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Natural Law and the Naturalistic Fallacy

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Abstract:

The central doctrine of the Natural Law Tradition is the Overlap Thesis—the claim that there is a necessary connection between law and morality, and that the issue of what law is cannot be separated from the issue of what law ought to be. Classical natural lawyers such as Cicero, St. Augustine, St. Thomas Aquinas, and even Common Law natural lawyers such as Sir William Blackstone invoked this thesis to illustrate how moral judgments about law could be derived from an objective moral order.

The tradition, however, was challenged by a powerful argument known as Hume's Fork, otherwise known as the Naturalistic Fallacy, which denies that moral propositions can be deduced from purely factual premises because they belong to different logical categories. For centuries thereafter, legal philosophers doubted whether the normative force of law could be derived from morality. This article examines four solutions offered by contemporary natural lawyers to address the Naturalistic Fallacy: Lon Fuller's Procedural Natural Law, John Finnis' Neothomist Natural Law, Michael Moore's Moral Realism, and Ronald Dworkin's Constructive Natural Law. It shall be argued that although their theories have greatly improved upon those of their predecessors, each suffers various defects that render them inadequate as solutions.

Key Words: Natural Law, Hume's Fork, Lon Fuller, John Finnis, Michael Moore, Ronald Dworkin

Introduction

The objective of this article is to examine four solutions that contemporary natural lawyers have proposed to solve the classical is-ought problem, also known as the naturalistic fallacy,[1] which concerns the question of whether moral conclusions can be logically derived from purely factual premises. If the answer to this is 'no', then this would imply that what people morally ought to do cannot be justified by any kinds of facts. In turn, this would mean that the central doctrine of the natural law tradition known as the Overlap Thesis—that there is a necessary connection between law and morality (Duke and George 2017, 1)—is fundamentally mistaken. Any adequate natural law theory, therefore, should be able to satisfy two criteria: (1) it should be able to provide a deductively valid solution to the is-ought problem and thereby explain law's normativity, and (2) it must do so in a way that clarifies our understanding of the concept of law. I shall refer to (1) as the logical criterion, and (2) as the conceptual one.

This paper is divided into five parts. In Part I, I provide a historical survey of the tradition and an explanation of the naturalistic fallacy, while in Parts II to V, I discuss Lon Fuller's Procedural Natural Law, John Finnis' Neothomist Natural Law, Michael Moore's Moral Realism, and Ronald Dworkin's Constructive Natural Law respectively. I conclude that the four contemporary natural law theories fail both criteria above for various reasons. I shall not attempt to introduce a positive theory or argument about the nature of law, for my goal is far more modest: to merely offer negative reasons against solutions to the naturalistic fallacy.

I. Classical Natural Law

Classical Natural Law emphasized three essential features of law: the existence of a natural order, its intrinsic connection with rationality, and its relation to standards of right judgment (Finnis 2002, 1).

A. The Existence of a Natural Order

The existence of a natural order implies that there are laws woven into the fabric of reality which are normative prior to human choices, and are distinguished from positive law in two ways.

[1] The term was coined by G.E. Moore (1922, 10).

First, natural law is universal and immutable in that it is binding upon all men regardless of time and place, whereas positive law is binding only upon those who fall under its jurisdiction. Second, natural law constitutes a higher body of standards which override laws promulgated by human authorities (Harris 1980, 7). As the Roman Senator Cicero said,

> *True law is right reason in agreement with Nature; it is of universal application, unchanging, and everlasting...We cannot be freed from its obligations by Senate or People, and there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times (1928, 33).*

The fathers of the Church distinguished the laws of nature in a third way: because the natural order was created by God who is necessarily just, then the laws of nature are inherently just as well, unlike human law that is oftentimes wicked. St. Augustine asserted that an unjust law is no law at all (1993, 8), which was his way of saying that unjust laws were not really law and could therefore not impose any genuine obligations upon us. He also claimed that without justice, the state was nothing but 'organized brigandage' or a 'band of pirates writ large' (2014, 55), which meant that the legitimacy of the state depended on the moral content of its laws. On this view, a state whose laws are unjust is not truly sovereign, and is morally no better than a group of criminals. Hence they concluded that law and morality are conceptually intertwined, and that our moral obligations could be derived from facts about nature.

B. The Primacy of Rationality

Classical natural lawyers argued that law was discoverable through reason. To this end, St. Thomas Aquinas distinguished between four kinds of law: the Eternal Law which governs the universe, the Divine Law that is revealed in Sacred Scripture, the Natural Law which derives from the Eternal Law and is discovered through reason, and positive laws that are derived from Natural Law to promote human ends (Aquinas 1988, 17-22).

The faculty of rationality was also emphasized in the philosophy of the common law, which refers to a body of practices, attitudes, and beliefs that have been passed on as community traditions since time immemorial and are fashioned into the customary laws judges apply to cases. Moreover, common law theory ascribes prominence to the Declaratory Theory of Precedent, which states that when judges decide cases, they are not creating law so much as they are discovering it among, in Sir William Blackstone's words, the "accumulated wisdom of the ages" (Blackstone 1807, 442). Judges in these systems are considered to be living oracles who identify the community's standards of

reason. Their expertise lies not in their competence in making law, but in their ability to maintain and expound upon the old one (Wesley-Smith 1987, 73-74).

