

EXISTENTIALISM AND NATURAL LAW

ABSTRACT

This paper explores methodological connections between the existentialist and natural law traditions, with particular emphasis on the writings of Jean-Paul Sartre and John Finnis. Existentialist approaches to phenomenology hold promise in illuminating the epistemological foundations of natural law accounts, especially those emphasising human self-fulfilment through practical choice. Some methodological challenges common to projects in the fields of existentialist ethics and natural law are discussed. It is suggested that an existentialist perspective holds potential in reinforcing contemporary natural law responses to the so-called ‘fact-value distinction’. Such an approach affords a promising methodological structure for investigating the pre-moral foundations for social judgements of ethical significance, thereby providing qualified support for the type of natural law theory advocated by Finnis.

I INTRODUCTION

Existentialism gives a central place to the conditions of human action. Despite this practical orientation, however, doubts persist about the possibility of an existentialist ethics. In what follows, it is suggested that existentialist investigations concerning ethical experience, particularly as reflected in the writings of Jean-Paul Sartre, hold promise in illuminating the epistemological foundations of contemporary natural law theories.

The first part of the paper introduces the natural law tradition and describes one of the leading philosophical challenges to the natural law approach. The problem in question centres on the relationship between objective ethical standards and empirical observations about moral behaviour. The second part of the paper outlines an interpretation of existentialism as *ethical phenomenology*. Finally, in the third part, the conception of existentialism just outlined is used as the basis for a reinterpretation of Sartre’s early writings on ethics, thereby sketching a possible response to the problem for natural law outlined in the first section.

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II LAW AND DESCRIPTION

The British legal positivist H L A Hart describes the natural law tradition in legal philosophy as the theory ‘that there are certain principles of human conduct, awaiting discovery by human reason, with which [human] law must conform if it is to be valid’.¹ For Hart, therefore, there are two elements to the natural law perspective. First, natural lawyers assert the existence of objective ethical principles, which are accessible to all humans by virtue of their rational capacities. Second, proponents of the tradition argue it is impossible to fully determine a law’s validity without having reference to these fundamental ethical ideas.

This paper focuses on the first element of the natural law tradition just outlined. A belief in objective moral values is, of course, by no means unique to natural lawyers. In this context, it should be noted that it is the second element outlined above that sets natural lawyers apart from their traditional philosophical opponents, the legal positivists. Some legal positivists would assent to the existence of objective moral principles. However, they would maintain those principles play no role in determining questions of legal validity. As Hart puts it, ‘it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality’.² On this view, any coincidence between law and morality is purely contingent.³

A belief in the existence of objective moral principles is, however, a necessary prerequisite for a tenable natural law theory. This aspect of the natural law tradition, like the second element mentioned above, has been subject to considerable criticism. The most fundamental hurdle natural lawyers face in justifying this element of their approach is an epistemological one. Given that, as the self-styled ‘legal ethical positivist’ Tom D Campbell puts it, ‘there are no tenets in political philosophy that command general assent’,⁴ how are natural lawyers to justify their claim that there are universal moral tenets upon which all rational beings can agree? The problem is made more intractable by the vexed nature of the relationship between empirical facts and moral ideals. Even if natural lawyers can point to empirical evidence that most people hold a certain set of moral beliefs, the question remains of how it can be demonstrated that these beliefs hold the status of objective moral values.

Any argument purporting to identify a set of fundamental moral propositions by observing people’s moral attitudes runs the risk of committing the notorious logical fallacy, said to have been exposed by David Hume, of attempting to deduce moral

¹ H L A Hart, *The Concept of Law* (1961) 182.

² Ibid 181.

³ Cf Tom D Campbell, ‘Introduction’ in Tom D Campbell (ed), *Legal Positivism* (1999) xi.

⁴ Tom D Campbell, *The Legal Theory of Ethical Positivism* (1996) 14.

principles from propositions of empirical fact. There is now considerable debate as to the true meaning of the passage in which Hume is alleged to have highlighted this issue,⁵ but that need not concern us here. The problem remains that, as G E Moore observes, the fact that a moral theory is capable of illuminating the psychological motivations of members of society, while it may be empirically interesting, does not necessarily bring us closer to a well-defined conception of the good.⁶

Most philosophers now accept that it is generally fallacious to attempt to deduce (non-trivial) moral conclusions from purely factual premises, although doubts are periodically raised about the principle's universality.⁷ The ontological foundations of the so-called 'fact-value distinction' will be explored further in the fourth section of this paper. For present purposes, it suffices to note that recognising the distinction does not commit one to a non-cognitivist view of moral statements. Non-cognitivism about ethics has an historical association with the positivist tradition in legal theory, although, as Hart points out, the correspondence between the two views is far from complete.⁸ There is, however, a more straightforward explanation for the apparent impossibility of deriving ethical principles from purely factual propositions than the view that statements about morality are non-propositional in character. This is simply that one cannot validly insert into the conclusion of one's argument a property that is not to be found in some form in one or more of the premises.

