alike, though it can be and is violated by state law. (5) State law may excuse immoral acts, but those who commit them pay a heavy moral price in the form of the debasement of their own human nature.

The Stoics did not end slavery. (Even Cicero owned a slave – his secretary.) However, Stoic natural law ideas had a civilising influence on Roman law. Early Roman law treated women, children and slaves as the disposable property of the *paterfamilias*, the male patriarch of the family. The condition of slaves, freemen (*libertini* – emancipated slaves) and women improved gradually as Stoic thought filtered into Roman jurisprudence through the *ius gentium* (law of nations) and *ius naturale* (natural law). Roman law was both written and unwritten. The written law (*ius scripta*) comprised mainly the statutes of various *comitia* (representative assemblies) and the Senate, the magisterial and imperial edicts and the written opinions of select jurists (*responsa prudentium*). Edicts were statements clarifying the law. *Responsa prudentium* were answers to specific legal questions given by learned jurists who were legally authorised to give opinions, which were binding as law. The unwritten law (*ius non scripta*) was made up initially of the customary private law that was the heritage of Roman citizens – the *ius civile*. The *ius civile* literally meant the law of the citizens. It had no application to foreigners (*peregrini*) and freemen. This created a serious problem as Rome expanded from a village to a city, and then to an extended republic, and finally to an immense empire that embraced most of what is now Europe, England, Asia Minor and North Africa. The empire, at its zenith, had about 4 million citizens and 50 million non-citizens, including slaves, freemen and people of the diverse Roman colonies. As the peoples of the empire began to interact, Roman magistrates (*praetors*) faced the bewildering challenge of administering justice between citizens and foreigners and among foreigners from different nations. They noticed that all nations shared a common stock of fundamental laws, such as those concerning person and property and the honouring of contracts. This body of laws became known as the *ius gentium* (law common to all nations), and this law was applied to civil disputes involving non-citizens.

The apparent universality of these laws led some jurists, including Rome's two greatest law codifiers, Gaius and Justinian, to equate the *ius gentium* with the *ius naturale*, the natural law of reason that the Stoics spoke about (Buckland 1963, 53). This position was unsustainable because there were many laws of the *ius gentium* – such as those legitimising slavery – that the *ius naturale* of the Stoics condemned. However, it is likely that, at least until the end of Emperor Hadrian's rule (117–138), the two were regarded as the same (Buckland 1963, 53). Principles of the *ius gentium* and the *ius naturale* initially applied only to non-citizens, but were received eventually into the *ius civile* through law reform. There were two ways in which this occurred. First, the jurists providing *responsa* were influenced by Stoic natural law ideals. The *responsa* were a primary source of law. Second, the *praetors*, in formulating their own edicts, were guided by the opinions of jurists. The introduction of the concept of equity (*aequitas*), which

allowed judges to ameliorate the harsher consequences of the law, was a notable case of Stoic law reform (Buckland 1963, 55; Rommen 1955, 28).

Christian natural law

It is not in the least surprising that natural law of the teleological kind became the bedrock of Christian jurisprudence. Belief in an omnipotent, omniscient and rational Creator leads naturally to the idea of a higher law to which all creatures are subject. Moreover, if God is responsible for all things and God is rational, the universe must be ordered according to a divine plan in which all things have a divinely determined purpose. Christian natural law theory was developed first by Saint Augustine of Hippo, and later by generations of Christian philosophers known as the Scholastics or schoolmen, of whom the greatest was Saint Thomas Aquinas. The Scholastics were so named because most of them studied in cathedral schools. They were scholar monks who sought to rationally justify their faith, and in that quest were greatly influenced by the classical masters, particularly Aristotle and the Stoics.

Saint Augustine of Hippo

Christian natural law is present in the New Testament. Saint Paul wrote that even Gentiles by nature followed God's law, which showed that the law was 'written in their hearts, their conscience also bearing witness' (Romans 2:14–15). However, the first systematic exposition of a Christian theory of natural law had to await the arrival of the Christian philosophers, of whom the first major figure was Saint Augustine (354–430). Augustine was an African, born in Tagaste (in present day Algeria), who rose to become the Bishop of Hippo and Christianity's first great scholar. As a student of rhetoric, he became familiar with Stoic philosophy, mainly through the writings of Cicero. The Stoics considered the natural law as part of the authorless eternal order of the universe. The universe for them was not random, but functioned according to a kind of cosmic reason. Stoics, like most Greeks and Romans of the classical age, had no concept of a single responsible creator God. Cicero's god was not the personal god of monotheistic faith but the impersonal god that represents the laws of the cosmic order. The classical world had many gods, who were themselves subject to universal law. Cosmic reason governed gods, humans, animals, plants and all objects.

In the Christian cosmology there is no law above God. God is the creator of the universe and all its laws. God is not like a computer programmer who writes the laws of a universal program and allows it to run its course. The Christian God keeps watch over his creation and intervenes at will. Augustine supplanted the impersonal cosmic reason with the reason of the purposeful personal God. The eternal cosmic law (*lex aeterna*) is God's law. Augustine wrote: 'eternal law is the divine reason and the will of God which commands the maintenance of the

natural order of things and which forbids the disturbance of it' (*Contra Faustum*, XXII.27; Chroust 1944, 196). God created human beings and endowed them with reason. Human reason, though, is seriously limited and is only capable of an imperfect understanding of the eternal law. However, a part of the eternal law is imprinted on the human soul. We can discover it within us by searching our souls with the torch of reason. The law so discovered is the natural law (*lex naturalis*). Natural justice is that which is in accordance with the natural order. Injustice is the lack of concord with this order. Augustine stated two cardinal principles of natural law: (1) give unto each person their proper due; (2) do nothing unto another he would not have done unto himself (*Epistola*, 157, 3, 15; Chroust 1944, 199).

Augustine thought that at the beginning there was no human law, as the natural law was sufficiently recognised and observed by people. Inevitably, the natural law became obscured as reason was corrupted by vice. Human law became necessary to restore the natural law with the force of political authority. It is also the case that the natural law is general and abstract. The state, by its enactments, works out the application of the general natural law to the variable conditions of social life. Augustine, unlike some of the early Church Fathers, did not regard the secular state as a consequence of original sin. Instead he viewed the state as the product of man's social instinct, which is a natural and divinely ordained aspect of the created universe (*De Civitas Dei*, XV, 16; Chroust 1944, 201). The state thus is a natural part of the divine eternal order.

Human law's role is to serve the natural law and, through natural law, to serve the eternal law. Wise and virtuous people do not need human law, as they live by the natural law without any compulsion. Hence, human law is not made for the righteous but for the wicked (*Epistola* 153, 6, 26; Chroust 1944, 202). The role of human law is not to make people good but to prevent people being bad. Human law cannot eliminate all evil, only the worst excesses.

The problem is that not only citizens but also the state can be, and often is, wicked. A wicked state in fact can cause more harm to the natural order, whatever that may be, than a wicked individual. The state from time to time makes diabolical laws. Augustine was very clear about unjust laws. A law is unjust when it is at odds with the natural law, and such laws should be ignored by everyone (*Epistola*, 105, II, 27; Chroust 1944, 200). In other words, unjust laws create no legal or moral obligation.

Saint Thomas Aquinas

In the Middle Ages, natural law theory was maintained by the Canonists, the ecclesiastical lawyers concerned with the governance of the Church. Around 1140, Gratian, a scholar monk at Bologna, the great centre of legal learning, produced the *Decretum Gratiani*, the first of a series of six collections of canon law that became the *Corpus Juris Canonici*. (The *Corpus* remained as the law of the Roman Church until 1917, when it was replaced by the *Codex Juris Canonici*,

promulgated by Pope Benedict XV.) The opening words of this first collection state: 'Mankind is ruled by two laws: Natural law and Custom. Natural Law is that which is contained in the Scriptures and the Gospel'. Elsewhere it is asserted that natural law 'came into existence with the very creation of man as a rational being, nor does it vary in time but remains unchangeable'. As to its force, the *Decretum Gratiani* states:

> Natural law absolutely prevails in dignity over customs and constitutions. Whatever has been recognised by usage, or laid down in writing, if it contradicts natural law, must be considered null and void. (I, viii, 2; D'Entrèves 1951, 34)

The Canonists were mainly concerned with the positive law of the Church, and not with philosophy. The best exposition of Christian natural law theory is that of the Dominican philosopher Saint Thomas Aquinas (1225–74). His work was profoundly influenced by Augustine and Aristotle, whom he refers to as 'The Philosopher'. Yet Aquinas was a great thinker in his own right, whose views about law are found in his monumental work *Summa Theologica*. Aquinas came to prominence as Europe emerged from the Dark Ages. The Church was under challenge by the secular state. Aquinas sought to maintain the spiritual and political supremacy of the Church through rational argument. Augustine had laid the foundation for this task, but Aquinas turned to Aristotle for the framework of his philosophy. The early patristic doctrine of the Church held that the coercive authority of the state was the consequence of original sin. There was no need for authority in the age of innocence. The state was installed after the fall as a penalty and remedy for sin. Hence, obedience to human law is a part of Christian duty. However, Aquinas argued, following Aristotle and Augustine, that the political state is not a punishment but is natural even in the state of innocence. The natural needs of man are the rational basis of the state. The state is part of a divine order, as God is responsible for both needs and their satisfaction. Aquinas painted an essentially teleological picture of the universe, but as a Christian he maintained that the world was ordained and controlled by God. The controlling principles of the universe supplied the ultimate criteria by which human laws must be judged. Aquinas identified four types of laws: eternal, natural, divine and human.

Eternal law

The universe is the creation of God. God is rational by nature, so the universe cannot be random. The laws that govern the universe are known as the eternal law, which controls both animate and inanimate things. All things that are subject to this law derive from it certain inclinations towards those actions and aims that are proper to them (I-II, Q 93, art 6; Aquinas 1947, vol. 1, 1008). The eternal law has two branches. One branch comprises the laws of nature that in the modern era are the subjects of the physical, biological and social sciences. These are the laws according to which the universe functions. The other branch comprises laws of behaviour, the moral law that distinguishes right and wrong conduct.

Aquinas maintained that the eternal law is not knowable as it truly is, and most scientists today would agree. Scientists generally concede that we may never discover all the laws of the physical world or develop a so-called theory of everything. Science has the modest aim of progressively extending human knowledge of the universe by observation, theorising and testing. From the Christian standpoint, to know the eternal law is to know God, and no one can read God's mind. The human mind can only comprehend the likeness of eternal law by the effects that it produces. Observations of the motion of celestial bodies, the behaviour of animals and plants, and the instincts, feelings and desires of human beings provide insights about the eternal law. Aquinas uses the Sun to explain the impossibility of knowing the eternal law. We do not know what the Sun is really like. We only have an imperfect idea of its nature gained by observing its effects on Earth (I-II, Q 93, art 2; Aquinas 1947, 1004).

If every person is subject to the eternal law, how can there be wrongdoers? Aquinas' answer has two aspects. First, human beings have imperfect knowledge of the eternal law and therefore are prone to error. Moreover, 'prudence of the flesh' (passion) corrupts reason and leads to wickedness. Second, the eternal law rewards good people with happiness and punishes the bad ones. 'Accordingly, both the blessed and the damned are under the eternal law' (I-II, Q 93, art 6; Aquinas 1947, 1008). The question of why God did not program all human beings to have perfect knowledge of the eternal law is left unanswered in the *Summa Theologica*.

Natural law

Inanimate things and irrational animals are governed by the first branch of the eternal law – the laws of nature. They obey these laws without knowing them. Thus, a rock thrown in the air falls to the ground, and a lion in the wild hunts by instinct. There is no great difference in the Thomist system between the behaviour of a rock and of a lion. Non-human animals have a limited capacity to calculate, as in survival techniques, but not to reason. (Findings in ethology, behavioural ecology and evolutionary psychology dispute this view of animal cognition, but that debate is best left to the discussion of evolutionary jurisprudence in Chapter 10.) The second branch of the eternal law, concerned with right conduct, has relevance only to entities that have the capacity for reason and moral judgment. These are human beings. One of the great paradoxes of creation is that only human beings endowed with the rational faculty are capable of disobeying the eternal law.

Human beings, like all things, obey the first branch of the laws of nature even if they have no knowledge of them. (Most people have at best a dim understanding of biology but they survive by obeying its laws as when they breathe, eat, drink, sleep, engage in humour and have sex.) However, a person cannot obey the moral commands of the eternal law without knowing what they are. If I do not know what the law commands, how can I observe it? The idea of eternal moral law makes sense only if it is knowable. Aquinas argued that human beings have

a share of the eternal reason that enables them to discern what is good and evil. Human beings, in this way, participate in the eternal law: 'this participation of the eternal law in the rational creature is called the natural law' (I-II, Q 91, art 2; Aquinas 1947, 997). Aquinas went on to clarify that irrational creatures also partake of the eternal law, but not in a rational manner, 'wherefore there is no participation of the eternal law in them, except by way of similitude' (1947, 997). We may gather from all of this that natural law is that part of the moral eternal law that rational human beings understand by their God given reason, which is denied to physical objects and other animals.

Divine law

The term 'divine law' refers to the specific moral rules set out in the Ten Commandments (the Decalogue) and other authoritative Scriptures. Aquinas addressed the question of why divine law is necessary, given that the eternal law and the natural law of reason guide human conduct. He gave four reasons.