C. Practical Reason

The third feature of natural law is that it establishes standards of right judgment derived from a teleological view of reality—the belief that all beings have purpose, meaning, and an ultimate good towards which they strive. Aristotle wrote:

> *Every skill and every inquiry, and similarly every action and rational choice is thought to aim at some good; and so the good has been aptly described as that at which everything aims (2014, 3).*

On this view, humans achieve their good by acting in accordance with right judgment, whereas they betray their nature by acting against it. St. Thomas explained that the source of these standards is the natural law, comprised of self-evident principles such as 'Good is to be pursued' and 'Evil is to be avoided' (Aquinas 1988, 46-47). Human good consists in acting morally; the more morally one acts, the more whole one becomes. Similarly, law is more valid, real, or true if it guides humans to act justly. This is how natural lawyers made the connection between the natural and the moral, or the 'is' and the 'ought', in an objective moral order.

D. The Naturalistic Fallacy

Natural law theory was dealt a powerful blow by a sound argument known as David Hume's Fork. Hume was an empiricist who maintained that the raw materials of knowledge are gathered from experience (Quinton 1998, 10). In his view, what we consider moral truths are reducible to feelings of approbation and disapproval that we associate with right and wrong (Hampshire 1963, 4-7). In this sense, moral truths consist of perceptual components[2]. We do not discover general moral truths "out there" and deduce moral conclusions from them. Rather, we begin with human experience from "within" and infer general moral principles from it instead (1983, 15). Hume's Fork is expressed as follows:

[2] D.F. Pears compares Hume's views with Russell's logical atomism. See "Hume's Empiricism and Modern Empiricism" in David Hume: A Symposium, ed. D.F. Pears (London: Palgrave MacMillan, 1963), 12-16.

> *In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it (1960, 469).*

This means that propositions that prescribe what ought or ought not be cannot be logically derived from propositions that describe what is or is not. Hume categorized all forms of knowledge, presumably including moral knowledge, as either relations of ideas or matters of fact. Relations of ideas are propositions demonstrable by the mere operation of thought, such as 'The product of three and five is fifteen,' while matters of fact are propositions that are verified through empirical observation, such as 'The sun rises in the east' (1977, 15). For anything to count as knowledge, it necessarily has to fall on either side of the fork.

Natural lawyers like St. Thomas treated moral truths as relations of ideas in which "the predicate is included in the essence of the subject." The problem is that allegedly self-evident propositions such as 'Good is to be pursued' or 'Evil is to be avoided' express nothing about morality. They are true by definition because 'good' is taken to mean 'something to be pursued' and 'evil' as 'that which should be avoided'. In short, they are tautologies without content or value. Hence, moral truths cannot be relations of ideas.

Unfortunately, they cannot qualify as matters of fact either because moral propositions cannot be verified by experience. For example, whereas the proposition that 'Smith was killed' can be validated by observing an empirical event, moral judgments such as 'Killing is wrong' cannot. There are simply no such things as moral facts in the world. Emotivists once said that moral propositions are nothing more than emotive responses (Ayer 1952, 107-108) or prescriptions of behavior (Hare 1952, 79). On these views, whereas 'Smith was killed' is either a true or false description, 'Killing is wrong' is an expression of disgust or a prescription against killing. Although emotivism has long been abandoned, the point remains: because normative judgments and descriptive facts belong to different logical categories, valid moral conclusions cannot be syllogistically deduced from purely factual premises. Nor can they be used to introduce something not included in the premises, i.e. they cannot justify the existence of a hard obligation on the weaker basis of mere inclination. I thus take the natural fallacy—for the

purposes of this paper anyway—as forging some kind of what Fine calls 'metaphysical necessity' (Fine 2018, 889) between descriptive facts about the world and entailed legal or moral obligations. In the centuries that followed Hume's powerful assault, metaphysical speculations about natural law were met with suspicion and skepticism,[3] and natural law jurisprudence was generally swept to the wayside.

II. Procedural Natural Law

Lon Fuller was the first contemporary natural lawyer who systematically addressed the is-ought problem in a time when natural law had become taboo (Rundle 2017, 428). The major premise of his solution was that the fact-value distinction disappears when human activities are interpreted as goal-directed enterprises, while the minor premise was that law is one such enterprise. I examine both premises in turn.

A. The Major Premise: Goal-Directedness and the Fact-Value Distinction

To interpret a human activity as goal-directed is to study it in relation to its purpose. For example, if someone encounters a traveler in the mountains who is rubbing two sticks together, it would be odd to say, 'He is engaged in the activity of rubbing two sticks together.' It would be better to say, 'He is trying to light a fire to pass the night.' Only then can one evaluate whether his actions are 'good'. For Fuller, this means that purposive activities must be interpreted in a manner that makes activities coherent, intelligible, and meaningful (1958a, 70). In contrast, a "flat" description would be uninformative and misleading.