Such an analysis neatly explains why observations about social attitudes do not warrant conclusions about objective moral principles. It is because the conclusion of such an argument would make reference to a specific property — namely, 'being moral' — that is not contained in any of the premises. It does not, however, follow from this that there is anything exceptional or anomalous about statements relating to the property in question. As Charles R Pigden points out, such an analysis applies exactly the same way to properties like 'being a hedgehog' as it does to properties such as 'being moral', but nobody is led by this to assert a radical distinction between empirical facts and hedgehog-statements.⁹

⁵ See W D Hudson (ed), *The Is-Ought Question: A Collection of Papers on the Central Problem in Moral Philosophy* (1969). See also John Finnis, *Natural Law and Natural Rights* (1980) 36–42.

⁶ G E Moore, *Principia Ethica* (1903) 11–12 (§11).

⁷ See, for eg, John R Searle, 'How to Derive "Ought" From "Is"' (1964) 73(1) *The Philosophical Review* 43.

⁸ Hart, above n 1, 253.

⁹ Charles R Pigden, 'Naturalism' in Peter Singer (ed), *A Companion to Ethics* (1991) 421.

It should be apparent that the immediately preceding analysis of the fact-value distinction is far more favourable to the natural law tradition than a non-cognitivist approach. Under the preceding analysis, all the natural lawyer is obliged to do is construct a valid argument that contains the moral property that features in the conclusion at some relevant point in the premises. In other words, this approach would potentially count as valid an argument that derives a moral conclusion from a mixture of moral and non-moral propositions. Non-cognitivism about ethics, by contrast, casts doubt upon any attempt to incorporate moral statements into a process of rational argument. Such an analysis, however, takes an anomalous approach to moral propositions that requires robust justification.

Even under the less robust approach to the fact-value distinction outlined above, the natural lawyer cannot move from *solely* factual premises to moral conclusions. There must be something moral in the premises to start with. Even this relatively modest requirement has been thought by some to be enough to scuttle natural law theories. The contemporary natural lawyer John Finnis, however, argues that such objections rest on a misunderstanding of the natural law tradition. He denies that natural lawyers have ever tried to derive moral principles solely from factual premises.¹⁰ Rather, Finnis argues, natural law theories typically rely on basic values that are not derived from anything. These fundamental values are self-evident, indemonstrable and underived, though, in his view, not innate.¹¹

Finnis goes on to argue that we decide upon courses of moral action by applying the indemonstrable moral precepts mentioned above to our factual circumstances using self-evident principles of ‘practical reasonableness’.¹² In this respect, he follows Thomas Aquinas, whom he interprets as treating most practically significant moral principles as conclusions deduced from self-evident values by the application of practical reason.¹³ Such a methodology is clearly acceptable under the less robust version of the fact-value distinction described above. Theories of this type also promise to provide us with good reasons to reject a non-cognitivist approach to moral statements. If there are really self-evident principles of practical reasonableness that enable us to engage in constructive reasoning about moral issues, then non-cognitivism about moral ideas becomes untenable.

The crux of Finnis’ vision of natural law lies in his assertion that the basic values he describes are self-evident and underived. This thesis enables him to avoid the charge of illicitly deriving moral ideas from empirical facts about human behaviour, while still recognising such empirical propositions have a role to play in moral reasoning. Finnis joins Moore in observing that universal belief in a particular

¹⁰ Finnis, above n 5, 33.

¹¹ Ibid 33–4.

¹² Ibid 100–3.

¹³ Ibid 101.

proposition does nothing to show it is really desirable.¹⁴ However, he also notes that observations about what other people would say about moral issues can play a valuable role in moral arguments by serving as reminders of the human experience of practical reasoning in situations similar to that currently under examination. They serve to prompt us in recalling our own and others' pre-philosophical grasp of the basic goods, without playing any role in deriving those fundamental values.¹⁵

In light of the central position of the idea of 'self-evidence' in Finnis' theory, it is useful to examine the main passage where he explains that term.¹⁶ He states first that self-evident propositions are not demonstrable, as they are presupposed in anything that would count as a derivation. In other words, the basic goods are obvious to anyone who has experience of practical deliberation. Finnis goes on to note that self-evident values are objective, rather than dependent upon convention or individual purposes. Finally, he observes that self-evident goods can be meaningfully denied; they are not mere tautologies. However, their denial appears manifestly unreasonable to anyone engaging in sincere moral thought.

