

# EDUCATING ONESELF IN PUBLIC

*Critical Essays in Jurisprudence*

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## *Law as a Functional Kind*

Natural law has for a long time had a bad press. It is supposed to be the sort of spooky stuff that Bentham derided when he hooted at natural rights as not being just simple nonsense, but 'nonsense on stilts'.<sup>1</sup> Oliver Wendell Holmes's own brand of ethical scepticism and legal positivism led him to characterize the natural law as a 'brooding omnipresence in the sky',<sup>2</sup> sort of like the northern lights apparently, but without the lights. The prevalence of such views has for some time made it the case that 'to be found guilty of adherence to natural law theories is a kind of social disgrace'.<sup>3</sup>

Recently the experience of announcing a natural law view has become a little less like removing one's hat and revealing one's antennae for all to see. This greater acceptance is partly due to the increased acceptance of moral realism within philosophy.<sup>4</sup> Since a natural lawyer about law is also (necessarily) a moral realist about morality, this greater acceptance of the moral metaphysics of natural law has removed some of the 'spookiness' attitude toward natural law theories. But part of this reaction to natural law remains even for those cured of metaphysical naivety about morality. To such persons, the natural lawyers' assertion that a necessary connection exists between law and morality seems obviously false even if not metaphysically outrageous. It is this latter rejection of natural law—the rejection of the thesis that law and morality are necessarily connected—that I wish to examine here.

The jurisprudence that interests me is that natural law jurisprudence which grew up after World War II and which may be seen as being in part a reaction to the atrocities done by the Nazis in the name of German law. Post-World War II natural law jurisprudence argues for the relational thesis distinctive of natural law on the following basis: (1) general jurisprudence studies the nature of law in general; (2) the essence of law in general is to be found in law's functions (or ends), not in its distinctive structures (or means); (3) such function of law is . . . [some value that is both a true moral value and can be served by law uniquely so that that value can be

<sup>1</sup> Jeremy Bentham, *Anarchical Fallacies*, in *Works* (Edinburgh: W. Tait, 1843), ii, 501.

<sup>2</sup> *Southern Pacific Ry. v. Jensen*, 244 U.S. 205, 222 (1916).

<sup>3</sup> H. Voegelin, 'Kelsen's Pure Theory of Law', *Political Science Quarterly*, 42 (1927), 268–76, at 269.

<sup>4</sup> Bill Lycan reports that he found himself 'preaching to the choir' in a recent defence of moral realism, contrary to the more typical reaction in the past that regarded moral facts as 'right up there with Cartesian egos, moxibustion, and the Easter Bunny. . . .' (William Lycan, *Judgement and Justification* (Cambridge: Cambridge University Press, 1988), 198).

said to be law's distinctive end]; (4) given the end of law and given human limitations in achieving that end, the structural attributes law must possess to fulfil its function include the possession by law of legitimate practical authority obligating citizen obedience; (5) law can possess legitimate practical authority obligating citizen obedience only if in content it is not too unjust; therefore, (6) for something to be law at all it must necessarily not be unjust, the natural lawyer's conclusion.

Such an argument obviously opens up large areas where much must be said even to be clear, let alone convincing. I shall proceed in the following way. Beginning at the end of the foregoing argument, I shall first examine the conclusion (6). In the first part of the chapter I thus clarify what I understand a natural law theory of law to assert. In Section II I turn to the beginning of the argument (1), examining the presuppositions about the nature of jurisprudence contained in the idea that jurisprudence studies law in general. In Section III, I examine the idea of functional attributions, taking the functional organization of the human body as my point of departure, and seek to show how jurisprudence is best carried on in functionalist terms (2). Section IV constitutes a preliminary view of the difficulties attendant on marrying a functionalist methodology in jurisprudence to the natural law thesis. In this section I describe the tension that exists between giving law a functional characterization (3), on the one hand, and discovering amongst law's structural features that authoritativeness of its norms that make unjust 'laws' no laws at all (4) (5). In this chapter I shall not undertake the further tasks of defending my own view of the end of law, nor of arguing for a structural realization of some such end of law that includes as one of law's features that it obligate obedience. My chapter is thus preliminary and expository, not itself a defence of a natural law view.

# 1. WHAT IS A NATURAL LAW THEORY OF LAW?

As I shall use the phrase, a 'natural law theory' contains two distinct theses: (1) there are objective moral truths; and (2) the truth of any legal proposition necessarily depends, at least in part, on the truth of some corresponding moral proposition(s). The first I shall call the moral realist thesis, and the second, the relational thesis.

It is the relational thesis that interests me in this article, and so I shall not outline how one might defend the moral realist thesis.<sup>5</sup> What does need saying here, however, is how often 'natural law' is used to label the moral

<sup>5</sup> A defence of the moral realist thesis may be found in M. Moore, 'Moral Reality', *Wisconsin Law Review* [1982], 1061-156; Moore, 'Moral Reality Revisited', *Michigan Law Review*, 90 (1992), 2424-533.

realist thesis by itself.<sup>6</sup> There are four related usages of 'natural law' of this sort that require mention just to dispel confusion.

One is as a synonym for moral realism itself. Lawyers often use the phrase 'natural law' to refer to any 'objectivist' meta-ethical position. Such generic meta-ethical objectivism is more precisely known as moral realism. A 'natural lawyer' in this broadest meta-ethical sense holds that the truth of any moral proposition lies in its correspondence with a mind- and convention-independent moral reality. 'Natural law' in this sense is committed to two meta-ethical theses: (a) moral qualities such as justice exist (the existential condition); and (b) such qualities are mind- and convention-independent (that is, their existence does not depend on what any individual or group thinks—the independence condition).<sup>7</sup>

Sometimes 'natural law' is used by lawyers and others to refer to a particular species of moral realism. One such more particular usage of the phrase can be seen by attending to the distinction between 'naturalists' and 'non-naturalists' in ethical philosophy. A non-naturalist believes that there are mind- and convention-independent moral qualities to which true moral propositions correspond, but believes that these qualities are 'non-natural', that is, they do not exist in the natural world. Such qualities may be related in various ways to natural ones, or they may not, but in any case they are not identical to those natural qualities nor are the expressions referring to such non-natural qualities equivalent to or synonymous with expressions referring to natural qualities. Moreover, existing as they do in a non-natural realm, such non-natural qualities must be known in some supra-sensible way, which usually leads theorists of this stripe to posit a special faculty of intuition (leading to a common epistemic label for this metaphysical position, 'intuitionism').<sup>8</sup>

A naturalist believes none of these things. Rather, he believes that moral qualities such as culpability do not exist in any realm different than the natural realm in which such properties as causation and intentionality exist. Moral qualities are simply natural qualities of a certain kind, just as intentionality is a natural quality of a certain kind (that is, a quality of mind). With this distinction in mind, 'natural law' can be seen as sometimes being used to refer to that kind of meta-ethics that is naturalist, rather than non-naturalist, in its realist metaphysics.<sup>9</sup>

<sup>6</sup> See e.g. the many papers discussing 'natural law' in Sidney Hook (ed.), *Law and Philosophy* (New York: New York University Press, 1963), where what is discussed is some variant of moral realism.

<sup>7</sup> These two theses—of existence and independence—are distinctive of realism in any domain, be it morality, psychology, mathematics, etc. See Ch. 10, below.

<sup>8</sup> The *locus classicus* of non-naturalist realism is G. E. Moore's *Principia Ethica* (Cambridge: Cambridge University Press, 1903).

<sup>9</sup> It is this sense of 'natural law'—as naturalist realism—that generates the much overblown discussion in twentieth-century ethics of the 'naturalistic fallacy'. For a discussion, see Moore, 'Moral Reality', above n. 5.

Sometimes a further refinement is intended by the usage of 'natural law'. Sometimes the phrase refers to a particular kind of naturalistic moral realism, namely, one finding moral qualities to be identical to or supervenient upon only one kind of natural facts, the facts of human nature. This is the 'wired in' view of natural law, holding that there is a universal and discrete human nature, and that the nature of that human nature determines what is morally right. The human nature referred to here may be teleological, so that it is cast as the natural function of mankind; or it may be a more contemporary anthropology, using only non-teleological descriptions of universal human traits. In addition, such human nature may be thought to possess epistemic power within each human being, so that each has a natural access to moral truth; or it may be thought to possess motivational power within each human being, so that each can not only see the good but has some natural inclinations to pursue it. We might call any and all of these variations, 'human nature naturalism'.<sup>10</sup>

A fourth exclusively meta-ethical usage of 'natural law' is to refer to that species of naturalistic moral realism associated with many religious traditions.<sup>11</sup> On this view, the nature of moral qualities like goodness is given by their having been commanded by God. This is a naturalist realist view because it asserts the (human) mind- and convention-independent existence of moral qualities and because it makes them depend on the natural fact of divine command.

These four meta-ethical senses of 'natural law' are worth mentioning only because the phrase is so often taken to be used in those senses. Yet the natural law theory of law I defend is committed only to the first of these senses of natural law—the moral realist sense—and not to naturalism, human nature naturalism, or religious naturalism. One can be as atheistic and as non-naturalist in one's metaphysics as one pleases and still be a natural lawyer in my sense. (For this reason some have suggested that a better label for my kind of view would be the 'moral law theory of law', but for reasons I shall mention later the traditional label is best.)

It bears the emphasis of repetition that subscription to 'natural law' in any of the meta-ethical senses of the phrase is insufficient to be a natural lawyer in my sense. The natural law that interests lawyers asserts not only the meta-ethical thesis of moral realism but also the relational thesis. One could thus be a 'natural lawyer' in the meta-ethical sense of being a moral

<sup>10</sup> Perhaps the best reason to dispense with the label, 'natural law', is the assumption that a natural lawyer is committed to human nature naturalism in her meta-ethics. Because some natural lawyers such as Aristotle and Aquinas were committed to human nature naturalism makes the confusion understandable but no less a confusion.

<sup>11</sup> See e.g. Kai Nielsen, 'The Myth of Natural Law', in S. Hook (ed.), *Law and Philosophy*, above n. 6, at 129 ('If there is no God . . . the classical natural law theory is absurd . . .'). I dispute this conclusion of Nielsen's at length in M. Moore, 'Good Without God', in Robert George (ed.), *Natural Law, Liberalism, and Morality* (Oxford: Oxford University Press, 1996).



realist yet not be a natural lawyer in legal theory. This would be the combined view that there are mind- and convention-independent moral truths but that such truths are irrelevant to the truth conditions of legal propositions. Legal positivists often hold just this combination of views.<sup>12</sup>

A moral realist view is thus not sufficient to be a natural lawyer. Some have argued that it is not even necessary.<sup>13</sup> Such people argue that natural law does not require that the truth conditions of legal propositions depend on moral truth but only on there being certain moral *beliefs* conventionally accepted in the society whose law it is. One might think, for example, that the truth of the singular legal proposition, 'This segregated school system violates the Equal Protection Clause of the Fourteenth Amendment', depends on a moral belief of most Americans (namely, a belief that segregated schools are immoral because they are violative of each person's moral right to equality).

There is nothing incoherent about this view; my only point here is that it is not a natural law view. For given its conventionalism about the morals to which law relates, such a view is really a kind of legal positivism: What is legally required does not depend on what is morally right, but only upon a certain kind of social fact, namely, whether a group of people have the requisite moral beliefs. That segregated schools are wrong is a moral fact; that most Americans now believe that they are wrong is a social fact, which this kind of legal positivist would add to facts about Supreme Court utterances in order to have a value-free theory of law. Such a positivist is

<sup>12</sup> As Herbert Hart noted in his classic description of legal positivism. Hart, 'Positivism and the Separation of Law and Morality', *Harvard Law Review*, 71 (1958), 593-629. Legal positivism, as Hart points out, is a legal theory; it is not committed to non-cognitivism in meta-ethics nor, indeed, to any meta-ethical position. Still, as Hart did not point out, one motive for seeking a 'pure' theory of law—that is, a theory holding law to be uncontaminated by morality—is the fear that morality is irrational and that law cannot be scientific if it is tied to morality. Kelsen and Holmes both were partly motivated to their legal positivism by this fear.