While fact and purpose sometimes go hand-in-hand, however, it does not follow that an object's putative purpose is part of its description. As Nagel explained (1958, 79), to judge something, one must first be capable of identifying what is being judged. One can only determine whether the traveler's actions are 'good' if one can describe what he is doing. Fuller questioned whether separating these two kinds of accounts would be "profitable" and "promote accuracy of description" (1958b, 88). He gave two examples to advance his case. The first is that if someone were presented a dubious assemblage of mechanical parts that resembled a steam engine, the questions 'Is it a steam engine?' and 'Is it a good steam engine' would "overlap mightily". Even if a non-evaluative account of the parts were provided, the explanation would not illuminate the engine's purpose and whether it fulfills it (1958b, 89).

[3] For more on Hume's Fork, see Nowell-Smith 1954, 36-38 and MacIntyre 1959, 451-468.

The second is that of an unskilled dancer who is attempting the tango. One might observe, 'He is trying to tango, but is not succeeding', which implies that while his movements synchronize with the standard pattern of motions, they are being executed so poorly that they fail to be the tango (1958b, 93). Fuller extends this interpretive methodology to the concept of law: he thinks that a conceptual analysis of law necessarily includes an explication of its moral purpose.

My objection is that in both examples, Fuller conflates "profitability" with "accuracy of description". Contrary to what he claims, it is perfectly possible and coherent to say, 'Yes, this is a steam engine, but no, it is not a good one because it no longer works'. It is also possible to say, 'Yes, he is doing the tango, but he is doing it ungracefully'. Both sentences are descriptively accurate, even if not "profitable". An engine does not cease to be an engine just because it no longer works, just as the tango does not cease to be the tango just because it is performed clumsily. Moreover, it is easy to think of situations in which broken engines and clumsy tangos are profitable. For instance, an aspiring mechanic may simply need an old assemblage of engine parts that he can study, while a dance instructor who grades his student may only need to ascertain that he memorizes the routine well enough to pass a class. In short, the major premise of Fuller's solution violates the conceptual criterion because it unjustifiably assumes that the moral purpose of X is part of the concept of X. The same analysis applies to the case of law: a non-purposive description of law does not necessarily fail to be an illuminating account of law.

Assuming Fuller were correct, it settles only the ontological issue of whether facts can be realized in terms of their value, not the normative issue of whether value judgments can be derived from facts. Even Kenneth Winston, who has been a sympathetic reader of Fuller, concedes that he never proved how an 'ought' can be deduced from an 'is' (1988, 332). Thus, insofar as the is-ought problem is concerned, the major premise of Fuller's solution is faulty.

B. The Minor Premise: The Eight Excellences of Legality

Fuller thought of law as a human achievement that represents the highest ideals of our collective "striving" (1958c, 646). In his seminal work The Morality of Law, he explained that law must be understood as having a "morality of aspiration"—the ideal that it tries to realize and become (1969, 5-6). Fuller identified eight ways through which law can fail to satisfy the morality of aspiration in relation to lawmaking. They occur when: (1) there is a failure to create legal rules such that issues are decided on an ad hoc basis; (2) there is a failure to publicize laws; (3) there is abuse of retroactive

legislation; (4) there is a failure to make rules understandable; (5) there are contradictory rules; (6) rules require conduct beyond the powers of affected parties; (7) changes in rules are so frequent that citizens cannot conform accordingly; and (8) there is a failure of congruence between the rules and their administration (1969, 33-39).

To rival the eight ways, Fuller introduced eight excellences of legality: that laws must be (1) general, (2) effectively promulgated, (3) prospective, (4) understandable, (5) consistent, (6) possible to obey, (7) constant throughout time, and (8) congruent with official behavior (1969, 47-91). They are built into the very nature of law and comprise its internal morality. This means that laws that satisfy them cannot fail to be moral.

Fuller connected the 'is' and the 'ought' in this manner. The validity of law—its claim to be binding upon citizens—ultimately rests on facts pertaining to the procedure of its creation. Anything that fails to satisfy these procedural criteria is not law in the proper sense and thus cannot make normative claims. For example, a government that allows judges to settle disputes by tossing a coin rather than by applying general rules would hardly be called a legal order. In contrast, laws that do observe the eight excellences have an inner morality by virtue of embodying standards of justice, fairness, and due process. Obviously, this minor premise only works if Fuller successfully establishes the major premise and shows that its moral purpose is part of the 'is' of law. Unfortunately, however, we have seen that this does not follow.

My objection against Fuller, following Hart's line of thinking (1965, 1294) is that he confuses principles of good legal craftsmanship with substantive principles of morality. The excellences are good not because they make law moral, but because they facilitate its purpose. This may be explained with an analogy. A well-sharpened knife is not morally good just because it enables the slicing of food; it can just as easily be good for killing someone. Thus, a knife in itself is morally neutral. Similarly, any rule-governed activity may have procedural requirements for improving its efficiency, but these do not guarantee its moral character. For instance, the act of poisoning someone is a goal-directed activity that has internal principles, but it does not make poisoning itself moral. Law is no exception; it may satisfy the eight excellences but also promote wicked ends like apartheid. In short, the eight procedural excellences are a necessary but not a sufficient condition for law's normativity. This means that Fuller violates the logical condition by failing to show that normative conclusions can be derived from facts about the procedure of law's creation. Something other than adherence to procedural criteria must exist in order for obligations to arise, such as law's substantive correctness.