Finnis regards the basic goods he outlines as representing 'basic forms of human flourishing'.¹⁷ Together, he claims, they encapsulate 'everything one could reasonably want to do, to have, and to be'.¹⁸ Given the importance of the role Finnis claims for these basic ideas, there is something vaguely unsatisfactory about his insistence, however intuitive it might seem, that they are simply self-evident to all reasonable moral agents. While it would be patently unreasonable to demand *proof* of the self-evidence of the basic goods, Finnis' approach to natural law would perhaps appear more satisfactory if he were able to offer some explanatory account of *how it is* that self-evident truths are self-evident. It does not seem unreasonable to suggest that any truly self-evident ideas would have the potential to sustain some form of explanatory project, even though the absence of such an explanatory theory might not count against the self-evidence of the ideas in question.

An explanatory project of the type suggested above has something positive to offer analyses of self-evident truths about natural law. Disputes about what values are truly self-evident have the potential to disintegrate into mere exchanges of claim and counter-claim. As Hart observes, it often happens that 'the disputants on one side [of such a debate] seem to say to those on the other, "You are blind if you cannot see this" only to receive in reply, "You have been dreaming."' ¹⁹ Such an exchange of bald assertions gets the protagonists nowhere. An explanatory

¹⁴ Ibid 66.

¹⁵ John Finnis, *Fundamentals of Ethics* (1983) 17–9.

¹⁶ Finnis, above n 5, 69.

¹⁷ Ibid 23.

¹⁸ Ibid 97.

¹⁹ Hart, above n 1, 182.

discourse concerning the ontological character of self-evident goods offers hope of a positive resolution to this sort of rhetorical impasse, by helping to illuminate the true basis of the intuitions about morality which are being debated.

Such an explanatory discourse holds a valid place in moral debates in much the same way as, according to Finnis, propositions about human behaviour have a role to play in prompting our realisation of basic values. Even in the absence of a pre-existing debate between competing sets of allegedly self-evident ideas, an explanatory project about self-evident values holds potential to illuminate the true basis of our intuitions about morality. This sort of approach to moral philosophy has clear affinities with the models of philosophical argumentation propounded by theorists like Robert Nozick, which focus on providing explanation, rather than proof.

As Nozick puts it, the idea behind such approaches is to carefully explore ‘our separate philosophical insights’, aiming ultimately to ‘unite and unify them under an overarching roof of general principles or themes’.²⁰ Such a methodology emphasises philosophical questions which ask ‘how something is or can be possible’.²¹ In the present context, then, the problem becomes how it is or could be possible that there are self-evident values that underpin our approaches to moral and legal questions. In my view, the existentialist approach to phenomenology holds clear promise in both fleshing out this explanatory methodology and illuminating our intuitions about the pre-philosophical foundations of moral deliberation.

III ETHICAL PHENOMENOLOGY

In my waking consciousness I find myself in this manner at all times, and without ever being able to alter the fact, in relation to the world which remains one and the same, though changing with respect to the composition of its contents. It is continually ‘on hand’ for me and I myself am a member of it. Moreover, this world is there for me not only as a world of mere things, but also with the same immediacy as a *world of objects with values, a world of goods, a practical world*.²²

It will be useful at this point to outline some central themes of the existentialist tradition in philosophy. The picture presented in this section is one of existentialism as *ethical phenomenology*. The following discussion begins by

²⁰ Robert Nozick, *Philosophical Explanations* (1981) 3.

²¹ Ibid 8.

²² Edmund Husserl, *Ideas Pertaining to a Pure Phenomenology and to a Phenomenological Philosophy, First Book* (F Kersten trans, 1983) 53 [§27].

sketching the central subject-matter of ethics, before suggesting how existentialism illuminates this subject-matter through a phenomenological mode of enquiry.

One way of understanding ethics is as the study of the conditions of practical choice. This conception of ethical discourse finds its most prominent early expression in the writings of Aristotle, who devotes large sections of the *Nicomachean Ethics* to discussing the special character of reasoning about action. In a well-known passage, Aristotle notes that, in ethical reasoning, ‘what we deliberate about is the same as what we decide to do’; furthermore, ‘by the time we decide to do it, it is definite’.²³ It is this connection between deliberation and action that confers upon ethical knowledge its uniquely practical character.

Finnis notes that it is often assumed that, in calling ethics ‘practical’, Aristotle simply meant that ethics is the study of human action.²⁴ While such a characterisation of ethics may be true, as far as it goes, it does not capture the essence of Aristotle’s comments. According to Finnis, what Aristotle meant to express is rather that one is properly engaged in ethics only if one is reasoning precisely ‘*in order to act*’²⁵ — that is, if ‘choosing and acting and living in a certain sort of way ... is *the very objective primarily envisaged*’ in the thought-process being undertaken.²⁶

On this view, then, ethics becomes the study of the way one approaches one’s capacity for action. Finnis’ adoption of an Aristotelian conception of ethical enquiry leads him to direct his ethical writings to exploring such questions as, ‘what considerations do we treat as relevant when evaluating different courses of action?’ and, ‘what methods of reasoning do we treat as appropriate in deciding what courses of action to take?’ However, I would argue there is an even more fundamental question signalled by an Aristotelian view of ethics. It is the question of exactly how it is that we are aware of our capacity for moral choice.

