-born, then such a statute would not have the force of law at all. **Notice this point very carefully:** the claim is not that such a statute would provide a very wicked law, but that even though it was validly passed, the statute would provide no law at all, just because the content of the statute was so at odds with morality, i.e. with natural law.

This most extreme version of the force of natural law theory has been a primary target of positivists; for the positivist, such a statute, assuming it was validly passed, would provide for a perfectly valid law, wicked though it was. One might be morally obliged to disobey such a law, but it would be a law just the same. In just this way, says the positivist, the dictates of morality can be distinguished from the dictates of the law. In the face of this criticism, very few natural lawyers defend the connection of morality and law as being quite so intimate as this. One of this chapter's tasks is to critically examine the different ways in which natural law theorists explain the connection between law and morality. But notice straight away that you are not a natural lawyer simply because you believe you can criticise the law for being out of step with morality. **Everyone believes that**. It is a common exam mistake to state something silly along the lines that 'only natural lawyers judge the law by moral standards'. This is nonsense. Legal positivists, in particular, are happy to criticise immoral laws. They simply do not deny that an immoral law **is** a law. The arch-positivist of the modern era, Jeremy Bentham, was a dedicated social reformer who forcefully attacked the laws of England throughout his life. In doing so, however, he attacked them as bad **laws**, and did not claim that they were non-laws because they were bad. The principal task of natural lawyers, since the rise of legal positivism, has been to show a more plausible connection between law and morality. This would need to be a more robust connection than simply saying that one can criticise the law for being immoral.

Self-assessment questions

1 What is natural law a theory of?

2 Why is natural law called 'natural law'?

3 Why does natural law theory pay attention to the law of particular states?

4 What is the *jus gentium*, and why is it related to the rise of natural law?

5 What does *'lex injusta non est lex'* mean? Why is this statement regarded as an extreme expression of natural law?

Activity 4.1

Read either the excerpt from Cicero[3] in Penner et al., pp. 46–50, or the excerpt from Cicero in Freeman, pp. 140–141, and answer the following:

Cicero says: 'And it is not only justice and injustice that are distinguished naturally, but in general all honourable and disgraceful acts. For nature has given us shared conceptions and has so established them in our minds that honourable things are classed with virtue, disgraceful ones with vice. To think that these

[3] Cicero: Marcus Tullius Cicero, Roman statesman, orator and philosopher, 106–43 BC.

things are a mere matter of opinion, not fixed in nature, is the mark of a madman.' He also says, 'And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over all of us, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.'

Are all the ideas Cicero puts forward in these passages about the nature of natural law consistent with each other?

Feedback: see page 75.

Summary

The natural law tradition arose as the application of a theory of morality which emphasised man's common moral nature to the legitimacy of states. The question of the legitimacy of states and their laws became politically important when empires sought to rule over different peoples with different customs, and so natural law seemed ideally placed to provide a universal standard of justice. Different natural law theories arose, however, which did not agree on what the universal basis of morality was; some emphasised human beings' intellect or reason, others their purpose, others revelation of God's will.

Reminder of learning outcomes

By this stage you should be able to:

- describe the origins of natural law in ancient Greece and Rome and the basic ideas which inform the natural law tradition.

4.2 The natural law of Aquinas:[4] structure

[4] Aquinas: St Thomas Aquinas (1225–1274) Italian-born Christian (Catholic) theologian and philosopher.

While the divine was considered by the ancients to be a source of understanding of morality, a brief review of the rough descriptions of Plato's, Aristotle's and the Stoic's theories of natural law given above shows that God was not an obvious central figure in the equation. Following the Christianisation of the Roman Empire, however, a theory of morality could no longer make reference to God's word solely as a rhetorical gesture. It took the genius of Thomas Aquinas to reconstruct the classical natural law tradition of the Greeks and Romans within Christian theology. The central idea is that the grace of God was held not to conflict with or abolish man's nature, but to perfect it, and in this way a Christianised version of natural law could be seen to continue or bring to fruition the natural law tradition. Aquinas modified Aristotle's teleological perspective so that man's end was not only to live socially and seek knowledge, but to live in a Christian community in which one would come to know, and presumable adore, God. Most importantly, however, he described orders of law, eternal, divine, natural and human law, which purported to show the way in which human reason was able to appreciate what was good and godly –

according to Aquinas, man, by his reason, was able to **participate** in the moral order of nature designed by God. The orders of law were as follows:

Eternal law: The whole universe is governed by divine providence or divine reason, which is the ultimate order imposed by the Creator.