<sup>13</sup> See e.g. Theodore Benditt, *Law as Rule and Principle* (Stanford: Stanford University Press, 1978), who argues for what he calls 'natural law' based on there being a necessary connection between law and conventional morality. Ronald Dworkin has throughout his career flirted with conventionalism about the morality to which law is related. See Dworkin, 'Philosophy, Morality, and Law—Observations Prompted by Professor Fuller's Novel Claim', *University of Pennsylvania Law Review*, 113 (1965), 668-90, at 688-90; Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978), 95, 125-6, 129, 134-5, 159-66; Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), 73. I and many others have noted this conventionalism before. See Ch. 8 above; M. Moore, 'A Natural Law Theory of Interpretation', *Southern California Law Review*, 58 (1985), 277-398, at 298-300; L. Alexander, 'The Empire Strikes Back', *Law and Philosophy*, 6 (1987), 419-38; H. Hurd, 'Relativistic Jurisprudence: Scepticism Founded on Confusion', *Southern California Law Review*, 61 (1988), 1417-1509, at 1458-9; J. Finnis, 'On Reason and Authority in *Law's Empire*', *Law and Philosophy*, 6 (1987), 357-80. To the extent Dworkin is a conventionalist about the morality to which law is related, he is not a natural lawyer, despite his own occasional self-labelling in these terms. (Dworkin, 'Natural Law Revisited', *University of Florida Law Review*, 34 (1982), 165-88.)

as much a natural lawyer's opponent as is the more traditional kind who seeks to keep even shared moral beliefs out of his theory of law.

Having said what a theory of natural law is not, it is time to say what it is. The relational thesis distinctive of a natural law theory of law asserts that there is some necessary connection between law and morality. In clarifying this thesis we need to say more about the two things being related—law, morality—and then about the relation asserted to exist between them.

Take law first. Clarity demands that we distinguish two dimensions of generality of law. The first can be seen by referring to Herbert Hart's fruitful distinctions about law in his 1958 debate with Lon Fuller.<sup>14</sup> In the context of discussing the *law* from which morality is separated (according to legal positivism), Hart distinguished: (a) *law*, in the sense of legal system, from (b) *laws*, in the sense of the individual statutes or common law rules that may exist in a legal system, from (c) the *law of a case*, in the sense of that singular proposition of law that decides a particular case.

The distinction between laws and the law of a case can be seen in terms of the (logical) generality of the legal proposition involved. When we use the word 'laws', we refer to those standards describable by what I shall call general legal propositions. There is commonly a legal rule, for example, that a non-holographic will must be subscribed to by at least two witnesses in order to be valid. A general legal proposition is one which asserts the content of such a rule, thus: 'All non-holographic wills must be subscribed to by at least two witnesses to be valid.' A singular legal proposition, by way of contrast, picks out a discrete individual, event, or state of affairs, and predicates of it some legal attribute. For example: 'This will (referring to a particular document executed by a particular testator) is valid.' The difference between the two kinds of legal propositions is a matter of logical form. A general proposition uses universal quantifiers (for example, 'all wills') while a singular proposition singles out (by use of definite referring expressions) one particular thing in the world for legal characterization. In the example given, 'this will' picks out one particular thing in the world.

Judges need singular legal propositions in order to decide cases. In a will contest, what decides the case is the truth of singular propositions such as, 'this will is valid' or, 'this will is invalid'. The truth of certain general legal propositions has a bearing on the truth of such singular legal propositions; but it is the truth of the latter that decides particular cases because it is only the latter kind of propositions that refer to the particular party or transaction before the courts in individual cases. I thus call the law expressed by such singular legal propositions the 'law of the case'.

<sup>14</sup> Hart, 'Positivism', above n. 12, at 600–1. The distinctions in the text are not quite the way Hart described them.



Law is a yet more general notion than laws. Here, one's concern is about the conditions that must be present before law as such is present. The questions, 'When is there law?', or 'Does this society have law?', or 'When do we have the Rule of Law?', are invariably questions about when there is a legal system.<sup>15</sup> I shall accordingly call the systemic notion *law*.

A second dimension of generality has to do with the distinction between general and particular jurisprudence.<sup>16</sup> General jurisprudence studies law (laws, laws of cases) in the abstract, without regard to any particular legal system. General jurisprudence is thus often described as 'external' because the phenomena with which it deals, and the viewpoint from which it deals with them, are external to any particular legal system, including the one in which the observer lives. Particular jurisprudence is in this sense internal, for it studies law (laws, laws of cases) as those phenomena occur within some one particular legal system and from the vantage point of actors (lawyers, judges, citizens) within that legal system. Particular jurisprudence is thus a culture-bound enterprise while general jurisprudence is not.

One asserting or denying a connection between law and morality must specify with what generality he is talking about law in each of these dimensions of generality. The natural law jurisprudence that I wish here to examine primarily asserts the connection of morality to law to exist at the most general level of each of these two dimensions. That is, such jurisprudence talks about the connection of morals to the existence conditions of law as such, and not, for example, to the American legal system. Moreover, this primary focus is on law in the sense of legal system, not laws or the singular laws of particular cases. The primary relational thesis of the theory is that the truth conditions of the statement, 'law exists', includes the truth conditions of certain corresponding moral propositions.

I say that this is the *primary* relational thesis of the theory because there are secondary relational theses, namely: (a) the truth conditions of the statement, 'X is a law', include the truth conditions of the corresponding moral statement, 'X is just', and (b) the truth conditions of the statement, 'X is the law of some case', include the truth conditions of the corresponding moral statement, 'X is just'. These are secondary relational *theses* to the primary thesis, and not mere corollaries, because there are independent arguments establishing the truth of (a) and (b) that give them a meaning broader than they would have as corollaries alone. Nonetheless, these are

<sup>15</sup> So argued in Joseph Raz, *The Concept of a Legal System* (Oxford: Oxford University Press, 2nd edn., 1980).

<sup>16</sup> There are often several distinctions elided together under the labels 'general jurisprudence' and 'particular jurisprudence'. See e.g. J. W. Harris, *Legal Philosophies* (London: Butterworths, 1980), 4, where Harris has the distinction turn on the generality of the concepts analysed and not on the culture-free/culture-bound nature of the enterprise.

*secondary* relational theses because they are partly corollaries of the primary thesis: since the existence of laws of cases and of laws presupposes that there is a legal system to which such laws of cases and laws belong, the moral existence conditions of law will also be among the moral existence conditions for laws and laws of cases.

There is also of course a like trickle-down effect from a natural law *general* jurisprudence to a natural law *particular* jurisprudence. If law as such can exist only if certain moral criteria are satisfied, then law in America exists only when such criteria are satisfied too. Such particular relational theses are thus *secondary* theses too. They are *theses*, not mere corollaries, because in many legal systems there are additional ways that morality enters the existence conditions for laws and laws of cases that are peculiar to that legal system. In America, for example, the existence of judicial review and of a value-laden, written Constitution results in much 'natural law' constitutional law. These particular connections heavily colour how morality is related to law in the American legal system in ways not following from the general connection of morality to law. Nonetheless, the natural law jurisprudence discussed in this article focuses on the general connection between law as such and morality, not the particular jurisprudence of specific cultures.<sup>17</sup>

Turning now to the nature of the thing, morality, to which law is related by natural law theory, less needs to be said. Nothing here needs to be said regarding the metaphysical status of the morality to which law is related—that question is already dealt with by the moral realist thesis of natural law theory. Rather, the question is what boundaries there are to morality so that the relational thesis can be made more precise.

This is a more difficult question than it may appear. If moral facts are as factual as any other fact—which, crudely put, is what the moral realist thesis asserts—how do they differ from other facts, such as the fact that an action was motivated by a desire to see another suffer? Is this less a moral fact than the fact that the action was sadistic in its motivation? Less than the fact that the action was cruel? Less than the fact that the action was wrong? Which of these are moral properties of the action, and which are properties of a non-moral kind? Non-naturalist moral realism has an easy answer (easy to state, at least, although hard to analyse) to this query: the moral properties are the non-natural ones. For those of us who are naturalist realists, however, that easy answer is unavailable. For naturalist realism, moral properties are either type-identical to natural properties, or they supervene upon them. Neither possibility gives rise to any clear answer to our 'moral borders' question.<sup>18</sup>

<sup>17</sup> The exception again is Dworkin, who apparently eschews general jurisprudence. See text at nn. 27–9, below.

<sup>18</sup> See Moore, 'Moral Realism', above n. 5.

A tempting answer may be in terms of the illocutionary act-potential of the words used to refer to moral properties. This speech-act criterion works like this: words that in their typical use not only describe a property but express an evaluation of the object possessing it are evaluative words, and the properties they refer to are moral properties.

This is close, but too tied to conventional features of language use—change the illocutionary act potential of a word, and thereby effect a change in morality? I doubt it. Better is to focus on the prescriptive element of evaluations: a moral property not only gives us a reason to believe that it exists, like any other property; a moral property also has ‘has-to-be-doneness’ built into it in the sense that its existence gives rational actors a reason to act (to pursue it if it is good, retard it if it is bad). A moral property gives rational actors an objective reason to act.

Saying this may not seem to resolve our ‘borders’ problem about morality. Objective reasons to act can be self-regarding or other-regarding, prudential or non-prudential, reasons of autonomy or reasons of deontology, agent-neutral reasons or agent-relative reasons. Are all these to count as *moral* reasons, and thus, the properties that give rise to them to count as *moral* properties? By the notion of morality that interests me here, the answer is yes. The morality to which law is necessarily related of course includes properties like justice and injustice, equality, right and wrong, entities like right and duties—the properties and entities that give obligation-reasons, reasons of deontology, or morality in its narrowest sense. Yet I also mean to include non-obligation-imposing properties such as the virtues, which give each of us reasons to pursue them even if not obligating us to do so. Further, we should include properties giving us only prudential reasons to promote and retard them—properties like painfulness, our own as well as others.

We need a notion of morality that is as broad as practical rationality itself because that poses the interesting question to a natural law theory of law. Is some norm law despite its not being a dictate of practical rationality, or can a norm be law only if in content it conforms to the dictates of practical rationality for the persons that the norm purports to bind? That I take to be the interesting question of debate between legal positivism and natural law, and a sense of ‘morality’ narrower than ‘practical reasonableness’ only distorts that debate.

Broad as it is, this sense of morality is narrow enough to exclude the purely subjective and instrumental ‘oughts’ that Lon Fuller’s critics were so fond of throwing up at him as *reductios*. It does not include the ‘ought’ of Hart’s murderous poisoner who, on learning of the failure of his poison, says, ‘I ought to have given her a second dose.’<sup>19</sup> Such ‘oughts’ are wholly

<sup>19</sup> H. L. A. Hart, ‘Book Review—*The Morality of Law*’, *Harvard Law Review*, 78 (1965), 1281–96, at 1286.

instrumental; they are means to the satisfaction of the subjective desires of an evil person; such a person has no *objective* reason to have given his intended victim a second dose, not even an objective reason of prudence.<sup>20</sup> Such oughts, accordingly, are not part of the morality to which law is related.

Our third and last clarification of the relational thesis of natural law was to describe the relation asserted to exist between law and morality. There are three possible relations that a natural law theorist might think exist here. The strongest is to assert an identity in legal and moral properties and thus an equivalence in legal and moral propositions. If 'slavery is unjust' is true, then 'slavery is legally prohibited' is true too, on this view. Such a view makes the justness of a norm *sufficient* for that norm's status as law.

This is a very strong or pure view of the relation between law and morality, for it makes law depend on nothing other than morality. Statutes can at most be evidence of laws, court decisions, only evidence of the law of the cases decided, constitutions, only evidence of the foundations of a legal system. Although Cicero, Blackstone, and other natural law thinkers on occasion said such things, and although such a strong version of natural law would be required to describe the prosecutions at Nuremberg as prosecutions under non-retroactive *law*, this is not the view post-World War II natural law jurisprudence has defended.