To use the Nozickian formulation suggested in the previous section, the problem becomes *how it is or could be possible* that we are aware of our capacity for moral reasoning. Having arrived at this general formulation, it then becomes possible to move to some more precise points of potential exploration. What are the ontological parameters that construct our awareness of the possibility of moral reasoning? Given that we apprehend ourselves as practical beings, what implications does that have for our orientation towards the world around us?

²³ Aristotle, *Ethics* (J A K Thomson trans, 1976) 120 [1113a2] However, I follow the translation offered in Robert Audi, *Practical Reasoning* (1989) 15.

²⁴ Finnis, above n 15, 1.

²⁵ *Ibid.*

²⁶ *Ibid* 3.

There may be many possible ways of exploring the above issues. Under an explanatory model of philosophical reasoning, such multiple approaches are to be encouraged. For present purposes, however, it is suggested that existentialist approaches to phenomenology provide a rich methodological framework that seems ideally adapted to illuminate the conditions of practical choice.

Perhaps an obvious place to commence in providing an exposition of the phenomenological approach to philosophy is with the idea of *intentionality*. At a basic level, intentionality can be understood as the insight that consciousness is always consciousness *of* something.²⁷ To put it another way, it makes no sense to speak of consciousness which is entirely devoid of content. Phenomenologists sometimes appear to use this picture of consciousness as inherently outward-directed as the basis for metaphysical arguments for the existence of an external world.²⁸ To view intentionality simply as a device to shore up a Kantian proof of the existence of things-in-themselves, however, is to fundamentally misunderstand the role of the concept within the phenomenological tradition.

As Sartre observes, the classic phenomenological argument about intentionality is not a metaphysical thesis so much as an ontological one. In his words, ‘it is not a question of showing that the phenomena of inner sense imply the existence of objective spatial phenomena, but that consciousness implies in its being a non-conscious and transphenomenal being’.²⁹ Edmund Husserl perhaps puts the matter more plainly when he observes that phenomenologists do not regard the world as ‘existing for us’, but rather as ‘something that *claims* being’.³⁰ For the phenomenologist, in other words, it is not really to the point of philosophy to speculate on whether there is actually a world outside of consciousness; what is important is that, in everyday experience, the external world is presented to us as something that *does* exist. As Husserl puts the point, the being of the world is not for us an ordinary ‘matter of fact’, contingent upon metaphysical evaluation, but rather a necessarily presupposed ‘acceptance-phenomenon’.³¹

For the phenomenologist, once the ontological implications of intentionality are understood, it becomes clear that the proper understanding of philosophy is as an exploration of the world as it is presented to consciousness — that is, the world *qua* acceptance-phenomenon. The most influential methodology that has been suggested for this task is to be found in the writings of Husserl. The central focus of Husserl’s approach is aptly delineated by Maurice Merleau-Ponty’s comment

²⁷ Cf Jean-Paul Sartre, *Being and Nothingness* (Hazel E Barnes trans, 1958) xxxvii.

²⁸ Cf *ibid* xxxviii.

²⁹ *Ibid*.

³⁰ Edmund Husserl, *Cartesian Meditations: An Introduction to Phenomenology* (Dorion Cairns trans, 1960) 18 [§8] (emphasis added).

³¹ *Ibid* 18 [§7].

that phenomenology is ‘the study of essences’.³² In Husserl’s early phenomenological writings, this analysis of essences is said to be accomplished through the use of ‘intuition’; in his later works, the methodological emphasis appears to shift to the somewhat more technical idea of the ‘epoché’.

Husserlian phenomenology is conceived as a philosophical enterprise seeking to apply a scientific mode of analysis to the objects of human experience, at their most basic and immediate level. As Husserl puts the matter, this approach to philosophy ‘has, as its exclusive concern, experiences intuitively seizable and analysable in the pure generality of their essence’.³³ He continues:

This phenomenology must bring to pure expression, must *describe* in terms of their essential concepts and their governing formulae of essence, the essences which directly make themselves known in intuition ... Each such statement of essence is an *a priori* statement in the highest sense of the word.³⁴

In a later passage, Husserl adds that essences ‘must admit of indefinite reconfirmation and of recognition of their self-identity’ over a series of individual reflections.³⁵ In other words, the essence of a specific phenomenon is discovered when one understands it in terms of a fundamental general concept.