Natural law: Humans are special creatures in having a special relationship to divine wisdom or providence, in that since they possess reason and free will, they have a 'share' in this divine wisdom themselves. This participation of man in the ordering of his affairs by reason is participation in the rational order ordained by God, and this is natural law.

Human law: Human law consists of those **particular** rules and regulations that man, using his reason, deduces from the general precepts of natural law to deal with particular matters. For example, it is a natural law precept that crimes must be punished with a severity that corresponds with the seriousness of a crime, but it is necessary to specify the actual punishment that, say, a thief will receive under a particular legal system, and the use of reason to provide a punishment of, say, two years is the use of reason called 'human law'. This might also be called 'positive' law, as it is the actual law posited by legal institutions.

Finally, there is **Divine law**: This is the law that is revealed by God to man, more or less directly, through the provision of the ten commandments or through scripture more generally, or via the divinely inspired pronouncements of prophets or the Church fathers or the pope. Divine law most directly concerns man in his relation to God and achieving paradise; it lays down how man is to act in relation to God (in terms of the requirement to take part in rituals such as baptism and Holy Communion, and in forswearing[5] other gods or idols, for example) and furthermore covers those matters of the soul which human institutions are unfit to regulate, such as evil thoughts, which are nevertheless of vital importance to a man's relationship with God. Though much of divine law would be Church or Canon Law, to the extent that religious law was also enforced by secular authorities like city states or princes (for example laws against usury or blasphemy or witchcraft), divine law could be instantiated in secular law as well. Furthermore, there is an overlap between this law of revelation and natural law, in such matters as are covered by, for example, the Ten Commandments, where the prohibitions against murder, theft, bearing false witness, and so on, are declared by divine law but can also be appreciated as natural law precepts as well.

[5] Forswearing (from verb 'forswear') = agreeing to have nothing to do with.

Self-assessment questions

1 According to Aquinas, what is man's *telos*? How does it differ from what Aristotle viewed as man's *telos*?

2 What are the different orders of law in Aquinas's scheme? In what ways do they interact or overlap?

Activity 4.2

Consider the criminal law of rape, the law of wills, and the law of taxation. What order(s) of law under the Aquinean scheme do these belong to, and why?

Feedback: see page 75.

4.3 The natural law of Aquinas: legal reason, human law, and the obligation to obey the law

We have seen from the preceding that, according to Aquinas, law arises from man's participation, via his reason, in the divine wisdom of God. Sometimes human law is simply a deductive conclusion from the general precepts of natural law. But there is a second way in which human law is created in accordance with natural law, and Aquinas exploits the analogy of the architect to explain this. In order to build a house, one starts with the general idea of a house – that it has rooms, doorways, windows and so on – so that there are, as it were, 'natural law' precepts or requirements of house building. However, the idea of a house does not tell the architect whether the doors must be two metres high, how many rooms and so on. The natural law precepts of house building will require that the doorways must be more than 30 cm high, for a doorway this low would not be functional. But no specific workable height is specified by the mere idea of a house; this specification needs to be done by the architect and, in the same way, while natural law requires that thieves be punished, the natural law does not specify what the particular punishment should be, so long as its severity corresponds in some sense or degree to the seriousness of theft. Aquinas rendered this distinction in Latin: what the natural law lays down – or can be deduced from it by reason alone – is *specificatio*, or specified. What man must practically decide about, compatibly with the natural law but not by deduction from it, such as the proper punishment for theft, is a matter of *determinatio*, determination within the boundaries set by natural law.

Human law also has particular tasks and limits which natural law – the general precepts of morality – does not. While some subjects of the law are naturally inclined to be virtuous, others are of more evil or selfish disposition – which we might perhaps all be in certain moods or times of our life. Thus the law must exert not only a guiding but a disciplinary force to deal with the latter sort of person. The human law must also be general, applying to all subjects, though laws applying to children and perhaps others with limited rational capacity may justifiably differ. The human law cannot be a counsel of perfection; it should attend to the more serious matters of human conduct, and not try to prohibit every vice or insist on every virtue: its task is to ensure a framework of rules which provide for a human community that is capable of flourishing – not to create heaven on earth.

