Clarifying the Natural Law Thesis

JONATHAN CROWE[†]

The core claims of natural law jurisprudence have been expressed in many different ways. One useful way of understanding the tradition, however, is through reference to what Mark Murphy has called the natural law thesis: law is necessarily a rational standard for conduct.[1] The natural law thesis holds that a norm or system of norms that does not serve as a rational standard for conduct is necessarily invalid or defective as law. Proponents of natural law jurisprudence characteristically affirm the natural law thesis, while legal positivists characteristically deny it.

The natural law thesis, then, provides a useful way of encapsulating what is at stake between natural law theorists and legal positivists. However, something that goes unremarked in many discussions of natural law is that the thesis comes in a range of distinct versions. Some important work has recently been done by authors such as Murphy and Robert Alexy in identifying different versions of the natural law claim, but these discussions have tended to focus on certain ambiguities while neglecting others.[2] Further work is needed in systematically clarifying the natural law

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† Associate Professor, T C Beirne School of Law, University of Queensland. An earlier version of this article was presented at a conference on The Nature of Law: Contemporary Perspectives at McMaster University in May 2011. I am grateful to Chris Essert, Matthew Kramer and Mark Murphy for valuable feedback on that occasion. I would also like to thank Michael Stokes and the anonymous referees for their helpful comments and suggestions.

1 Mark C Murphy, 'Natural Law Jurisprudence' (2003) 9 *Legal Theory* 241, 244; Mark C Murphy, 'Natural Law Theory' in Martin P Golding and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2005) 15. Compare Mark C Murphy, *Natural Law in Jurisprudence and Politics* (2006) ch 1. For an overview of the core themes of contemporary natural law scholarship in ethics, politics and jurisprudence, see Jonathan Crowe, 'Natural Law Beyond Finnis' (2011) 2 *Jurisprudence* 293.

2 See, for example, Murphy, 'Natural Law Jurisprudence', above n 1; Murphy, 'Natural Law Theory', above n 1; Murphy, *Natural Law in Jurisprudence and Politics*, above n 1, ch 1; Robert Alexy, *The Argument from Injustice* (2010); Robert Alexy, 'On the Concept and the Nature of Law' (2008) 21 *Ratio Juris* 281; Robert Alexy, 'The Dual Nature of Law' (2010) 23 *Ratio Juris* 167; Robert Alexy, 'An Answer to Joseph Raz' in

thesis and distinguishing the different versions that appear in the philosophical literature.

The present article aims to contribute to this project. It begins by identifying four distinct ambiguities in the natural law thesis and clarifying the different possible formulations that arise from them. The article then examines three routes to the natural law thesis that appear in the literature and considers which versions they are best understood as targeting. I argue that the versions of the natural law thesis endorsed by some of its leading proponents are not always a good fit with their chosen arguments.

1. Clarifying the Thesis

According to the natural law thesis, a norm or system of norms that is not a rational standard for conduct is necessarily invalid or defective as law. The thesis can therefore be presented as follows:

> NL: A rational defect (R) in a norm or system of norms (N) necessarily renders it invalid or defective as law (L).

We will see below that natural law authors affirm different versions of this claim. For example, some hold that a rational defect in a norm or system of norms renders it legally invalid, while others hold that a rational defect in a norm or system of norms renders it legally defective. However, all natural law theorists affirm that it is, in some sense, a necessary property of law that it serves as a rational guide for action. This is the core claim that unites natural law views and differentiates them from legal positivism.

The above claim is ambiguous in at least four important ways. The first ambiguity concerns whether the thesis is understood as a claim about the *concept* of law, the *nature* of law or the linguistic *meaning* of the term 'law'. The second ambiguity concerns what counts as a *rational defect*; the third, what it means for a norm to be *invalid or defective as law*; and the fourth, whether the thesis concerns *individual norms or normative systems*. The following sections examine each of these issues in turn.

A. CONCEPTS, KINDS AND TERMS

The first ambiguity in the natural law thesis is not obviously drawn out by the formulation offered above, although it might be viewed as pertaining to

George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (2007) 37.

the meaning of 'necessarily' in NL.[3] The natural law thesis is a claim about what makes a norm a law or a normative system a legal system. However, this type of claim can be understood in three ways.

The first way to understand the natural law thesis is as a *conceptual* claim. On this view, a rationally defective norm or normative system falls outside the concept of law. The concept of law under examination is sometimes taken to be the concept held by members of the community and sometimes the concept held by legal officials. This conceptual approach to jurisprudential questions has largely dominated the field since H L A Hart adopted it in *The Concept of Law*.[4] The framework also has prominent natural law adherents, most notably John Finnis in *Natural Law and Natural Rights*.[5]

A second way to understand the natural law thesis is as a claim about not the *concept* of law held by members of the community or legal officials, but the *nature* of law as a phenomenon. One way to describe this approach is to say that it treats law as a kind, roughly in the sense employed in the natural sciences. A kind is an ontological category that does not depend purely on convention, but can be described in terms of its essential properties. We might call this a *metaphysical* approach to legal theory. This is the understanding of the natural law thesis endorsed by Michael Moore.[6]

The two forms of enquiry described above are far from unrelated, although the connection between them is often left unexplained. Joseph Raz has argued that analysis of the concept of law is best understood as a means of exploring the nature of law.[7] The concept of law, on this view, serves as a bridge between the meaning of the linguistic term 'law' and the nature of law as a social institution. Complete understanding of the concept would involve complete understanding of the phenomena to which it applies. Alexy makes a related point, arguing that concepts are conventional constructs that claim to describe the nature of the world.[8] An enquiry that seeks an adequate concept of law therefore aims at a full understanding of the nature of law.

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3 Compare Michael S Moore, 'Law as a Functional Kind' in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (1992) 198-200.

4 H L A Hart, *The Concept of Law* (2nd ed, 1994).

5 John Finnis, *Natural Law and Natural Rights* (1980) ch 1.

6 Compare Moore, above n 3, 204-6. See also Michael S Moore, 'Law as Justice' (2001) 18(1) *Social Philosophy and Policy* 115.