First, natural law only helps human beings to live up to their natural human nature. A person, unlike an irrational creature, can also aspire to a higher supernatural existence by following the divine law. Aquinas wrote: 'But to his supernatural end man needs to be directed in a yet higher way; hence the additional law given by God, whereby man shares more perfectly in the eternal law' (I-II, Q 91, art 4; 1947, 998).

Second, human reason, which is the means to understanding the natural law, is prone to error. Hence the cardinal rules of the eternal moral law need to be expressly stated. Aquinas wrote:

> Secondly, because, on account of the uncertainty of human judgment, especially on contingent and particular matters, different people form different judgments on human acts; whence also different and contrary laws result. In order, therefore, that man may know without any doubt what he ought to do and what he ought to avoid, it was necessary for man to be directed in his proper acts by a law given by God, for it is certain that such a law cannot err. (1947, 998)

Third, human law makers can only legislate in relation to external effects of acts, but cannot govern what is not seen. 'Consequently human law could not sufficiently curb and direct interior acts; and it was necessary for this purpose that a Divine law should supervene' (Aquinas 1947, 998).

Fourth, human law cannot punish or forbid all evil without hurting the common good. Aquinas, following Augustine, stated that by trying to do away with all evils, we 'would do away with many good things, and would hinder the advance of the common good, which is necessary for human intercourse . . . in order, therefore, that no evil might remain unforbidden and unpunished, it was necessary for the Divine law to supervene, whereby all sins are forbidden' (1947, 998).

Morality has two dimensions. One consists of not doing wrong to others. This is what is classically known as justice. 'Thou shall not murder' and 'Thou shall not

steal' belong to this category. The other category relates to virtue. The commonly identified virtues include chastity, temperance, charity, diligence, forgiveness, humility and courage. It is not feasible for the state to promote these by banning their opposites, namely: lust, selfishness, gluttony, sloth, wrath, impatience, greed, pride and cowardice. Aquinas, like Augustine before him, was astute enough to recognise that if all persons were compelled to be saints, there might not be, for example, any commerce or industry or art. Hence it is necessary for the divine law to supervene, whereby all sins are forbidden. Of course, if all persons followed all of the divine law in letter and spirit, the consequences for society would be equally problematic. The general point, though, is well made: that the state cannot compel persons to be virtuous without causing serious social harm, and that some things are best left to the individual's good sense.

Human law

Human law is the law established by custom or by the legislative acts of the state. Aquinas considered the moral basis of legislative authority. As mentioned above, human beings have knowledge of natural law by virtue of having a share of divine reason. Aquinas held that the moral authority for human law making is found in that part of the eternal law which reason reveals to man in the form of natural law. There are two ways in which human law is derived from the natural law. First, just as a scientist proceeds from indemonstrable first principles to particular conclusions, the law maker may derive logical consequences from the self-evident premises of natural law. Thus, the rule 'Thou shall not murder' is logically derived from the natural law precept that a person must not harm another person. Here the law maker has no discretion, as logic rules the matter. The law of homicide is a direct application of the natural law (I-II: Q5, art 2; Aquinas 1947, 1014–15). Second, human law may determine the way natural law applies to particular types of cases. It is a principle of the natural law that wrongdoers ought to be punished. Human law makers in different societies and in different periods may prescribe different punishments for the same offence. Here the law is determined by human discretion (Aquinas 1947, 1014–15).

The effect of unjust human laws

The essential point that Aquinas made is that whichever way human law is derived, its moral justification is in serving the natural law and hence also the eternal law. Aquinas stipulated three pre-conditions for the recognition of an enactment as a law at all. They are that the law is: (1) made for the common good; (2) made by the whole people or by God's vice regent for the whole people, who is the monarch ruling by divine right; and (3) promulgated (I-II, Q 90, arts 2, 3, 4; 1947, 994–5). Thus, a statute that serves the ruler's private interest may not be a law. Aquinas perhaps was thinking of some form of plebiscite when he referred to a law made by the whole people. Since law is made by the whole people or the vice regent of God, the commands of a usurper will not be law. A law has to be known by those to whom it is addressed. These are only the formal

requirements of law. A law that is formally valid may yet fail the ultimate moral test.

Consider this example from recent history. An elected representative legislature enacts and promulgates a law that requires persons of a minority religious group to be exiled or executed. The majority of the people think that the law promotes the common good. Legal positivists are likely to say that the enactment is a law properly so called even though it is monstrously evil. Legal positivists may not condone the enactment but will argue that nothing is gained by denying the law's validity. (See discussion of this issue in Chapter 6.) Aquinas took the opposite view: that such a statute is not a law but a perversion of law (*non lex sed legis corruptio*).

> I answer that, as Augustine says 'that which is not just seems to be no law at all': wherefore the force of a law depends on the extent of its justice. Now in human affairs a thing is said to be just, from being right, according to the rule of reason. But the first rule of reason is the law of nature, as is clear from what has been stated above. Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law. (I-II, Q 95, art 2; Aquinas 1947, 1014)

Aquinas conceded that law makers cannot be as precise as scientists in deriving particular conclusions from indemonstrable general principles: 'Human laws cannot have that inerrancy that belongs to the demonstrated conclusions of sciences' (I-II, Q 91, art 3; 1947, 998). Nevertheless, the central message is clear. Law makers have no business other than to serve the natural law by working out the logical implications and the practical applications of its precepts.

Does a person have a duty to obey an immoral or unjust law? Aquinas adopted the general legal doctrine that a command of an authority need not be obeyed if it is against the command of a higher authority. Since the authority of God is supreme over secular authority, human law that offends the natural law (or the divine law) is not binding on persons. 'Wherefore if the prince's authority is not just but usurped, or if he commands what is unjust, his subjects are not bound to obey him, except perhaps accidentally, in order to avoid scandal or danger' (II-II, Q 104, art 6; Aquinas 1947, vol. 2, 1646). Aquinas conceded that practical reason may sometimes dictate that a person ought to obey an unjust law if disobedience would destabilise a legal system that is generally just.

In summary, the Thomist theory of law affirms that law properly so called is law that is derived directly or indirectly from the eternal law of God and that does not violate the eternal law. The individual is directly and indirectly under the command of the eternal law. Apart from the physical laws of nature that govern all things, human beings are duty bound to obey the divine law of the scriptures and the moral precepts of the natural law that are imprinted in the form of reason. Individuals also have a moral duty to obey the laws of the state that do not violate the natural law or the divine law. The universe of the law according to Aquinas may be presented as in Figure 5.2.

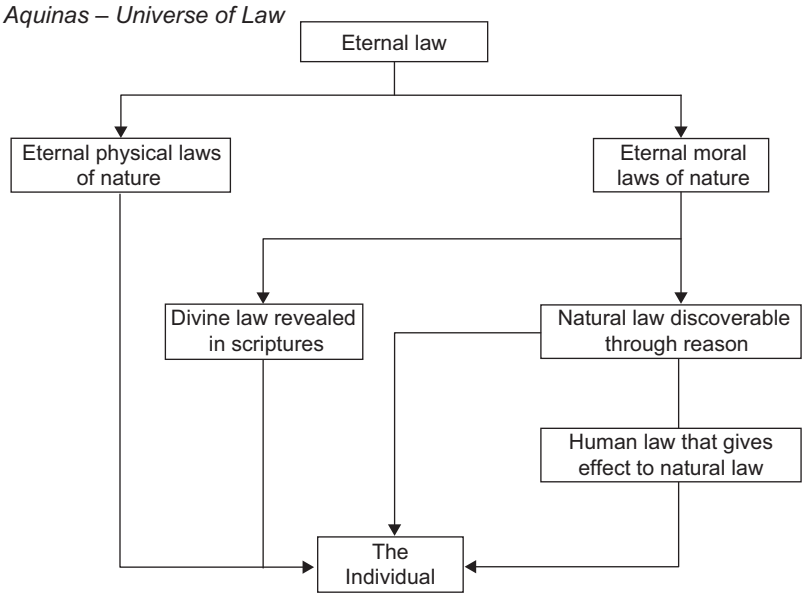

Figure 5.2 Aquinas' universe of the law

Theological beginnings of a secular natural law

A rethinking of theological natural law was bound to happen as Christians engaged with the world outside Christendom. Societies that Christian explorers discovered in the Americas and Asia had different gods, many gods or no gods at all. A natural law founded exclusively on Christian faith was not very natural to these peoples. Philosophers sought a basis of natural law theory that appealed to humankind generally. The seeds of a secular natural law tradition, though, had already been sown before the great discoveries, during the theological debates of the 13th to 17th centuries.

Greek natural law was based on cosmic reason. In Christian thought cosmic reason became divine reason. Aquinas, like Aristotle and other classical philosophers, ranked *reason* above *will*. Human law that flows from the will of rulers is subordinate to the natural law that flows from God's reason. Moreover, God does not and cannot legislate contrary to his own reason because God by definition is perfectly rational and good. Thus, God cannot will that man must hate God, commit murder, steal, tell lies or break promises. According to this train of thought, if we accept the existence of a perfect God, we must accept that divine reason rules. The later Scholastics and the Lutherans after them recognised two problems with this approach. The first was that God's rationality can be judged only with prior reason. Otherwise, God's reason must be taken on faith. The second problem was

that human reason can lead different persons to different conclusions. Is abortion wrong under any circumstance? Is lying justified to save a life? Can there be a just war? Is adultery immoral, and what of adult homosexuality? We know that there is disagreement on these questions, even among the wisest. Hence, in practice, there is a need for a human authority to rule on disputed questions. According to the Catholic Church, that authority is the pope. This is the doctrine of papal infallibility. But what happens if the Church and the papacy are corrupted and divided and they lose their moral authority? This was the situation in the 14th century that led to the Papal Schism (known also as the Western Schism), when there were two popes – Urban VI in Rome and Clement VII in Avignon – both claiming to represent God on Earth.

The Conciliar Movement was a reaction to that state of affairs. Conciliarists, inspired by the writings of William of Ockham and Marsilius of Padua, argued that the universal Church consists of the congregation, not the papacy, and matters of doctrine should be resolved by a council elected by the faithful. This would have led to a form of theological democracy where the council, like a parliament, legislated on moral questions. It was a radical attack on the orthodox doctrine and it generated a long intellectual and political struggle. The papacy prevailed in the end, and at the Council of Constance (1414–18) the infallibility of the pope on all matters was confirmed. However, the deeper intellectual message of the Conciliarists did not die. Part of this message was that certain moral principles had to be accepted out of sheer necessity.

Scottish theologian John Duns Scotus[3] (1266–1308) was a major inspiration to Conciliarism. He argued that there were two kinds of natural law. One is natural law in the strict sense, and the other is natural law broadly speaking. Natural law in the strict sense consists only of the moral propositions that are self-evident and the necessary conclusions from them: *principia per se nota ex terminis* (*Ordinatio* IV, dist 17; Frank 1997, 202). These, he thought, were contained in the first two commands of the Decalogue concerning fidelity to God. God must not be hated or disrespected, and no other god should be worshipped. There is some doubt whether the command to observe the sabbath is strict natural law, but the commands not to commit murder, adultery, theft, or perjury and not to covet others' wives or property are not self-evident but are only 'exceedingly in harmony' with what is self-evident (Frank 1997, 203). These are natural laws in the broad sense. According to Duns Scotus, private property is not absolutely necessary, and in the state of innocence when everyone was perfectly nice to each other, all things were held in common. This is not the case in a community of sinners, who are likely to take more than their fair shares of material goods. Therefore the law allocating resources to private ownership 'is exceedingly consonant with peaceful living' and hence it is a natural law in the broader sense (Frank 1997, 204, 220). Thus, Duns Scotus

3 John Duns is more commonly known as Duns Scotus, meaning Duns the Scot.

acknowledged a concept of natural law based on the realities of social life and human need.

His English contemporary, William of Ockham (1288–1347), was a Franciscan friar whose prodigious intellect earned him the epithet *Doctor Invincibilis* (Invincible Doctor), and his method the name 'Occam's Razor'. Ockham's work got him into serious trouble with the Church in Avignon and he was excommunicated in 1328. Ockham thought that there were three kinds of natural law. The first kind is the laws that are true for all time and all places. They are the laws that we can derive logically from self-evident propositions such as: 'Exercise your will according to reason' and 'Avoid all blameworthy acts'. Ockham nominated the rules 'Do not lie' and 'Do not commit adultery' as belonging to this category. The second type of natural law consists of natural equity that prevailed in the age of innocence, when everyone behaved perfectly without the need for legal compulsion. We can forget about this type, as the age of innocence ended long ago when Adam and Eve committed the 'original sin'. The third kind of natural law is the moral law of our own era. This kind of law may be deduced by evident reason, the law of nations and from human behaviour (*Dialogus de imperio ac pontificia potestate* III, tr 2, p 3, c 6; Luscombe 1982, 715). Such natural law can be overridden if there is some special reason why it cannot be observed. Thus, a person may take another's property against the eighth commandment in case of extreme necessity (*Short Discourse*, 2, 24; William of Ockham 1992 (1340), 690).