A much weaker view would make law (laws, laws of cases) always depend on morality, in the sense that the morality or immorality of a norm would always be *relevant* to its legal status. But this weak natural law view would not assert that the justness of a norm—say one prohibiting criminal conduct—was *sufficient* to constitute that norm into a law, nor would this view even assert that the justness of a norm was *necessary* for that norm's legal status. Rather the justness of a norm would only be 'criteriologically' relevant.<sup>21</sup>

My own view of the relation is stronger than this. My view is Augustine's view, that the justness of a norm is *necessary* to its status as law, but that law and morality are not identical. Just because some action is immoral and just because a norm prohibiting that action would be just, does not mean that action is illegal. This 'less-than pure' natural law view leaves room to include institutional history—facts like legislatures passing statutes, courts deciding cases—as relevant to a norm's legal status. On the

<sup>20</sup> The attentive reader will have noticed that I not only presuppose that each of us has reasons to act that we in no sense subjectively desire—'objective reasons'—but that satisfaction of desire is not itself among the objective reasons of practical reasonableness. For defence of both points, see Tom Nagel, *The View From Nowhere* (Oxford: Oxford University Press, 1985), 169–71.

<sup>21</sup> On criteriological theories generally, see M. Moore, 'The Semantics of Judging', *Southern California Law Review*, 54 (1981), 151–295, at 214–21.

other hand, my Augustinian view rejects the weak or criteriological view of the relation. The Augustinian view has a bite to it lacking in the weaker view, for on the Augustinian view the justness of a norm is *necessary* to its status as law. Or, to use Augustine's much-quoted language, an unjust law is no law at all.<sup>22</sup> Similarly, an unjust court decision is not the law of the case so decided, an unjust political system, not a legal system at all. These are strong enough conclusions to be counter-intuitive to many.

There is one last clarificatory hurdle to be cleared before getting on to the argument, and that concerns the nature of the *necessity* claimed here. It is sometimes said that there may well be an accidentally 'necessary' relation between law and morality, but that such accidental 'necessity' is not what the natural lawyer needs. He needs, it is further said, that it be *analytically* necessary—part of the meaning of 'law'—that law be connected to morality in the way just specified.

There is a grain of truth to this charge, so let me extract it before throwing the rest away. The legitimate point is that natural law as a legal theory cannot be established by doing particular jurisprudence alone. This is true even if the particular jurisprudence that is done is done for all the cultures there are or have been in the world. Suppose every legal culture has (or had) the following characteristics: for every plausible moral argument there is a plausible constitutional law argument, and vice-versa; there is judicial review, so that every statute or case decision is subject to being overturned if contrary to the constitutional law (which is by hypothesis the same in content as morality). In such circumstances, it could be said of each culture that an unjust law is not a law of the system and that an unjust decision does not determine the law of the case decided. Even so, the natural lawyer's relational thesis would not have been made out, because it would not have been shown that law (or laws and laws of cases) itself is connected to morality in the requisite way. One has to do general jurisprudence in order to make out the natural lawyer's relational thesis (or its opposite, the legal positivist's thesis of the separation of law and morals).

Some sense of 'necessity' is thus involved in saying that, *necessarily*, law cannot be too unjust and still be law, and 'accidental necessity' is no kind

<sup>22</sup> Augustine, *De Libero Arbitrio*, I. v. 11. There is an ambiguity that affects considerably just how strong this Augustinian view is. The ambiguity turns on whether we count only the unjustness of the content of a purported legal norm when we are assessing its legal validity, or we count also other considerations of morality (such as the unfairness of surprising reliance on the norm, the injustice caused by the encouragement of lawlessness by civil disobedience by others, etc.) when we ask, is this norm unjust? The latter view can be much weaker than the former, depending on how much weight is attached to the secondary moral considerations that might make a norm unjust-in-content nevertheless overall just. Aquinas appeared to have adopted the second, weaker view, as would I. A. C. Pegis (ed.), *Basic Writings of Saint Thomas Aquinas* (New York: Random House, 1945), ii. 795 (*Summa Theologica*, I-II, Q. 96, Art. 4); J. Ross, 'Justice Is Reasonableness: Aquinas on Human Law and Morality', *The Monist*, 58 (1974), 86–103, at 103.



of necessity at all. Such 'accidental necessity' is based on what is sometimes called an accidental generalization. An accidental generalization is a generalization that is true of a finite sample size of things but that is not necessarily true because of the nature of the kind of things making up the sample. 'All American lawyers are under seven feet tall' is, as far as I know, true about the hundreds of thousands of American lawyers that exist. Yet the generalization is not necessarily true because it does not answer correctly the crucial counterfactual question, 'If someone were over seven feet tall, would he not be a lawyer?' There is, in short, no necessary connection between size and being a lawyer, only an accidental connection. Similarly, to observe that all legal systems we have seen invalidate laws that are contrary to morality does not support the counterfactual (would there be law without this connection to morality?) needed to apply the generalization to all legal systems that could exist, and not just those that have existed.

So some sense of necessity is required. *Analytic* necessity, however, is not what the natural lawyer needs to establish, because few if any words have a meaning supporting analytic relations.<sup>23</sup> 'A bachelor is an unmarried man' may be an analytically necessary truth, but I would hardly defend 'an unjust norm is not law' as having the same nature.

Saul Kripke's notion of 'metaphysically necessary' is the sense of necessity needed by the natural lawyer here.<sup>24</sup> Unlike the semantic notion of analytic necessity, a metaphysically necessary truth is a truth only dependent on how the world is and not upon the conventions of human language use. 'Water is H<sub>2</sub>O' is (as far as we know) a metaphysically necessary truth because something wouldn't be water if it weren't H<sub>2</sub>O. Put another way, one atom of oxygen bound to two of hydrogen gives the essential nature of water. Such essence is *not* fixed by what English speakers mean when they say or think to themselves, 'water'. Such an essence is to be found in the nature of the kind of thing that water is. We have theories about such essential natures, but theories can be wrong; definitions (analytic truths), which purport to fix such essences by conventional stipulation, could not be wrong.

A natural lawyer should say that the essence of law is such that it includes justice, among other things. *Necessarily*, that is, if some system, norm, or decision is unjust, it is not *legal*. Not as a matter of conventional usage of the word 'law' (analytic necessity); not as a matter of universal social practices (accidental necessity); but as a matter of the nature of one of the things that exists in the world, namely, law.

<sup>23</sup> See Moore, 'Semantics', above n. 21.

<sup>24</sup> Saul Kripke, *Naming and Necessity* (Cambridge, Mass.: Harvard University Press, 2nd edn., 1980).



## II. THE STRUCTURE OF GENERAL JURISPRUDENCE: FOUR JURISPRUDENTIAL DEBATES

### A. The (Im)Possibility of General Jurisprudence

Before getting to the nature of, and justification for, functionalist general jurisprudence, we need to deal with certain debates about jurisprudence more generally. The first is the debate whether general jurisprudence in any form is possible. The argument is that an historically situated human observer (i.e. any of us) cannot get external to her own legal culture in order to think about (either descriptively or normatively) 'law in general'. The most such an observer can do, this view continues, is to interpret one's own legal culture, and one will only mislead oneself and others if one parades the results of such internal interpretation as if it were an external description or evaluation of something more general than, say, *American law*.

Ronald Dworkin's recent work is imperialistic against general jurisprudence in this way.<sup>25</sup> Dworkin's 'you can't be doing anything different than I'm doing, which is particular jurisprudence' claim is based mostly on epistemological scepticism but partly on the positive claim that law is an interpretive concept (that demands therefore an interpretation of a culture's legal system).

Against general epistemological scepticism, little will be said here.<sup>26</sup> The positive claim is jurisprudentially more interesting. An interpretive concept for Dworkin is a concept towards which we take the 'interpretive attitude'.<sup>27</sup> The interpretive attitude, in turn, is mainly marked by regarding some practice as authoritative for one's decisions in the sense that there is some point or value served by making one's decisions depend on interpretations of some authoritative practice (or 'text').<sup>28</sup> The point or value justifying judges in taking the interpretive attitude towards statutes, for example, might plausibly be thought to be the furtherance of democracy (assuming that the statutes in question issue from a democratic legislature).

The problem with this positive claim lies in its justification of the interpretive attitude for legal theorists as well as for judges, for there is an important disanalogy between the reasoning of judges and the reasoning

<sup>25</sup> Dworkin, *Law's Empire*, above n. 13; R. Dworkin, 'Legal Theory and the Problem of Sense', in R. Gavison (ed.), *Issues in Contemporary Legal Philosophy* (Oxford: Oxford University Press, 1987). I discuss this aspect of Dworkin's thought in Chs. 3, 8, and 10.

<sup>26</sup> But see Chs. 3, 8, and 10.

<sup>27</sup> Dworkin, *Law's Empire*, above n. 13, at 47.

<sup>28</sup> *Ibid.* See below, § IV, where I give an alternative interpretation of Dworkin's interpretivism that makes it (to my mind, at least) much more plausible but at the cost of reducing it to functionalist general jurisprudence.

of legal theorists. It is just not very plausible to think that jurisprudence is interpretive in the way that much of the legal reasoning done by judges when they decide cases is interpretive, for what is distinctive about interpretive reasoning is the authority granted to some text as one decides particular cases. And what authority is possessed by the practices of Anglo-American judges for me as a legal theorist? When I seek to articulate the best way for judges to justify their decisions, how are those judicial practices in any way authoritative for me, as a kind of text that I must respect? Granted, there are persuasive normative arguments making certain texts authoritative for *judges* when they decide cases; but what are the analogous arguments making those judges' practices authoritative for me when I seek to articulate the best theory of how judging should be done? Why should I care if none of them, all of them, or some of them, for example, actually look for the psychological intentions of the framers in applying the United States Constitution? No matter what the practices of American judges might be in this regard, I would argue (and have argued) that the framers' intentions are irrelevant to both the right answer, and the right way to justify what is the right answer, in constitutional cases.

Of course, one can target normative arguments at particular audiences, and when one does so it is often a good rhetorical strategy not to bend too much the practices of your targeted audience as you seek to persuade them to mend their ways. Perhaps the authoritativeness of Anglo-American legal practice for Dworkin comes to no more than that. But such considerations have to do with the pragmatics of presentation of a theory of legal reasoning, not with there being some intrinsic mandate that jurisprudence be limited to interpreting some culture's legal practices. Such pragmatic considerations hardly require some kind of 'interpretive' jurisprudence that is limited in its ambitions to providing interpretations of some one legal culture's practices; such considerations only constitute a practical limitation on how one presents general jurisprudence to certain audiences.

Alternatively, perhaps the point only is that general jurisprudence must be worked out not only in the ideal case but also as applied to the less-than-ideal world. To be practical, general jurisprudence must take into account certain features of existing legal cultures because those features themselves are morally relevant. It matters, for example, to what degree a legislature or a constitutional convention is truly democratic because such representativeness affects the degree of respect to which legislative or constitutional enactments are entitled.

Yet this defence of interpretivist and therefore particularist jurisprudence is ill-conceived because it in no way defends the authoritativeness of some culture's legal practices for a legal theorist. The only point this argument establishes is that when general jurisprudence is applied to

some culture it must take into account the features of that culture that make a difference. The point is the same as that to be made to an observer generally: when describing or evaluating the practice of slavery in Athens, take into account whatever features of Athenian culture (limited alternative economic opportunities?) as are relevant. In neither case does such context-sensitive application of one's moral or scientific theory mandate the authoritativeness of any set of practices, legal or otherwise.

## B. Descriptive Versus Normative General Jurisprudence

General jurisprudence is often divided between descriptive jurisprudence and normative jurisprudence. A descriptive jurisprudence seeks to describe law and in so doing employs a concept of law that such jurisprudence does not create. A normative jurisprudence, by contrast, does not seek to employ a concept of law already formed but rather, to stipulate a meaning to 'law' that we ought hitherto to employ. The first seeks to tell us what law (or our concept of law) *is*, whereas the other seeks to tell us how law *ought* to be conceived.