Furthermore, since humans are granted only limited reason and insight, human law cannot be treated merely as the laying down and enforcement of rules. There will always be exceptional cases in which a departure from the strict rule will be justified, and human judges must maintain and nurture this sense of 'equity' in the face of the rules.

Because the human law is a particularisation or determination of concrete rules and principles, which while they must be in keeping with the natural law, are not fully specified by it, the human law is mutable, and will be different in different times and places. Despite this mutable character, it is unwise, according to Aquinas, to change the human laws too often or too radically, even if within the confines of natural law, for custom is important, and the more laws change, the less legitimacy they appear to have; and consequently the proper coercive power of the law is diminished. The law should only be changed if the benefits clearly outweigh these drawbacks.

According to Aquinas, a law only 'obliges in conscience' to the extent that it is in keeping with the natural law. An unjust law has more the character of violence than of law. Yet Aquinas does not draw from this the conclusion that an unjust law is not a law – it continues to partake of the character of law in its form, and in this sense participates in the order of law at least in this minimal way. One must always remember that the law is, from the moral point of view, a necessary human institution of communal practical reason. Every person has the duty to support, and to act so as to foster, conditions for its success. Thus the fact that a law is unjust does not provide one with an absolute licence to disobey it; one must take into account the consequences of one's obedience for the general project of law – disobedience might, for example, generate a willingness amongst people to disobey the law for selfish reasons, or make it more difficult for just laws to be administered, and so on.

Self-assessment questions

1 What are the two ways in which the natural law is a source of human law?

2 Explain the difference between *specificatio* and *determinatio*.

3 What particular tasks and limitations does human law have?

4 What is Aquinas's view on the moral obligation to obey the human law?

Activity 4.3

Read either the excerpt from Aquinas in Penner et al., pp. 50–65, or the excerpt from Aquinas in Freeman, p.142–146, and answer the following:

What are the strengths and weaknesses of Aquinas's theory of the law?

Feedback: see page 76.

Summary

Aquinas married Aristotle's natural law theory with the Christian tradition to develop the most refined theory of natural law before the twentieth century, and his work is a fundamental reference point for all natural law theorists. Acquinas's natural law theory shows man, because of his reason, to be a participant in divine wisdom, whose purpose is to live in a flourishing Christian community. Law is a necessary institution in such a community, and just laws will reflect directly (*specificatio*) or indirectly (*determinatio*) the universal morality of natural law.

Reminder of learning outcomes

By this stage you should be able to:

- explain the natural law theory of Aquinas, in particular the relation of natural law to divine law and human law, and the importance of the distinction between *specificatio* and *determinatio* in the generation of law.

4.4 Modern natural law theory I: Finnis[6]

[6] You may also find it useful to read Hart's introduction to the ideas of natural law in Chapter 8 of his *Concept of Law*.

Modern natural law theory is an attempt to sustain the natural law theorist's project of exposing and emphasising the importance of the connections between law and morality, but which has had to face squarely the objections of legal positivists. John Finnis, the most important contemporary natural law theorist, was a student of H.L.A. Hart's, and one of the strengths of his natural law theory is its respect for the insights of positivism. He ultimately concludes, however, that positivism is at best a partial, and at worst, a fundamentally flawed, theory of law.

4.4.1 Finnis's ethical theory

Two major arguments against natural law theory must be addressed by any modern natural law theorist. The first is moral scepticism. '**Realists**' about morality believe that moral values and principles exist, and '**cognitivists**' about morality believe that humans can come to know what these moral values and principles are, so that statements about what is morally right can be judged to be true or false. Moral sceptics of various kinds deny either or both of these views. **Emotivists** of various kinds, for example, believe that what we call our moral beliefs are ultimately just expressions of our emotional attitudes. As an example of a modern positivist who clearly doubted that there were universally valid, objective moral norms that humans could know the truth of, one can cite Kelsen (see Chapter 10). Moral scepticism has itself been attacked as incoherent or nonsensical, but the debate remains a live one. Clearly, if moral scepticism is right, then natural law theory is hopeless, for there would be no objective moral standards that could connect with the law. You should remain aware of this issue, in part because it is a necessary backdrop for understanding Finnis's moral theory, but more generally to understand the broader kind of philosophical challenge that a natural law theory might face. It is well beyond the scope of this course to study in detail the arguments of moral sceptics and their respondents.