Husserl regards the discovery of the essence of an object as closely linked with the exercise of intuition. The idea of intuition, in this sense, reflects Husserl’s vision of phenomenology as what Dermot Moran terms a ‘presuppositionless science of consciousness’.³⁶ Husserlian phenomenology, in its ideal form, is intended to operate independently of existing frameworks of logic, science and philosophy — indeed, existing schemes of analysis of any kind. As such, Husserl stresses the phenomenologist is to concentrate solely on what is given to her or him directly in the form of intuition — that is, through unmediated phenomenal representations of objects in the world. Knowledge gained through this process will be uniquely reliable, insofar as it describes the world qua acceptance-phenomenon. This crucial characteristic of knowledge through intuition was reiterated by Husserl in his *Ideas* in the form of what he termed the ‘principle of all principles’,³⁷

that every originary presentive intuition is a legitimising source of cognition, that everything originarily ... offered to us in ‘intuition’ is to be accepted

³² Maurice Merleau-Ponty, *Phenomenology of Perception* (Colin Smith trans, 2002) vii.

³³ Edmund Husserl, *Logical Investigations* (J N Findlay trans, 1970) vol 1, 249 [II, Introduction, §1].

³⁴ Ibid.

³⁵ Ibid vol 1, 252 [II, Introduction, §2].

³⁶ Dermot Moran, *Introduction to Phenomenology* (2000) 126; cf Husserl, above n 33, vol 1, 263 [II, Introduction, §7].

³⁷ Husserl, above n 22, 44 [§24] (emphasis omitted).

simply as what it is accepted as being, but also only within the limits in which it is presented there.³⁸

Husserl never ceased to view the concept of intuition as central to phenomenology.³⁹ In his later works, however, he refined his conception of the phenomenological methodology to place more emphasis on the technical idea of the ‘epoché’.⁴⁰ Husserl’s concept of the epoché involves the suspension or ‘bracketing’ of what he terms the ‘natural attitude’ [*die natürliche Einstellung*].⁴¹ The natural attitude represents our everyday mode of experiencing the world. At this level of experience, Husserl states, the world is ‘continually “on hand” for me and I myself am a member of it’.⁴² The world in its natural guise is experienced not only as ‘a world of mere things’ but as ‘a world of objects with values, a world of goods, a practical world.’⁴³ At this level, we are incapable of regarding the world without also being immediately aware of our state of immersion within it.

The performance of the epoché, then, consists in putting aside our natural attitude for the purposes of phenomenological enquiry. Husserl argues that, while it is impossible to completely cease the kind of ‘positing’ of the world that characterises the natural attitude, we can nonetheless ‘put out of action’, ‘exclude’ or ‘bracket’ our natural view of the world when engaging in certain forms of reasoning.⁴⁴ That is, while we cannot completely rid ourselves of the natural attitude — it is ‘still there, like the parenthesised in the parentheses’⁴⁵ — we are able to adopt an outlook where we ‘make no use of it’ in forming phenomenological judgements.⁴⁶

In works such as the *Ideas* and the *Cartesian Meditations*, Husserl’s use of the epoché takes on distinctly Kantian overtones. He consistently speaks of his reductive methodology as the path to transcendental knowledge about the conditions of conscious experience, implicitly aligning himself with a Kantian transcendental idealism.⁴⁷ Husserl argues in this phase of his work that once we set aside the presuppositions that characterise the natural attitude, our connection with the conditions of everyday phenomenal experience can be regained through an ‘all-

³⁸ Ibid (emphasis omitted).

³⁹ Moran, above n 36, 10; Joseph J Kockelmans, *Phenomenology: The Philosophy of Edmund Husserl and Its Interpretation* (1967) 81.

⁴⁰ Husserl took the term ‘epoché’ or ‘?p???’ from the Sceptics of ancient Athens, who used it to mean a ‘cessation’ or ‘suspension’ of judgement: Moran, above n 36, 136, 148-9.

⁴¹ Ibid 136; Husserl, above n 22, 60-2 [§32].

⁴² Husserl, above n 22, 53 [§27].

⁴³ Ibid (emphasis omitted).

⁴⁴ Ibid 59 [§31] (emphasis omitted).

⁴⁵ Ibid.

⁴⁶ Ibid (emphasis omitted).

⁴⁷ Husserl, above n 30, 23-9 [§10-12]; Husserl, above n 22, 86-104 [§41-9].

embracing self-investigation',⁴⁸ by which the transcendental natures of particular types of phenomena can be identified. The implications of this self-styled 'transcendental turn',⁴⁹ represent an important point of departure for specifically existentialist versions of phenomenology.

For Sartre, Husserl's proposed bracketing of the natural attitude and subsequent investigation of the transcendental conditions of experience posits an unacceptable degree of disconnection between the conscious subject and the intentional world.⁵⁰ Sartre argues it is impossible to extricate any aspect of consciousness from its natural position of immersion in the world of natural phenomena. It follows that Husserl's project of transcendental reduction is doomed to failure, relying as it does on a purely reflective conception of the self qua transcendental ego.