Normative jurisprudence most typically gives moral reasons why we ought to conceive of law in one way or another. Legal positivist conceptions of law, for example, are often accused of making persons who accept them too obeisant to legal authority; natural law conceptions are accused of breeding both reactionaries and anarchists.<sup>29</sup> In either case, the reason given to adopt a concept of law is a moral one. Normative reasons can also be of a non-moral kind, however. Instrumentalists about theoretical terms in social science take there to be no reality dictating how such terms are to be used; rather, we must create a concept like law to suit our explanatory/predictive purposes. Following this instrumentalist perspective out in jurisprudence will result in a normative jurisprudence, for such jurisprudence will purport to tell us how we *ought* to conceive of law, even though the reasons backing the 'ought' are of a non-moral kind.<sup>30</sup>

Both kinds of normative jurisprudence should be put aside as being incapable of answering the legal positivist/natural law debate.<sup>31</sup> The nat-

<sup>29</sup> The arguments of Lon Fuller and Herbert Hart, respectively, in L. Fuller, 'Positivism and Fidelity to Law—A Reply to Professor Hart', *Harvard Law Review*, 71 (1958), 630–72; Hart, 'Positivism', above n. 12. See generally P. Soper, 'Choosing a Legal Theory on Moral Grounds', in J. Coleman and E. F. Paul (eds.), *Philosophy and Law* (London: Basil Blackwell, 1987).

<sup>30</sup> Hart suggests such a social-science-construct approach to jurisprudence in various places in *The Concept of Law* (Oxford: Oxford University Press, 1961), but he does not apparently follow the method in the book. I discuss this briefly in Ch. 2.

<sup>31</sup> As also noted by John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), 24–5. See also Philip Soper, *A Theory of Law* (Cambridge, Mass: Harvard University Press, 1984), where at 171 n. 13, Soper urges that 'one must take care not to confuse the question of what is important about law with the question of what is important in

ural lawyer asserts that there is a necessary connection between law and morality, and neither kind of normative jurisprudence can support or rebut that claim. To give moral reasons for *inducing* belief in the natural law theses is not to give reasons to believe those theses. Put another way: the good or bad consequences of someone believing some proposition to be true have nothing to do with the truth of the proposition. The question the natural lawyer poses is whether or not natural law is true. He is not concerned with whether our believing such theses to be true will have good or bad consequences. The latter calculation may affect to whom he tells his natural law theory, but it cannot affect whether he believes the theory to be true.

Theory-building reasons of social science likewise cannot answer the natural lawyer's question. Even if we *ought* to adopt a certain concept of law for, say, increased-predictability-of-judicial-decisions reasons, that cannot effect whether and how law is related to morality. For our newly defined construct—let us call it 'schmaw'—does not refer to law; it in fact (on instrumentalist views of scientific theories) doesn't refer to anything at all. Schmaw does not exist, but the term 'schmaw' is a logical place-holder in some predictive calculi of social science. How law is related to anything is untouched by the success of social scientists in framing some construct like 'schmaw'.

So ours is a quest in descriptive general jurisprudence. I next shall consider how this enterprise is best carried on.

### C. Describing Law versus Describing A Social Concept of Law

Most often descriptive general jurisprudence adopts a conventionalist theory of meaning in its quest to analyse law.<sup>32</sup> A conventionalist about meaning believes that words like 'tiger', 'gold', 'malice', and 'law' refer to their respective things in the world only via a conceptual intermediary. That is, what determines what the word 'gold' refers to—gold—is our *concept* of gold. There are thus three things, on this view of meaning: gold, 'gold', and "gold" (double quotes used for concepts, single quotes for words).

Most often a concept takes the form of a list of criteria for a thing to be gold,<sup>33</sup> e.g. 'yellow, precious, malleable, metal'. Anything that satisfies

deciding whether to classify something as law'. Despite this warning, Soper himself appears to mix normative arguments about how we ought to classify law (*ibid.* at 158–60) with his nominally non-normative, essentialist search for the nature of law (*ibid.* at 25).

<sup>32</sup> On conventionalist theories of meaning, see Moore, 'Natural Law', above n. 13, at 291–301.

<sup>33</sup> Alternatively, some think that a concept is conventionally fixed by paradigmatic examples. See e.g. W. B. Gallie, 'Essentially Contested Concepts', *Proceedings of the Aristotelian Society*, 56 (1956), 167–98. Arguably, Herbert Hart shared this 'paradigm case' view of concepts. See Hart, 'Positivism', above n. 12, 607–8, where Hart discusses 'standard instances';

such a list must (analytically must) be gold, and anything lacking these properties must not be gold.

On this view of meaning general jurisprudence becomes a study of 'the concept of law' or 'the concept of a legal system'—to paraphrase the titles of the best-known books of this genre.<sup>34</sup> For on this view of meaning one studies the nature of the thing, law, by studying our concept of law (remembering that law is whatever our concept of law fixes it as). In rejecting the claim that natural law theory's relational thesis is an analytic truth I have already implicitly rejected this approach to jurisprudence. It is now time to make this rejection explicit.

The alternative theory of meaning under which I shall proceed asserts that our concepts do not determine the reference of terms like 'gold' or 'law'. Rather, the theory is one of 'direct reference' whereby 'law' refers to law without some third thing intervening. The meaning of 'law', on this theory, is given by the nature of the thing referred to—law—and not by some concept of law that fixes (by linguistic convention, or 'analytic necessity') what can be law.

The theory of direct reference has been defended elsewhere at length with respect to natural kind terms like 'gold' or 'tiger'.<sup>35</sup> Whether such a theory of meaning properly applies to artifactual words like 'pencil', 'lawyer', or 'law' is more controversial, for such kinds of things are often thought to lack any natural essence that can guide the meaning of such terms.<sup>36</sup> What is included in the class of such things, one might think, is wholly a matter of our conventions, conventions that can be fully stated as *concepts* (lists of properties) of pencil, law, etc.

Often those who adopt the conventionalist line on words like 'law' confuse two different ways in which conventions might be relevant to the meaning of 'law'. Such persons often confuse conventions being part of the nature of a thing, on the one hand, with our linguistic conventions

see also Hart, 'Ascription of Responsibility and Rights', *Proceedings of the Aristotelian Society*, 49 (1949), 171–94, where Hart thought it 'absurd' to seek criterial definitions of legal concepts. Nonetheless, Hart's own theory of law in *The Concept of Law* is statable as a definition of law (in terms of two individually necessary, jointly sufficient conditions, general citizen obedience of the primary rules and adoption of the internal attitude by officials towards the secondary rule of recognition). On this, see P. Hacker, 'Hart's Philosophy of Law', in P. Hacker and J. Raz (eds.), *Law, Morality and Society* (Oxford: Oxford University Press, 1977).

<sup>34</sup> Hart, *Concept*, above n. 30; Raz, *The Concept of a Legal System*, above n. 15.

<sup>35</sup> Moore, 'Natural Law', above n. 13, 'Semantics', above n. 21.

<sup>36</sup> See e.g. S. Munzer, 'Realistic Limits on Realist Interpretation', *Southern California Law Review*, 58 (1985), 459–75; S. Schwartz, 'Putnam on Artifacts', *Philosophical Review*, 87 (1978), 566–74; D. Patterson, 'Realist Semantics and Legal Theory', *Canadian Journal of Law and Jurisprudence*, 2 (1989), 175–9. Compare Hilary Putnam, *Mind, Language, and Reality* (Cambridge: Cambridge University Press, 1975), 242–5; Moore, 'Semantics', above n. 21, at 217–18; Moore, 'Natural Law', above n. 13, at 300–1; D. Brink, 'Semantics and Legal Interpretation (Further Thoughts)', *Canadian Journal of Law and Jurisprudence*, 2 (1989), 181–91; Leo Katz, *Bad Acts and Guilty Minds* (Chicago: University of Chicago Press, 1987), 82–96.



(concepts) fixing that nature as a matter of analytic necessity, on the other. Take the phrase, 'co-ordination solution' as it is used by game theorists. A co-ordination solution is a convention that forms around some salient feature of a co-ordination problem. But that does not mean that the kind of thing that can be a co-ordination solution is fixed by our linguistic conventions (concepts) about the correct use of the phrase, 'co-ordination solution'. We study the nature of co-ordination solutions as a matter of better or worse theory; we do not study them only by attending to the concept of co-ordination solution in use in our language.

My own view is that the only things whose nature is fixed by our concepts are 'things' that do not exist—Pegasus, the twentieth-century kings of France, and the like. There are no things referred to by such terms, so such words' meaning can only be given by their concepts. Pencils, law, co-ordination solutions, etc., do exist and thus can have a nature that gives the meaning of their respective words.

I accordingly shall not seek to tease out a concept of law. General jurisprudence should eschew such conceptual analysis in favour of studying the phenomenon itself, law.

#### D. Law as a Nominal versus Functional Kind

The immediately foregoing remarks will seem more controversial than they are until it is realized what has been left open by them. Specifically, the possibility they leave open is that law is a nominal kind. A natural kind is a thing that exists in nature as a kind without human contrivance. Natural kinds have a nature that makes them kinds even if no human makes use of that nature or even discovers or labels it. A nominal kind, by contrast does not exist as a kind in nature, although its particular specimens may exist. Indeed, a nominal kind is *nominal* in the sense that as a kind its only nature is given by the common label attached to its various specimens.

Consider Figueroa Street, the North-South street in Los Angeles often listed as the longest municipal street in the world. Figueroa streetness is a good candidate for being a nominal kind not just because it was created by man (or at least a related species, Angelenos) but because there is no nature to Figueroa streetness that determines whether any given bit of asphalt or concrete is or is not part of it. Whether some bit of asphalt partakes of Figueroa streetness wholly depends on human convention: how were the Los Angeles maps and street signs posted?

If law were a nominal kind like Figueroa streetness then there would be no unified nature to seek in descriptive general jurisprudence. General jurisprudence would become the study of whatever was *called* 'law' by native speakers of English as they observed their own and others'



societies. The attempt would be to distil universal characteristics possessed by all things so labelled.

I implicitly rejected this sociological conception of general jurisprudence when I rejected 'accidental necessity' as the kind of necessity needed by the natural lawyer. Let me now make the rejection more explicit and more defensible. In the first place, I doubt that there is a conceivable enterprise called general jurisprudence if law were a nominal kind like Figueroa streetness. For all that unifies the bits of pavement that together form Figueroa Street is the symbol, 'Figueroa Street', attached to each bit. When we change cultures and change language, we give up the unifying symbol. 'Law' is not a word in French or German; of course, 'droit' and 'Recht' are, but how could one say that these mean what we mean by 'law' when there is no *nature* to law that *droit* and *Recht* share? General jurisprudence could only be a language-specific study, so that there would be an English general jurisprudence, a French general jurisprudence, etc.

One might agree with this last point and simply give up on general jurisprudence on the ground that it, indeed, has no subject matter, law being a nominal kind without a nature susceptible of cross-cultural study. One is thus not forced by this argument to view law as other than a nominal kind.

More conclusive argument against thinking that law is only a nominal kind may be found if we repair to other artifactual terms. Consider the term, 'mower'. The Seventh Circuit Court of Appeals in the United States had to consider recently whether a haybine that both cut the hay and conditioned it was a mower within the meaning of a statutory exemption of 'one mower' for a farmer in bankruptcy. As Frank Easterbrook noted, haybines are not *called* 'mowers'; they are called 'haybines'. If mower were a nominal kind, this linguistic fact should have been the end of the case. Yet the court correctly decided that the symbol attached to haybines was not determinative because mowers had a nature:

[N]either is it appropriate to say that the statute concerns only machines called 'mowers.' . . . 'mower' is not limited to the thing called a mower today, or even the thing called a mower in 1935. A statutory word of description does not designate a particular item . . . but a class of things that share some important feature.<sup>37</sup>

As Easterbrook concluded, in order to apply the statutory word, 'mower', he had to discover 'what a mower is . . .'<sup>38</sup>

What is the nature of a mower, if 'mowness' is not merely a nominal kind? It is not very plausible to think that mowers have some essential structural features, features without which they would not be mowers. Technological advances have changed the structural features of mowers considerably, and will continue to do so—and will not those instruments

<sup>37</sup> *In re Erickson*, 815 F.2d 1091, 1092 (7th Cir. 1987).

<sup>38</sup> *Ibid.* at 1093.

for the mowing of hay still be *mowers*? An affirmative answer suggests that the essence of mowness is given by function and not by structure. Anything that mows hay is a mower, whatever its structural features turn out to be. (Think of the common answer to the question, 'Do you have a dishwasher?', given by pointing to one's children and saying, 'I have two of them.')