7 Joseph Raz, 'Can There Be a Theory of Law?' in Martin P Golding and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2005) 324, 324-8.

8 Alexy, 'On the Concept and the Nature of Law', above n 2, 290-2.

Likewise, it seems plausible that any enquiry into the nature of law must identify its object by making at least preliminary use of the associated concept. Frank Jackson has made this point about the role of conceptual analysis in metaphysics generally.[9] The difference between the conceptual and metaphysical frameworks is therefore perhaps best regarded as one of emphasis, rather than kind. Nonetheless, I will argue later that whether a natural law argument is couched in conceptual or metaphysical terms can make a difference to the standards used for evaluating it.

A third topic that regularly arises in jurisprudential discussions concerns the *meaning* of the linguistic term 'law'. No natural law theorist, to my knowledge, has ever been exclusively or primarily concerned with this issue: legal theorists are not lexicographers.[10] However, natural law theorists have sometimes advanced claims about the meaning of 'law' alongside claims about the concept or nature of law.[11] In some cases, the questions are explicitly linked. For example, Moore presents his theory of the nature of law as yielding an account of the meaning of 'law' when combined with the Kripke-Putnam direct theory of reference.[12] Nonetheless, it is possible to endorse either a conceptual or metaphysical version of the natural law thesis without also endorsing the thesis as a claim about linguistic meaning.[13]

B. THE NOTION OF A RATIONAL DEFECT

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9 Frank Jackson, From Metaphysics to Ethics: A Defence of Conceptual Analysis (1998) 30-1.

10 Raz has made this point in a number of places. See Joseph Raz, *The Authority of Law* (1979) 41; Joseph Raz, 'The Problem About the Nature of Law' (1983) 21 *University of Western Ontario Law Review* 203, 207; Raz, above n 7, 325. See also Scott J Shapiro, *Legality* (2011) 7-8.

11 See, for example, Moore, above n 3, 204–6; Finnis, above n 5, 6, 9-10, 26-7, 233-7, 363-6.

12 See, for example, Moore, above n 3, 204–6. For the Kripke-Putnam theory of reference, see Saul Kripke, *Naming and Necessity* (1980); Hilary Putnam, 'The Meaning of "Meaning"' (1975) 7 *Minnesota Studies in the Philosophy of Science* 131.

13 It might be thought that if X is the concept of law, then X must be one meaning of the term 'law'. However, it could be that 'law' has a univocal meaning in a range of contexts (legal, religious, scientific and so on) that is neither exhausted nor partially constituted by the concept we use to connect the term with legal institutions. For example, 'law' in all these contexts might mean something like 'rules of a certain strength, permanence and generality'. The term might then be linked to legal institutions by a more specific concept, but that does not make the concept part of the term's meaning. See Raz, above n 7, 325.

The second ambiguity in the natural law thesis, which is clearly drawn out by NL, concerns what qualifies as a rational defect. This question holds important implications for the robustness of the natural law claim. A wide notion of rational defectiveness would potentially call into question the legal status of a diverse range of different norms or normative systems, while a narrow version would have less fundamental consequences.

On one possible account of rational defectiveness, a norm is rationally defective if it requires a person to perform an action that she is not rationally required to perform; that is, if the norm is not backed by decisive reasons for compliance. Let us call this the *strong* version. According to some leading accounts of legal and political obligation, many positive laws may not be rationally binding.[14] This view of rational defectiveness therefore potentially yields a robust version of the natural law thesis.

Importantly, the strong view does not hold that a positive law must be backed by decisive reasons *independently of its legal status* to avoid being rationally defective. Part of what makes a norm rationally binding may be that it is required by law. Some positive laws are backed by independent moral or prudential reasons for compliance, but others gain rational force at least partly by supplying subjects with reasons they would not otherwise have. A positive law that is backed by reasons in either of these ways will not be rationally defective on the strong view.[15]

On another possible view, a norm is rationally defective only if it requires a person to perform an action that she is morally obliged not to perform; that is, if the action is morally prohibited. Let us call this the *weak* construction, since it yields a less robust version of the natural law thesis. According to the weak view, norms are not rationally defective whenever they lack decisive reasons for compliance, but only when they require injustice. We can summarise these alternative constructions as follows:

> R^S: *N* is rationally defective if it requires a person *A* to perform an action that *A* is not rationally required to perform.

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[14] See, for example, Raz, *The Authority of Law*, above n 10, ch 12; A John Simmons, *Moral Principles and Political Obligations* (1979); Leslie Green, *The Authority of the State* (1990); M B E Smith, 'Is There a Prima Facie Obligation to Obey the Law?' (1973) 82 *Yale Law Journal* 950.

[15] A positive legal norm that requires a person to have two witnesses in order to be legally married will therefore not be rationally defective on the strong view, assuming that the legal status of the requirement (along with the legal and social benefits of having one's marriage legally recognised) supplies sufficient reason to comply with it.

> R^W: *N* is rationally defective if it requires *A* to perform an action that *A* is morally obliged not to perform.

C. LEGAL INVALIDITY AND DEFECTIVENESS

A third issue arising from the natural law thesis concerns the meaning of *invalid or defective as law*. On one possible view, a rational defect in a norm renders it legally invalid, such that it is not properly regarded as a law at all. Let us call this the *strong* view of the idea. On another possible account, a rational defect in a norm renders it merely legally defective. Let us call this the *weak* view. We might summarise the distinction as follows:

> L^S: A rational defect in *N* renders it legally invalid.
>
> L^W: A rational defect in *N* renders it legally defective.