Richard Hooker (1554–1600) argued that general principles of natural law are self-evidently known or gathered from the 'universal consent of men' and the fact that 'the world hath always been acquainted with them' (Hooker 1977, I, viii, 3, I, vii, 9). Francisco Suarez (1548–1617) contended that there cannot be a law unless it is willed by a superior; hence natural law is what is willed by God. However, he conceded that certain acts are objectively good or wicked independently of divine law. Human acts may in addition 'have a special good or wicked character in relation to God, in cases which furthermore involve a divine law . . .' (*De Legibus*, II, 6, 17; Suarez 1944 (1612): 202). Suarez, like William of Ockham, believed that in times of extreme need private property reverts to common use. Like Ockham, he maintained that when rulers become tyrants they forfeit the authority conferred on them by social contract and political power returns to its original natural source, the community (Haakonssen 1996, 18). Suarez was also the first Scholastic to think systematically about international law (*ius gentium*). He recognised that the *ius gentium* is the product of custom resulting from the actions of states.

The work of these Church Fathers represented a move away from the older tradition of seeking to know the mind of God through reason. According to these thinkers, natural law principles, though set by God, are discernible by rational deduction from human experience. They foreshadowed the theories of natural rights and social contract that were to become the cornerstones of the secular natural law theories that sprouted in the 17th and 18th centuries.

Rise of secular natural law: natural rights and social contract

Five factors encouraged the emergence of secular natural law theory in the 17th and 18th centuries. The first was the need for a natural law theory that was 'natural' in all societies irrespective of faith. The second was the need to counter the growing moral scepticism within Europe itself. The third was the gathering force of the Enlightenment, which disputed the traditional authority of church and state and questioned all metaphysical or mystical teachings. The fourth was the Lutheran belief that it is not possible to know the rational mind of God. If we knew the mind of God, we would be his equal. The fifth was the need to find a moral basis for the binding force of the *ius gentium* (international law) in a Europe deeply divided by religious and colonial wars. Some of the greatest intellectuals of the 17th century – among them Hugo Grotius, Thomas Hobbes, John Locke and Samuel von Pufendorf – turned their minds to this project.

The natural law theories that flowed from their speculations had two common themes. The first was that human beings have natural needs. They need protection from physical harm, they must have material resources to live and they need freedom to pursue their chosen life ends. The second theme was that human beings are also social animals by nature. They survive and prosper in cooperative social groups. This means that individuals must respect the natural needs of other individuals. Hence there must be a set of laws that secure the basic human rights that allow persons to survive and pursue their individual life ends without harming others. The second theme is concerned with the way these rights are recognised and protected. All these scholars attributed the existence of these rights to some form of social agreement.

Hugo Grotius

Hugo Grotius (1583–1645) was a Dutch scholar widely regarded as the greatest jurist of his age, and viewed by many as the father of the discipline of international law. No previous scholar apart from Suarez had paid serious attention to international law. The Roman *ius gentium* referred to the stock of civil laws that were common in all nations. These were laws that governed the relations between individuals, such as the laws prohibiting murder, theft and breach of contract. In contrast, what Suarez and then Grotius identified by the *ius gentium* was the law that governed relations among nation-states. Grotius' treatise *De Jure Belli ac Pacis* (*The Law of War and Peace*) was the result of his inquiry about the rights and duties of states towards each other in times of war and peace. The starting point of his inquiry was the question of how rights and duties exist at all. The answer lies in the nature of humans as social animals. Human beings, like other animals, have instincts of self-preservation. Unlike other animals, they also

have an instinctive desire for social life.[4] Human beings have three additional attributes: capacity for language, a sense of what belongs to each other (what is yours and what is mine) and acting in accordance with general principles of conduct (*Prolegomena*, para 7; Grotius 1957 (1625), 11–12). The maintenance of social order in accordance with human intelligence is the source of law properly so called (para 8; Grotius 1957, 12). Grotius declared that these propositions 'would have a degree of validity even if we should concede that which cannot be conceded without utmost wickedness, that there is no God, or that the affairs of men are of no concern to him' (para 11; 1957, 13). Grotius believed that the free will of God is another source of law, but his key point in the *Prolegomena* was that there is a law that is natural to humankind irrespective of faith. This natural law confers upon the individual rights to self-preservation compatible with similar rights of others.

Thomas Hobbes

In *Leviathan*, Thomas Hobbes (1588–1679) famously described life in the state of nature as 'solitary, poor, nasty, brutish and short' (Hobbes 1946 (1651), 82). Hobbes believed (wrongly) that before the establishment of law and government people lived in a state of nature where every person was at war with every other person. This was because without the restraint of law every person had total freedom and a right to everything, including the bodies of each other. Hobbes wrote:

> The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law; where no law, no injustice. Force and fraud are in war the two cardinal virtues. (1946, 83)

However, all is not lost. People by nature do not like conflict, and seek peace. They seek peace out of passion and reason. 'The passions that incline men to peace are: fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them' (1946, 84). Reason allows men to identify convenient articles of peace – terms of a social contract that allows individuals to live in safety and harmony. These articles are otherwise called the laws of nature (1946, 84). Hobbes' 'laws of nature' were expressed normatively (as 'ought' propositions), but he presented them as scientific laws because without them human life is invariably at peril. Hobbes identified the following laws of nature in Chapters XIV and XV of *Leviathan* (1946, 84–105):

1. Persons have a duty to strive for peace to the extent that it is possible. However, every person retains the right to defend themselves against aggression.
2. Persons have a duty to give up their claims to total liberty and rights to everything that they held in the state of nature, provided that others too

4 This is not strictly true, as there are many other social species in the animal world. Animal societies, though, are less complex than human societies.

are willing to do the same. However, the liberty to defend oneself remains with the individual. This is the social contract.

3. Persons should abide by the terms of the social contract, or else people will return to the state of nature. The very notion of justice arises from this obligation to observe the terms of the social contract. Hobbes wrote: 'The definition of injustice is no other than the non performance of covenant. And whatsoever is not unjust is just.'
4. Persons owe gratitude to those who benefit them. Hobbes struck upon an important insight about human society. The observance of the negative rules of justice is a necessary condition of social life, but it may not be sufficient. Social cooperation declines if there is no reciprocity of goodwill among individuals. We should also remember that Hobbes was writing at a time when there was no state-provided social security and private charity was the sole means of dealing with personal misfortune.
5. Every person should try to accommodate themselves to the rest. This is about 'give and take', about making reasonable adjustments for the sake of good relations.
6. A person should forgive a wrongdoer who repents because forgiveness promotes peace.
7. Revenge should never be to even the score but to deter future wrongs.
8. Persons should not 'by deed, word, countenance, or gesture, declare hatred or contempt of another'.
9. Every person must be acknowledged for the purpose of the covenant to be the equal of every other person by nature.
10. As a consequence of the previous law, no person at the time of entering into the covenant should reserve for themselves any right that they will not grant to others. Hobbes was clear that persons may retain certain rights and liberties, such as the right to govern their own bodies, air and water and the freedom of movement without which a person cannot live.
11. The things that cannot be divided, such as the resources of rivers and seas, are to be held in common. Interestingly, Hobbes accepted the law of primogeniture, which allows estates to be inherited by the firstborn to the exclusion of other children.
12. It is a law of nature that any dispute concerning rights must be determined by an impartial judge whose independence must be respected by all parties.

The rest of the rules are concerned with the independence and fairness of adjudication. Hobbes' laws of nature are logical deductions from two premises: (1) human beings have the natural right to live and to strive for their own betterment; and (2) human survival and flourishing depends on cooperation within society. Hobbes believed that these laws of nature can be maintained only by a sovereign body such as England's Crown in Parliament. He theorised that people enter into a covenant whereby they give up their autonomy to a sovereign power that is capable of protecting their rights and administering justice. Individual autonomy is surrendered to the sovereign in exchange for the sovereign's

protection. Sovereign power is terminated when the sovereign is unable to provide this protection because of weakness or corruption. (See discussion in Chapter 2.)

Samuel von Pufendorf

Samuel Pufendorf (1632–94), born into a Lutheran family in Saxony, seemed destined to the clergy like his father until drawn to law and academic study. Pufendorf sought to reconcile the natural law founded on the survival needs of man with divine providence. The result of this effort is found in his major work, *On the Duty of Man and Citizen According to the Natural Law*. Pufendorf, like Grotius, commenced with the special nature of man. A paradox of human existence is this. On the one hand, the human individual is helpless without fellow humans. It takes a family to raise a child and a community to make civilised living possible. On the other hand, human beings, owing to their intelligence and manual dexterity (we can fashion weapons), have more capacity for evil than the brutes. A lion will kill only for food or in defence. As we all know, humans engage in deceit and wanton crimes against each other.

The only solution to this problem is sociability. Grotius thought that sociability is part of human nature. Hobbes thought that the human desire for survival compels people who are unsociable in nature to become sociable under the covenant establishing law and government. Pufendorf argued that apart from instinct and convenience, human beings have a moral duty to be sociable. Hence the fundamental natural law is that every person must cherish and maintain sociability, as far as possible. From this it follows that all things necessary for sociability are ordained by natural law, and all things destructive of it are prohibited (I, 3, 9; Pufendorf 1991 (1673), 35–6). All other rules are derived from this fundamental law.

Pufendorf held the view that the imperatives of social living give content to the natural law, but their binding force is owing to God's command. This is because, like the positivists, he thought that a law must flow from some competent authority. No legislator, no law. Sociability is enjoined on man by God. 'This is the origin of that quite delicate sense in men who are not totally corrupted, which convinces them that when they sin against the natural law, they offend Him who has authority over men's minds, and who is to be feared even when there is nothing to be feared from men' (I, 3, 11; Pufendorf 1991, 36–7).

John Locke

John Locke (1632–1704), the British philosopher, medical practitioner and political theorist, is considered the first great British empiricist by virtue of his ground breaking treatise, *Essay Concerning Human Understanding*. His political thesis concerning the limitation of sovereign power, set out in the *Two Treatises of Government*, became the authoritative statement of Whig political theory, which

inspired the English constitutional settlement following the Glorious Revolution of 1688. Locke's important contribution to natural law theory is intimately connected with his political theory, and is found in the *Second Treatise*.

Locke's theory also begins with humans in the state of nature. However, unlike in the Hobbesian version, Locke's state of nature is not a state of war. The state of nature is ruled by the law of nature. Human beings are God's creatures and hence are his property. No person may therefore harm themselves or any other person (Locke 1960 (1690), 289). Every person has the right to life, liberty and property. A person owns their own body and mind and any property converted to use through their labour. This is the fundamental natural law. There is one serious problem with the state of nature. There is no civil government, hence every person is their own law interpreter, judge and enforcer. In the state of nature I determine what my right is, pronounce judgment in case of a dispute and enforce it to the best of my ability. So long as resources are plentiful in the state of nature conflicts are few and manageable. However, as life becomes more complex and commerce develops, the need for civil government arises.

Hobbes, in *Leviathan*, argued that only a sovereign authority with unlimited power is capable of establishing order and protecting the people. He saw no need for any precautionary limits on power. Locke, on the contrary, believed that it was the absence of limits on power, particularly those set by the separation of powers, that causes the inconvenience in the state of nature. Locke's people, like those of Hobbes, enter a covenant by which they concede to a supreme authority the power to protect life, liberty and estate. However, unlike Hobbes' covenant, which is a contract among individuals themselves, Locke's contract is between the individuals and the sovereign. Also unlike the Hobbesian folk, the Lockean people give the sovereign only a limited mandate. Power is conceded to the sovereign on trust in return for the specific undertaking that the sovereign will govern in a manner that avoids the principal causes of misery in the state of nature. Locke wrote:

> . . . the power of the Society or Legislative [the supreme authority] constituted by them [the people], can never be suppos'd to extend further than the common good; but is obliged to secure every ones Property by providing against those three defects above-mentioned that made the State of nature so unsafe and uneasie. And so whoever has the Legislative or Supreme Power of any Common-wealth is bound to govern by establish'd standing Laws, promulgated and known to the People, and not by Extemporary Decrees; by indifferent and upright Judges, who are to decide Controversies by these Laws; And to employ the force of the Community at home only in the execution of such Laws, or abroad to prevent or redress Foreign Injuries, and secure the Community from Inroads and Invasion, And all this to be directed to no other end, but the Peace, Safety, and publick good of the People. (1960, 371)

Locke was more explicit than Hobbes about what will happen if the sovereign violates the natural rights of the people. The people retain the right of resistance to the sovereign: 'The Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a supream Power to remove or alter

the Legislative, when they find the Legislative act contrary to the trust reposed in them' (Locke 1960, 385). When the legislature violates the trust, 'the trust must necessarily be forfeited, and the Power devolves into the hands of those that gave it, who may place it anew where they shall think best for their safety and security' (Locke 1960, 385).

Legacy of the natural rights theorists

Only four of the major natural rights theorists were discussed here, for reasons of economy. These theorists were followed by others, such as Jean-Jacques Rousseau, Richard Cumberland, James Harrington, Frances Hutcheson, Algernon Sydney and John Trenchard, to name only a few. The idea of inviolable natural rights became the central plank of the constitutional movements of the 18th and 19th centuries. It inspired the *Declaration of American Independence*, the US *Bill of Rights* and the French *Declaration of the Rights of Man and of the Citizen*. The rules derived from natural rights theory supply the most important provisions of the *Universal Declaration of Human Rights* and the international treaty law on human rights. Although debate continues about the ways and means of promoting these rights domestically and internationally, there is little disagreement about the moral case for their protection.

Natural rights theory marked a break with the theological tradition and created a foundation for a cross-culturally accepted set of ideas about fundamental rights of all human beings. The older Aristotelian–Thomist tradition of natural law, however, did not die. Its modern face is presented by John Finnis' masterful restatement.