I call kinds like mowers functional kinds. Unlike nominal kinds, items making up a functional kind have a nature that they share that is richer than the 'nature' of merely sharing a common name in some language. Unlike natural kinds the nature that such items share is a function and not a structure. A stomach, for example, could have a silicon-based chemistry and be cubical in shape (rather than carbon-based and roundish) and still be a stomach because it performs the first-stage processing of nutrients distinctive of stomachs.

Whether law is a functional kind is not obvious. One cannot simply say that law is created by *purposive* human activity and that therefore law is 'purposive' (i.e. a functional kind), as Lon Fuller used to do.<sup>39</sup> This glosses all the interesting questions. I shall accordingly examine the question (of what kind of kind law is) in two stages: first, we need to be clear how functions are attributed to parts of systems and how systems themselves are assigned functions, and to illustrate this I shall talk about the functional organization of the human body. Second, we need to apply this analysis to legal systems and see what sense we can make of the idea that legal systems serve a function.

### III. FUNCTIONALIST JURISPRUDENCE

#### A. Health and the Functions of the Human Body

'The function of the human heart (or the heart's beating) is the circulation of blood.'<sup>40</sup> This seems to be a true statement, but my enquiry is into what we mean when we assign such a function to body parts or processes. Most

<sup>39</sup> Fuller consistently elided 'purpose' in the sense of mental state with 'purpose' in the sense of function in his rush to conclude that law is purposive. See e.g. L. Fuller, 'Human Purpose and Natural Law', *Natural Law Forum*, 3 (1958), 68–76. Because of this and like confusions, Hart's jurisprudential epitaph for Fuller was accurate (if a bit brutal): 'The author [Fuller] has all his life been in love with the notion of purpose and this passion, like any other, can both inspire and blind a man . . . I wish that the high romance would settle down to some cooler form of regard. When this happens, the author's many readers will feel the drop in temperature; but they will be amply compensated by an increase in light' (Hart, 'Book Review', above n. 19, at 1296).

<sup>40</sup> This example, and the analysis that follows, are presented in greater detail in Michael Moore, *Law and Psychiatry: Rethinking the Relationship* (Cambridge: Cambridge University Press, 1984), 26–32.

obviously, we at least mean that one of the things the heart does—one of the consequences of its beating—is that the blood circulates. Whatever else we mean, we do mean to assert this much when we discover functions of things.

Often this is all that function statements are taken to assert. Joe Raz, for example, in his discussion of the functions of law, means only to discuss the *effects* of law.<sup>41</sup> The function of a thing for Raz just is its effects, which he taxonomizes as being either direct or indirect. More generally, social scientists often use function language in this limited way, saying for example that the *function* of certain ceremonial dances in certain tribes is the relaxation of group anxieties; all they apparently mean is that such dances have such effects. Similarly, much of the current research into the function of sleep is purely an empirical research into the *effects* of sleep—does it sweep away unnecessary memories of the day (Hughlings Jackson), allow us to dream and thus to discharge drive energies (Freud), prevent or combat fatigue (Claparede, Coriat), or even 'knit up the ravelled sleeve of care' (Shakespeare)?<sup>42</sup>

Such usages of 'function' are misleading, because all we have done when we isolate the effects of something else is to discover *possible* functions for that thing. The function it actually has will be one of those consequences, but it will not be all of them.

In the heart example, we cannot simply mean that one of the effects of one of the heart's activities is that blood circulates when we give that as the heart's function. For hearts do many things—they occupy space in the chest cavity, put upward pressure on the peristaltic gut for example—and even when we focus on their beating activity to the exclusion of others, that beating has many consequences besides the circulation of blood. Such beating produces noise in the chest cavity, for example.

None of these other consequences are the function of the heart, so we must mean something more determinate when we say that its function is to circulate the blood. Similarly, when we discover the functions of sleep, we will not have simply catalogued all the effects sleep in fact causes. (Otherwise, we should include as a possible function of sleeping the maintenance of the mattress industry, the provision of opportunities for nighttime burglaries, etc.)

One temptation may be to think that of all the consequences of an activity like sleeping or heart-beating, we honour as its function only those consequences the designer had in mind when he made such things. This solution leads very quickly to the teleological argument for God's exist-

<sup>41</sup> J. Raz, 'The Functions of Law', in Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979).

<sup>42</sup> These and other theories as to the function of sleep are explored in Ernest Hartmann, *The Functions of Sleep* (New Haven: Yale University Press, 1973).

tence, for with hearts and human bodies there is no *human* designer to have intended some effect; so if a designer's intention is needed in order for a function to exist, and if hearts and sleep have functions, then there must be a Grand Designer.

Those of us who are not theists reject such a conclusion and therefore must reject the premise that leads to it (namely, that functions are the intended effects of a system's designer). Another temptation may be to think that the function of something is the consequence either actually brought about, or intended to be brought about, by the average human user of that thing. The function of a hammer is to drive nails because that is the usual intention with which it is used, on this view. While such conventionalist ascriptions of function may be all that is meant on some occasions for artefacts like hammers, this can't be what we mean about hearts and sleep; for neither the beating of our hearts nor our sleeping are acts we will and thus are not done by us to achieve further intentions. The function of sleep thus cannot be the consequence we typically intend to achieve by going to sleep.

My answer to our problem is different from the preceding two answers, relying on designers' or users' intentions. To find an activity's function, we sort through all the consequences of that activity in light of an hypothesis both about there being some larger system in which the activity occurs and about that system having an overall goal. The heart's beating and sleeping are both activities within (or of) the system we call the human body. We think such a system itself has a function or goal, namely, physical health. Such a system-wide goal is aided by some consequences of a heart's beating and by some consequences of sleeping, and not by others. We call the former the function of the heart or of sleep.

This selection amongst the consequences of sleep or of the heart's beating is thus in part guided by a further causal judgement: not only must the circulation of blood be caused by the heart's beating, but the circulation of blood must itself cause maintenance of that state of the system that is its goal (here, health). But this is only part of the story about discovering what is the function of what. Also needed of course is some way of picking out what is the overall goal of the system.

Finding the goal of the human body cannot itself use the same strategy we just detailed in selecting the function of sleep or of hearts. The finding of ever-larger systems, with ever-larger goals, has to stop somewhere. There are two leading possibilities for how we discover the overall goals of some system: we either find that the system naturally tends to maintain itself in some state of equilibrium despite widely disequilibrating conditions; or we discover that of all the human goods there are some but not others that either are or can be served by the system in question. The first is a value-free enterprise while the second is value-laden.

With regard to the first of these possibilities, there are cybernetic mechanisms with feedback loops that maintain various natural or man-made systems in certain states. We call such states homeostatic states. The subsystem of the human body that maintains constant inner body temperature despite widely varying environments is one example. One can study such systems and meaningfully index what one learns around the maintenance of this naturally occurring end state. The function of dilating capillaries in the skin would then be said to be the ridding of inner body heat, the function of perspiration, the same, etc. In no sense does this kind of function assignment require an evaluation by the investigator. Both the discovery of a goal for the system, and the discovery of the causal contribution of each part of the system to its attainment of its goal, are matters of hard, scientific fact.

Most of the time, however, this is not how we assign functions. Most of the time we are evaluating something as good when we say what it is good *for* (i.e. what its function is). In such cases we consult our list of all the good things there are and ask, which of these, if any, does/can this system promote? Physical health is on just about everyone's list of goods ('when you have your health, you have . . .' etc.). Physical health is the good that the human body can contribute—it can't contribute justice or liberty or economic well-being—so physical health is the goal of the human body.<sup>43</sup> When we attribute functions to body parts or processes based on their causal contributions to physical health, we are positively evaluating such parts and processes. 'The heart's beating is good for circulation which is good for physical health, and physical health is good', is the evaluation that lies behind the innocent statement, 'The function of the heart is to circulate blood.'

The evaluative nature of such goal attribution is easily missed in the case of physical health because there is such widespread agreement on health's desirability. Freedom from death, distress, or disability—the 'three D's' typical in definitions of negative health—are seen to be good by

<sup>43</sup> See Moore, *Law and Psychiatry*, above n. 40, 190–4. Chris Boorse has long disagreed with me on this. See Boorse, 'On the Distinction Between Disease and Illness', *Philosophy and Public Affairs*, 5 (1975), 49–68; Boorse, 'Wright on Functions', *Philosophical Review*, 85 (1976), 70–86; Boorse, 'What a Theory of Mental Health Should Be', *Journal of Theory of Social Behaviour*, 6 (1976), 61–84; Boorse, 'Health as a Theoretical Concept', *Philosophy of Science*, 44 (1977), 542–73. One can only settle the long-standing debate between myself and Boorse on the basis for function assignments on a piecemeal basis. About function assignments within physical medicine, Boorse's and my own method largely overlap in the functions they assign body parts because the health we value is by-and-large the health our bodies normally tend to achieve anyway, given aeons of natural selection. Still, the overlap is not perfect: we value capacities that make obesity dysfunctional even though there is no natural tendency to maintain *healthy* (i.e. not dysfunctional) weight; indeed, the body's natural tendency to store energy in the form of fat we find to be quite dysfunctional and thus unhealthy.



just about everybody.<sup>44</sup> Move to mental health, however, and the disagreement becomes larger, particularly about the level of mental capacities that are healthy to have. Since mental health guides the functional organization of the mind just as physical health guides the functional organization of the body, disagreement about the goodness of various ideas of mental health makes more evident the normative nature of mental function attributions.

Let me now draw this together in a way that can be applied to functional jurisprudence. Suppose we are ignorant of modern medicine or biology, but we have a sense that perhaps the human body is a functional system. The steps we should take as we test our intuition should go like this.

1. We isolate some parts or processes that we are relatively certain are parts or processes of the system. These are provisional hunches only, because we know that if we are right about the system as a whole—it is a functional kind, a kind whose essence is given by its function and not by its structure—we could be wrong about any particular structure actually belonging to the system. In the example I have been using, we start with the heart and sleeping as a part or activity of the human body.

2. We isolate the effects of the activities of the heart, or the effects of the activity of sleeping. This is our list of possible functions for each of these parts or activities.

3. We ascertain of all the human goods which one or ones could be served by the human body. Physical health being such a good, we hypothesize that physical health is the goal of the body, i.e. what the body is good for.

4. In light of such hypothesis about the goal of the human body, we discover which of the various activities of the heart, and which of the various effects of sleep, themselves causally contribute to the maintenance of the body in the state of health. These activities and effects are the functions of the heart and of sleep.

5. We continue the same four-step analysis both from the 'bottom-up' and from the 'top-down'. The bottom-up strategy picks other parts or processes we are relatively sure belong to the human body and probes their effects for any contribution to health. Such a procedure may modify what we think physical health to be. The top-down strategy begins with our increasingly well-defined notion of health and looks for parts or processes that must exist if the overall goal of health is to be maintained. Such a procedure may throw out certain parts of the body that are not

<sup>44</sup> This definition of health will be found in Robert Spitzer and Jean Endicott, 'Medical and Mental Disorder: Proposed Definition and Criteria', in R. Spitzer and R. Klein (eds.), *Critical Issues in Psychiatric Diagnosis* (New York: Raven Press, 1978). My own fine-tuning of the definition is in Moore, 'Definition of Mental Illness', in *Critical Issues*, above; and in *Law and Psychiatry*, above n. 40, at 210–16.



essential in that they perform no function (e.g. 'love-handles', the bits of waist fat that serve no function but which we nonetheless label in (humorously) functional terms).

At the end of our multiply iterated four-step procedure we will have written a comprehensive medical textbook on the human body. The overall system will be subdivided, not by structural principles, but by functional ones, so that we will have major subsystems such as the 'limbic system', the 'reticular system', etc. Such subsystems will themselves be divided into sub-subsystems, etc., so that eventually each essential (structural) feature will have its (functional) place in the teleological organization of the body. Such a textbook is a book in applied ethics because it asserts (or more often, presupposes) the goodness of health and then charts in detail the unique ability of the human body to realize that good. The same, I shall now argue, is true of jurisprudence textbooks when properly written, except that both the good the legal system obtains, and the means of its attainment, are of course quite different than the function and structure of the human body.