Sartre argues that self-awareness is always spontaneous, rather than reflective.⁵¹ It is part of the inherent nature of conscious experience that 'consciousness is consciousness of itself';⁵² in this sense, the conscious self represents a special kind of acceptance-phenomenon.⁵³ Sartre's conception of self-awareness as a fundamental feature of intentionality founds a renewed vision of the phenomenological project. The exploration of the essential features of the world-for-consciousness becomes once again an intuitive grasping of the natural structures of phenomenal experience. There is no need to take the Husserlian step of parenthesising the phenomenal world as the world *as experienced by the self*, because the self can now be recognised as irrevocably embedded in the fabric of the natural world. Under this approach, phenomenology analyses the world directly as it is presented to us, bearing in mind that our subjectivity is an integral part of that picture.

A similar reinvigoration of the idea of intentionality can be discerned in the work of Merleau-Ponty. Like Sartre, Merleau-Ponty doubts whether it is possible to completely bracket the natural attitude in order to perform phenomenological analysis. For him, an important characteristic of the phenomenological reduction is that it is always incomplete. As he puts it, 'the overarching lesson of the reduction is the impossibility of its own completeness.'⁵⁴ It is simply not possible to take a

⁴⁸ Husserl, above n 30, 156 [§64].

⁴⁹ Ibid 23 [§10].

⁵⁰ Jean-Paul Sartre, *The Transcendence of the Ego* (Forrest Williams and Robert Kirkpatrick trans, 1957) 104–6.

⁵¹ Ibid 96–101; Stephen Priest, *The Subject in Question: Sartre's Critique of Husserl in The Transcendence of the Ego* (2000) 53-5.

⁵² Sartre, above n 50, 40.

⁵³ Ibid 42.

⁵⁴ Maurice Merleau-Ponty, *Phénoménologie de la perception* (1945) viii (my translation).

detached perspective on the totality of one's own existence; 'there is no thought that encompasses all our thought.'⁵⁵ Rather, the intentional insight that consciousness is always consciousness *of* something implies an inherent fusion of consciousness *with* the world. Consciousness is always a 'project for the world, meant for a world ... towards which it is perpetually directed'.⁵⁶

Intentionality, then, becomes for Merleau-Ponty an *interaction* between the subject and the phenomenal world. The world is never apprehended merely as an object for analysis and reflection — since the subject and the world are inherently fused, the world in its essential nature becomes a practical world, a field of action. This observation echoes Husserl's comment, reproduced at the beginning of this section, that the natural world is inherently 'a world of objects with values, a world of goods, a practical world', which is 'continually "on hand"' for the subject.⁵⁷ As Merleau-Ponty puts the point, 'consciousness is originally not an "I think that", but an "I am able"'.⁵⁸ In this sense, consciousness represents a constant state of anticipation, a continual sense of 'being-towards-the-thing',⁵⁹ albeit situated within the context of an interconnected phenomenal unity.

It should by now be somewhat clear in what sense the existentialist methodologies of Sartre and Merleau-Ponty can be described by the term 'ethical phenomenology'. The conceptions of phenomenology advanced by those authors are directed at examining an inherently practical world — a world that can never be divorced from its intentional character as a potential field of action. Such a perspective appears well-equipped to enable us to explore the ontological conditions of our capacity for ethical choice. However, the idea of an existentialist theory of ethics has invariably been controversial. In the following section, it is suggested that an examination of the foundations of this debate holds insights not only for existentialist ethics, but also for the natural law tradition in legal theory.

IV OBLIGATION AND ONTOLOGY

Critics of the idea of an existentialist ethics have presented a number of potential problems for such a theory. The following paragraphs explore two of the most important of these challenges. The first charge alleges that, since existentialism is fundamentally a project of descriptive ontology, it is not methodologically equipped to draw conclusions about value. The second challenge asserts that existentialists

⁵⁵ Ibid ix (my translation).

⁵⁶ Merleau-Ponty, above n 32, xx.

⁵⁷ Husserl, above n 22, 53 [§27] (emphasis omitted).

⁵⁸ Merleau-Ponty, above n 54, 160 (my translation). Cf Merleau-Ponty, above n 32, 159.

⁵⁹ Merleau-Ponty, above n 32, 160.

are committed to a subjectivist view of morality, which is inconsistent with any attempt to assert objective ethical values. I would like to suggest that an answer to these challenges is available that illuminates both the structure of an existentialist ethics and the ethical underpinnings of the natural law approach.