This kind of distinction has been drawn by a number of natural law authors. Finnis argues in *Natural Law and Natural Rights* that the best construction of the natural law thesis is that a rationally defective standard still counts as law, but only in a weak or qualified sense of the term.[16] He therefore endorses the weak view outlined above. More recently, the distinction has been noted by Murphy, who uses it to differentiate strong and weak versions of the natural law thesis.[17] Murphy, like Finnis, favours the weak construction, although he takes the strong alternative seriously. Other natural law authors, such as Moore, have defended the strong view.[18]

Alexy, meanwhile, adopts a hybrid position. He distinguishes what he calls classificatory and qualificatory connections between law and morality.[19] This corresponds to the dichotomy between invalidity and defectiveness employed above. He then argues that a rational defect in a norm may have either classificatory or qualificatory implications for its legal status, depending on whether it crosses a threshold of 'extreme injustice'.[20] He therefore combines the strong and weak views on this issue.

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16 Finnis, above n 5, 363-6. For criticism of Finnis's view, see Jonathan Crowe, 'Five Questions for John Finnis' (2011) 18 *Pandora's Box* 11, 16-17.

17 Murphy, above n 1, ch 1. See also Moore, above n 3, 198.

18 Moore, above n 3, 198. See also Philip Soper, 'In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All' (2007) 20 *Canadian Journal of Law and Jurisprudence* 201; Crowe, above n 16, 16-17.

19 Alexy, *The Argument from Injustice*, above n 2, 26; Alexy, 'On the Concept and the Nature of Law', above n 2, 289.

20 Alexy, 'The Dual Nature of Law', above n 2, 176-7; Alexy, 'On the Concept

The strong and weak positions outlined above are primarily ontological claims about whether something counts as non-defective law. However, it is natural to view them as holding practical implications. The strong claim that a rationally defective norm is legally invalid may seem to imply that legal actors should recognise that the norm is not law and decline to follow it. Similarly, the weak view that a rationally defective norm is legally defective might seem to suggest that the norm loses some, but not all, of the weight it would otherwise hold in legal deliberation. It might be thought, on this basis, that the strong view necessarily yields more robust practical outcomes than the weak view. However, this assumption should be resisted.

Natural law authors would typically agree that a norm that is legally invalid or defective due to a rational defect loses at least some of its weight in legal decisions. However, the extent to which such a norm remains salient depends primarily on the nature and extent of its rational defectiveness, rather than its precise legal status. Alexy's view entails that a norm's level of rational defectiveness determines whether it is legally invalid or merely legally defective, but most authors separate the two issues. Finnis, for example, makes it clear that some positive norms confer no practical obligations, even though they still count as law in a weak sense of the term.[21]

The two distinctions that I have so far outlined, concerning the meaning of rational defectiveness and the notion of legal invalidity or defectiveness, together yield four possible versions of NL:

> NL^1: *N* is legally invalid if it requires *A* to perform an action that *A* is not rationally required to perform. (R^S + L^S)
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> NL^2: *N* is legally invalid if it requires *A* to perform an action that *A* is morally obliged not to perform. (R^W + L^S)
>
> NL^3: *N* is legally defective if it requires *A* to perform an action that *A* is not rationally required to perform. (R^S + L^W)
>
> NL^4: *N* is legally defective if it requires *A* to perform an action that *A* is morally obliged not to perform. (R^W + L^W)

and the Nature of Law', above n 2, 287-90.

21 Finnis, above n 5, 359-61.

These positions all figure in the recent literature on natural law theory. As we will see in more detail later in this article, Moore argues for NL^1, while Finnis and Murphy favour NL^3. Alexy, on the other hand, endorses NL^2 with respect to laws that exceed a threshold of 'extreme injustice' and NL^4 with regard to laws that fall below that threshold.[22] Alexy's view illustrates that the versions of NL set out above are not all mutually exclusive. Various combinations are possible. As a further example, it would be possible to consistently defend both NL^2 and NL^3, holding that a norm is legally invalid if it requires *A* to do something *A* is morally obliged not to do and legally defective if it requires *A* to do something *A* is not rationally required to do.

D. NORMS AND NORMATIVE SYSTEMS

The reference to a *norm or system of norms* reveals a fourth ambiguity in the natural law thesis. The thesis can be understood as a claim about the impact of rational defects on the legal status of individual norms or as a claim about the effect of rational defects on the legal status of overall normative systems. The latter claim has further variations, depending on what proportion (one, some, many, all) of the norms that comprise a system must be rationally defective for the system as a whole to lose its legal status.

For example, the thesis called NL^3 in the previous section could be understood in the following ways:

> $NL^{3(I)}$: An individual norm is legally defective if it requires *A* to perform an action that *A* is not rationally required to perform.
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> $NL^{3(S)}$: A normative system is legally defective if it requires *A* to perform an action that *A* is not rationally required to perform.
>
> $NL^{3(P)}$: A normative system is legally defective if a certain proportion (some, many, all) of the norms that comprise it require *A* to perform an action that *A* is not rationally required to perform.

The other versions of NL identified previously can be interpreted in similar ways. Once again, it bears noting that the resulting claims are not all mutually exclusive. For example, one might combine NL^1 or NL^2 about norms with NL^3 or NL^4 about normative systems. This would entail that a rational defect in a specific norm renders the norm legally invalid and the system of which it is a part legally

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22 Alexy, 'The Dual Nature of Law', above n 2, 177; Alexy, 'On the Concept and the Nature of Law', above n 2, 287-8.

defective. This seems to be Alexy's view of legal systems containing one or more extremely unjust norms: the norms are legally invalid ($NL^{2(I)}$), while the system is legally defective ($NL^{4(S)}$).[23]

2. Three Routes to the Thesis

Natural law theorists have offered a variety of arguments for their preferred versions of the natural law thesis. The most prominent arguments can be placed into three categories. The first route presents law as a *hermeneutic concept*: its role is to explain and justify normative social practices, which it can only do if it holds moral force. The second treats law as a *functional* concept or kind: its distinctive function is to direct human action through a particular method or towards a specific end, so anything that fails in that function fails as law. The third treats law as a form of *speech act*, which is deficient unless it lives up to the claims it presents to its subjects.