The second argument concerns the way in which we might know what morality requires. You may have heard of the **fact/value distinction**, which is akin to the distinction between description and prescription, or the factual and the normative. The fact/value distinction is the distinction between statements which **describe** some aspect of reality, e.g. 'Elizabeth II is Queen of England', and statements which **evaluate** some aspect of reality, or **prescribe** some behaviour, e.g. 'Killing the innocent is wrong' or 'Do unto others as you would have them do unto you'. The leading philosopher of the Scottish Enlightenment, David Hume (1711–1776), famously pointed out that one cannot validly infer or derive evaluative propositions from factual ones; the point is typically put thus, 'One cannot derive an "ought" from an "is".'

Thus it is fallacious (though unfortunately not uncommon) for people to reason like this: 'Because of their biology, women can bear children; therefore, women **ought** to bear children, and it is morally good that they do so, and immoral for them to avoid having children.' It is fallacious to reason from a description of women (that they have the capacity to bear children) to the moral principle that they **ought** to bear children. (G. E. Moore called this fallacy the 'naturalistic fallacy'.) How does this bear on natural law theory? You will have noticed that one of the principal organising ideas of natural law theory is that it looks to the nature of man, or certain aspects of his nature, e.g. that he is social, or that he has reason, or that he can know God. These are all descriptions of man, albeit intended to be more or less ultimate descriptions of his essential nature. But from these characterisations of man, we are supposed to derive moral principles by which man should guide his life. But this reasoning, as we have just seen, is fallacious. To say that man is rational is one thing; it is an entirely different matter to decide whether acting morally amounts to acting rationally. **That** God says to do so and so is one thing; it is another to decide whether one **ought** to obey God.

The argument, then, is that the natural law tradition is founded on the fallacy of deriving **ought** from **is**, and it is not obvious how this argument can be countered.

John Finnis tackles this issue head-on, denying that the natural law tradition (especially as it is represented by Aquinas) is founded on the derivation of 'ought' from 'is'. Rather, he says, natural law theory is founded on man's ability to grasp values **directly**, not inferring them from the facts of the world. According to Finnis, there are basic values that underlie the human appreciation of the value of any particular thing and all man's purposive activities. As presented in his first major work on the topic, *Natural Law and Natural Rights*, published in 1980, these values are life, knowledge, play, aesthetic experience, friendship, religion (not in the sense of any particular religion, but in the value of seeking to understand man's place in the universe), and practical reasonableness (the value of pursuing the other values in a reasonable fashion). These seven values are not inferred from facts about the world or man, but are appreciated directly by humans as valuing beings. While Finnis admits that there can be debates about the list of basic values, he is insistent that the basic values are irredeemably plural and 'incommensurable', that is, the good of one cannot be directly measured against the good of another on some common scale. Thus it is **not** the case that if one is presented an opportunity to play or enhance one's knowledge, one could detect that one had an opportunity to get seven units of play but only five units of knowledge, and so decide to play. Choosing to pursue one value rather than another is not a simple process of this kind. Furthermore, the seven basic values are not mere manifestations of some more basic or master value, such as pleasure, or utility.

Self-assessment questions

1 What is moral scepticism? Why does it undermine natural law theory?

2 What is the 'naturalistic' fallacy? Why does it undermine natural law theory?

3 What is Finnis's response to the claim that natural law derives *ought* from *is*?

4 What are the basic values that Finnis describes? Can they be reduced to some more fundamental value?

4.4.2 Finnis's natural law theory of law and the criticism of positivism

The essential claim that Finnis makes about the law is that it is a social institution whose purpose is to regulate the affairs of people and thus contribute to the creation of a community in which all people can flourish, i.e. a community in which everyone can realise the seven different basic values. In this way, the law is a moral project. Therefore, in order to rightly describe the law, one must take the position of a person who examines the law with this person in mind (i.e. the practically reasonable person who grasps the seven basic values and the law's purpose in helping people to realise them). This provides a clear connection between moral philosophy and legal philosophy. Whether one's description of law is correct or not will (in part, but very significantly) depend upon whether one's moral views are correct, for one's moral views will inform the way in which one conceives of the project of law. In this way, Finnis denies that positivism provides a full or accurate picture of law. While Finnis welcomes the insights into the nature of law that have originated with positivists, in particular the positivism of H.L.A. Hart, he denies that these insights provide a sufficient theory of law.