The thesis that existentialism is solely concerned with descriptive ontology would appear to be supported by comments made by Sartre in the conclusion to *Being and Nothingness*. There, Sartre is careful to remind the reader that ‘ontology is concerned solely with what is’.⁶⁰ He goes on to observe that ‘we cannot possibly derive imperatives from ontology’s indicatives.’⁶¹ It would seem that Sartre is well-aware of the logical gulf between description and value. However, many commentators have questioned whether the distinction is so diligently observed in *Existentialism and Humanism*, where Sartre attempts to establish a positive moral thesis based on his earlier ontology. The central theme of *Existentialism and Humanism* is that one ought to recognise the moral value of both one’s own freedom and the freedom of others. Sartre argues that such an attitude is necessary to maintain ‘strict consistency’;⁶² the decision not to value freedom amounts to self-deception, since one cannot avoid recognising one’s ontological status as a contingent being.

Perhaps the leading objection to Sartre’s thesis in *Existentialism and Humanism* is that his appeal to ‘strict consistency’ is unjustified. As Thomas C Anderson puts the matter, Sartre’s argument ‘seems to presuppose that there is some inherent value in being consistent with human reality.’⁶³ However, Sartre offers no justification for such a naturalistic principle, leading to the suspicion that he is making an illicit inference from empirical description to moral value.⁶⁴

It is undeniable that the precise logical basis for Sartre’s moral conclusions in *Existentialism and Humanism* is far from explicit. It also bears noting that Sartre himself later expressed serious dissatisfaction with the formulation of existentialist ethics presented in that work. Nevertheless, I would argue there is a way of salvaging Sartre’s argument from the objection described above. This involves reading Sartre’s thesis, not as an attempted logical derivation of foundational moral principles, but as an explanatory project aimed at clarifying our intuitions about the foundations of moral reasoning. Such an approach does not claim to prove the value of freedom, but rather suggests that freedom’s fundamental moral importance

⁶⁰ Sartre, above n 27, 625.

⁶¹ Ibid.

⁶² Jean-Paul Sartre, *Existentialism and Humanism* (Philip Mairet trans, 1948) 51.

⁶³ Thomas C Anderson, ‘Sartre’s First Two Ethics’ in A B Dallery, S H Watson and E M Bower (eds), *Transitions in Continental Philosophy* (1994) 227, 230.

⁶⁴ See also Richard Bernstein, *Praxis and Action* (1971) 151–4; Henry Veatch, *For an Ontology of Morals* (1971) 76–7.

is self-evident to anyone who engages in ethical deliberation. On this view, Sartre's idea of 'strict consistency' is to be taken as referring to a moral, rather than a logical, judgement;⁶⁵ any attempt to deny the value of freedom is untenable because it contradicts moral values that everyone would recognise, upon reflection, to be true.

This reinterpretation of Sartre's argument would seem to be consistent with some of his comments in the important concluding section of *Being and Nothingness* concerning ethical implications.⁶⁶ There, for instance, Sartre describes his 'existential psychoanalysis' as a project of 'moral description', insofar as it 'releases to us the ethical meaning of various human projects.'⁶⁷ Such a statement is suggestive of an explanatory attitude towards moral ideas, as opposed to a deductive approach. By this, however, I do not mean to claim that the explanatory conception of existentialist ethics sketched above is wholly consistent with Sartre's comments in *Being and Nothingness*. To this extent, it remains a constructive reinterpretation, rather than a strict application, of Sartre's ethical theory.

It should be clear how this sort of reinterpretation of Sartre's project would avoid the objection of making an illicit inference from fact to value. Prima facie, however, it would still appear to be susceptible to the second sort of challenge to existentialist ethics mentioned above — namely, that the existentialist world-view is fundamentally inconsistent with the idea of objective moral values. Again, there is much in Sartre's writings to support this objection. In *Being and Nothingness*, he proclaims that 'nothing, absolutely nothing, justifies me in adopting this or that particular value'.⁶⁸ Later, in the section on ethical implications, he strongly denounces the 'spirit of seriousness', according to which values are 'transcendent givens independent of human subjectivity'.⁶⁹ For many commentators, this apparent moral subjectivism undermines the very idea of an existentialist ethics.⁷⁰

The interpretation of the existentialist view of morality outlined in the previous paragraph has translated into a popular perception of existentialism as a morally vacuous perspective under which everything is permitted. This has led authors such as Brian Hutchinson to warn of 'the great harm that vulgarised versions of existentialism have done to modern life by placing "authenticity" above simple

⁶⁵ Cf Sartre, above n 62, 50.

⁶⁶ Sartre, above n 27, 625-8.

⁶⁷ Ibid 626 (emphasis omitted).

⁶⁸ Ibid 38 (emphasis omitted).

⁶⁹ Ibid 626.

⁷⁰ Thomas C Anderson, *The Foundation and Structure of Sartrean Ethics* (1979) 21, 154 n 10.

decency'.⁷¹ Moral subjectivism, however, is by no means the only tenable interpretation of the existentialist reaction to totalising theories of value.