The following sections will consider each of these routes in turn. My aim will be to identify the versions of the natural law thesis advanced by the leading proponents of each approach and to ask whether the routes lend themselves better to some versions of the claim than to others. In some cases, I will argue that the version of the claim defended by a specific author is a poor fit with the chosen line of argument. I will also ask whether natural law authors whose views appear to conflict may sometimes be talking at cross purposes, because their arguments target subtly different claims.

A. THE HERMENEUTIC ARGUMENT

Some natural law theorists treat law as a *hermeneutic concept*: its role is to explain and justify normative social practices, which it can only do if it holds normative weight. This is the view set out by Finnis in the opening chapter of *Natural Law and Natural Rights*.[24] We will see below that it also plays a key role in the work of other authors.

Concepts, kinds and terms

Finnis's argument for the natural law thesis centres on an account of the focal meaning of 'law'.[25] His discussion of this issue is framed largely as a response to the legal positivist theories of Hart and Raz. Hart famously criticises earlier legal positivists, notably John Austin, for not paying sufficient attention to the 'internal view point of view': the perspective of

23 Alexy, *The Argument from Injustice*, above n 2, 66-8.
24 Finnis, above n 5, ch 1.
25 Ibid 9-11.

those who consider themselves bound by legal norms.[26] Finnis endorses this criticism and turns it back on Hart, attacking the thinness of his normative outlook.[27]

Finnis, then, accepts Hart's methodological focus on law as a normative social concept. This gives his natural law theory a primarily conceptual emphasis. Finnis also offers some remarks about the linguistic meaning of 'law'. We have seen that Finnis's hermeneutic argument centres on an appeal to the focal meaning of 'law'. The focal meaning of 'law' is a philosophical refinement of the ordinary meaning of 'law'.[28] In relation to the focal meaning of 'law', Finnis endorses the following claim:

> $NL^{3(FM)}$: The focal meaning of 'law' is such that *N* is legally defective if it requires *A* to perform an action that *A* is not rationally required to perform.

This version of the natural law thesis is not, however, a claim about the everyday meaning of the term 'law'. It is best viewed as a conceptual claim, since the focal meaning of 'law' represents Finnis's gloss on the social concept of law, rather than an attempt to capture the term's linguistic meaning. $NL^{3(FM)}$ is therefore equivalent to the following:

> $NL^{3(C)}$: The concept of law is such that *N* is legally defective if it requires *A* to perform an action that *A* is not rationally required to perform.

Indeed, Finnis's comments on the ordinary meaning of 'law' suggest that he doubts whether it consistently tracks the natural law thesis. His view is rather that the term 'law' is used in multiple senses, at least some of which can properly be used to pick out rationally defective norms.[29] He can therefore be understood as making the following claim, which is logically consistent with the conceptual thesis outlined above:

> $\sim NL^{(M)}$: The linguistic meaning of 'law' is such that a rationally defective norm or normative system may nonetheless still be 'law'.

Rational defectiveness

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26 Hart, above n 4, 89-91.

27 Finnis, above n 5, 11-18. For a critique of Finnis's argument, see Murphy, above n 1, 26-8. For a response, see Jonathan Crowe, 'Natural Law in Jurisprudence and Politics' (2007) 27 *Oxford Journal of Legal Studies* 775, 782-5.

28 Finnis, above n 5, 9-10, 277, 279.

29 Ibid 6, 9-10, 26-7, 233-7, 363-6. Compare Hart, above n 4, 81.

Let us turn next to the issue of rational defectiveness. The question here is what understanding of the natural law thesis is required for the concept of law to play its hermeneutic role. The weak understanding of rational defectiveness discussed above entails that a norm's legal status is affected if it requires injustice. However, this view threatens to both underexplain and underjustify law's normative significance.

In order for law to fulfil its role as a set of binding social rules, people must have reason to do as law requires. This demands more of law than merely that it refrains from requiring people to commit wrongs. People must have positive cause to comply with its dictates. The hermeneutic argument therefore fits most naturally with a strong understanding of rational defectiveness. Indeed, this is clearly Finnis's position.[30]

Legal invalidity or defectiveness

I noted in the first part of this article that Finnis endorses a weak conception of legal invalidity or defectiveness. Norms or systems that have some features of the central case of law (that is, the case picked out by the focal meaning of 'law') but lack others are law only in a weak sense. This analysis applies, for example, to positive laws that are not rationally binding. Finnis therefore holds the following version of the natural law thesis:

> NL^3: *N* is legally defective if it requires *A* to perform an action that *A* is not rationally required to perform.

The hermeneutic argument seems to lend itself to a weak view of legal defectiveness. The point of the argument is to construct a theory of the concept of law that explains and justifies its normative significance. It considers the attributes of law that are necessary to explain the way it is understood by holders of Hart's 'internal point of view'.[31] Any plausible theory of this sort seems bound, like Finnis's, to refer not only to the moral point of legal rules but also to their social sources and the sanctions associated with them. This links naturally with the idea that legal enactments that fail to confer obligations are nonetheless laws in a sense. They possess some, but not all, of the key attributes laws are conventionally taken to have.

Norms and systems

30 See, for example, Finnis, above n 5, 276-7.

31 Hart, above n 4, 89.

We have seen that Finnis's hermeneutic argument assesses the legal status of institutions by their correspondence to an ideal type.[32] It therefore admits of degrees of legal defectiveness: a norm or normative system may be more or less defective depending on the extent to which it promotes the common good.[33] A normative system that contains one rationally defective norm will therefore be defective as law, but a system that contains many defective norms will depart even further from the ideal type.

This is arguably a necessary feature of the hermeneutic view, for similar reasons to those canvassed in relation to legal defectiveness. A positive legal system that generally lacks rational force will still exhibit some features of the central case of law. It will therefore qualify as law in at least a weak sense. The hermeneutic view can therefore establish a rational test for legal defectiveness, but it cannot obviously sustain the view that a system that is rationally defective can become, by that fact, legally invalid. This is because the reasonableness of law is only one part of the apparatus the theory employs to explain and justify the normative role of the concept.