John Finnis' restatement of classical natural law

In his book *Natural Law and Natural Rights*, John Finnis undertook a major restatement of the classical natural law theory, with the intention of clarifying its central ideas and defending the tradition against its critics. His restatement represents further development of the thought of Aristotle and Aquinas.

The central task that Finnis set himself was to persuade readers that there are universal basic values or goods that may be discerned through practical reason and from which we may derive our moral rules. Finnis agreed with Hume that it is not possible logically to infer the 'ought' from the 'is', meaning that we cannot derive a principle of how we ought to behave from observed facts of how things are. Finnis argued, however, that not every natural law theorist, and certainly not Aquinas, is guilty of that error (1980, 33). He pointed out that according to Aquinas the first principles of natural law that specify basic forms of good and evil are self-evident and indemonstrable. Finnis asserted, following Aquinas, that the basic goods may be non-inferentially grasped by persons who are old enough to reason. He pointed out that human intelligence operates in different ways

when determining: (a) what is the case; and (b) what is the good to be pursued. In determining what the case is, we use inferential logic to derive conclusions from observed facts. In deciding what ought to be done, we engage in practical reasoning. Practical reasoning enables us to understand the basic self-evident principles (*prima principia per se nota*) from which we may infer what is right and wrong (Finnis 1980, 33–6).

Basic values

The starting point of Finnis' theory is the assertion that there are seven basic values or goods that are self-evident and that cannot be reasonably denied. They are also irreducible in the sense that they cannot be broken down to more basic goods. Basic values are not the same as basic human urges. Individuals have urges or inclinations, but a value is something that a person thinks is worthwhile to pursue independent of any urge. I have an urge to gain knowledge, but I also think that the pursuit of knowledge is worthwhile. Basic values must also be distinguished from the conditions that make them possible. Intelligence is helpful to gain knowledge but is not a basic value. Basic values must be distinguished also from intermediate (or instrumental) ends that make the basic values achievable. Thus John Rawls' primary goods (liberty, opportunity, wealth and self-respect) are not basic values but intermediate ends that make the pursuit of the basic values possible. Liberty, one would think, is a primary good because without it we cannot pursue knowledge or the preservation of life, or for that matter any of the other basic values. Yet Finnis argued that liberty in itself is not a basic value in the sense of being an irreducible good, because liberty is a means to ends.

Finnis asserted that there are seven basic values that can be objectively established. They represent forms of 'human flourishing'. They are: (1) life, (2) knowledge, (3) play, (4) aesthetic experience, (5) sociability (friendship), (6) religion (in a broad sense), and (7) practical reasonableness. Why are these values basic? According to Finnis, they are basic and universal because: (a) they are self-evidently good; (b) they cannot analytically be reduced to being a part of some other value or to being instrumental to the pursuit of any other; and (c) each one, when we focus on it, may seem the most important (Finnis 1980, 92).

Self-evidence

The idea of self-evidence is central to Finnis' thesis, but is not easy to describe. What is self-evident must be evident to all reasonable people without the help of anything outside of itself. Hence, it is the intuitive grasp of the truth. We can say that we know something to be true although we cannot demonstrate that truth with independent evidence. However, Finnis made a strong effort to describe why certain values are self-evidently good. He began by stating that a value is not self-evident simply because: (a) one has a feeling of certitude about

it; (b) great and intelligent persons think so; or (c) most people are inclined to participate in or desire that value (1980, 66–70).

What, then, is self-evidence? Finnis' explanation was heavily dependent on analogies drawn with the methodology of empirical science. Finnis pointed out that self-evidence is known to empirical science. In every empirical discipline there are principles or norms of sound judgment that are self-evident. Thus, we use deductive logic although its validity cannot be independently proved. Scientists trust the evidence of their senses. A proposition that is self-evident is indemonstrable. Any attempt to demonstrate it involves using the proposition. If I say knowledge is bad, I am professing some knowledge. What is self-evident is obvious to anyone who has experience of inquiry into matters of fact or of theoretical judgment, and to deny them is straightforwardly unreasonable.

Finnis asserted that there are self-evident notions in moral science. He focused most of his efforts on arguing that knowledge is self-evidently good. As mentioned before, knowledge cannot be denied without engaging in knowledge. Consider another example from Finnis' list of basic values – religion. Finnis used religion in the broadest possible sense to mean one's view of the cosmos and one's own place in the universal scheme of things. He was not suggesting by religion a theistic or creationist view of the universe. Even a scientist who denies God, has no belief in an after-life and understands the universe as a process governed by the laws of physics is engaging in religion in Finnis' sense. So is a person who believes that the universe is essentially chaotic. Consider the basic value 'play'. It is hard to imagine that this would be a self-evident value to an ascetic monk. Finnis' argument concerning the retorsive effect of any denial of a basic value is not altogether convincing. Equally, this is not the critical point about self-evidence. His most important argument is that when we seriously contemplate each basic value, we realise that it cannot be denied without being straightforwardly unreasonable.

Finnis pointed to anthropological evidence showing that all human societies value these basic goods (1980, 83). Empirical observations provide us with knowledge of the practical choices we have in determining what is good. The ultimate decision, though, rests with the individual's own intuitive grasp of the indemonstrable (Finnis 1980, 85).

Finnis maintained that the basic values cannot be reduced to a more fundamental value such as pleasure. He dismissed the utilitarian argument that pleasure is the ultimate criterion of good and bad, alleging that it makes nonsense of human history and anthropology and that it mislocates what is really worthwhile. Finnis made the Aristotelian argument that virtuous persons pursue the basic values not because they lead to pleasures, but because engaging in them is the highest form of pleasure (1980, 95–7). Utilitarians will say that we pursue friendship for the pleasure we get from it. Finnis' point was that although many people do seek friendship for pleasure, what makes friendship good is not the pleasure but its self-evident rightness. He distinguished the reasons why people happen to be good from the reason why something is good. Note, however, that

there are other theories about how we gain our sense of good and bad, and the prevalence in all cultures of certain basic values and rules. Among them are evolutionary explanations (considered in Chapter 10).

Deriving moral rules from basic values: the requirement of common good

Finnis' basic values are not rules of behaviour. They are the values from which moral rules can be drawn. How do we proceed from basic values to moral rules? The first question is: why must we extend the benefit of the basic values to others? It is obvious that if values are not shared there can be no social rules. Social rules cannot arise without some notion of common good. If each person seeks to pursue the basic values in disregard of others, there will be no harmony, no cohabitation and no social rules. Finnis was not content to rest his theory of rules on pragmatism. He distinguished morality from mere prudence by the fact that it is based on generalised concern for others.

Finnis pointed out that friendship (sociability) is itself an objective good that leads to concern for others. It is good to have friends and one's life is impoverished without friendship. Having a friend is not simply a matter of enjoying someone's company or finding someone amusing. Friendship involves caring about the welfare of the other person for their own sake. Thus, friendship is an objective good that leads us beyond an exclusive concern with ourselves. The complete egoist who treats all other persons as resources or means to their own satisfaction will lead an impoverished life, as they are incapable of friendship. Friendship is therefore an essential part of the good life that can be attained only by our concern for the common good.

Finnis also said that practical reasonableness, which is a basic value, requires a person to have regard to the common good when determining their commitments, projects and actions. How did Finnis show that this is a self-evident requirement? To the utilitarian, the answer is simple. The common good is another name for the ultimate moral test, the greatest good of the greatest number when everything is considered. Finnis, predictably, rejected this notion of the common good. One of the charges levelled at consequentialist theory is that the individual is not intrinsically important in the *calculi* that determine the moral worth of an act or a rule.

Finnis' idea of the common good is defined by the principle of subsidiarity. This principle means that the group (whether it be the family, an association or a political community) exists to serve the needs of the individuals who comprise it, not that individuals exist to serve the group. As Finnis put it, 'the proper function of an association is to help the participants in the association to help themselves' (1980, 146). The inference from this principle is that the common good must be determined having regard to the purposes for which the group exists. A political community, according to Finnis, exists to facilitate the realisation by each

individual in the community of their personal development. The common good of the political community is the securing of the ensemble of material and other conditions which tend to favour that object (Finnis 1980, 154). The principle of subsidiarity recognises the intrinsic worth of the individual. Finnis explained:

> Human good requires not only that one *receive* and *experience* benefits or desirable states; it requires that one *do* certain things; if one can obtain the desirable objects and experiences through one's own action, so much the better. Only in action (in the broad sense that includes the investigation and contemplation of truth) does one fully participate in human goods . . . one who is never more than a cog in big wheels turned by others is denied participation in one important aspect of human well-being. (1980, 147)

Deriving moral rules from basic values: practical reasonableness

The essential problem for Finnis remained: objective goods are abstract values, not moral rules. Even if objective goods (basic values) are everywhere and always the same, the moral rules differ from place to place and from time to time. According to Finnis, the basic values form the 'evaluative substratum of moral judgment' or the 'pre-moral principles of natural law'. The (moral) natural law is derived from these values by the observance of practical reasonableness, which, of itself, is a basic good (Finnis 1980, 103).

The importance of practical reasonableness lies in the facts that: (a) all basic values are worth pursuing; and (b) life is too short to enable us to pursue each and every value to the maximum extent. Hence we need to make choices concerning *commitments*, *projects* and *actions*. The requirements of practical reasonableness are: (1) a coherent plan of life; (2) absence of arbitrary preferences among values; (3) absence of arbitrary preferences among persons; (4) detachment; (5) commitment; (6) efficiency within reason; (7) respect for every basic value in every act; (8) requirements of the common good; and (9) following one's conscience. Few would quarrel with Finnis about the requirements themselves, but Finnis needs to meet the consequentialist alternative.

Practical reasonableness and consequentialism

Consequentialism (utilitarianism) offers a serious challenge to Finnis' statement of practical reasonableness. Consequentialists make utility the ultimate criterion of moral judgment, in direct contrast to the natural law criteria of immutable values. Finnis rejected the consequentialist philosophy and argued that one should have regard to efficiency only within reason. Consequentialists affirm, alternatively, that one should always choose:

(a) the act that, so far as one can see, will yield the greatest net good for the whole (act utilitarianism), or
(b) according to a principle or rule which will yield the greatest net good for the whole (rule utilitarianism).

Finnis made some of the well-known objections to consequentialist theory, based on its practical unworkability and theoretical unsoundness. Among his objections are the following. The methodological injunction to maximise good, he said, is senseless because human beings do not have a single, well-defined goal or function. What is good for one may be bad for another. There is also no common factor in all human goals, such as the 'satisfaction of desire'. The absence of common goals or a common factor in different goals makes it impossible to measure the greatest good of the greatest number. Finnis also argued that consequentialism leads to arbitrary preferences, as the satisfaction of desire is the sole criterion. He claimed that consequentialism does not enable us to criticise a person who maximises pleasure regardless of the welfare of others. Consequentialism, according to Finnis, does not yield a principle of distribution. There is no consequentialist reason why we should not, for example, promote the maximisation of goods regardless of equitable distribution. Thus, enslaving part of the population may be justified if it leads to an increase on overall net satisfaction (Finnis 1980, 111–18).

Finnis' seventh requirement – namely, having respect for every basic value in every act – raises certain moral dilemmas, such as those concerning abortion and euthanasia, both of which he vigorously opposed. According to Finnis, this requirement means that one should not choose to do any act which *of itself* does nothing but damage any one or more of the basic forms of good (1980, 118). It means that one should not damage a basic good even if the good consequences outweigh the damage. Finnis considered the example where a hostage taker demands that a named individual be killed in exchange for the release of the hostages, who otherwise would themselves be killed. He seemed to assume that in this situation, the consequentialist would say that killing the individual is justified as it saves many lives. Finnis called this a senseless argument, and surely it is. He contended that the release of the hostages is one consequence among a multitude of incommensurable consequences of the act of killing. Finnis said that the calculus 'one life versus many' is naively arbitrary (1980, 119). Finnis was caricaturing consequentialism here. No serious consequentialist would judge the issue according to that simple calculus. Rather, they would agree that the calculus should take account of a wide range of consequences. They would say that the consequentialist method may lead to Finnis' own conclusion: that the individual should not be killed. But their reasons would be based on utility as opposed to self-evidence.

What is law?

Finnis rightly pointed out that people use the term 'law' to mean different things in different contexts. The 'ordinary concept of law' is quite unfocused, hence very versatile. It enables us to understand lawyers when they talk about sophisticated legal systems, anthropologists when they talk about elementary legal systems, bandits when they talk about the customs of their syndicate and theologians and

moralists when they talk about moral rules (Finnis 1980, 278). He said that each of these meanings is justified in its context. But in a much laboured definition, too long to repeat here, Finnis attempted to capture the 'focal meaning' of the term' law'. 'Focal meaning' refers to the central case of the law or the typical form the law takes in a complete (developed) community. In giving only the focal meaning he avoided excluding from the term 'law' things that fail to have all the characteristics of the central case.

Finnis' focal meaning definition traverses many aspects of the law and the legal system highlighted in definitions provided by other thinkers. It refers to rules made according to regulative legal rules (Kelsen, Hart) by a determinate and effective authority for a complete community (Austin). It refers to the fact that law is backed by sanctions (Austin, Kelsen, Hart). It emphasises that law typically exists where the conditions for the rule of law exist (Fuller). It identifies the law's central purpose as the resolution of the community's co-ordination problems, and points to the need for reciprocity between ruler and subject (Fuller) (Finnis 1980, 276–7).