## B. Law as a Functional Kind

As Phil Soper has noted, 'in the case of the concept of a legal system, most modern theorists agree that it is function that provides the clue to the latent principle [essence]'.<sup>45</sup> Suppose we share the intuition that law (legal systems) is a functional kind. Functionalist jurisprudence, rightly conceived, should play out that intuition in the five steps just outlined.

1. What are, provisionally at least, features of law? There is no poverty of suggestions in this regard. We might plausibly think that law is marked by coercive sanctions and the habit of obedience that such sanctions induce in people.<sup>46</sup> Alternatively, we may fasten onto the idea that law regulates its own creation,<sup>47</sup> or that law is marked by the existence of a special secondary rule that legitimates all other rules as rules of law.<sup>48</sup> We may think that 'law has authority', and mean by that: either that law is actually morally obligating,<sup>49</sup> or that law is *regarded* by its citizens and/or judges as obligating,<sup>50</sup> or that from the point of view of the legal professional law is obligating.<sup>51</sup> Yet again, we may fasten onto those features often called the

<sup>45</sup> Soper, *A Theory of Law*, above n. 31, at 170, n. 9. See also P. Soper, 'Legal Theory and the Problem of Definition', *University of Chicago Law Review*, 50 (1983), 1170–200, at 1187 n. 62.

<sup>46</sup> John Austin's and Jeremy Bentham's view. For a modern discussion of each, see Hart, *Concept*, above n., 18–76, and Hart, *Essays on Bentham* (Oxford: Clarendon Press, 1982), 127–43.

<sup>47</sup> Kelsen's slogan. Hans Kelsen, *General Theory of Law and State* (Cambridge, Mass.: Harvard University Press, 1949), 124, 126, 132, 198, 354.

<sup>48</sup> Hart, *Concept*, above n. 30.

<sup>49</sup> Finnis, *Natural Law*, above n. 31.

<sup>50</sup> Soper, *A Theory of Law*, above n. 31.

<sup>51</sup> Raz, *The Authority of Law*, above n. 41.

rule of law features—characteristics such as general, prospective, public, clear, stable, consistent rules that only command the possible and which officials apply when they adjudicate citizens' claims.<sup>52</sup> Others have thought that law is marked by formal features, such as the continuity of legal entities over time, the treating of past acts as having authority now, the gapless nature of law, or its ability to generate an authoritative rule without there being some other rule authorizing it,<sup>53</sup> whereas still others think that law is most uniquely marked by its justification of present state coercion by past political decisions or by its inherently controversial nature.<sup>54</sup>

Each of these have been presented as being features of law as such. Each is plausible enough that it could be selected as the place to begin in seeking the function law serves and the structures needed to realize that function. For ease of illustration, let us pick a simple feature, that a legal system is marked by its citizens at least believing that its norms have legitimate practical authority over them.

2. We now need to isolate the typical effects of such (provisionally) structural feature of law. We might suppose, for example, that the effects of citizen belief in the authoritativeness of law include: (a) it makes citizens less willing to think for themselves in moral matters; (b) it frees citizen time for more leisure activities; (c) it increases rebelliousness in children, who by virtue of such widespread belief must revolt against the law as well as against parents in order to develop into autonomous adults; (d) it allows the solution of co-ordination problems because the perceived authoritativeness of laws will make them salient features of any co-ordination problem faced by citizens. This list, could of course be drawn out considerably even from this one feature of law.

3. In order to say what the function is of law being believed to be authoritative, we next need some hypothesis about the general goal of law. As with structural features of law, again, there is no dearth of plausible suggestions here. Law, it has been suggested, has as its goal: the subjecting of human conduct to the guidance of rules;<sup>55</sup> the enhancement of the liberty and autonomy of persons through the opportunities for choice law can create when it has predictable legal sanctions;<sup>56</sup> the promotion of the common good, which on one conception of it, is that way of realizing

<sup>52</sup> Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 2nd edn., 1969).

<sup>53</sup> Finnis's five formal features of law in *Natural Law*, above n. 31, at 268–70.

<sup>54</sup> Dworkin's 'concept' of law in *Law's Empire*, above n. 13.

<sup>55</sup> Fuller, *Morality of Law*, above n. 52.

<sup>56</sup> F. A. Hayek, *The Road to Serfdom* (London: Routledge and Kegan Paul, 1944), 54. This is also most clearly the value that makes best sense of Fuller's eight desiderata for law. See Finnis, *Natural Law*, above n. 31, at 272; Hart, 'Book Review', above n. 12, at 1291; M. J. Radin, 'Reconsidering the Rule of Law', *Boston University Law Review*, 69 (1989), 781–819; and D. A. Gianella, 'Thoughts on the Symposium: The Morality of Law', *Villanova Law Review*, 10 (1965), 676–8, for reconstructions of Fuller along these lines.

substantive human goods made possible by life in a community;<sup>57</sup> the maximization of the common good in another sense, namely the aggregative sense that aggregates the preferences of citizens into a social welfare function;<sup>58</sup> promote the common good in yet another sense, namely, the goods of individuals which as individuals each has in common with other individuals;<sup>59</sup> the enhancement of simple survival for individuals;<sup>60</sup> attaining integrity in government, a desirable mode of government's achieving substantively good results through comprehensive, coherent, and equality-respecting means;<sup>61</sup> the maintenance of peace and order;<sup>62</sup> the peaceable settlement of disputes between citizens;<sup>63</sup> social control not by actual obligation or by force but by *prima facie* obligation.<sup>64</sup>

To get a handle on such a list requires nothing less than a full theory of the good and the right. One has to know, that is, what is objectively good and one has to know the permissible means of reaching it through action. Then one can decide which of this list are goods and thus which could be what a legal system is good for.

John Finnis's comprehensive *Natural Law and Natural Rights* illustrates this insight nicely. In the early chapters Finnis lays out his view of the seven good things and the nine conditions of practicable reasonableness that constrain any moral person's attainment of those seven good things. Finnis needs such a fully described moral theory in order to pick out the distinctive goal of law, which Finnis urges to be the 'common good'. The common good as Finnis conceives it is 'a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other . . .'.<sup>65</sup> The common good is thus not for Finnis the good each individual has which is the same as the good of everyone else. Although Finnis is a moral realist, his view of morality allows there to be different answers to how persons should lead their lives that are equally good. The law, as Finnis sees it, is uniquely situated to co-ordinate these different visions of the good life allowing each to realize his/her own vision.

<sup>57</sup> Finnis, *Natural Law*, above n. 31. Arguably Fuller too had some co-ordinative goal in mind for law when he said that law provides 'firm base lines for human interaction'. (*Morality of Law*, above n. 52, 209, 210, 223, 229), that it enables men to collaborate effectively (*Anatomy of Law*, Westport, Conn.: Greenwood Press, 1968, 6), and that it allows for that 'collaborative articulation of purpose' (Fuller, 'A Rejoinder to Professor Nagel', *Natural Law Forum*, 3 (1958), 83-104) Fuller thought essential to moral insight.

<sup>58</sup> Richard Wasserstrom, *The Judicial Decision* (Stanford: Stanford University Press, 1961), 10-11.

<sup>59</sup> One of Finnis's senses, although not his main one, in *Natural Law*, above n. 31, at 155.

<sup>60</sup> Hart, *Concept*, above n. 30, at 188.

<sup>61</sup> Dworkin, *Law's Empire*, above n. 13.

<sup>62</sup> e.g. Hobbes, *Leviathan* (Oxford: Clarendon Press, 1909).

<sup>63</sup> Karl Llewellyn, *The Bramble Bush* (New York: Oceana Publications, 1930), 12.

<sup>64</sup> Soper, *A Theory of Law*, above n. 31.

<sup>65</sup> Finnis, *Natural Law*, above n. 31, at 155.

Consider, by contrast, Lon Fuller's once held view that legal theorists did not have to develop a full theory of the good and the right in order to ascertain the unique good of law. Fuller purported to discover an 'internal morality of law' that allowed him to ground his famous eight structural features (publicity, generality, etc.) as being necessary to law.<sup>66</sup> Yet the goal that Fuller's truncated morality produced was the colourless, neutral goal of subjecting human conduct to guidance by rules. As many of Fuller's contemporary critics pointed out,<sup>67</sup> there is nothing intrinsically good about that goal. By itself, guiding persons by rules cannot be the goal of law because by itself, guiding persons by rules is not a good.

Suppose one has a full theory of the good and the right. And suppose that one has enough of an idea of the structural characteristics of a legal system to sort through that full moral theory and to isolate which good(s) are those uniquely achievable through law. One then could hypothesize which of the suggested goals of law is in fact its goal.

For illustration, let me continue with Finnis, since his system is so completely worked out. Finnis argues that the common good is a good—it consists in: (1) the good of co-ordinating conflicting individual goods for mutual benefit, (2) the good of co-ordinating individual goods when doing so has intrinsic merit (as in play), and (3) the good of co-ordinating when that realizes the goods of friendship and love.<sup>68</sup> Finnis further argues that this threefold common good is the unique good law can achieve and thus is law's goal.

4. Armed with a view of the goal of law, one can then isolate which of the effects of certain features of law are those features' functions. In Finnis's case, this would be to pick the consequence, co-ordination, as the function served by law being believed to be authoritative by its citizens. Such co-ordination, and not citizen obeisance or children's patterns of rebelliousness, would be the function served because such co-ordination itself causes the common good to be realized.

5. Having a provisional theory of the goal of a legal system and the functional and formal features of some parts of such a system, functionalist jurisprudence then repeats steps 1–4 for each plausible part of a legal system, asking in each case whether such a part could perform a function in the attainment of the goal of law. Working from the bottom up is to start with a feature such as coercive sanctions and ask whether this feature is a necessary part of law (necessary in the sense of necessary to attain the goal

<sup>66</sup> Fuller, *Morality of Law*, above n. 52.

<sup>67</sup> Hart, 'Book Review', above n. 19; Dworkin, 'Professor Fuller's Novel Claim', above n. 13; Dworkin, 'The Elusive Morality of Law', *Villanova Law Review*, 10 (1965), 631–9; Marshall Cohen, 'Law, Morality, and Purpose', *Villanova Law Review*, 10 (1965), 640–54. For a contemporary expression of this criticism, see Radin, 'Reconsidering The Rule of Law', above n. 56.

<sup>68</sup> Finnis, *Natural Law*, above n. 31, 139–47.

of law). Sanctions, for example, are not an obviously necessary feature of law if the goal of law is the common good in Finnis's sense, because co-ordination problems do not require sanctions for their solution.<sup>69</sup> Working from the top down is to start with the goal of the legal system and seek to discover what structures one would need in order to realize such a goal. Herbert Hart, for example, once speculated that a goal of the legal system on which everyone could agree was survival and that from such a goal one could infer that law would have to have a 'minimum content' of criminal prohibitions and property entitlements.<sup>70</sup>

#### IV. FUNCTIONALIST JURISPRUDENCE AND NATURAL LAW

We now should ask whether the enterprise just described will inevitably result in a natural law theory. In exploring this question I shall along the way explore other doubts about the enterprise.

One broadside objection would deny that functionalist jurisprudence carried on along the lines outlined above *could* yield a natural law result. The argument is that in functionalist jurisprudence there can be no *necessary* connection of law to morals because no structural features are necessarily law. Herbert Hart voiced a moderate form of this objection in his consideration of 'natural law with a minimum content'.<sup>71</sup> Hart correctly noted that even conceding *arguendo* that survival is good and that survival is a goal of the legal system, it still requires assumptions about human nature to generate conclusions about the shape of law. Hart's example: if we each had an armoured exterior rendering us invulnerable to physical attacks by our fellows, the criminal prohibitions needed would be quite different than those needed by us quite vulnerable persons.

Marshall Cohen once put Hart's point more bluntly. In objecting to defining law by whatever structural features that maximally realize the goal of law, Cohen objected that 'Means are not logically entailed by ends.'<sup>72</sup> Cohen's example: political office is often obtained through the means of party service, military glory, and intellectual eminence; yet no one would define 'political office' in terms of these typical means of obtaining it.<sup>73</sup>

Both Hart and Cohen mistake the necessity claimed by natural law (or by any sensible theory of law). They thought that to give the nature of law

<sup>69</sup> On this, see Leslie Green, 'Law, Co-ordination, and the Common Good', *Oxford Journal of Legal Studies*, 3 (1983), 299-324. Compare J. Finnis, 'Law as Co-ordination', *Ratio Juris*, 2 (1989), 97-104.