B. THE FUNCTIONAL ARGUMENT

Some natural law theorists have argued that law is a *functional* concept or kind: its characteristic function is to direct human behaviour either through a distinctive method or towards a distinctive end, so anything that fails in that function is defective as law. Moore and Lon Fuller both advance versions of this argument.[34] Murphy also endorses this approach, as well as supporting the speech act strategy discussed below.[35]

The versions of the functional argument advanced by these authors differ somewhat in their details. For example, they give different accounts of law's distinctive function. Moore argues that law's function is to coordinate action in the name of some distinctive good, perhaps (although he equivocates on this) what natural law theorists often call the common good.[36] Fuller contends that law's function is to direct human action in accordance with rules.[37] Finally, Murphy argues that one of law's

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32 Finnis, above n 5, 9.

33 Compare ibid 279-80.

34 See, for example, Moore, above n 3; Lon L Fuller, *The Morality of Law* (rev'd ed, 1969).

35 Murphy, above n 1, 29-36.

36 Moore, above n 3, 223-4.

37 Fuller, above n 34, 96.

characteristic functions is providing dictates backed by decisive reasons for action.[38]

Concepts, kinds and terms

Are the above authors primarily making claims about the concept of law, the nature of law or the meaning of 'law'? Moore provides the most direct answer. He makes it clear his argument is about law as a kind, not concepts or linguistic meanings. According to Moore, the natural law thesis is 'metaphysically necessary', in the sense that it is 'only dependent on how the world is and not upon the conventions of human language use'.[39]

Murphy's position is more complex. He notes the distinction between conceptual and metaphysical arguments in jurisprudence, but goes on to question the exclusivity of these approaches.[40] An adequate hermeneutic account of the concept of law, Murphy argues, must also be capable of playing a role in a descriptive theory of legal institutions. The two strategies should therefore be viewed as mutually supporting. Murphy then goes on, correctly in my view, to note that neither the hermeneutic nor the metaphysical strategy has necessary implications for linguistic meaning.[41]

How, then, does Murphy understand his own methodological outlook? The answer seems to be that he offers his account of law as playing both a conceptual and a metaphysical role. He rejects Finnis's version of the hermeneutic strategy as unmotivated,[42] but he does not mean to deny that his own account of law has hermeneutic force. At the same time, he seeks to provide a theory of law that can play a useful role in social scientific analyses of legal institutions. Murphy therefore appeals to two intertwined explanatory standards in motivating his line of argument.

Fuller, on the other hand, does not directly consider the distinction between conceptual, metaphysical and linguistic arguments. He does, however, make some comments that suggest he understands his argument as falling into the second category. For example, he stresses at one point that he is not offering a 'conceptual model' of law akin to Hart's theory, but rather is describing 'social reality'.[43] Fuller does not identify the central point of law by examining conventional understandings, but rather by examining law's structure as a social institution. His methodology is

38 Murphy, above n 1, 32-6.
39 Moore, above n 3, 200.
40 Murphy, above n 1, 16-17.
41 Ibid 17-18.
42 Ibid 26-8.
43 Fuller, above n 34, 219.

therefore similar to that adopted by Moore, although it is far less clearly expressed.

There is also reason to think that Fuller does not intend to endorse a linguistic version of the natural law thesis. For example, he notes in one passage that the term 'law' is often used to mean 'any official act of a legislative body', regardless of its procedural defects.[44] In a later passage, he argues that ordinary applications of the term 'law' do not admit of degrees, but shortly goes on to dismiss the relevance of this type of linguistic analysis to enquiries into law's distinctive structure and functions.[45]

Rational defectiveness

A common strand in functional arguments is that law has the characteristic function of directing human action in some distinctive way. If the function of law is to direct human action in some way, this suggests a putative legal norm is likely to be defective if it does not supply adequate reason to do as it requires. In other words, it is defective if it directs a person to perform an action she is not rationally required to perform. A person might lack adequate reason to comply with a norm even though it does not require her to break a moral obligation. The functional argument therefore seems most consistent with the strong understanding of rational defectiveness:

> M^S: *N* is rationally defective if it requires a person *A* to perform an action that *A* is not rationally required to perform.

As it happens, Moore and Murphy both construe the notion of rational defectiveness in this way.[46] Fuller's view is more elusive, but a good case can be made that he, too, adopts the understanding of rational defectiveness outlined above. Fuller argues that the legal validity of a norm depends upon its minimal compliance with a series of procedural standards. These procedural standards are not guarantors that the norm will be morally sound, but he argues they tend to guard against serious injustice.[47]

It might appear at this point that Fuller adopts a weak conception of rational defectiveness, according to which a norm is rationally defective only if it results in injustice. However, this is too weak, for it is possible for a norm to fail Fuller's procedural test without resulting in a wrong. The

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44 Ibid 91-2.

45 Ibid 122.

46 Moore, above n 3, 197; Murphy, above n 1, 8.

47 Fuller, above n 34, ch 4; Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630, 648-57.

discouragement of unjust laws may be a consequential benefit of Fuller's standard of rational defectiveness, but it does not lie at the heart of his theory. Rather, Fuller argues his procedural test for legal validity is necessary if law is to fulfil its central purpose of directing human action.

Fuller's argument, then, begins with the premise that law's characteristic purpose is to enable humans to order their behaviour. A norm that fails to satisfy certain procedural conditions will be difficult or impossible to follow and will therefore fail in this characteristic aim. A putative legal norm is rationally defective, for Fuller, if its procedural defects mean it cannot be followed. This is close to the strong sense of moral defectiveness discussed above: a procedurally defective norm may be intended by its enactors to guide human behaviour, but it fails to supply reasons for action.