Finnis admitted that his focal meaning definition allowed for the possibility of laws of an objectionable kind. So what sort of natural law theorist is he? He stated that the tradition of natural law theory is not concerned with the denial of the 'general sufficiency of positive sources as solvents of legal problems'. Rather, he said, the concern of the tradition has been to show that the act of 'positing the law . . . is an act which can and should be guided by "moral" principles and rules' (1980, 290).

Duty to obey the law

Even so, Finnis addressed the question that the theologians raised: is there an obligation to obey an unjust law? Finnis said that a person asking this question may conceivably be using the words 'obligation to obey the law' in any one of four different senses:

1. Empirical liability to sanction in the event of disobedience

In this case, the questioner is asking something like: 'Will I be jailed if I disobey this law?' This question is practically very important but, according to Finnis, theoretically banal. Finnis said that this is the least likely sense in which the question might be asked. Yet Austin understood the concept of law only in this sense (Finnis 1980, 355).

2. Legal obligation in the intra-systemic sense

Put simply, the question posed is: 'Is there a legal obligation in the legal sense?' But what does the question mean by 'legal sense'? It means the obligatoriness of the law derived from the fact that the law satisfies the formal criteria established in the legal system for recognising obligatory rules. This is the sense in which the lawyer poses this question in the ordinary course of practice. Lawyers tend to

regard the legal system as internally complete, coherent and thus sealed off from the debate about what is just or unjust. The lawyer working within the system would regard the morality of the law as ordinarily irrelevant to its validity. Finnis did not dismiss the importance of the question when posed in this sense. He considered that the intra-systemic approach to the question reflects 'practically reasonable responses to the need for security and predictability, a need which is indeed a matter of justice and human right' (1980, 355–6). The separation of the issue of justice from the issue of validity promotes the certainty of the law, which is a necessary condition of the rule of law.

However, Finnis did not think that a total separation of law and morality was possible. He pointed out that even within a so-called sealed off legal system, there is room to make moral arguments. There are many open-ended principles of justice that admit moral reasoning. The golden rule in statutory interpretation permits a court to give an ambiguous statute a meaning that avoids absurdity or manifest injustice. The test of reasonableness is often a moral test. There are endless opportunities for moral reasoning in legal argument. Finnis conceded that if the highest court has rejected the moral argument and upheld the law, it is idle to deny the obligatoriness of that law in the intra-systemic sense, and agreed with Hart that such denial would not be conducive to clear thought.

3. Legal obligation in the moral sense

According to some positivists, once a law is obligatory in the intra-systemic sense, insofar as jurisprudence is concerned the argument is over. Any further inquiry must be conducted within some other discipline. Finnis disagreed. He argued that we may rightly inquire of a valid unjust law whether it is also obligatory in a further sense. We may ask the question: 'Given that legal obligation presumptively entails a moral obligation, and that the legal system is by and large just, does a particular unjust law impose upon me any moral obligation to conform to it?' (Finnis 1980, 357). Positivists would not have this question discussed within jurisprudence. Finnis said that they are wrong, for three reasons.

First, the proposed separation is artificial. The types of moral arguments that positivists expel from jurisprudence are in fact used in legal practice and often find favour with judges. Second, a jurisprudence that banishes such questions to another discipline will amount to no more than lexicography of a particular culture. At the most basic level of jurisprudential inquiry, one has to ask the question: what is to count as a law in a given society? The basic positivist answer will be true of some legal systems but not of others. An intra-systemic description of the law is valid only for the particular culture. Finnis says that jurisprudence is a social science which seeks to describe, analyse and explain the object that is called 'law'. The conceptions of law that different communities entertain and that they use to shape their conduct are quite varied. The subject matter of the jurisprudential theorist's description does not come neatly demarcated from other features of social life and practice of the relevant community (Finnis 1980,

3–4, 358). Third, Finnis accused those who propose to separate moral questions from their descriptions of law of failing to consistently observe what they propose. He said that the works of these theorists are replete with undiscussed moral assumptions. Following are examples:

(a) The formal features of the legal order contribute to the practical reasonableness of the laws that are made and the practical reasonableness of obeying them.
(b) The formal features have some connection with justice, such that lawyers are justified in regarding some principles of justice as principles of legality.
(c) The fact that a rule is legally valid gives reason for treating it as morally obligatory.

Finnis said that none of these assumptions can be shown to be valid or even discussed without transgressing the proposed boundary between jurisprudence and moral or political philosophy (1980, 358–9).

Returning to the third meaning of the question, Finnis said that, for the purpose of assessing one's legal obligation in the moral sense, one is entitled to discount laws that are unjust. Thus, in the context of the third meaning, one may say *lex injusta non est lex*. In other words, for some purposes, an unjust enactment may be considered invalid although it may be 'obligatory' in the formal legal sense (Finnis 1980, 360–1).

4. Moral obligation deriving not from legality but from a collateral source

Even if the moralist finds that a law is not obligatory in the moral sense, there may still be a moral reason for obeying it. Where the constitution and the legal system are considered generally good or desirable, the disobedience of particular unjust laws may undermine public respect for the system, with probable harm to the common good. Hence a moral obligation may arise from this collateral source to obey a law that is not obligatory in the third sense.

The obligation in the fourth sense arises from the desirability of not rendering ineffective the just parts of the legal order. Following Aquinas, Finnis observed that in such a case there is no moral requirement to obey the law fully, but only to the degree that will avoid bringing the law as a whole into contempt (1980, 361).

The enduring legacy of natural law theory

Natural law theory, in its various forms, represents the moral dimension of the law. The natural law tradition draws its power from three sources. One is the need to constrain the abuse of the legislative powers by rulers. Unrestrained power leads inevitably to corruption and abuse. The notion of higher norms that rulers must not transgress has appeal in every age. A second source of strength is the universal human instinct for self-preservation. No rational person wishes to be deprived of their life, liberty and possessions. Hence, the idea of natural

rights makes a compelling case for limiting the powers of rules. A third force is the universal aspiration to align the law with a community's moral notions, whether they are religious, utilitarian or rationalistic.

As we observed, the law of ancient communities was quite simply their moral law. The distinction between law and morality arises when rulers acquire political power to make law according to their will. The Greek philosophers looked to the cosmic laws that, in their teleological view, governed everything and directed each person and object to its proper end. The teleological view became the theological jurisprudence of St Augustine of Hippo and St Thomas Aquinas. The later Scholastic debates, the great discoveries and the Enlightenment ideas shaped a new secular natural law tradition based on the natural needs of the individual in society, which has grown in influence with the rise of constitutionalism and liberal democracy.

The idea of natural law is not without its dangers. As the utilitarian positivists demonstrated, the failure to separate the positive law from moral law can defeat the values of clarity, predictability and certainty of rules that are themselves morally worthy attributes of law. The fact that its central concerns have gained recognition in so many national constitutions and in international law is the highest testament to the power of the natural law idea. That these principles have become part of the positive law of countries and of the community of nations is a tribute to the force of the legal positivist argument.

6

Separation of Law and Morality

Jurisprudence was enlivened in the second half of the 20th century by new debates about law and morality. Two of these involved Herbert Hart, the major figure in British legal positivism. Hart argued that the connection between law and morality was not necessary but contingent. He acknowledged that law often gives effect to morality, as when it prohibits crimes and torts and demands the performance of contracts. However, he maintained that a law, however immoral, will be law if it is recognised as law according to the established rules of recognition. The sensible response to such acts, Hart argued, is not to deny that they are law but to correct their effects by other laws passed where necessary with retrospective effect. (See discussion of Hart's views in Chapter 2.)

Two American professors of law questioned this general theory, and argued that law cannot be separated from morality in the sense proposed by Hart and his positivist predecessors. The first was Lon Fuller, whose theory was inspired by the German legal philosopher Gustav Radbruch. The second was Ronald Dworkin, who was a student of Fuller at the Harvard Law School. Their arguments are related in some ways to the classical ideas of natural law discussed in the previous chapter, but they also introduced new dimensions to the debate about the relation of law and morality. Fuller and Dworkin approached the question from different directions, but I conclude that their theories are fundamentally similar. We cannot leave the subject of law and morality without discussing their philosophies.

Lon Fuller on the morality of law

Lon Louvois Fuller (1902–78) was Carter Professor of General Jurisprudence at the Harvard Law School. The significance of his work in legal philosophy is

insufficiently recognised outside the United States. He is best known for the debate with Hart on the connection between law and morality. Fuller was not a natural law theorist in the traditional sense, but in some respects his theory is more far reaching. Fuller's theory of the morality of law is best understood against the background of the post-war debate about the legality of crimes against humanity committed under positive law.

Historical roots of Fuller's theory: the closing period of the Nazi regime in Germany

The first of the great 20th century debates on law and morality arose in the aftermath of the Second World War, which witnessed human atrocities on an unimaginable scale in Europe and Asia. The victorious Allied powers (the United States, the United Kingdom, France and the Soviet Union) established international military tribunals in Nuremberg, Germany and in Tokyo, Japan to bring to justice officials of Nazi Germany and Imperial Japan accused of war crimes and crimes against humanity. The common defence of the accused persons was that they were acting under lawful orders and hence their actions were lawful. Any retrospective punishment of these acts, they argued, would contravene the basic rule of justice that a person should only be punished for crimes against the law (*nullum crimen, nulla poena sine lege*). The debate was precipitated by the conviction of Nazi officials by the Nuremberg Tribunal.

The National Socialist (Nazi) Party came to power through democratic elections under Germany's Weimar Constitution. The Constitution, though democratic in character, had certain fatal defects, including the president's power to suspend civil liberties in case of emergencies and the legislature's power to amend the constitution by two thirds majority. These defects allowed the Nazi Party to transform the Constitution from within. In the short period that it held power, the Nazi Party under Hitler converted the liberal-democratic German state into an unrecognisable abomination of tyranny. At the height of Hitler's powers, the German political system displayed the following features:[1]

- frequent retroactive laws punishing the guiltless or excusing atrocities
- enforcement of secret (unpublished) laws that denied citizens the guidance of the law
- uncontrolled discretions that identified the law with the momentary wishes of officials
- the fact that a verbal order by Hitler was regarded as sufficient authority to exterminate thousands of people

1 These facts are taken from the judgments in the Nuremberg trials, particularly from the judgment in *USA v Alstötter* (*The Justices Case*) 3 TWC 1 (1948); 6 LRTWC 1 (1948); 14 Ann Dig 278 (1948). They are also set out in detail in Lon Fuller's essay 'Positivism and fidelity to law: A reply to Professor Hart' (1958) 71(4) *Harvard Law Review*, 648–57.

- frequent lawlessness, seen in the practice of extra-judicial punishment by the state acting through 'the Party in the streets' – a euphemism for party thuggery
- unification of legislative, executive and judicial power in the person of Adolph Hitler (the Fuehrer principle)
- total intimidation of courts, which did the bidding of party officials. Judges were required to decide cases as the Fuehrer would.

The question that Fuller raised was whether in such conditions there can be a legal system capable of producing laws in a meaningful sense.

The Radbruch doctrine

Gustav Radbruch (1878–1949) was a professor of law at the University of Heidelberg and one of the leading German philosophers before the Second World War. A member of the Social Democratic Party, he was elected to the Reichstag (the lower house of parliament) and served as Germany's Minister of Justice from 1921 to 1924. He returned to Heidelberg in 1926 and taught until his removal by the Nazi government in 1933. After the war he resumed his academic life at Heidelberg, where he proposed the so-called 'Radbruch doctrine', which became influential in the post-war jurisprudence concerning crimes against humanity.

Radbruch's early views on the concept of law are found in *Legal Philosophy* (*Rechtsphilosophie* 1932). He sought to combine elements of German legal positivism with natural law thinking, but the finished theory placed him closer to the positivists than to the natural lawyers. The idea of law, according to Radbruch, has three aspects: (1) Law serves expediency – the various purposes of human co-existence. (2) It serves justice. (3) It promotes legal certainty. (Radbruch 1950 (1932), 118) These three aspects are of equal value. He wrote that 'the legal certainty that positive law affords may justify even the validity of unjust or inexpedient law', but argued that the demand of legal certainty has no absolute precedence over the demands of justice and expedience (1950, 118). Conflicts between these qualities are left to the resolution of individual conscience. Conscience will usually choose legal certainty over personal conviction 'but there may be "shameful laws" which conscience refuses to obey' (Radbruch 1950, 118). A judge's conscience may direct them to enforce an unjust law against a person who disobeys it because of their own conscience. Radbruch stated that in relation to such a person, 'the law may prove its power but can never demonstrate its validity' (1950, 119). What does this mean? The power of the law is different from the validity of the law. Validity in the case of an unjust law is a matter of subjective judgment according to one's conscience. An unjust law may be valid from a judge's point of view, but from the viewpoint of the person who violates it the law may be effective but invalid. This suggests that officials may in good conscience enforce even the most unjust laws.