III. Neothomist Natural Law

A. The Seven Basic Goods and the Nine Principles of Practical Reason

John Finnis, a staunch defender of St. Thomas' doctrines, is the most eminent natural lawyer alive today and introduces what Fuller lacks: a substantive theory of natural law. In his view, St. Thomas had been gravely misunderstood and was not guilty of committing the naturalistic fallacy at all. This is because his principles of Natural Law were not derived from metaphysical truths, but from "self-evident" principles of practical reason:

> *Most important, perhaps, is [Aquinas'] insistence that...the primary meaning and reference of the term 'natural' is: reasonable. To say that some kind of conduct is required or excluded by natural law (or natural right) is to state the conclusion of an argument which begins with premises about what kinds of conduct one needs to choose (or reject) if one is to act reasonably. To say that a disposition is natural and a virtue, or unnatural and a vice, is to express a conclusion that follows from premises about which dispositions to act ready one for acting reasonably and which ready one to choose unreasonably (unjustly, self-destructively, and so forth). Moral arguments should never run from what is natural to what is reasonable—a fallacy that can well be called 'naturalistic'. Their conclusions about what is required by reason need never (but always can) be expressed also in terms of the natural or unnatural (Finnis 2017, 18).*

For Finnis, the principles of Natural Law are not inferred from speculative principles, natural facts, or teleological conceptions of reality. In fact, no inference whatsoever is made, for the principles are demonstrably grasped by anyone who has reason. To discover these principles, one only needs to proceed by intelligent reflection on the objects of human nature from within—to conduct a careful investigation from the inside into the inclinations and goods that all humans share. In Natural Law and Natural Lights, Finnis identified seven basic goods: (1) life, (2) knowledge, (3) play, (4) aesthetic experience, (5) sociability, (6) practical reasonableness, and (7) religion (1980, 86-90). They are intrinsic in that all activities are directed towards their realization. Moreover, any other good (e.g. health, education, friendship) is reducible to one of these seven goods. In this sense, they are ultimate reasons for action.

But knowledge of the seven goods is insufficient by itself. It must be supplemented by a second inventory consisting of ten requirements of practical reasonableness that guide people in making moral decisions. These are (1) having a coherent plan of life, (2) having no arbitrary preferences among the basic values, (3) adopting no arbitrary preferences among persons, (4) being detached from particular projects, (5) but not abandoning these projects carelessly, (6) limiting the relevance of consequences in

decision-making, (7) respecting every basic value in every act, (8) favoring the common good of the community, (9) following one's conscience, and (10) morality (1980, 100-127). Like the seven goods, the requirements of practical reasonableness are fundamental and underived.

How does this relate to positive law? Finnis claims that natural law provides the framework for any legal system that conforms to practical reasonableness (2021, 48). This means that positive laws are derived from natural law and concretize its requirements. This is because natural law principles are general and thus not formulated so precisely as to prescribe the right action in every scenario. They must be fashioned into nuanced rules that directly govern legal situations. Therefore, it is not just that positive law inherits the content of natural law; positive law adds to it as well, but what is added is specific to the community, time, and place in question (2011, 103). In this sense, law is a reason for action not only because it conforms to our rational nature, but because it expresses a community's standards of right and wrong.

Neothomists have distanced themselves from what Murphy called the "Strong" Natural Law Thesis stating that a man-made rule that is not a rational standard of conduct is no law. They acknowledge immoral laws as prima facie valid. They do, however, accept the "Weak" Natural Law Thesis that necessarily, law is a rational standard (Murphy 2005, 19-21). They do not mean this in the same sense as 'Necessarily, squares have four sides', but in the weaker sense that a non-rational law falls outside of the central case of law and is not fully law in the proper sense.

B. From Self-Evidence To Normativity

Finnis is criticized for claiming that there are "self-evident" basic goods and principles of practical reasonableness (Rodrigues 2016, 40-41), which are central to his solution to the naturalistic fallacy. Hittinger argues that the seven goods seem to have been arbitrarily selected based on some kind of intuitionism (Hittinger 1987, 198), lacking support from any methodologically antecedent theory of human nature. Weinreb accuses Finnis of confusing self-evident principles with his personal convictions (1987, 113); it is not the case, for instance, that people universally view religion as an ultimate good, nor does everyone accept that upholding the good of the community is a fundamental principle. On their view, G.E.M. Anscombe was partially correct in stating that it is not profitable to engage in moral philosophy until we have an adequate philosophy of psychology (1958, 1). Without one, the appeal to self-evidence is a convenient maneuver that Finnis seems to think absolves him of the task of justifying their universal significance. In my view, this problem becomes aggravated if Finnis is

asked to explain how these goods relate to positive law specifically, not just natural law. For one thing, it is not obvious whether and how every law can be traced back to one of the seven goods or principles of practical reasonableness. For another, it is also not obvious how these goods or principles can explain the existence of laws which seem to go against human flourishing and practical reason. In other words, Finnis' theory is in danger of failing the conceptual criterion.