The main question for Fuller here is why he confines his focus to procedural defects.[48] What of norms that fail to direct human action for other reasons, such as failing to comply what Fuller calls the 'external morality' of law?[49] The foundations of his view, however, seem to be closer to the strong view of rational defectiveness than the weak version. The leading proponents of the functional argument for the natural law thesis are therefore more or less united in their approach to this issue.

Legal invalidity or defectiveness

We saw previously that Moore endorses the strong view of legal invalidity or defectiveness, according to which rationally defective norms are legally invalid.[50] Murphy, by contrast, argues for the weak approach, on which rationally defective norms are merely legally defective.[51] Does the functional argument give reason to prefer either view? Murphy defends his stance by appealing to other examples of entities that fail in their distinctive function.[52] He offers an alarm clock as a plausible example of a functional kind. What, then, is the status of broken alarm clocks that fail to go off in the morning? Murphy argues that they are still alarm clocks, albeit defective ones.

If Murphy were offering a purely hermeneutic argument here, his analysis would be persuasive. The social concept of an alarm clock makes

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48 Compare Hart, above n 4, 207; H L A Hart, 'Book Review: *The Morality of Law*' (1965) 78 *Harvard Law Review* 1281, 1288.

49 Fuller, above n 34, 44-5.

50 Moore, above n 3, 198.

51 Murphy, above n 1, ch 1.

52 Ibid 57.

reference to its distinctive function, but a broken alarm clock is still recognisable as an instance of the concept. We might use Finnis's terms here: a broken alarm clock falls outside the focal meaning of 'alarm clock'. It has, nonetheless, some of the essential features an alarm clock is conventionally taken to have, so it remains an alarm clock in a weak or partial sense.

However, Murphy is not offering a solely hermeneutic argument. He is also making a claim about the nature of law. His argument seems weaker when considered in this light. He asserts that 'a broken alarm clock is an alarm clock; it is just a defective alarm clock'.[53] However, in the absence of further argument, this has limited weight. Moore could concede that people naively believe that broken alarm clocks are alarm clocks, but argue this naive view is false: the best available theory of the structure and function of alarm clocks shows a broken alarm clock is no alarm clock at all.[54]

Murphy therefore fails to show that a metaphysical version of the functional argument does not support a strong view of legal invalidity. He does give hermeneutic reason to think that we should not endorse the strong view. However, as we have seen, an adherent of Moore's position might accept that the weak understanding of legal defectiveness accurately captures the social concept of law, but nonetheless contend that a rationally defective norm is, in metaphysical terms, no law at all.

We saw previously in this article that the conceptual and metaphysical approaches are best viewed as differing in emphasis, rather than kind. This is because conceptual analysis in jurisprudence commonly has the ultimate aim of uncovering essential properties of law, while metaphysical analysis of law must at least start with the associated concept. This continuity between the two approaches suggests there is at least a weak presumption against holding the view described immediately above. If an account of the concept of law is hermeneutically justified, then good reason must be given for rejecting that theory at a metaphysical level.

The underlying point here is that metaphysics needs compelling reasons for rejecting commonsense. This presumption is widely accepted. As David Lewis puts it, 'a credible theory must be conservative': it loses

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53 Ibid.

54 Murphy also notes that to break one's arm in a skiing accident 'is not to lose an arm in a skiing accident': ibid. However, this elides some complex issues about the distinctive function of an arm. An arm that, although temporarily broken, is still part of a healthy and functioning body has arguably not ceased to fulfil its distinctive function. The example therefore tells us little without more argument.

plausibility if it rejects too much of what we previously believed.[55] However, the presumption can be overcome by other desiderata of metaphysical theories, such as simplicity, coherence and explanatory power. Lewis's own metaphysics notoriously embraces the startling thesis of modal realism (the existence of an infinite plurality of worlds) by invoking its explanatory advantages in a range of different philosophical contexts.[56]

Murphy, then, might charge that Moore fails to adduce sufficient reasons for rejecting the weak view of legal defectiveness, given its hermeneutic appeal. However, the objection is far from decisive. Moore advances his view in the context of a general theory of functional kinds. He claims that the best theory of a range of objects and practices, such as mowers, hearts, sleep and law, identifies their essence by reference to their function.[57] Moore can therefore be read as arguing that any hermeneutic advantages to regarding rationally defective norms as laws are outweighed by the economy and unity of his overall theory. The resolution of this issue depends on weighing the explanatory merits and drawbacks of each account.

Fuller, meanwhile, endorses versions of both the strong and weak views. On his view, a norm or system that exhibits 'total failure' in one of its procedural dimensions is legally invalid;[58] norms or systems that are procedurally defective without exhibiting total failure are merely legally defective.[59] This scheme makes sense within Fuller's theory. A norm or system that totally fails to direct human action in accordance with rules, due to procedural breakdown, is no law at all. A norm or system that directs human action poorly, due to procedural defects, is thereby rendered legally defective. The reason, however, why norms and systems can direct human action despite procedural defects is that they retain their reason giving character. The question therefore arises, once again, as to why Fuller fails to emphasise factors other than procedural issues that may prevent law from fulfilling its function.

Norms and systems

What of the issue of norms and normative systems? The functional argument potentially works at both levels: it can be an argument about the function of particular norms or the function of normative systems. We noted

55 David Lewis, *On the Plurality of Worlds* (1986) 134.
56 Compare ibid 133-5.
57 Moore, above n 3, 208-13.
58 Fuller, above n 34, 39.
59 Ibid 122, 198-200.

above, however, that the systemic claim itself admits of two different versions. The first holds a normative system to be legally defective or invalid if any of the norms within it are rationally defective, while the second holds a system to be legally defective or invalid if a proportion (some, many, all) of the norms that comprise it are rationally defective.