The horror of the Nazi reign of terror led to much soul searching by German legal positivists. In 1946 Radbruch published the essay 'Statutory lawlessness

and supra-statutory law', in which he revised his pre-war theory of law. Radbruch used as his context one of the so-called 'grudge informer' cases. Grudge informers were persons who betrayed critics of the Nazi regime to the authorities, with knowledge that the betrayed persons faced certain execution. The common defence of grudge informers was that they did not violate any law by informing on critics. The defence of the officials who ordered the executions was that they were simply obeying the law in putting to death the betrayed critics. Radbruch argued that post-war German courts were right to convict the informers in disregard of the Nazi law. He could not do this without revising his pre-war theory that left the resolution of conflicts between statutes and justice to the conscience of judges. Radbruch reformulated his theory in the following terms:

> The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, 'as flawed law' must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law. (2006 (1946), 7)

Radbruch thus proposed a moral test that applies to all positive laws. His test is not a high hurdle to clear. It does not invalidate every unjust law, for what is unjust is a matter of legitimate debate. It nullifies only laws whose injustice is beyond rational doubt. The Radbruch doctrine proved influential in many post-war trials in German courts and in the Nuremberg trials.

Hart's criticism

In 1958, the *Harvard Law Review* carried articles by Professors Hart and Fuller presenting opposing views on the Radbruch doctrine and post-war trials of war criminals. In 'Positivism and the separation of law and morality' Hart defended his version of positivism and levelled two criticisms at the Radbruch doctrine. The first was that Radbruch had confused the distinction between legal duty and moral duty. According to Hart, one may be under a *legal* duty to obey an inhumane law but have an overriding *moral* duty to disobey it. (This was, in substance, Radbruch's pre-war position.) The grudge informers and Nazi officials should not have been punished, because they acted in breach of morality and not law. Hart's second criticism was that the Radbruch doctrine, by denying legal status to inhumane law, does more harm than good. He accused Radbruch of 'extraordinary naiveté' and of having 'only half-digested the spiritual message of

liberalism' (Hart 1958, 617–18). Hart considered the case of a woman convicted by the post-war West German court of appeal of the offence of illegally depriving her husband of his freedom. The woman wanted to be rid of her husband and to this end reported him for criticising the Reich, knowing that he would be sentenced to death. He was sentenced but sent to the battlefront, where he survived against great odds. The woman argued that she did no wrong under the law. Hart's point was that in convicting her, the post-war German court violated a different cherished value – the fidelity to law. The case raised a moral dilemma. The woman had committed an outrageously immoral act. Hart argued that from the positivist standpoint there were two choices before the German state: to let her go free, or punish her under a new retrospective statute. The latter course 'would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems' (Hart 1958, 619).

This raises another question. What difference does it make if the woman is punished by the court under the Radbruch doctrine or by the legislature under retrospective law? In either case the result is the same. Hart argued that the latter course has the value of clarity. Everyone can understand the idea that 'laws may be law but too immoral to obey', whereas the contrary opinion that an immoral law is not law is not widely held and 'raises a whole host of philosophical issues before it can be accepted' (1958, 620). This is a utilitarian argument. Why engage in difficult debates when a simple solution is at hand? Hart's argument, though, is not without its own problems.

First, Radbruch was not saying that all immoral laws are invalid, but only those of the most inhumane kind. Hart's confidence that the general public will regard as law even the most heinous statutes may be misplaced. Lawyers are familiar with the disbelief of clients when they are informed that some statute or precedent bars their claim. 'How can this be law?' they ask, and they are not referring to genocidal laws but to laws such as those taking property without compensation. Hart's claim that the public would have difficulty accepting the Radbruch formula is untested. In any event, the Radbruch doctrine is now implemented in substance by the *Rome Statute of the International Criminal Court*.

Second, the option of punishment by retrospective legislation is available only if the evil regime is ousted. The Allied powers and the West German state had this choice because the Nazi regime was defeated and replaced by an authority that could enact retrospective laws. If the odious regime continues in power, its inhumane laws will remain in force nationally. What happens when a foreign court is asked to apply these laws? In *Oppenheimer v Cattermole*, the House of Lords considered the effect of the 1941 Nazi decree that took away the German citizenship of Jews who left the country, and confiscated their property without compensation. Most Jews fled out of fear for their lives. Lord Cross of Chelsea declared: 'To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all' ([1976] AC 249, 278). Lord Salmon agreed:

> The Crown did not question the shocking nature of the 1941 decree, but argued quite rightly that there was no direct authority compelling our courts to refuse to recognise it. It was further argued that the authorities relating to penal or confiscatory legislation, although not directly in point, supported the view that our courts are bound by established legal principles to recognise the 1941 decree in spite of its nature. The lack of direct authority is hardly surprising. Whilst there are many examples in the books of penal or confiscatory legislation which according to our views is unjust, the barbarity of much of the Nazi legislation, of which this decree is but an example, is happily unique. I do not consider that any of the principles laid down in any of the existing authorities require our courts to recognise such a decree and I have no doubt that on the grounds of public policy they should refuse to do so. ([1976] AC 249, 281–2)

The point I make is that from time to time a court is confronted with a statute whose injustice cannot, in a practical sense, be rectified by retrospective statute. Lords Cross and Salmon held, as a matter of English law, that an English court will not recognise the heinous laws of a foreign country.

Third, the utilitarian reasoning that Hart adopted is no more conclusive than the natural law reasoning he rejected. There is reason to think that officials may be less willing to enforce evil law if they know that in the event of a regime change a court will not entertain the defence of lawful orders. The Radbruch doctrine, by utilitarian calculation, may do more good than harm, though we will never know for certain.

Fourth, Hart's argument conflicts with his own concept of law. In his book *The Concept of Law*, Hart criticised the command theory of law on the ground, among others, that it misunderstands the idea of a rule. A rule of law has an external and an internal aspect. The external aspect is objective and factual. (Parliament has enacted the law.) The internal aspect is mental and subjective. (I ought to obey the Act of Parliament for reasons A, B and C.) It is the internal aspect that distinguishes a law from the demand of a gunman. An armed robber forces the victim to hand over their wallet. In contrast, a citizen regards the law as obligatory, even without the threat of force. In Hart's own words, 'Law surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion' (1958, 603). This was precisely Radbruch's argument.

Fuller's response: the morality that makes law possible

Radbruch, having died in 1949, was not around to answer Hart's criticism. Harvard professor Lon Fuller, however, developed Radbruch's central ideas into a theory of the morality of law. The editors of the *Harvard Law Review* published Fuller's response right next to Hart's essay. Fuller argued that Hart's proposal to invalidate the inhumane Nazi laws by retrospective statutes (as against judicial annulment) does not advance the value of fidelity to the law. Whether the laws are set aside by court or legislature, the effect is the same – what was once law is declared not to have been law. The only question then is 'who should do the

dirty work, the courts or the legislature' (Fuller 1958, 649). Fuller defended the post-war decisions, arguing that the German legal system under Nazi rule had degenerated to the point that it ceased to make law 'except in the Pickwickian sense in which a void contract can said to be one kind of contract' (Fuller 1969, 39). 'To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system' (Fuller 1958, 660).

Fuller's own substantive theory of law maintains that law and morals cannot be separated because the very concept of law carries within it certain moral qualities. Fuller's thesis may be summarised as follows:

- Law's authority cannot be based on law, but on the moral attitudes of the community.
- Law is an ongoing purposive enterprise. We cannot fully understand the nature of law without considering its purpose.
- The purpose of law is to allow individuals to communicate and coordinate with each other.
- The purpose of the law requires reciprocity between the ruler and the citizens. Law is not a one-way projection of authority but a system of cooperation.
- Law's purpose cannot be achieved unless it displays certain qualities. These qualities represent the internal morality of the law.
- A legal system that wholly lacks one or more of these qualities fails to make law, except in the Pickwickian sense that a void contract is a type of contract.
- The internal morality of law involves both morality of duty and morality of aspiration. Morality of duty demands that law provides the basic rules that make social life possible. A community may aspire beyond this point to achieve the best possible laws. This is the morality of aspiration.
- The external and internal moralities of law have reciprocal influence. The decline of one leads inevitably to the decline of the other.

Moral basis of law: external and internal moralities of law

It is a ridiculous tautology to say: 'The law is valid because the law says it is'. Law's authority must ultimately rest on the moral attitudes of the people. The law earns fidelity by the general moral quality of its rules. Fuller called this the external morality of the law. The external morality of the law refers to the substantive content of legal rules. If this content is pervasively unjust the legal system will fail to command the respect of the community and must maintain itself by force. This is common sense. Hart agreed when he argued, in *The Concept of Law*, that a legal system must have a minimum content of natural law to be effective (1997, 193–200). Fuller argued that law also has an internal morality that arises from its very nature as a purposive human activity. The internal morality is not principally about the content of the law, but concerns the qualities that

enactments must possess to become law at all. Fuller's project of demonstrating the morality of law started in his *Harvard Law Review* reply to Hart, continued in his Storrs Lectures at the Yale Law School and was completed in the two editions of his book *The Morality of Law*.

Law is a purposive, reciprocal and ongoing enterprise

Fuller regarded law as: (a) purposive, (b) reciprocal, and (c) an ongoing enterprise. This proposition goes to the heart of Fuller's theory and marks a point of sharp difference from legal positivism. He began with the insight that law cannot be understood without considering its purpose. If we describe to a child the various parts of a computer without explaining what it does or what purposes it serves, we give them a very limited idea of what a computer is. Similarly, if we describe the law, say to a Martian, only by its formal features (that it is made by parliament, is applied by courts, etc) without saying what purpose the law serves, we give an incomplete account of it. Fuller here is not talking about the specific purposes of particular laws (to raise revenue, to provide social security, to ban narcotics, etc) but the purpose of having law at all. The abstract purpose of law is to make it possible for individuals to communicate, to coordinate and to reach understanding with each other (Fuller 1969, 185–6). Law does this by subjecting human beings to the governance of rules (1969, 106).

Law's purpose reveals the second aspect of the enterprise – its reciprocal nature. The law cannot be conceived as whatever the ruler wills if its purpose is to facilitate human coordination. Fuller claimed that legal positivists wrongly conceive the law 'not as the product of an interplay of purposive orientations between the citizen and the government but as a one-way projection of authority, originating with government and imposing itself upon the citizen' (1969, 204). It is common knowledge that laws made by democratic legislatures do not always advance human coordination, and often impede it. Yet history shows that legal systems that consistently fail to serve law's human purpose degenerate into dictatorial command systems.

The third aspect is that law by nature is an ongoing enterprise. It is also an aspirational activity, in the sense that it aspires to an ideal of the law that can never be fully achieved. An analogy is helpful here. A motor car may be described by its structure, capacity, mechanical devices and its purpose, which is to carry passengers from one location to another. A brand new Rolls Royce may come close to a person's ideal motor car. At the other end we see a shell of what was once a car, with no wheels, seats or engine. It would be silly to call this a car. In between the Rolls Royce and the wreck, there are cars in various conditions of excellence and dilapidation. At some lower point on this spectrum it is no longer sensible to call the object a motor car. Different persons may draw the line at different points. Yet if the motor car is beyond repair and ceases to serve its purpose, most rational persons will agree that it is no longer a motor car, except in the special sense that a wrecked car is a kind of car. According to Fuller, it is the same story with legal systems: they achieve law to varying degrees, from

excellence to abomination. At some point it is no longer sensible to call a law a law, for it fails law's purpose, which is facilitating social life. The question at this point is not whether the law is good or bad but whether there is a law at all. If the law, for example, is not publicised or requires the impossible, it cannot do its job – that of guiding people's conduct. Even a well-meant law can fail for these reasons. Just as a motor car needs continual maintenance, the legal system needs constant attention to what makes law possible.

Internal morality of law

Fuller explained the inner morality of law with the help of an allegory. Assume that a country is ruled by King Rex, who has unlimited law making power. He is utterly selfish, uncaring and incompetent. He does not lay down any rules but from time to time issues commands intended to punish those who disobey him and to reward those who obey him. However, because of his incompetence he makes no attempt to find out who has been obedient and who has been disobedient. Consequently, he frequently punishes obedience and rewards disobedience. Rex will not achieve his aim, as there is no meaningful connection between his commands and his actions. He fails to produce law. At other times, Rex's commands are so confused, ambiguous and inaudible that his subjects do not know what Rex wants them to do or not do. Sometimes he commands today that something must have been done yesterday. Again, he fails to make law capable of guiding conduct. Fuller used this analogy to demonstrate how the Nazi regime debased and destroyed the legal system through *ad hoc* commands, retroactive laws, *ad hominem* laws, secret enactments, punishment without trial, indemnities for state condoned crimes, official disregard for the law and the practice of thuggery.

Fuller proceeded to identify what he termed 'eight ways to fail to make law':

1. failure to achieve rules at all, in the sense that every command of the ruler is *ad hoc* and lacks any degree of generality – if this is the case, the subjects have no guidance as to how they should behave
2. failure to publicise the rules that people are expected to observe
3. abuse of the practice of enacting retroactive laws – such laws not only fail to guide conduct but also undercut the integrity of prospective rules by placing them under constant threat of retrospective change
4. failure to make rules comprehensible
5. enactment of contradictory rules
6. enactment of rules that require conduct beyond the powers of the affected persons
7. frequently changing the rules such that the subjects cannot orient their actions by them
8. lack of congruence between the rules as announced and their actual administration.