Activity 4.4

Read either the excerpts from Finnis in Penner et al., pp. 68–71, or in Freeman, pp. 178–80, and answer the following question:

What does Finnis mean by the 'focal' concept of law, and why does he not intend to explain our 'ordinary' concept of law?

Feedback: see page 76.

Reminder of learning outcomes

By this stage you should be able to:

- explain Finnis's modern natural law theory, in particular his employment of the 'focal meaning' or 'central case' to determine the subject matter of legal theory, his reference to self-evident basic values, and his characterisation of practical reason.

4.5 Modern natural law theory II: Fuller

Unlike Finnis, Fuller did not aim to produce a morality of law on the basis of a general moral theory in keeping with the ancient natural law traditions; rather, he sought to explain the moral content in the idea of 'the rule of law', i.e. governance by rules and judicial institutions as opposed to other sorts of political decision-making or ordering, such as military command or bureaucratic administration. The morality he describes is morality as 'legality', meaning morally sound aspects of governing by rules. For this

reason, Fuller is often credited with devising a 'procedural' natural law theory, in that he does not focus on the substantive content of legal rules and assess them as to whether they are moral or not, but rather concerns himself with the requirements of just law-making and administration.

Activity 4.5

Read the excerpt from Fuller either in Penner et al., pp. 74–83, or in Freeman, pp. 157–171, and answer the following questions:

(a) What are the eight principles of the morality of law, according to Fuller?

(b) Do they, in your opinion, capture the morality of the law?

(c) What do you make of Hart's criticism (Hart, H.L.A. *Essays in Jurisprudence and Philosophy*. (Oxford: Clarendon Press, 1983), p. 350) that Fuller's 'principles of legality' 'perpetrate a confusion between two notions it is vital to hold apart: the notions of purposive activity and morality. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. ("Avoid poisons however lethal if they cause the victim to vomit", or "Avoid poisons however lethal if their shape, color, or size, is likely to attract notice.") But to call these principles of the poisoner's art "the morality of poisoning" would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned.'

Feedback: see page 77.

Summary

Finnis's natural law theory is based on the direct appreciation of self-evidently valuable basic goods – the purpose of law is to provide conditions in which these goods can be realised. His theory is Aquinean in the sense that he follows Aquinas's general theory as regards the *specificatio/determinatio* distinction and its general outlook on attitude subjects must take to unjust laws. Fuller's natural law theory is concerned to vindicate the notion of 'legality' or the rule of law, to provide a sense in which rule by law, as opposed to executive fiat or administration, is distinctive in a morally significant way.

4.6 The continuing debate over the connection between law and morality

Although working through this chapter will provide you with the basic ideas which underlie natural law thought, the question of the connection between law and morality is a vast one, and perhaps in the Western philosophical tradition, the most important and deeply contested question there is. Thus you should bear in mind this question as you work through the succeeding chapters. Next you will study the legal philosophy of H.L.A. Hart, who, though a positivist, was always sensitive to the natural lawyer's claims, and again and again addressed the different connections he saw between morality and law. Similarly, when you pass to the work of Ronald Dworkin, you will examine the work of a theorist, who, like natural lawyers, sees an intimate connection between morality and

law, although from a quite different perspective. Dworkin believes that his theory refutes positivism, in part for its failure to account for the role moral theory plays when judges decide cases. There is, finally, a massive literature on this subject, and while we have looked at Finnis's work in detail, there are also modern natural lawyers of different kinds, such as Michael Moore, who deserve attention if you want to read more widely.

Reminder of learning outcomes

By this stage you should be able to:

- explain in detail Fuller's 'inner morality of law'
- critically assess these various versions of natural law theory in light of the attack on natural law by legal positivists.