Fuller's view is instructive in this regard. We have seen that Fuller provides a distinctive (albeit flawed) account of when a putative legal norm fails in its moral function. He then goes on to apply his theory to the existence conditions of legal systems. However, Fuller does not claim that a system is legally invalid as soon as a single norm fails his procedural test. Rather, it is only when there is a 'total' or 'drastic' failure to respect the procedural standards that the existence of a legal system is called into question.[60] Moore takes an analogous view, suggesting that a 'sufficiently unjust system' will lose its legal status.[61] However, he does not discuss the issue at length.

There is a connection worth noting here between the issue of legal invalidity or defectiveness and the different systemic versions of the natural law thesis. The view that a normative system that fails in its function becomes legally invalid suggests there must be a point at which the system ceases to hold legal status. Legal defectiveness, by contrast, potentially admits of degrees. A normative system (or, indeed, an individual norm) might be more or less legally defective depending on its level of moral defectiveness. This, as we have seen, is Fuller's view in relation to legal norms and systems that partially fail in their function of guiding human action.

C. THE SPEECH ACT ARGUMENT

A third group of theorists, including Alexy and Murphy, has argued that legal norms are a form of *speech act*, which is invalid or defective unless it lives up to the claims it makes on its subjects.[62] Alexy and Murphy suggest different versions of this argument. Alexy argues that all legal systems necessarily claim moral correctness; a norm or system that fails to make good on this claim is therefore either invalid or defective as law, depending on the level of injustice it involves.[63] Murphy, by contrast, portrays the act

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60 Ibid 39-41.

61 Moore, above n 3, 224.

62 Alexy, *The Argument from Injustice*, above n 2; Alexy, 'The Dual Nature of Law', above n 2; Alexy, 'On the Concept and the Nature of Law', above n 2; Murphy, above n 1, 37-56.

63 Alexy, 'The Dual Nature of Law', above n 2, 177; Alexy, 'On the Concept and the Nature of Law', above n 2, 287-8.

of legal enactment as a form of demand. He argues that a demand that is not backed by decisive reasons for action is defective as an illocutionary act, so a law that is not backed by decisive reasons is defective as law.[64]

Concepts, kinds and terms

Murphy's methodological strategy was considered in the previous section. We saw that he makes both a hermeneutic and a metaphysical argument. He presents these strategies as mutually supporting, which leads him to draw on both routes at various points in his work. However, this weakens his ability to directly counter competing metaphysical views that place less weight on hermeneutic considerations.

Alexy also sees his arguments as playing both a conceptual and a metaphysical role. He argues that conceptual analysis in jurisprudence has a twofold character: it attempts to both capture conventional understandings of law and generate an adequate theory of law's nature.[65] The substance of Alexy's argument, however, heavily stresses hermeneutic factors. He draws a distinction between two perspectives: the participant's perspective and the observer's perspective.[66] The former perspective is that of a person who lives within a legal system and has a direct interest in its rulings. The latter is the perspective of one who is not interested in the correctness of a legal system's decisions, but merely wishes to describe how it operates.

Alexy's argument for the natural law thesis is conducted from the participant's standpoint. Indeed, he argues that, from the observer's perspective, legal positivism is true.[67] It is only from the participant's perspective that law issues claims to correctness. It therefore appears that Alexy is advancing a primarily hermeneutic argument. The natural law thesis forms part of the best account of the concept of law, because it explains and justifies the hold legal norms have on their subjects.

Rational defectiveness

Alexy and Murphy differ in their understandings of rational defectiveness. We saw above that Murphy adopts the strong view of the notion, according

64 Murphy, above n 1, 44-7.

65 Alexy, 'On the Concept and the Nature of Law', above n 2, 290-2.

66 Alexy, *The Argument from Injustice*, above n 2, 25; Alexy, 'On the Concept and the Nature of Law', above n 2, 297. As Alexy notes in the former passage, this mirrors Hart's distinction between internal and external points of view.

67 Alexy, *The Argument from Injustice*, above n 2, 37; Alexy, 'On the Concept and the Nature of Law', above n 2, 297; Alexy, 'An Answer to Joseph Raz', above n 2, 45.

to which a norm is rationally defective if it requires a person to perform an action she lacks decisive reason to perform. Alexy, on the other hand, views a putative legal norm as rationally defective for the purposes of the natural law thesis only if it involves injustice.[68] This aligns him with what we have previously called the weak view of rational defectiveness:

> M^W: *N* is rationally defective if it requires *A* to perform an action that *A* is morally obliged not to perform.

Now, it is clear why Murphy adopts a strong view of rational defectiveness. He argues that a legal enactment is defective as a demand if it is not backed by decisive reasons. It is less clear why Alexy opts for a weak view. He contends that law claims moral correctness. This claim depicts law as holding legitimate authority over its subjects, since it serves higher ideals or values.[69] However, in order to be satisfied, such a claim would require more than a lack of legally sanctioned injustice; it would require that law is backed by positive reasons for compliance. Alexy's understanding of rational defectiveness therefore seems a poor fit for his argument.

Could there, nonetheless, be a version of the speech act argument that validly incorporates a weak view of rational defectiveness? There is no logical contradiction in such a view. However, it would need to be supported by an appropriate account of the speech acts of legal officials: one that makes it a non-defectiveness condition of legal norms that they refrain from injustice, but not that they are backed by positive reasons for action. Alexy's theory does not supply us with such an account.

Legal invalidity or defectiveness

Alexy and Murphy diverge again on their views of legal invalidity or defectiveness. It is convenient to focus first on individual norms. We have seen that Murphy adopts the weak view of legal defectiveness, according to which a rationally defective norm is legally defective, rather than legally invalid. Alexy's view is more complex. He distinguishes between unjust norms that fall above and below a threshold of 'extreme injustice'.[70] Unjust norms that fall below this threshold are legally defective, while norms that

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68 Alexy, *The Argument from Injustice*, above n 2, 67; Alexy, 'The Dual Nature of Law', above n 2, 177; Alexy, 'On the Concept and the Nature of Law', above n 2, 287-8.

69 Alexy, *The Argument from Injustice*, above n 2, 33-4; Alexy, 'The Dual Nature of Law', above n 2, 168-71; Alexy, 'An Answer to Joseph Raz', above n 2, 49-50.