Specifically in relation to the naturalistic fallacy, the appeal to self-evidence leaves the 'ought' hanging. There is nothing—not even a prior normative premise—to support it. If someone asks, "Why is φ morally binding?", a valid answer would point him to an independent source of obligation, but the reply "Everyone can see that it is," only begs the question. The answer assumes that the obligations deriving from them are built-in from the start, purporting to be binding just because they conform to our rational nature. But this takes the concept of normativity for granted without proof. It is not so much a solution as an evasion of the problem, thus placing Finnis in danger of violating the logical criterion as well.

Contemporary natural lawyers have defended Finnis' argument from self-evidence. In an article co-written with Finnis, Germain Grisez [4] and Joseph Boyle argue that there is "data" from the social sciences on "natural dispositions" illustrating universal knowledge of the basic goods and practical reasonableness (1987, 108). Psychology suggests that there are natural inclinations to stay alive and healthy, to work, or to be sociable. Anthropological studies indicate that different cultures share common goals of passing on knowledge, promoting the good of the group, and maintaining harmony among its members. One might object that differences in language, concepts, and ethical traditions make it impossible for different cultures to share universal concepts, evidenced in the fact that people have divergent moral attitudes with respect to issues such as abortion. Boyle replies that these differences do not make it impossible for various cultures to possess identical goods and practical reason (1992, 7). If people arrive at conflicting moral judgments on some issues, it is not because they are incapable of grasping Natural Law principles, but because they err on matters that are not as self-evident, such as misjudging how to uphold the common good (1992, 26).

Robert George, Finnis' most ardent supporter, defends self-evidence from everyday experience (1988, 1390-1394). If someone is asked why he works two jobs, for instance, he may answer that he needs more money.

[4] Grisez's influential article made a profound impact on Finnis' philosophy and is regarded as the co-founder of the Neothomist Tradition. See "Grisez 1965, 168-201.

His interlocutor assumes that he does not need money for its own sake, but for something more fundamental. If he is asked why he needs more money, he might confide that it is for a surgery that his cancer-stricken mother gravely needs. It becomes apparent that his actions are directed towards the basic good of life. At this point, there is no need to probe further because unlike the value of money, the value of life is an explanation-stopper. It is intrinsic to human fulfillment and requires no further justification (George 2001, 86). If there are goods that are self-evident, the logic goes, then there must also be principles of practical reasonableness that are self-evident.

I argue that these rejoinders damage Finnis' argument more than save it. First, if there truly are self-evident goods and principles, then empirical data—whether from the social sciences or everyday experience—is superfluous. One should be able to discover what these goods are without relying on the tools and methods of the social sciences. It is strange, then, that Finnis' defenders gather data made redundant by self-evidence. Second, even if there were a plethora of data to support Finnis' claims, it would only count as a preponderance of evidence but not proof of self-evidence. The attractiveness of Finnis' theory is precisely that it purports to show that natural law principles can be demonstrably known a priori, hence, any appeal to empirical data undercuts the very pedestal it stands. Besides, the use of empirical data implies that self-evident knowledge can, in fact, be indirectly derived from speculative knowledge, at least insofar as self-evidence is taken as the existence of universal patterns of behavior.

Furthermore, if self-evidence depends on the existence of such patterns, then Finnis' solution is no different from those of Philippa Foot [5] and John Searle [6], who claim that some moral judgements are true if certain factual conditions obtain. But such solutions illicitly smuggle factual premises into normative arguments. For example, it rests on the premise that it is self-evident that aesthetic experience is a basic good. Even if one accepted it for the sake of argument, the naturalistic fallacy would still be committed regardless; no 'ought' can arise simply by virtue of the fact that everyone exhibits certain inclinations. Even in a world where every individual was inclined

[5] See Foot 1958, 502-513. Foot argued that evaluative judgments are justified under certain circumstances, e.g. the judgment that someone is rude applies if someone shoves a person out of the way. But a change in factual circumstances entails a change in evaluative judgments.

[6] See Searle 1964, 43-58. Searle argued that evaluative judgments can be derived from descriptions of acts that consist of institutionalized rules, e.g. that Smith ought to pay Jones five dollars because Smith promised Jones he would. This is because it is inherent to the institution of promising that the promisor places himself under an obligation.

the good of aesthetic experience, it would be false to claim that there is an obligation to direct one's actions towards it. In short, the Neothomist appeal to self-evidence fails to solve the is-ought problem as well.

IV. Moral Realism

Michael Moore's solution comes in three parts: (1) that there are objective moral facts, (2) that legal facts supervene upon these moral facts, and (3) that law is a functional kind whose goal picks out which moral facts constitute legal ones.

A. Moral Ontology

J.L. Mackie was a subjectivist who claimed that there are no objective moral values. If there were, then they would be very "queer" metaphysical entities utterly different from anything in the universe. They would not be scientifically verifiable and could only be known through some sixth sense or moral intuition. For example, in virtue of what exactly is it "objectively" wrong to douse a cat in gasoline and ignite it, and how do we know this (1977, 38-41)?