Useful further reading

- Coleman, J. and Shapiro, S. (eds) *Oxford Handbook of Jurisprudence and the Philosophy of Law.* (Oxford: Oxford University Press, 2002) Chapter 1: (John Finnis), 'Natural law: the classical tradition', and Chapter 2: (Brian Bix), 'Natural law: the modern tradition'.
- George, R. (ed.) *Natural Law Theory: Contemporary essays.* (Oxford: Clarendon Press, 1992) (which includes M. Moore's, 'Law as a functional kind', at pp. 188–242).
- Hart, H.L.A. *The Concept of Law.* (Oxford: Clarendon Press, 1994) (second edition) Chapter VIII, 'Justice and morality', and Chapter IX, 'Laws and morals'.
- Hart, H.L.A. *Essays in Jurisprudence and Philosophy.* (Oxford, Clarendon Press, 1983) Chapter 2: 'Positivism and the separation of law and morals', and Chapter 16: 'Lon L. Fuller: The morality of law'.
- Finnis, J. *Natural Law and Natural Rights.* (Oxford: Clarendon Press, 1980).
- Fuller, L. L. *The Morality of Law.* (revised edition) (New Haven: Yale University Press, 1969).
- Morrison, W. *Jurisprudence from the Greeks to Post-modernism.* (London: Cavendish, 1997) Chapter 2: 'Origins: Classical Greece and the idea of natural law', and Chapter 3: 'The laws of nature, man's power, and God: the synthesis of mediaeval Christendom'.
- Shiner, R. *Norm and Nature: Movements of legal thought.* (Oxford: Clarendon Press, 1992).

Sample examination questions

Question 1 Why is natural law sometimes historically associated with revolutionary movements, and sometimes with social conservatism? Does this varying association detract from its plausibility as a theory of law?

Question 2 Besides its undoubted relevance to the history of legal thought, does natural law theory matter any more?

Advice on answering the questions

Question 1 This question concerns the way in which, under traditional natural law theory, natural law is regarded as a 'higher' law by which positive law is to be judged. Since the natural law is the true dictate of morality, what any person regards as ultimately morally right will provide the content of the natural law, and this vantage point of criticism is available equally to the revolutionary and the conservative. Because of this, the content of natural law will be as controversial as morality is. In one respect, this is just as it should be, for if morality is controversial, so should the content of natural law be; but on the other hand, it does seem to detract from plausibility of natural law's claim that law is intimately connected to morality. For the law seems to be settled at any one time in a way that morality is not, and this would suggest that the connection, if any, is a weak one, and a positivist might claim, as Hart did, that any legal system need only give effect to a minimum content of natural law. In other words, the law must respect basic human nature in so far as it fosters human survival with laws against murder, theft, and so on; but beyond that, it is not determined by morality at all. Much can also be said here about Finnis's and Fuller's natural law positions. Finnis tries to render the connection between morality and law in a much more nuanced fashion, which aims to preserve natural law's critical perspective, while giving little comfort to the revolutionary who fails to see the inherent moral project of the law and would seek to overthrow legal structures *per se*. Similarly, the appeal of Fuller's natural law theory, focusing as it does on process rather than content, would not oscillate so dramatically between reform and conservatism over time.

Question 2 This question requires an exploration of the contemporary relevance of natural law theory, in particular the natural law theories of Finnis and Fuller, and of people like Moore and George, if you have read more widely. It demands an examination of whether natural law can withstand the central claim of positivism, that it illegitimately glorifies a social institution as necessarily moral, whereas it should be regarded as a human practice, a social technique, which can be put to good or bad ends. You might also consider whether the prevalent moral relativism of a secular age, or philosophical scepticism, has undermined natural law thinking. Finally, does natural law theorising avoid committing, in one way or another, the 'naturalistic fallacy'? Notice how easily this fallacy can be committed – Fuller's description of the principles which make up the 'inner morality of law' commits just this fallacy if Hart is correct in judging him to have mistakenly treated principles of effectiveness as principles of morality.