70 Alexy, 'The Dual Nature of Law', above n 2, 177; Alexy, 'On the Concept and the Nature of Law', above n 2, 287-8. See also Robert Alexy, 'Effects of Defects – Action or Argument?' (2006) 19 *Ratio Juris* 169, 172-3.

exceed the threshold are legally invalid. Alexy argues that this position strikes the right balance between the factual and critical dimensions of law.

Does the speech act argument lend itself more naturally to a weak or a strong understanding of legal invalidity or defectiveness? Murphy supports his preference for the weak view by drawing an analogy between law and other kinds of speech acts.[71] A lie, he argues, is a defective form of the speech act of assertion, but it would be incorrect to claim that a lie is no assertion at all. Similarly, a law that is not backed by decisive reasons for compliance is a defective demand, but it would be wrong to conclude from this that it is no law at all. It is, rather, defective as law.

Murphy's strategy here is similar to the one he adopts in aligning his functional argument with a weak view of legal defectiveness, insofar as it involves an argument by analogy. I argued earlier in this article that while Murphy's functional argument is intended as a claim about the nature of law, its link with the weak view is tightest if we see it as primarily a hermeneutic argument. That was because his rejection of the strong view rested on an appeal to conventional understandings. Murphy's speech act argument, by contrast, is anchored to the weak view through an analogy with the structure of other illocutionary acts. The connection therefore seems to come through at a metaphysical level. A demand not backed by decisive reasons is, it seems, still a demand, albeit a defective one.

Alexy's argument, on the other hand, relies heavily on hermeneutic considerations. His distinction between extremely unjust and less unjust norms is meant to capture what he calls the 'dual nature of law': namely, that law has both a factual dimension, represented by the need for legal certainty, and a critical dimension, represented by its claim to correctness.[72] This appears to be primarily an attempt to describe the concept of law as it is understood from the participant's point of view.

Norms and systems

Alexy presents an unusually complex view of the relationship between rationally defective norms and normative systems. On his view, a putative legal system that does not claim moral correctness is legally invalid.[73] A

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71 Murphy, above n 1, 57-8.

72 Alexy, 'The Dual Nature of Law', above n 2, 176-7; Alexy, 'Effects of Defects', above n 70, 172-3; Alexy, 'An Answer to Joseph Raz', above n 2, 52-3.

73 Alexy, *The Argument from Injustice*, above n 2, 34; Alexy, 'The Dual Nature of Law', above n 2, 168-9; Robert Alexy, 'On the Thesis of a Necessary Connection Between Law and Morality' (2000) 13 *Ratio Juris* 138, 144.

system that claims correctness, but fails to satisfy that claim will normally be legally defective, but not completely invalid. This is because even a system with extremely unjust components will usually also contain a sufficient proportion of reasonable norms to prevent the whole system from collapsing. It will only be where the unjust components of the system completely undermine its effectiveness that the system as a whole will be invalidated.[74]

One way of presenting Alexy's view is that making a claim to correctness is an existence condition of a legal system, while fulfilling that claim is normally a non-defectiveness condition of such a system. His view on the first issue is similar, though not identical, to Raz's thesis that law necessarily claims legitimate authority.[75] The question, for present purposes, is whether this aspect of Alexy's position is properly understood as an endorsement of the natural law thesis. There is reason to doubt it.

The natural law thesis holds that law necessarily serves as a rational standard for conduct. However, Alexy's account of the existence condition of a legal system does not invoke the system's rational status. As Alexy himself notes,[76] a legal system could be fundamentally unjust while still claiming correctness. His view that legal systems necessarily claim correctness is therefore not itself a natural law view, just as Raz's account of law's claims does not make him a natural law theorist.[77]

This is not to deny that Alexy holds a version of the natural law thesis with respect to legal systems. As we saw above, he holds that a legal system that fails to satisfy its claim to correctness is legally defective. Meanwhile, individual norms that fail to satisfy the claim may be either legally defective or legally invalid, depending on their level of injustice. The claim to correctness therefore forms a central part of Alexy's natural law argument, but the proposition that law necessarily claims correctness is not enough by itself to sustain the natural law thesis. That requires the further contention that a norm or system is invalid or defective if the claim is not fulfilled.

3. Conclusion

74 Alexy, *The Argument from Injustice*, above n 2, 66-8.

75 Raz, *The Authority of Law*, above n 10, ch 2.

76 Alexy, *The Argument from Injustice*, above n 2, 33-4.

77 For discussion of the significance of Raz's claim for natural law theory, see Murphy, above n 1, 52-6; Crowe, above n 27, 785-6, 790-1. Compare Jeffrey D Goldsworthy, 'The Self-Destruction of Legal Positivism' (1990) 10 *Oxford Journal of Legal Studies* 449.

This article has sought to do two things. Its first aim was to draw some important distinctions between different possible versions of the natural law thesis. In particular, I argued that proponents of the thesis may differ on their understandings of four key issues: whether the thesis targets conceptual, metaphysical or linguistic conclusions; the notion of rational defectiveness; the idea of legal invalidity or defectiveness; and the application of the thesis to individual norms and normative systems.

The article's second aim was to examine the versions of the natural law thesis endorsed by leading natural law authors and assess whether those versions are a good fit with their respective arguments. In some cases, the arguments of leading theorists are undermined by suboptimal choices about which versions of the thesis to defend. Scholars examining natural law arguments should take care to clarify which version is being advanced, since natural law positions may seem stronger or weaker depending on which claim they are understood as targeting.

On the other hand, my analysis also suggests that different versions of the natural law thesis could work together in an overall account of the natural law position. Many of the versions are not mutually exclusive. It may well be that the most plausible overall account of natural law jurisprudence draws on multiple strategies and targets multiple claims. There is more work to be done by natural law theorists in articulating and defending the most plausible combination of the various possible views discussed above.