Moore responds: what are these entities queer in comparison to? If the standard of verifiability separates normalcy from queerness, then numbers, gravity, or kinetic energy are no less queer than objective moral values (1982, 1117-1124). None of these can be perceived by the senses, yet none of them are considered queer. Similarly, nothing is queer about someone who says, "Torture is wrong" when he sees someone torturing a cat. Making this inference is no different from inferring that someone is hurting when he exhibits typical pain-expressing behavior. And if 'pain' refers to something real, then 'wrong' must refer to something real as well, and that is whatever it is that causes us to believe that torture is wrong. Moore believes this is true by virtue of the explanationist conception of ontological commitment—that one commits oneself to the existence of X if it figures into the best explanation of Y (1992, 2492). The same applies to other moral terms. 'Just' and 'right' are nothing more than labels for whatever cause us to make moral judgments about justice and rightness, which are known as "moral kinds."

Do moral kinds really exist? Moore examines language involving natural kinds such as tigers and gold, as if they have an "essence" to which the meanings of terms are fixed. For example, 'tiger' refers to a catlike species that possesses a certain genome, while 'gold' denotes a metal with seventy-nine electrons. Iron pyrite, which was once thought to be gold, was discovered to possess a different atomic structure and was subsequently renamed as "fool's gold". It is not that scientists arbitrarily decided to change the

meaning of 'gold', but that scientific progress caused language to be adjusted to reflect the way the world "really" is. Moral kinds are talked about in the same way. Our linguistic habits indicate that we intend to refer to things like torture as if they are "objectively" wrong. While the conventional meaning of 'wrong' is subject to change, exemplified in how slavery was once not thought to be wrong, its "real" meaning never changes. The best explanation for the change in the meaning of 'wrong' is not that wrongness itself changed, but that new knowledge of its nature caused our language to adjust. We are thus committed to the existence of moral kinds as much as natural kinds. How, then, do moral kinds fit into the world? For Moore, moral qualities such as wrongness supervene upon natural events such as acts of torture and depend on them for their existence (1992, 2515). Consequently, such qualities change with respect to their base actions. Wrongness manifests when boys torture a cat, but not if they do not torture a cat.

B. Legal Ontology

Moore embraces the Kripke-Putnam theory of reference[7] and the realist theory of meaning: the view that a word (e.g. 'wrongness') refers to an object, event, idea, or entity that occurs in the physical world, and its meaning is determined by its referent. In his view, the advantage of this theory over conventionalism in law is its flexibility. Conventional meanings "run out" (Moore 1985, 293) and prevent judges from interpreting the law in accordance with the moral reality they discern.

To clarify further, let it be assumed that a doctor is being tried for murder after harvesting the organs of a patient who flatlined but could have been revived, even if he had consented to becoming a donor upon death. Under the conventional meaning of 'death', the judge might be forced to decide that the accused is not guilty since death was once equated with the cessation of heart and lung functions. Technological advances, however, allowed patients in this state to be revived, thereby changing our understanding of death. Under the realist theory of meaning, however, the judge can reason that the "true" nature of death is non-revivability and decide against convention. The judge who applies scientific and moral realism to legal concepts in this manner is known as a legal realist (Moore 1989, 882).

The legal realist acknowledges the existence of concepts that are neither natural nor moral kinds. Take the example of malice, the presence of which must be established to

[7] See Saul Kripke's analysis of rigid designators in 2018, 71-105 and Hilary Putnam's Twin Earth example in 2012, 96-102.

convict the doctor of murder. Moore explains that legal properties such as malice depend on non-moral and moral facts (2002, 625-626). The non-moral facts include the institutional fact that Congress enacted a statute prohibiting the extraction of organs from living persons, and the semantic fact that the patient did not fall within the extension of 'dead' at the time. The moral facts include the objective meaning of moral terms contained within the statute, and the fact that it is wrong to terminate life. Just as moral properties supervene upon natural acts, legal properties depend on disjuncts of non-moral and moral facts that are reducible to natural ones.

The problem for Moore is how to determine which combination of properties accounts for all and only the instances of malice. After all, there is an indefinitely large number of disjuncts that may be used to ascribe malice unto the accused (2002, 671-679) The solution Moore proposes lies in the nature of legal kinds (e.g. malice, rights, intentions, obligations) as functional kinds whose essences consist in the goal of the larger system to which they belong. He outlines a four-stage method for determining the function of a functional kind, which is necessary to determine its essence. (1) The first step is to identify the purported functional kind, in this case, malice. (2) The second is to identify its effects, such as (a) how it is used to distinguish between murder and manslaughter, or (b) how it factors into the computation of damages, or (c) how it can be used to upgrade the severity of punishment. (3) The third is to identify the larger system in which the functional kind belongs—e.g. the legal system—to which Moore imputes the function of upholding the common good. (4) The fourth is to determine which effects of the functional kind causally contribute to the realization of the goal of the system (1992, 213-217). Within this framework, it is clear that effects (a), (b), and (c) of malice all contribute towards the goal of the legal system, though other effects may not. Whatever natural properties that (a), (b), and (c) "supervene" upon (e.g. the gravity of damaged property) are part of the disjunct of malice.

Moore's solution to the naturalistic fallacy is thus two-pronged: legal oughts derive from (1) objective moral facts upon which they depend and (2) the nature of functional kinds. Each prong, however, is not without its defects.