Feedback to activities: Chapter 4

Activity 4.1 Notice the two very different sources of natural law (i.e. our understanding of morality in these passages): first, our shared reason – our 'shared conceptions' given us by nature by which we all classify things in the same way, evil with evil, good with good, and so on; but secondly, God, the 'author' of the natural law. Is it not possible for our reason to conflict with what we learn from the revelation of God's will? This tension between reason and revelation was a source of doubt throughout the Renaissance:[7] was the moral law as revealed by God good just because God willed it, or was it willed by God because it was good? Grotius[8] famously denied that right conduct was good just because God willed it, holding that natural law would be valid even if God didn't exist. One of the questions these passages raise is this: does the natural law tradition provide a plausible theory of morality in the first place? After all, for a natural law theory to move on fruitfully to consider the moral character of the law, it must be sound in its fundamentals. But have you any faith that morality can be successfully derived from man's reason alone, or from revelation, or from some combination of the two? A utilitarian would adamantly oppose this sort of characterisation of morality. So does natural law theory's claim that law and morality are at some level connected depend upon the sort of theory of morality you espouse?

[7] Renaissance: (French for 'rebirth) the upsurge of cultural, philosophical and cultural life that spread from Italy to the rest of Europe beginning in the fourteenth century. It was triggered by the rediscovery of classical Greek, Islamic and Roman texts.

[8] Grotius: Hugo Grotius, Dutch legal scholar, 1583–1645.

Activity 4.2 Assuming that forcible assault and sexual intercourse among citizens is universally regarded as wrong (which, on the anthropological evidence, is a fair assumption), laws prohibiting rape can be seen to reflect the basic precepts of natural law, a prohibition which is universally understood by all with reason. However, various passages in the Bible also testify to the wrongness of rape, and so one can also conclude that the evil of rape is revealed to us by God, and thus forms part of the divine law as well. Note however that the particular legal requirements for criminal conviction, such as the rules regarding *mens rea* and consent, the rules on evidence, and the punishments imposed, are matters of human law. These specific rules are not spelled out by the divine law or natural law. The law of wills is an interesting case, for if the law of wills is the law which concerns looking after one's dependents on one's death, then this might be seen to draw upon both scripture and natural law. It is interesting to note that the law of wills was, in England and elsewhere, originally part of the canon law jurisdiction. Of course, the particular formalities, requirements, and much else in the law of wills, are clearly determined by human beings and form part of the human law. Almost all of the law of taxation, although it might in very abstract terms, draws upon the divine law and natural law – as the law which concerns and specifies our obligations to support our fellow man and provide resources for public goods which underpin a flourishing community – seems clearly to fall within the province of human law.

Activity 4.3 This is very similar to a general examination question focusing on Aquinas. Aquinas is justly famous for taking the ancient natural law tradition and 'Christianising' it in a way that provides genuine insights into the nature of the relations between law and morality that many people find compelling. In the first place, notice how his theory of the connection between law and morality is often portrayed as *indirect*, but in such a way that this indirect connection is nonetheless quite robust. For example, his characterisation of the orders of eternal, natural and human law emphasises the rational and guiding functions of order and law, so that human law seems naturally to fit within a larger structure. His distinction between *specificatio* and *determinatio*, and his emphasis on the latter as the way in which much human law is created, makes the supreme morality of natural law a constraint upon human law. This seems much more plausible than treating human law as somehow directly ordained by morality.

You should also note the various tasks which must be accomplished by the human law, and the limitations on what it can do, that Aquinas points out, once again explicating the indirect relation of human law to natural law. On the other hand, the theory is unavoidably complicated by Aquinas's religious purposes, his sourcing of law in divine wisdom, and his characterisation of the eternal law. These cannot be regarded as credible features of a theory of law in a secular age. Furthermore, it is arguable that Aquinas talks around, rather than giving a straight answer to, the central question of our moral obligation to follow the law whether the particular rule in question is just or not. Look at the formulations he gives of the way that human law partakes of the order of eternal law, and of the way law obliges in conscience. Could not the guidance he provides about disobeying the law not equally be provided by a positivist: do what is morally right when the law says so, just because it is morally right; conversely, you have no obligation to obey the law if it is morally wrong, but obviously you should take into account the consequences of disobeying the law if that will cause more harm, morally speaking, than obeying, as when it might lead to civil unrest and violence, for example?