Fuller contended that the total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly

called a legal system at all except in the Pickwickian sense described above. Fuller wrote:

> Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he has acted, or was unintelligible, or was contradicted by another rule of the same system, commanded the impossible, or changed every minute. It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point, obedience becomes futile – as futile, in fact, as casting a vote that will never be counted. (1969, 39)

The eight failings are mitigated by the eight virtues of the internal morality of law. They are: (1) generality, (2) publicity, (3) prospectivity, (4) clarity, (5) consistency, (6) possibility of compliance, (7) constancy, and (8) faithful administration of law.

The internal morality of law is morality of duty and of aspiration

Fuller, following Kant, Adam Smith and other moral philosophers, distinguished morality of aspiration from morality of duty. If we imagine a vertical moral scale, the lower half will occupy the morality of duty and the upper half the morality of aspiration. Morality of duty relates to the fundamental and essential moral duties. These consist mainly of forbearances or negative injunctions such as 'Do not murder', 'Do not steal' and 'Do not break your contracts'. Morality of aspiration occupies the upper part of the scale. This is the morality of striving towards the highest achievements open to human beings. At some point on the scale what is a duty becomes an aspiration. 'Somewhere along this scale there is an invisible pointer where the pressure of duty leaves off and the challenge of excellence begins' (Fuller 1969, 10). This is a fluctuating pointer, hard to locate but vitally important. Social attitudes about rewards and punishments are important indicators of where the pointer rests. A person is usually condemned for violating morality of duty but not praised for observing it (Fuller 1969, 30). I will be condemned if I commit theft but will not be praised because I did not steal. In contrast, a person is usually praised for displaying morality of aspiration but not condemned for the lack of it. I will be praised for plunging into the raging torrents to save my neighbour's cat, but will not be condemned if I thought better of it.

A legal system is also measurable on the moral scale. A system that fails to provide a basic framework of rules that enable peaceful social life fails the morality of duty. This is Fuller's basic argument. We must note, though, that no legal system in history has fully met the requirements of the external and internal morality of law. No legal system ever will. Let me focus on the legal system that I know best – that of Australia. The Australian legal system is nowhere near perfect by Fuller's yardsticks. There are arbitrary discretions that allow officials to determine the law for the particular case. Some laws have retrospective effect, such as those that impose taxes or take property without compensation.

Some laws are so complex that ordinary citizens who must observe them have no idea what they are. Some obscure rules, regulations, orders and judicial precedents lie in the crevices of the legal system, undiscovered even by the best judges and lawyers. There are contradictions within laws that remain unresolved. Yet most rational observers will place the Australian legal system at the upper end of Fuller's moral scale, well above the pointer that separates the moralities of duty and aspiration. The reason is that the Australian legal system by and large serves the social purpose of law. This is mainly because the constitutional features of the system make it open to self-correction. In contrast, Fuller argued that the legal system and laws of the Nazi regime fell far below the pointer.

Fuller's overall position was that law may fail by some standard of aspirational morality but will still be law. A law that fails the morality of duty is not law at all except in the Pickwickian sense.

Hart's rejoinder

The first edition of *The Morality of Law* was published in 1964, and Hart lost no time in publishing a critical review of it. A major part of the review criticised Fuller's misunderstandings of positivist positions and identified technical deficiencies in Fuller's theory. One criticism, though, went to the heart of Fuller's thesis of the internal morality of law. Hart had earlier noted that the inner morality of law is 'compatible with very great iniquity' (1961, 202). Hart's point was that a legislature may comply with all the requirements of the inner morality of law and still produce unjust law. Hence, the requirements are ethically neutral. They can be put to good or bad use. In the book review, Hart argued that the eight requirements Fuller specified are not principles of morality but principles of good legal craftsmanship. In short, he accused Fuller of confusing morality with efficiency (Hart 1965, 1286).

Hart argued that Fuller's logic would mean that principles of efficacy in any purposive activity would represent the inner morality of that activity. This would lead to the absurd conclusion that even despicable activities have an internal morality. Hart took the example of a person who wishes to poison to death another person. Common sense tells the poisoner to choose a poison that is hard to detect and administer the poison without being observed. 'But to call the principles of the poisoner's art "the morality of poisoning" would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned' (Hart 1965, 1286). This is a grotesque misreading of Fuller's theory.

Fuller's counter

In the first edition of *The Morality of Law*, Fuller had already offered a defence against the charge that his internal morality is in fact ethically neutral. The

demand that rules be known, general and observed in practice seems at first sight ethically neutral, but Fuller argued that without these qualities one cannot judge the morality of the law at all because one only sees patternless *ad hoc* commands. He said that an unlimited power expressing itself solely in unpredictable and patternless interventions could be said to be unjust only in the sense that it does not act by a known rule. It is hard to call it unjust in any more specific sense until one has discovered what hidden principle, if any, guided its interventions (Fuller 1969, 157–8). Generality also has ethical merit in mitigating discriminatory laws, such as those used in apartheid and segregation (Fuller 1969, 160).

Fuller's most important argument was that the internal morality arises from a particular view of human beings as responsible agents. Every departure from the principles of inner morality, he argued, is an affront to people's dignity as responsible agents. To judge a person's actions by unpublished or retroactive law, or to order a person to do an act that is impossible, is to convey to them your indifference to their powers of self-determination (Fuller 1969, 162).

In the revised edition of *The Morality of Law*, Fuller directly addressed Hart's claim that his internal morality was in fact efficiency. He compared two different types of social ordering: managerial direction and law. Five of the principles of internal morality are applicable to managerial activity. Managers who wish to ensure that subordinates work according to plan will announce their directions as clearly as possible and without contradictions. They would be silly to give impossible directions, and good managers will not change their instructions frequently. However, the qualities of generality, prospectivity and congruence of rules and actions have a special place in law that they do not have in management. Generality of directions is only a matter of convenience in management. Subordinates have no cause to complain if the manager directs them on occasions to depart from the general orders. There is also no compelling reason for a manager not to depart from announced rules. As for the principle of prospectivity, Fuller stated that the issue does not arise: no manager with a semblance of sanity would direct a subordinate today to do something yesterday (1969, 208–9).

Fuller argued that the inapplicability of these three requirements brings out the essential difference between managerial direction and law. Management represents a one-way projection of authority, and hence only requires principles of efficiency. On the contrary, a relatively stable reciprocity of expectations between the law giver and the subject is part of the very idea of a functioning legal order. Law, unlike management, is not simply about directing persons to perform tasks set by a superior, but is a matter of providing citizens with a sound and stable framework for their interactions with one another, the role of government being that of a guardian of the integrity of this framework. Fuller claimed that his positivist critics confused his principles of inner morality with requirements of efficacy because they regarded law essentially as a one-way projection of authority.

The connection of internal and external moralities

The external morality of law concerns the moral content of the rules. A law that authorises torture is bad and a law that bans torture is good. The internal morality is about the qualities that make the law serve the general social purpose of human coordination. It provides stable rules of the game. Fuller conceded that a law that complies with internal morality may yet be unjust. The law in the People's Republic of China that prohibits parents from having more than one child is general, prospective, promulgated clearly, and so forth. Yet it has been widely condemned as unjust. Inner morality is logically consistent with external injustice. This does not mean that the inner morality is not true morality.

Imagine two bad regimes, A and B. Regime A operates by clearly declared prospective and general rules that are consistently and scrupulously enforced, while regime B operates through *ad hoc* commands, retrospective laws, secret laws and extra-judicial punishment without charges or trial. Is there any moral difference between the regimes? Clearly there is. Regime A provides a degree of order that allows citizens to avoid official retribution and go about their lives even within the confines of harsh laws. In regime B nothing is certain and people are in constant jeopardy. History also demonstrates repeatedly that the internal and external moralities of law are symbiotic. One does not live long without the other. This is why the internal morality of law, under its other name 'the rule of law', is widely regarded as a moral imperative.

Ronald Dworkin and the integrity of law

Ronald Dworkin, like Lon Fuller, advanced a theory of law that asserted a necessary connection between law and morality. There are similarities between the legal philosophies of these two Americans, though Dworkin hardly mentioned Fuller's work. I will say something about these similarities in the course of this discussion. Dworkin is considered by many as the leading contemporary American legal philosopher. He succeeded Hart in the chair of jurisprudence at the University of Oxford in 1969 and later held the WN Hohfeld chair of jurisprudence at Yale University. He currently holds chairs at University College, London and New York University. Dworkin's philosophy was developed over two decades. Its most definitive statement is found in his book *Law's Empire*.

Dworkin, like many natural law theorists, posed this question: what justifies the use of force by the state against its citizens? In other words, what is the reason that makes it acceptable for the state to make and enforce laws even against persons who disapprove of them? Dworkin, like the natural lawyers and many modern legal positivists, rejected the notion that power alone justifies law. The duty of a citizen to submit to the authority of law is seen, then, as a moral duty (Dworkin 1998, 191).

Dworkin's legal philosophy makes the following intellectual claims regarding law:

1. We can truly understand our law only if we consider it within the context of our own culture. Law can mean different things in different cultures.
2. In the Anglo-American legal culture, law is not the command of whosoever has physical power to enforce it. The state's monopoly of power to coerce citizens – in other words, the power to make law – is founded not on physical force but on moral authority.
3. This moral authority to make law is a feature of a special kind of community. Such a community is one that accepts integrity as a political virtue (1998, 188). It is the integrity of the law that creates the moral duty of citizens to obey the law. Integrity is not fairness or justice. People obey laws that they think are unfair or unjust provided that the law as a whole has integrity. There are two principles of political integrity:
   (a) *Legislative principle*: law makers should try to make the total set of laws morally coherent. Political integrity asks legislators to make law in keeping with the principles established within the legal system (1998, 176). This is essentially an argument about consistency. A statute that imposes strict liability on motor car manufacturers but not on makers of trucks fails the aim of integrity.
   (b) *Adjudicative principle*: judges should view the law as coherent in the same way as far as possible.
4. The duty of the judges to maintain coherence means that the judges must interpret common law precedents and statutes in a manner that maintains coherence. The judicial task, therefore, is never mechanical and is always creative. (Dworkin compared a judge to a chain novelist whose duty is to continue an ongoing story by interpreting previous chapters while seeking to make the novel the best it can be.)
5. Although there is no explicit claim that morality and law are inseparable, if integrity is a moral value the necessary connection of law and morality follows.

Beginning of Dworkin's legal philosophy: the rights thesis

Dworkin launched his initial assault on legal positivism's thesis of the separation of law and morality in his 1977 book, *Taking Rights Seriously*. The principal aim of this book was to contest one of Hart's central contentions. Hart claimed that in a 'hard case' the judge makes law. A hard case is one where existing statutes and judicial precedents do not provide a clear or conclusive answer to the legal question before the court. Hart argued that the rule of recognition in England authorises the judge to act as a deputy of Parliament and supply a rule to resolve the case. This argument was necessary for Hart to maintain that law and morality are separate. The judges in these hard cases will consult their own sense of justice. In other words, they will make a decision based on their own moral views. Hart

argued that the decision of the judge is law, not because of its moral content but because it is made by an official (the judge) who is authorised by the rule of recognition to make law. Dworkin said that this cannot be right. A litigant has no right to a favourable decision, but has a right to a decision in accordance with law. A judge cannot say: 'There is no law, so I am going to make the law'. Dworkin argued that Hart's view is flawed by a serious misunderstanding about the concept of law.

Principles and policy

The law, according to Dworkin, comprises not only rules but also principles. When rules run out, judges look to the legal principles that are imbedded in the general body of the law. In Hart's view, a judge may decide a hard case on grounds of *policy*, whereas Dworkin argued that a judge must always decide according to *principle*. Legislators are entitled to make law on policy, but judges are not. So what is the difference between policy and principle? Policy does not require consistency, principle does. Parliament may decide to grant workers in the mining industry a statutory wage, while ignoring the claims of auto workers. Parliament may impose strict liability on some manufacturers but not on others. Judges cannot make these kinds of decisions without undermining public confidence in the judiciary. They have to give a judgment that is consistent with past non-recanted decisions. The political responsibility of judges is to make only decisions that they can justify within a theory that also justifies other decisions that they propose to make. The rights theory 'condemns the practice of making decisions that seem right in isolation, but cannot be brought within some comprehensive theory of general principles and policies that is consistent with other decisions also thought right' (Dworkin 1977, 87).

A principle, unlike a rule, does not provide an automatic answer to a legal question. A principle may be contradicted by a rule of law or by another principle. The legal principle 'No man may profit from his own wrong' is contradicted by some laws. A trespasser may get ownership of a piece of land if he occupies it long enough. An employee who leaves without notice to take a better paid job gets to keep the higher wage despite her breach of contract. This is because parliament's will or some other principle outweighs the principle against profiting from wrong. 'All that is meant when we say that a particular principle is a principle of our law is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another' (Dworkin 1977, 26).

Dworkin's overall thesis in *Taking Rights Seriously* was that there is always a right answer to a legal dispute that a good judge like Hercules (Dworkin's fictional ideal judge) can derive from the rules and principles of the legal system. Judges, of course, make mistakes – unlike Hercules, they are fallible mortals. The fact that judges err does not mean that there is no right answer. A good legal system, through its institutional safeguards and juristic techniques, seeks to reduce the number of mistakes overall (Dworkin 1977, 130).

The rights thesis did not establish a *necessary* connection between law and morality. Judges who summon principles in aid of a decision import morality. It is not their personal morality but the morality of the legal system. However, a statute that is constitutionally valid may enact an immoral law and, where its meaning is free of doubt, the court will give effect to it. In *Law's Empire*, Dworkin reformulated his thesis in a way that makes the value of integrity indispensable to the concept of law. If true, it means that law and morality are inseparable.