First, objective morality implies that since we use moral terms such as 'wrong' as rigid designators for objects with certain natures, then we are committed to some kind of metaphysical realism. Unfortunately, as Bix points out (1992, 1321-1324), this conclusion does not follow. This is because the Kripke-Putnam Theory is compatible with views other than metaphysical realism. Putnam himself emphasized how the linguistic division of labor within society often determines the meaning of terms, (1979,

227-229) the gist being that even though competent language-users know how to correctly use natural kind terms such as 'gold', they have no way of knowing what they mean unless they defer to the final judgments of scientific experts. It is also compatible with Wittgenstein's theory that how we apply terms depends on shared judgments of common "forms of life" (Wittgenstein 2009, 35e-46e). Even though our understanding of morality changed over the centuries, it does not mean that we have moved closer to grasping the "true nature" of wrongness; 'wrong' only acquired a new sense due to other causal factors. Putnam's and Wittgenstein's theories are compatible with Moore's metaphysical realism, but they are just as compatible with anti-realist theories that posit no moral facts whatsoever.

Even if there were an objective moral reality, as Jeremy Waldron points out (1992, 174-175), it would be irrelevant to law. This is because the moral realist does not offer any epistemological apparatus to match his ontological commitments. He has no way of verifying whether his beliefs conform to moral reality, justifying whether his views are truer than those of others, and knowing whether he has arrived at the correct moral conclusions. Even judges who sincerely believe in the soundness of their moral reasoning will be deciding cases on arbitrary grounds (1992, 179-182), for what will prevail in the end will be their personal beliefs about objective morality, not objective morality itself. But morality is inherently controversial; what is objectively right for one judge may be wrong for another. Thus, deciding cases in accordance with one's perception of moral reality only makes adjudication less predictable, rational, and determinate. There is no guarantee that a judge's decision conforms to the 'ought' entailed by the 'is' of morality. This suggests that Moore's solution fails the logical criterion.

Meanwhile, the problem with Moore's method for analyzing functional kinds, as Spaak says (2018, 38-44), is that it is indeterminate. To begin with, Moore does not specify how to individuate the effects of one functional kind from those of another. Does malice have the effect of determining the psychological capacity of the accused, or is this the effect of a different functional kind altogether, such as intention? Perhaps this may be remedied by choosing an appropriate level of abstraction upon which to describe the effects, but unfortunately, Moore does not clarify how to do this either. If the logic of functional kinds is that "If natural facts A, B, and C obtain, then X", it is important to specify the level of generality with which A, B, and C are to be formulated. Otherwise it becomes unclear what the precise effects of a functional kind are. If these are unclear, however, then the questions of what function it fulfills, what type of functional kind it is, or whether it is a functional kind at all become vague as well.

Furthermore, the goal of the larger system to which the functional kind belongs is indeterminate in the context of law. Moore obviously borrows Finnis' claim that the function of law is to promote the common good (Finnis 1980, 134-160). This is certainly a goal of the legal system, but there are others. It has been said that law provides publicly ascertainable standards of behavior (Raz 1979, 52), achieves social cooperation (Waluchow 1994, 117-123), brings about structure and regularity (Kramer 1999, 204), creates plans (Shapiro 2011, 119), establishes conventions (Marmor 2005, 122), and imposes authoritative requirements (Green 1988, 77). Moore does not explain why promoting the common good is the function of the larger system. This is a crucial oversight that damages his solution to the naturalistic fallacy, for if he cannot justify why the promotion of the common good constitutes the 'is' against which functional kinds in law are to be studied, then the 'oughts' to be derived from them become just as dubious. In other words, Moore falls short of the conceptual criterion on two levels: first, he does not sufficiently clarify the nature of law as a functional kind, and even if he did, the second problem is that he does not adequately defend his conception of the function of law he proposes, i.e. his theory does elucidate what law intends to achieve.

V. Constructive Natural Law

Ronald Dworkin was the greatest natural lawyer of the twentieth century, even if he expressed discomfort with the label (1982, 165). His solution to the naturalistic fallacy was to construct law into a coherent web of legal facts and moral values.

A. Legal Rules and Moral Principles

Ronald Dworkin rose to prominence in 1977 when he published a methodical refutation of H.L.A. Hart's highly influential theory known as Law as the Union of Primary and Secondary Rules (Hart 1961, 77-94). Hart argued that the key to understanding the nature of law is to study the relationship between primary rules directed towards its citizens (e.g. the law against murder) and secondary rules that guide officials in the administration of the primary rules themselves (e.g. rules of adjudication). The most important rule in a legal system, however, is the rule of recognition—a master test of pedigree that lays out social fact criteria for determining whether something is legally valid, such as its enactment as a constitutional provision, promulgation as a legislative statute, or enshrinement as a judicial precedent.

Dworkin criticized Hart for reducing law to a model of black-letter rules, as if the only norms that judges hold to be binding are those explicitly written in authoritative sources. In his view, there are other standards not formulated as legal rules but nevertheless form

part of the law's content. These standards are known as principles, and they are legally valid not by virtue of their pedigree, but by their moral rightness. For example, unwritten principles such as 'No man should profit from his own wrongdoing', 'Manufacturers have special duties unto their customers', or 'Courts cannot be used to enforce contracts in which one party has unjustly taken advantage of another' are often invoked by judges to decide cases as if they were law (1977, 18-45). The question, however, is that since principles form an amorphous bundle of standards, how can judges know which ones are part of the law? The answer for Dworkin is that they must construct the morally soundest interpretation of the legal rules that cover a case and the moral principles that figure into their soundest justification.