<sup>70</sup> Hart, *Concept*, above n. 30, 189-95; Hart, 'Positivism', above n. 12, at 622-3.

<sup>71</sup> *Ibid.*

<sup>72</sup> Cohen, 'Law, Morality, and Purpose', above n. 67, at 623, n. 19.

<sup>73</sup> *Ibid.* at 649.



was to produce an analytic definition (concept) of 'law' so that law's structural features (including its relation to morality, if any) would be analytically necessary features of law. As I argued before, this is a mistake. Legal theorists doing general jurisprudence only need point to a metaphysical necessity about the nature of law. And while Hart is certainly right that functionalists need to plug in certain assumptions about human nature, these human nature claims are (if true) metaphysical necessities too. *Given* these (metaphysically necessary) truths about human nature, and *given* the (metaphysically necessary) truths about morality that make some goal of law good, then law (metaphysically) must have certain structural features. Such non-analytic necessity about law's structural features is enough for any legal theorist, natural lawyer or otherwise.<sup>74</sup>

A second objection to functionalist jurisprudence focuses on the dependence of any structural feature being a feature of *law* on the selection of an ultimate goal for law. The idea is that even if familiar criminal prohibitions are necessary to preserve survival, that does not make such prohibitions necessary to law as such.<sup>75</sup> But this objection forgets what it is functionalist jurisprudence claims about the goal of law: the claim is that law's essence is given by that goal, not by any structural feature. Therefore any structural feature necessary to attain law's goal *is* law in any sense that the functionalist need defend. The only way this essentialist claim of the functionalist can be forgotten is by focusing on examples like Hart's, where a goal is picked for law (survival) only because of widespread agreement on its desirability<sup>76</sup> and not because such a good is the good law can uniquely achieve.

This raises a third objection to functionalist jurisprudence: there is no universal agreement on an end for law.<sup>77</sup> This objection can be put aside quickly. The last thing a moral realist means by objectivity is universal agreement. Moral realism is not the doctrine that certain values, such as the value of law, are universally agreed upon. Rather, it is the claim that such values exist and that their existence does not depend on what we or any group of people think. Agreement about the ends of law is not to be expected, but neither is the issue of agreement relevant. In this context it is a red herring.

<sup>74</sup> The assumptions about human nature that must be made in order for functionalist jurisprudence to yield determinate answers about law's structural features is what inclines me to retain the otherwise misleading label, 'natural law theory of law'. Human nature enters here, in the determination of what is instrumentally necessary for the attainment of law's good; human nature does not enter in to determine what is intrinsically good.

<sup>75</sup> For such an objection, see Kai Nielson, 'The Myth of Natural Law', in Hook (ed.), *Law and Philosophy*, above n. 6, at 136–8.

<sup>76</sup> Both Hart and Nielson explicitly discuss such goals as survival because of their popularity, not because of their plausibility as distinctively legal goals. See *ibid.* at 136–7; Hart, *Concept*, above n. 30, at 187–8.

<sup>77</sup> Hart, 'Positivism', above n. 12, at 623.



A fourth and more serious objection about functionalist jurisprudence would be the objection that it just assumes that law serves a goal (that is, that law is a functional kind). Not only is this unsupported, but as a natural law theory it is question-begging because functionalists assume from the start that law must serve some good. No surprise that they then end up with a theory of law asserting that law is necessarily connected to morality (i.e. to something good).<sup>78</sup>

There are two aspects to this objection that need separating. One is a circularity charge to functionalist jurisprudence as such, independent of whether such jurisprudence reaches a natural law conclusion; the other is the question-begging charge directed against functionalist jurisprudence insofar as it purports to yield a natural law conclusion. As I now propose to show, to answer the circularity charge will be to answer the question-begging charge as well.

The circularity part of the objection can be fleshed out like this. A functionalist about law starts with some feature he takes to be a feature of a legal system (call it feature 'X'), and then seeks X's function. Yet he can't know whether X is or is not a feature of law without knowing the goal of law, for the goal determines what is functionally necessary to its realization (i.e. is law). On the other hand, he cannot know the goal of law—nor even whether law has a goal—until he knows which of all the goods there are is the good that law can uniquely serve, but to know this he has first to know what law's structural features are.

Strange as it may sound to say it, the circularity of functionalist jurisprudence is not a defect of that mode of analysis but a virtue. For if the epistemic credentials claimed by the analysis were any stronger than they are, they would have to be false. As it is, such credentials are exactly analogous to those obtaining anywhere where one claims to know anything.

Consider our knowledge of the existence of a natural kind like gold, together with our knowledge of the kind's essential nature (gold's atomic structure) and of its instances (pieces of gold). How might one come to know whether there is in the world some kind of thing that we can call gold, what its nature was, or what its instances were, if he began in ignorance on all these matters? He might come across some initial examples, say some bits of iron pyrites (fool's gold). He might later come across many other individual bits of yellow, metallic stuff, and decide to label the whole class, 'gold'. This at the moment is a highly provisional hypothesis, because he is hypothesizing that all the members of the class of things that he has encountered share some essential nature even though he doesn't

<sup>78</sup> I am indebted to Stephen Morse for seeing this objection clearly. See Frederick Olafson, 'Essence and Concept in Natural Law Theory', in Hook (ed.), *Law and Philosophy*, above n. 6, at 237, for an apparent form of the objection.

know what it is. He could be wrong about this, as the case of jade illustrates; but he provisionally thinks that there is a kind, gold.

He next seeks to discover gold's essential nature, and develops various theories. Such theories are constructed in light of everything else that he knows (say, about other elements of the periodic table) and in light of such theories' ability to include as gold the instances of the stuff he has so far encountered.

Suppose eventually he reaches our theory of gold, that it is an element with such and such atomic structure. He will then turn that theory back onto the examples that suggested it to see whether or not they are truly instances of gold. As I have posed this little story, it turns out that his initial examples are not instances of gold at all.

There is no natural stopping point in this process any more than there is a natural starting point. Theories of the nature of a kind, hypotheses that there is a kind, hypotheses about what are the instances of a kind, are just that, theories and hypotheses. They are always subject to improvement and even replacement. At any point in time the most one gets is a kind of 'reflective equilibrium'—which is enough certainty to justify worrying about something else.

Consider another illustration of this non-foundationalist epistemology, the currently fashionable 'interpretivism'. In Dworkin's hands, for example, interpretivism begins by focusing on some 'pre-interpretive data'.<sup>79</sup> Such data is pre-interpretive in the sense that one hypothesizes that this data is part of the law before one has (by interpretation) justified that claim. Dworkin's example in jurisprudence: start with the idea that law is inherently controversial at a theoretical level.<sup>80</sup> Next, one seeks the point or value of law, which Dworkin calls our interpretation or *conception* of law. For Dworkin, this is integrity. Then, one applies back onto the data that generated it, this theory of law's point to justify what are and are not features of law. This results for Dworkin in a general description of law's structural features, what Dworkin calls our *concept* of law: law is marked by its use of political decisions made in the past to justify present state

<sup>79</sup> Dworkin, *Law's Empire*, above n. 13, at 65–6. My interpretation of Dworkin's interpretivism is alternative to that earlier given. Earlier, I took Dworkin to be claiming that jurisprudence is interpretive in the sense that there was some authoritative text for legal theorists whose theories therefore were interpretations of that text. Now, I construe Dworkin to be eschewing the need for any text; such 'interpretivism' proceeds rather by seeking a 'point' or value to the existence of law (not a point or value to regarding some legal practices as authoritative for theorists—true interpretation). The difference is that such textless 'interpretivism' just is functionalist general jurisprudence under a quite misleading label, for like the functionalist Dworkin seeks a goal for law and lets that goal guide what structural features are part of law.

<sup>80</sup> *Ibid.* at pp. vii, 3–15. See esp. 13: '[L]aw is a social phenomenon. But its . . . function . . . depend[s] on one special feature of its structure. Legal practice, unlike many other social phenomena, is *argumentative*.'

coercion.<sup>81</sup> With such more complete picture of law's structural features, Dworkin then more fully justifies his 'interpretation' (or 'conception') of law's point or function: law as integrity is the conception of law making law's structural features (given by our 'concept' of law) the best they can be.

Thus, even those who began their jurisprudential careers sceptical of functionalist jurisprudence<sup>82</sup> have ended up doing such jurisprudence, however unwittingly. The reasons for this are twofold: first, knowledge of any kind, natural or functional, will be non-foundationalist ('circular') in the way indicated. Second, law's nature as a functional kind forces those who would study it to do so in the functionalist way. Law does seem to be good for something more than it seems to have a structural essence, and playing out this intuition in the way indicated is to verify or falsify this intuition.

Does this beg any questions about natural law? Only in the sense that a physical scientist 'begs' questions about the relation of gold to atomic structure by his theory that that is the nature of gold—which is to say, not at all. The theory that law is a kind and that its nature is given by such-and-such a goal is just that, a theory, falsifiable as is the atomic theory of gold. It is not a foundational assumption about law's nature that begs the question, 'Is law related to morality?' True, if law is a functional kind then necessarily law serves some good and thus, necessarily, law is in that way related to morality. But this is a discovery, not a posit, of functionalist jurisprudence.

I have saved the best objection for last. This is the opposite of the question-begging objection just considered. Now the objection is that functionalist jurisprudence cannot result in a natural law theory. An observation of Ruth Gavison's begins this objection: 'It is true that a description of a thing that is defined by its function must affirm that it has some minimal capacity to perform the function, but such functional attributions are morally evaluative only if the function itself has a determinate moral value. Nothing will be called a knife if it could not cut; yet knives are not inherently good or bad.'<sup>83</sup>

Lon Fuller's functionalist jurisprudence well illustrates this pitfall. Early in his career<sup>84</sup> Fuller likened a legal system to a steam engine in that both were functional kinds; this, he thought, meant that there could be no clear separation of the questions, 'Is X a steam engine?' and 'Is X a good steam

<sup>81</sup> Dworkin, *Law's Empire*, above n. 13, at 93, 110.

<sup>82</sup> R. Dworkin, 'Does Law Have a Function? A Comment on the Two-Level Theory of Decision', *Yale Law Journal*, 74 (1965), 640–51. In this criticism of Dick Wasserstrom's functionalist jurisprudence, the early Dworkin regarded 'the assumption of a fundamental social goal as chimerical, even as a legislative standard'. *Ibid.* at 648.

<sup>83</sup> R. Gavison, 'Natural Law, Positivism, and the Limits of Jurisprudence: A Modern Round', *Yale Law Journal*, 91 (1982), 1250–85, at 1266–7.

<sup>84</sup> L. Fuller, *The Law in Quest of Itself* (Boston: Beacon Press, 1940), 10–11.

engine?', for the reason that Gavison references: to be a steam engine at all is to perform the function of steam engines to some degree. Gavison's point is that the goodness of a good steam engine need not be moral goodness but only an instrumental goodness. One can, as earlier noted, be a *good* poisoner in the instrumental sense of 'good'.

Fuller's functional jurisprudence was peculiarly open to this charge, because much of the time Fuller proclaimed that the overall goal of law as simply the subjecting of human conduct to the guidance and control of general rules.<sup>85</sup> This by itself is not very plausibly thought to be among the things that are intrinsically good. If such an instrumental good were the only thing law was good for, then like a knife or a steam engine such an instrument can equally well be used for good or for evil.<sup>86</sup> Yet it is not difficult to think of intrinsic goods that are plausibly served by those aspects of law (generality, prospectivity, publicity, etc.) on which Fuller focused. Liberty and autonomy come most easily to mind, for Fuller's rule of law virtues allow citizens more predictability of when law will sanction their behaviour and such increased predictability enhances planning ability and hence liberty and autonomy. Alternatively, such features may plausibly be supposed to serve the good of co-ordination and collaboration.<sup>87</sup>

Liberty, autonomy, and the common good (in the co-ordinative sense) are genuine moral goods. If these are the goals of law, then for a system to be a *legal* system there must be some moral goodness in these dimensions. This by itself would support a weak version of the natural law relational thesis, for what would be said is that the existence of a legal system in part depends on its moral worth (in the dimensions of liberty, autonomy, and the common good).