Activity 4.4 The 'focal' concept of law that Finnis describes is a theoretically narrowed, multifaceted conception of law as the rules and institutions which flow from working out of the requirements of practical reasonableness in its quest to provide a community in which the basic values can be realised. It is not the ordinary concept of law, which is much more diffuse, and which allows 'law' to be used of the anthropologist's primitive 'legal' culture, or to be used of the rules of a tyrant's coercive regime or the rules of the Mafia. Finnis is claiming to provide the best concept of law for the theoretical purposes of understanding law. The difficulty with this view is that it looks too 'stipulative', that is, Finnis decides upon his theoretical approach to law, one in the natural law mould, and then argues that the concept of law which differs from the ordinary concept of law is most suited to explaining law; but the sceptic might claim that having at the outset found value in the natural law tradition, Finnis just matches his concept of law to it. The point here is that we are not generally free to choose how we will define our concepts, whatever our theories of the things the concept represents. Our 'ordinary' concept of law is what it is because it

reflects what we all share in terms of what counts as law and what doesn't; and no one is entitled simply to say that our ordinary concept of law is too diffuse or mistaken. The positivist would respond that our ordinary concept of law, which treats wicked legal systems of law as legal systems nevertheless, and wicked laws as laws despite their wickedness, is the concept of law we must explain. It does no good to tailor a concept to match our moral interests, as Finnis arguably does here, for that is simply to change the subject of the inquiry; by doing so, the positivist will respond, Finnis fails to address the phenomenon of law as it is understood by people generally. This sort of criticism cannot be blunted by appealing to the norms of reason of natural science, for example by saying that for the purposes of physics, it doesn't matter what our ordinary concept of, say, mass, is, for physics is sound when it gets the nature of mass right, not because there is some kind of social acceptance of the physicist's theory of mass. The positivist would respond by saying that in the case of social institutions like the law, part of what makes them what they are is what people understand them to be, for institutions like law are made up of intentional human practices, ways of behaving, and so one cannot ignore the concept of the participants themselves in the practice when examining what the practice actually is. Bear these points in mind when you look at H.L.A. Hart's theory of law.

Activity 4.5 According to Fuller, in order for the law to acquire the value of 'legality', the law must (1) operate by general rules, which (2) must be published to the subjects of the law, and (3) must operate prospectively rather than retrospectively, and (4) which are reasonably clear and intelligible, and (5) which are not contradictory, and (6) which do not change so often and radically so as to make it impossible for a subject of the law to follow the law, and (7) do not require the impossible of the subjects of the law, and finally (8) must be administered in accordance with their meaning and purpose.

Notice that these requirements of 'legal morality', which Fuller sometimes refers to as the 'inner morality of the law', are explained in terms of eight ways in which the law can fail to be made or administered in a just way. This might lead one to question whether these eight principles fully capture the morality of law, for they are all about avoiding doing wrong **rather** than achieving any valuable purposes. Even in procedural terms, it might be argued that Fuller does not capture obvious moral principles. Consider the two principles of 'natural justice' which deeply inform administrative law; *audi alteram partem* ('hear the other party' – the principle that a decision is not fair if both parties to a dispute are not given fair opportunity to present facts and make representations as to the law), and the principle that a tribunal must not be biased, i.e. that the decision-maker cannot have any interest in the proceedings or be related to either party so as to bring him or her into a conflict of interest. Are these not obvious principles of 'legality'? Can they easily be fitted into Fuller's eight principles? Hart's criticism is famous, and at first glance seems decisive, for it does indeed look as if Fuller's principles of legality are principles of **effective law-making**, not morality, which could be turned either to wicked or good purposes. The Nazis would have needed to follow Fuller's principles if they wanted to succeed in using the law to get their subjects to do what they

wanted. There is, however, a possible response to this, though it is questionable whether it vindicates Fuller's view as a 'natural law' view. It might be said that retrospective legislation, legislation setting impossible tasks, or a failure to observe the *audi alteram partem* rule, are not just matters of ineffectiveness, but are obvious instance of unfairness, and thus immoral. While this seems right, it does not seem to establish a necessary connection between law and morality. All it seems to establish is that *if* you have a legal system in operation, then there are new and different ways of acting immorally than there would be if there was no legal system in place. So the existence of different social institutions, like law, the family, marriage or schools, give rise to new and different occasions of wrong-doing. If there were no examinations there could be no cheating in exams; if there were no authors or books there could be no cases of plagiarism. But this doesn't establish that taking examinations is a moral enterprise, or that writing books is. Similarly, the fact that the law provides new and different occasions for acting wrongfully does not seem to establish any necessary connection between law and morality.