B. Constructive Interpretation

For Dworkin [8], law is an interpretive concept; judges must apply it in a manner that best serves its point, purpose, and justification. Contrary to the democratic expectation that courts should insulate law from political morality, judges should make substantive decisions because citizens have moral and political rights that cannot be found in the legal rule books (1985, 11). To this end, they must proceed with the method of constructive interpretation which comes in three stages. The first is the pre-interpretive stage where the judge gathers legal materials related to a case and treats them as the raw data of the concept, e.g. equality. The second is the interpretive stage where he begins constructing his interpretation of the concept. This is where principles come in—the principles which place the legal rules in the morally soundest light possible are part of the law. This is because, for Dworkin, the law is whatever its best interpretation is, and the best interpretation in turn is whatever the morally soundest interpretation is. The third is the post-interpretive stage where the judge adjusts his interpretation back and forth until reflective equilibrium is attained and he discovers which principles truly form part of the law. Then he will know what the law "really" says and therein lies the decision to the case (1986, 65-66).

There are thus no independent factual criteria of truth. There is only a coherent, seamless web of moral truth that must be interpreted holistically. Within this web, legal propositions are true if the moral propositions that they depend on are true:

> *Because value judgments can only be true, they can only be true in virtue of a case. Given*

[8] Dworkin borrows John Rawls' concept-conception distinction from A Theory of Justice 1971, 5.

> *Hume's principle, that case must contain further value judgments—about the right understanding of the doctrine of precedent or about the responsibilities of political officials. None of those further judgments can be barely true either. They can be true only if a further case can be made supporting each of them. The truth of any true moral judgment consists in the truth of an indefinite number of other moral judgments, and its truth provides part of what constitutes the truth of any of those others (Dworkin 2011, 116-117).*

This means that a legal proposition is true not by virtue of any fact, but by its conformity to a value judgment about equality, which in turn depends on another value judgment about justice, and so on. Thus, Dworkin's solution to the is-ought problem is to eliminate the 'is' altogether and replace it with a seamless, coherent web of value. The web is infinite and has no boundaries, for the entire domain of value can bear upon law no matter how remote or far-removed, provided it figures into a legal rule's constitutive case.

My main objection against Dworkin is that his theory rests on a highly implausible representation of legal systems. As Joseph Raz points out (2016, 10), Dworkin gives no reason as to why the constitutive case for a legal proposition must include the entire domain of value. If law were essentially limitless and contained any conceivable value, then it would be conceptually indistinguishable from morality. It would mean that constitutions, statutes, and decisions would cease to be authoritative because they would need to be validated against moral criteria. This undermines the very concept of law, for the very reason it exists in the first place is to make authoritative determinations that can be identified without recourse to moral argument. That is to say, it preempts the first-order (moral) reasons for its creation. This entails determining in advance which values are part of the law and which are to be excluded. There is thus an element of contingency in legal values. They can only be explained historically by reference to events in which they were recognized (Raz 2001, 76). Judges thus cannot make purely evaluative judgments without consulting statutes and judicial customs as to how to interpret the values underlying a case. This would mean that the values forming the constitutive case of law—if there is one—depends on facts to have relevance within a legal system. Dworkin thus faces a double bind: either his conception of law as an infinite web of value circumvents the logical criterion but fails the conceptual criterion due to its implausibility, or he assents to a more modest conception of law that satisfies the conceptual criterion but fails the logical criterion because it fails to eliminate the 'is' altogether.

Moreover, values are socially dependent, though this is not meant to be understood in a culturally relativistic sense. Rather, it simply means that values cannot be interpreted so

abstractly that they are detached from the practices sustaining them Raz 2008, 39). For example, from the point-of-view of law, what makes something good, just, or equitable depends on judicial conventions, communal standards, past decisions, policies of the state, and so on. This is made apparent by how there are no universal concepts of, but only various conceptions of good, justice, and equality across different legal systems. Thus, legal values do not arise in vacuums, unrelated to the society to which they owe their existence. Their sense and normative force derive from historical factors as well. Therefore, Dworkin cannot sustain his solution of making law a purely evaluative enterprise without stripping it of its distinctive social character. This oversight of law's social character provides yet another reason why Dworkin likely fails the conceptual criterion.

Conclusion

It has been argued that the solutions of four contemporary natural lawyers fail to overcome the naturalistic fallacy because each of their theories fail both the logical and conceptual criteria. Fuller's solution of deriving obligations from procedural facts of law confuses substantive moral principles with principles of efficacy. Finnis' solution of introducing self-evident goods and principles of practical reasonableness is merely asserted and made redundant by appeals to empirical data. Moore's solution of invoking moral and functional kinds is compatible with anti-realist theories of morality and meaning. Finally, Dworkin's solution of constructing a coherent, seamless web of value to replace facts altogether strips law of its distinctive social character. The Natural Law tradition has undoubtedly made tremendous advances in its jurisprudence, but more must be done to withstand Hume's powerful assault.

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