This would be a weak version of the natural law relational thesis because the goods of morality other than those that are the goals of law are not related to the existence conditions for a legal system. It is thus still possible that a legal system exists (because it is sufficiently promotive of law's distinctive goods) and yet that it is patently unjust. As Hart observed, systems can be highly respectful of individual liberty (assuming *arguendo* that is the good at which law aims) and still possessed of great iniquity in every other dimension of morality.<sup>88</sup>

<sup>85</sup> Fuller, *Morality of Law*, above n. 52, at 53, 107, 115, 122, 130, 146, 150, 162.

<sup>86</sup> The first of the two main criticisms commonly levelled at Fuller's functionalist jurisprudence. See Hart, 'Book Review', above n. 19; Dworkin, 'Professor Fuller's Novel Claim', above n. 13; Cohen, 'Law, Morality, and Purpose', above n. 67.

<sup>87</sup> Finnis so appropriates Fuller's eight desiderata of law. *Natural Law*, above n. 31, at 270-3.

<sup>88</sup> Hart, *Concept*, above n. 30, at 202; 'Book Review', above n. 19, at 1287. See also Kenneth Stern, 'Either-or or Neither-Nor', in Hook (ed.), *Law and Philosophy*, above, 249-50, where Stern urges that the best mousetrap is not necessarily one that is best in trapping mice (a mousetrap's function); rather, the best mousetrap may be one that is pretty good at catching mice *and* that serves other values best, e.g. one with a safety catch that prevents human harm.

There is thus something of a dilemma facing any functionalist jurisprudence that has a natural law theory as its conclusion. On the one hand, functional jurisprudence seeks some distinctive end that law serves. The very idea that law is a functional kind depends on there being some such good that law can uniquely serve. That is what allows the functionalist to define law by its (functional) ends, and not by its (structural) means. Law cannot have as its distinctive good, 'all things that are good', without ceasing to be a functional kind.

Yet the natural law conclusion sought by functionalist jurisprudence seems to demand that law have as its goal nothing less than all the goods there are. For short of such a comprehensive goal for law, law seems 'compatible with great iniquity'.

Lon Fuller's mode of confronting this dilemma was highly problematic. Fuller assumed that any system that promoted law's goal had to promote all other goods as well. As Fuller put it throughout his work,<sup>89</sup> his was the faith that if you do things the right way (i.e. seek law's goal, its 'internal morality'), you'll end up doing the right things. That requires a stronger faith in the interconnectedness (within human nature) of the various motivations to promote all the goods there are than I can sustain.<sup>90</sup>

A better mode of confronting this dilemma is to seek some goal for law that does have connections to all the goods there are and yet is not simply, 'all the goods there are'. This is Finnis's strategy insofar as he assigns law the goal of the common good, which is not another of the seven good things Finnis thinks there are; yet the common good consists in the seven goods insofar as we can obtain them through co-ordination and community. Dworkin's implicit response to the dilemma is the same. He posits a goal of law, integrity, which is not one of the four political goods there are (distributive justice, fairness, procedural fairness, fraternity). Integrity is thus distinct, a separate end distinctively law's; yet integrity is connected to all legitimate political aims (the above four goods). Integrity purports to be both intrinsically good and the good uniquely served by law, and yet it purports to be linked to all goods such that its denial denies them as well.

Whether these responses by Finnis and Dworkin to the dilemma fare any better than Fuller's I shall leave to another occasion. Important here is to see that some such resolution is necessary if a functionalist jurisprudence is going to lead to a natural law theory of law.

<sup>89</sup> L. Fuller, 'What the Law Schools Can Contribute to the Making of Lawyers', *Journal of Legal Education*, 1 (1948), 189–204, at 204; Fuller, 'Fidelity to Law', above n. 29, at 636, 643, 661; Fuller, 'A Reply to Professors Cohen and Dworkin', *Villanova Law Review*, 10 (1965), 655–66, at 661–6. Fuller, *Morality of Law*, above n. 52, at 152–86, 223–4.

<sup>90</sup> This was the second major criticism of Fuller's functionalist jurisprudence: even if law's 'internal morality' (law's goal) was intrinsically good, one could achieve that moral good without necessarily achieving any other goods (Fuller's 'external morality of law'). For a limited resuscitation of Fuller on this point, see Finnis, *Natural Law*, above n. 31, at 273–6.



I shall close with a few remarks on how functionalist general jurisprudence may also generate a natural law theory of *laws* and of *laws of cases*. Suppose the functionalist-natural lawyer has made her case about law. That is, it is shown that law has a distinctive goal, that goal is intrinsically good, and that good can be realized only if all other goods are also realized to some degree. An unjust system will in that case not be a legal system.

This natural law conclusion about legal systems will have a trickle-down effect on laws and laws of cases. If the unjustness of a society precludes it from having a legal system, then that unjustness will also preclude it from having any laws or laws of cases. No law, no laws and no case-laws. As much Fuller would have had the post-World War II German courts decide; they should invalidate the Nazi informer statutes, not on the ground that such statutes were themselves unjust, but on the ground that there was no legal system in place in Nazi Germany. The same would be true for the judgements of Nazi courts: they should not be given *res judicata* effect because such judgements could not represent the laws of the cases purportedly decided by them if there was no legal system.

To this limited extent the functionalist who has made out his natural law theory about law has also made it out about laws and laws of cases. Yet natural law theory typically is more ambitious than this for laws and laws of cases. About laws, the natural lawyer's relational thesis is that the degree of *their* injustice (not the overall injustice of the legal system of which they are a part) determines their status as laws. The functionalist thus needs some argument about laws that is independent of the argument about law if he is to establish his secondary relational thesis about laws.

About laws, the crucial issue between legal positivist and natural law theories is whether laws necessarily obligate to be laws. If the answer is 'yes', as Augustine asserted, then laws must be relatively just to be laws—for only morality can obligate. If the answer is 'no', as Bentham proclaimed, then it is perfectly possible that unjust norms can both fail to obligate and yet be laws.

The functionalist in jurisprudence who wishes to defend the natural law theses about laws must thus show that laws necessarily obligate. This showing can be made by a functionalist only by showing that the end of law is served by laws obligating obedience to their terms by citizens and judges. The function of law, in other words, must be such that law's structure possesses this feature.

Consider Finnis's end for law for purposes of illustration. If law exists in order to promote the co-ordination of the differing goods of individuals (the 'common good'), then laws may be thought to need acceptance by citizens as authoritative (obligating) in order to serve their co-ordinating function. For laws that are believed to be obligating are strongly salient

features of any co-ordination problem and thus can serve as such a problem's solution. Finnis, however, needs to show more than this to make out his natural law thesis about laws. Laws need to *be* obligating—not just believed to be obligating by citizens—in order for the natural law relational thesis to be true. And this structural feature does not seem necessary for laws to serve their co-ordinating function. To make it necessary, Finnis would have to argue that citizens will not maintain their belief in the obligating character of laws unless they believe that the laws are just, and they will not maintain any long-term belief that the laws are just unless those laws *are* just.

There are problems with this chain of reasoning. Why do laws need to be accepted as authoritative by citizens in order to have the salience needed to solve co-ordination problems—couldn't sanction-backed rules that are not believed to be obligating be equally salient? Also, asserting that long-term beliefs in justice are supportable only if the objects of belief *are* just, is to assert a strong causal thesis about moral qualities, namely, they inevitably cause belief. Although a moral realist should think that moral qualities do cause belief, it is not very plausible to assert it so strongly; there can be (and are) numerous factors that cause people to hold false beliefs about morality permanently.

Finnis appears to believe that he can sidestep a defence of these troublesome points by adverting to his notion of 'central' or 'focal' meaning.<sup>91</sup> The central case of 'law' for Finnis is seen only from the internal point of view of an actor asking, 'How does *that* (some norm that purports to be a law) affect my obligations?' The necessary obligatoriness of laws to be laws stems from the conceptual primacy of the question asked from such internal point of view, for Finnis. Yet whatever the merits of this defence of the natural lawyer's crucial structural claim about laws, it is not a defence based on functionalist grounds. This is not a defence proceeding *from* law's co-ordinating function *to* law's obligatory nature; rather, this defence abandons functionalist jurisprudence for a direct argument that the essence of law (law's 'focal meaning' or 'central case') lies in its obligating character.

Whatever the problems Finnis would have in defending the natural law thesis at the level of laws, I mention it for illustration only. Consider now the thesis at the level of the laws of cases. The laws of cases can have two different sources: one, in authoritative general rules or other standards, such as statutes; or two, in the reasoning by analogy from prior particulars that are regarded as having been authoritatively decided. The first source requires interpretive legal reasoning in order to discover the law of some

<sup>91</sup> Personal communication, 7 Jan. 1990. On 'focal meaning', see Finnis, *Natural Law*, above n. 31, ch. 1.

case, and the second source requires non-interpretive (or common law) reasoning in order to discover the law of some case.<sup>92</sup> Let me consider each type of case-law separately.

With regard to interpretive case-law, Lon Fuller famously argued for 'purposive interpretation' in his 1958 debate with Herbert Hart.<sup>93</sup> Statutes, Fuller argued, should be interpreted by their purposes, so that a fully operational truck mounted on a pedestal as a war memorial in a park should not be considered a vehicle for purposes of a statute forbidding vehicles in the park—no matter how much such a truck was a standard instance of the word 'vehicle' in ordinary English. Hart responded that a legislature's purpose could be evil and that purposive interpretation was no guarantor of the justness of the law of the case that resulted. Could not Nazi judges have interpreted Nazi statutes regarding the Jews in a way that furthered the purposes of such statutes?<sup>94</sup>

If the natural lawyer has made out his relational thesis at the level of laws, then the answer to Hart's question must be no. If laws must be obligating to be laws, and if they must be just to be obligating, then the purpose that guides interpretation of such laws cannot be evil. Imagine a statute motivated exclusively by an immoral purpose. For example, the legislature requires margarine-makers to dye their product red solely because butter-makers do not want competition with their product. Suppose that dyeing margarine red in fact causes a real good to be achieved, perhaps the prevention of its consumption by those deathly allergic to it. Purposive interpretation of such a statute would then not be guided by the purpose (motive) of the legislature that passed the statute. Rather, such interpretation would ignore that psychological question altogether and engage in moral reasoning: how can the moral good that is the purpose (function) of the statute best be served?<sup>95</sup> The law of the case that results from this latter kind of purposive interpretation will be dependent upon morality in just the way the natural lawyer asserts. If the judgement of a case is unjust, it is not the law of that case, but a judicial mistake.

Now consider common law reasoning. Here we cannot rely on the necessary justice of laws to argue for the necessary justice of laws of cases, because there are no laws in common law reasoning. (There is law, but no laws.) Instead, the natural law argument here proceeds from the goal of common law reasoning, which is equality. (One must of course have some overall goal to law that makes equality the goal of this kind of laws of

<sup>92</sup> I defend the view that statutory reasoning is interpretive in Moore, 'Natural Law Theory of Interpretation', above, and I defend the view that common law reasoning is non-interpretive in Moore, 'Precedent, Induction, and Ethical Generalization', in L. Goldstein (ed.), *Precedent in Law* (Oxford: Oxford University Press, 1987).

<sup>93</sup> Fuller, 'Fidelity to Law', above n. 29.

<sup>94</sup> Hart, 'Positivism', above n. 12.

<sup>95</sup> I argue for this kind of purposive interpretation in 'Semantics', above n. 21, and in 'Natural Law Theory of Interpretation', above n. 13.

cases, but I leave that to the side for now.) Equality requires that like cases be treated alike, the requirement of formal justice. How one determines the likeness that morally entitles litigants to like treatment is the crucial question. I have elsewhere argued that equality is an intelligible good only if one judges likeness as including all and only morally relevant features.<sup>96</sup> If this is so, then the law of a common law case depends on all of morality, for only all of morality can answer the question of relevant likeness. This does not mean that the decisions of past cases have no bearing on the content of the common law; only that the directions of like treatment such cases demand are determined by a moral judgement about relevant similarity. This is enough to make out the natural law thesis for this kind of law of the case.

<sup>96</sup> Moore, 'Precedent', above n. 92.