Dworkin's concept of law

Dworkin did not attempt to define law. He rejected what he called semantic theories of law. Semantic theories are those that try to provide a universally true description of what is known as 'law'. He included the various theories of legal positivism and natural law in this category. Dworkin considered the semantic approach to be futile because different communities understand law in different ways. He therefore tried to understand what law meant in his own culture, the Anglo-American political culture. He identified the domain of law or legal practice that most theorists can accept with respect to that culture. He said that 'the most abstract and fundamental point' of legal practice is to guide and constrain the power of government in the following way:

> Law insists that force not be used or withheld, no matter how beneficial or noble these ends, except as licenced or required by individual rights and responsibilities flowing from past political decisions about when force is justified. The law of a community on this account is the scheme of rights and responsibilities that meet the complex standard: they licence coercion because they flow from past decisions of the right sort. (Dworkin 1998, 93)

It takes some effort to work out precisely what Dworkin was saying here. He made three points:

1. Law consists of rights and responsibilities of citizens.
2. Rights and responsibilities flow from past political decisions of the 'right sort'. These are primarily the constitution, legislation and judicial decisions.
3. Coercion by the state is justified only to enforce the rights and responsibilities established by past political acts.

Let us try to understand these propositions even more simply. Consider the following two typical legal cases. Parliament passes the *Minimum Wage Act* today. A year later, employee A complains to the court that her employer B has not paid her the minimum wage, and asks the court to order B to pay the shortfall. The court's decision to compel B to pay this sum is justified by the *Minimum Wage Act*. If the *Minimum Wage Act* did not exist, the court could not justify coercing B to pay the sum that A claims. Now consider the case of C, whose brand new motor car is damaged because its braking system failed. C sues the manufacturer of the motor car, D & Co, though he actually bought the car from

a local dealer. The court's decision to award damages and enforce judgment against D & Co (with whom C has no contract) is justified by previous decisions of the court in similar cases. All this is plain to the legal practitioner and is uncontroversial.

There are, of course, other ways of understanding law. Dworkin looked at law primarily from the point of view of justifying the use of force by the state. It is worth remembering that law may exist without state intervention. It is true that a party may enlist the state's assistance to enforce its rights in the last resort by obtaining judgment in a court of law, but the state's coercive power plays no part in the vast majority of private transactions that make up social life. Let us stay, though, with Dworkin's concept of law.

Justification for the use of force

Dworkin first addressed the question of why coercion is justified only when it is applied in conformity with rights and responsibilities established by law. If courts disregard statutes and precedents and act as they please, the law obviously will become unpredictable and arbitrary. Dworkin stated that limiting state coercive power in this manner also 'secures a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does' (1998, 97). Notice that Dworkin referred to a 'kind of equality'. This is the kind of equality that Fuller identified with generality, which is a moral attribute of law. The principle of generality does not require absolute equality, but only the like treatment of persons in like situations (Dworkin 1998, 165).

The problem for Dworkin was that past political acts (statutes and precedents) do not always secure equality. Even democratically elected legislatures discriminate between interest groups for political expediency. This led Dworkin to identify another essential quality of law – integrity. Fuller had argued previously that legislative power to discriminate must be contained if law is to maintain its moral authority. A legal system that continually disregards the moral demand of generality will lose its capacity to make law. Law becomes a jumble of *ad hoc* commands that provides no guidance for human conduct. Fuller also identified other factors that defeat the purpose of law: public ignorance of what the law demands, inconsistency (incoherence within the system of laws), lack of clarity, instability of the laws (frequent change), retrospectivity, impossibility of compliance and the disregard of the law by officials. Dworkin collapsed all these virtues into a quality that he termed 'integrity'.

Law as integrity

Dworkin's notion of integrity requires internal consistency of the system of rules and principles that make up the law. It has a close affinity to the principle of equal protection of the law entrenched in the Fourteenth Amendment of the US Constitution (Dworkin 1998, 183).

We say that a person has integrity when they are known to act always according to their principles. We respect such a person even if we do not agree with all of their principles. Dworkin argued that law is similar. People may disapprove of some laws as unfair or unjust, but overall people respect and observe the law because of its integrity. Law's integrity depends on legislators and judges. If they legislate or adjudicate arbitrarily the law loses its integrity and its moral authority.

Dworkin selected integrity as the chief virtue of law, in preference to justice or fairness. There are different notions of justice, but for Dworkin justice represents 'morally defensible outcomes' (1998, 165). Fairness in politics is about fair political procedures. These are the methods of electing officials and making their decisions responsive to the electorate (Dworkin 1998, 164). Some thinkers consider justice as fairness, but according to the way Dworkin understood these concepts they are different. A fair procedure may produce an unjust outcome, while an unfair process can yield a just result. In a democracy people do not always agree on what is just, and they tolerate many decisions that they find unjust. However, people expect integrity in their legal system. This means that statutes and judicial precedents must show consistency in the way they treat like cases.

Dworkin explained his notion of integrity by contrasting it with checkerboard solutions (1998, 178). The checkerboard approach leads to laws that treat groups of people differently when there is no rational difference between them. A law that imposes strict product liability on makers of washing machines but not refrigerators is a checkerboard response. So is a law that forbids racial discrimination on buses but not in restaurants. Integrity bars 'Solomonic justice' that calls for a dispute to be settled by compromise in disregard of right and principle (Dworkin 1998, 178–9). Dworkin acknowledged that sometimes circumstance may compel piecemeal solutions that are better than no solutions. Universal product liability law, for example, may be forestalled by the power of manufacturing lobbies, so legislatures go about it selectively (Dworkin 1998, 218).

Integrity and interpretation of statutes

The principle of legislative integrity, which calls on legislatures to treat like matters alike, is generally accepted in liberal democracies as an article of political morality. However, Dworkin proceeded from this point of consensus to the most controversial aspect of his thesis. Dworkin argued that 'The integrity of a community's conception of fairness requires that the principles necessary to justify the legislature's assumed authority be given full effect in deciding what a statute it has enacted means' (1998, 166). In simpler English, what he said is that the courts have the power and the duty to interpret statutes in a way that maintains the integrity of law. This can be done only if courts interpret each statute to ensure as far as possible its consistency with other statutes and the system as a whole. This argument marks the sharpest point of difference between Hart and Dworkin.

The problem arises in this way. The legislature of a state does not always respect the principle of integrity in making statutes. In some countries, constitutional provisions (such as the US Fourteenth Amendment) will limit the power of legislatures to enact checkerboard statutes. Constitutional checks, though, inhibit only the more outrageous acts of discrimination. The US Congress is notorious for pork barrelling, the practice of granting benefits to the constituents of a legislator in return for their vote in Congress. Australians, Britons and others living in Westminster systems are familiar with legislation that shamelessly favours critical voting blocs in marginal electorates. According to orthodox doctrine, courts must enforce these statutes, provided that they pass the constitutional tests. There are juristic techniques for limiting the mischievous effects of statutes. If the language is not clear and is open to different interpretations, the court will adopt an interpretation that is constitutional in preference to one that is not. There are also many presumptions in the common law that promote integrity in statute law. The courts will presume (in the absence of clear words to the contrary) that an act is not intended to have retrospective penal effect, or to take property without compensation, or to deny the safeguards of natural justice and procedural fairness, or to take away vested rights. Courts also presume that parliament does not authorise officials to abuse their power. There are many more presumptions that are well known to legal practitioners. If this was all that Dworkin meant by judicial interpretation, there is no dispute between him and Hart, but Dworkin claimed much more.

Hart argued that where the meaning of a statute and its constitutional validity are not in doubt, the court's duty is simply to apply its provisions. It is then a case of application rather than interpretation. When the meaning is not clear and past judicial decisions are unhelpful, a judge, according to Hart, acts as a deputy of the legislature to determine the effect of the statute. Dworkin disagreed.

As observed previously, in *Taking Rights Seriously*, Dworkin argued that judges in hard cases do not legislate but draw on the principles of the law to make the right decision. In *Law's Empire* Dworkin went further, claiming that judges are involved in creative interpretation in every case – even in relation to the clearest statute. The duty to interpret arises from the demand of integrity that the law show consistency. Dworkin said that the aim of creative interpretation is not merely to *discover* the purpose intended by the law maker but to *impose* purpose over the text (1998, 228). This is not the kind of statutory interpretation that students learn in law school or judges profess in their written opinions. Dworkin identified three stages in the process of interpretation.

Pre-interpretive stage

In this stage, the interpreter identifies the rules and standards of the tentative content of relevant materials. In the typical legal case these would be the relevant statutory provisions and case law. Some degree of interpretation, Dworkin said, is involved in locating this material (1998, 66).

Interpretive stage

The interpreter at this stage 'settles on some general justification of the main elements of the practice identified in the pre-interpretive stage' (Dworkin 1998, 66). Translated into plain English, this means that the interpreter must determine the reason for treating the legal document as relevant to the case. The *Crimes Act* should be considered in a murder case because it is an Act of Parliament on the subject and the Constitution requires courts to give effect to Acts of Parliament.

Post-interpretive stage

This is a 'reforming stage at which [the interpreter] adjusts his sense of what the practice "really" requires so as better to serve the justification he accepts at the interpretive stage' (Dworkin 1998, 66). In plain English, there is a moral justification to regard Acts of Parliament as binding, or for that matter to consider the Constitution to be binding. The justification is that the system as a whole promotes integrity of the law. Hence, the initial interpretation must be adjusted or 'reformed' to ensure that the integrity is not undermined. This means that the court should creatively interpret the statute so that it is consistent with other laws and principles of the legal system.

Dworkin said that this is what judges and lawyers actually do in legal practice, though their legal rhetoric suggests otherwise. More critically, he claimed that in the post-interpretive stage judges are not making law but enforcing the law, as law's legitimacy depends on its integrity. Hart, of course, took the opposite view: in difficult cases the legal rhetoric belies the fact that judges in fact are making law.

Law as a chain novel

Dworkin compared the law to a chain novel and the role of the judge to that of a chain novelist. A chain novel is a work of fiction that is written by successive authors. It is similar to the soap operas familiar to television watchers. Different script writers, and even different actors and directors, take charge of the production over time. The readers of the chain novel and the viewers of the soap opera expect the story to unfold in a coherent manner. The characters usually retain their character and the history and the geography are not rewritten. Dworkin saw law as a similar phenomenon:

> In this enterprise a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as integrity. (1998, 229)

Dworkin's point is this: just as a discordant chain novel may turn away readers, a discordant legal system will lose the faith of the community. The difference is

that we can pick up another novel to read or another television drama to watch, but most of us cannot change the legal system under which we live.

Law and morality in Dworkin

Dworkin's account of law is specific to his own legal culture, which is the Anglo-American culture. The use of force on citizens by the government is justified in this culture by the facts: (a) force is used according to established legal rights and duties of citizens; and (b) the laws that determine rights and duties have the quality of integrity. The process of interpretation, by which judges try to make the law the best it can be, introduces a moral dimension to Anglo-American law. What about other legal cultures that justify the use of force on other grounds? Did Nazi Germany have law? According to Dworkin, the answer depends on what conception of law we adopt to address this question. In one sense Nazi law was law, and in another sense it was not:

> We need not deny that the Nazi system was an example of law, no matter which interpretation we favour of our own law, because there is an available sense in which it plainly was law. But we have no difficulty in understanding someone who does say that Nazi law was not really law, or was law in a degenerate sense, or was less than fully law. (Dworkin 1998, 104)

Nazi law, according to Dworkin, was law in the pre-interpretive sense, because German courts of the era did not engage in the kind of moral interpretive exercise that our courts undertake. Hart argued that this concession strengthens the positivist argument (1997, 271). The real difference between Dworkin and positivists like Hart turns out to be as follows.

The positivists offer descriptive theories of law – the kind of theory that Dworkin calls semantic. According to these theories, immoral law can be law in a descriptive sense. Dworkin agreed that, according to a particular semantic theory such as legal positivism, even the most unjust laws may be regarded as law. Dworkin, though, rejected semantic theories in favour of a justificatory theory of law that recognises creative interpretation as a feature of Anglo-American law. Nevertheless, Dworkin said that a community's law is different from its popular morality.

Dworkin understood popular morality as 'the set of opinions about justice and other political and personal virtues that are held as matters of conviction by most members of a community, or perhaps of some moral elite within it' (1998, 97). Law in the Anglo-American culture consists of rights and duties that flow from past decisions as those decisions are interpreted by judges. These past decisions may not always reflect popular morality. The judge's duty is not to align the law with public morality but to give an interpretation that maintains the integrity of the law. Thus, law may fail popular morality while retaining its integrity. This is true of the Anglo-American legal culture. A different community's legal culture may contain an additional requirement that judges

must consider popular morality in addition to past decisions, but this is not a feature of all legal systems.

So, in what sense, if any, does Dworkin's theory challenge the positivists' contention that law has no *necessary* connection with morality? Dworkin said that legal practice in Anglo-American political culture demands the integrity of law. Integrity is a moral virtue of the law irrespective of outcomes. This is very similar to Fuller's theory of the internal morality of law. Fuller argued that we can recognise the internal morality of law even when we disapprove of its moral outcomes. Dworkin argued that there is moral value in the integrity of law even when its results are unwelcome.

PART 3
SOCIAL DIMENSIONS OF LAW