Existentialism and Humanism contains a famous anecdote that is often viewed as giving support to a subjectivist interpretation of existentialist ethics. In this passage,⁷² Sartre recounts the case of a student who sought his advice on a moral quandary. The young man was about to choose between joining the Free French Forces in England and remaining in France to care for his lonely mother. He found each option morally attractive, but for different reasons. How, he asked Sartre, was he to resolve this intensely practical question? Sartre's apparently unhelpful response — 'You are free, so choose'⁷³ — teaches us much about his approach to ethics, but it may not be the simple lesson that some commentators would have us learn.

In Sartre's view, his interlocutor was 'hesitating between two kinds of morality; on the one side, the morality of sympathy ... and, on the other side, a morality of wider scope but of more debatable validity.'⁷⁴ In such a situation, no account of moral value could help him decide how to act. However, it does not follow from this that there are no objective values. It might simply be that moral values are such that the results of ethical deliberation are sometimes underdetermined.

In this sense, Sartre's point connects with an argument raised by Finnis. Finnis criticises utilitarian and, more generally, consequentialist theories of ethics, which he characterises as varieties of 'proportionalism', for not taking account of the 'incommensurability' of moral values.⁷⁵ He notes that proportionalist theories propose a computational account of moral deliberation.⁷⁶ On such views, the correct solution to a moral quandary can be deduced by weighing up the available options and choosing that course which represents the best 'proportion of benefit to harm'.⁷⁷ For Finnis, this computational model of ethics is 'not just impracticable but ... senseless'.⁷⁸ The reason is that there is no single, definitive measure of value — moral decision-makers are frequently called upon to choose between competing goods, all of which seem morally important and none of which appears to be reducible into any of the others.

⁷¹ Brian Hutchinson, *G E Moore's Ethical Theory: Resistance and Reconciliation* (2001) 63–4. Cf Charles Taylor, *The Ethics of Authenticity* (1992).

⁷² Sartre, above n 62, 35–8.

⁷³ Ibid 38.

⁷⁴ Ibid 36.

⁷⁵ Finnis, above n 15, 86.

⁷⁶ Ibid 87.

⁷⁷ Ibid.

⁷⁸ Ibid.

In the type of difficult moral situation envisaged above, it is not to the point to engage in the kind of ‘rationalisation’ that characterises proportionalist approaches.⁷⁹ In the end, one must choose. To use Finnis’ terms, one must voluntarily adopt ‘a set of basic commitments’ to guide one’s actions.⁸⁰ It does not follow that these commitments are purely arbitrary or subjective; Finnis argues that we readily recognise the range of values from which we can reasonably choose.⁸¹ However, the element of choice cannot be rationalised out of the process of moral deliberation.

Let us suppose that Finnis’ observations about ethical deliberation are correct. How, then, can we explain the irreducibility of moral choice? How it is or could it be possible that moral choices are sometimes underdetermined? In the first place, this seems to be a question about the ontological character of moral obligation. An important starting-point for an exploration of this issue is provided by the distinction, made famous in legal theory by Hart,⁸² between ‘being obliged’ and ‘having an obligation’. If a person is coerced to take some action against her or his will, we might reasonably say she or he was ‘obliged’ to take that action. It would not, however, be correct in such circumstances to say that the actor ‘had an obligation’ to act in the relevant way. The idea of ‘having an obligation’ requires more than compulsion.

Hart goes on to infer from the above distinction that ‘having an obligation’ requires the existence of a socially-recognised rule.⁸³ It is worth asking whether this response captures the essence of the dichotomy in question. Compulsion can be logical as well as physical. The problem with the process of rationalisation in which moral proportionalists engage is that it represents ethical decision-making on a model of logical compulsion. If one carries out one’s reasoning diligently, the morally correct response cannot be avoided. Such an analysis may oblige us to act in a particular way, but can it explain what it is to *have* a moral obligation?⁸⁴

A careful reading of the passage where Sartre discusses his student’s predicament suggests that Sartre’s main target in recounting the story is the type of moral rationalisation discussed above. He methodically dissects the forms of rationale commonly offered for such a decision, arguing that they merely serve to disguise the underlying exercise of moral will.⁸⁵ In the end, Sartre argues, any attempt to

⁷⁹ Ibid 94.

⁸⁰ Ibid 90–1.

⁸¹ Ibid 91.

⁸² Hart, above n 1, 80.

⁸³ Ibid 83–4.

⁸⁴ Cf Jean-François Lyotard and Jean-Loup Thébaud, *Just Gaming* (Wlad Godzich trans, 1985) 21.

⁸⁵ Sartre, above n 62, 36–8.

remove the element of choice from the process of moral deliberation is simply a sophisticated form of self-deception. This is also precisely Finnis' point.⁸⁶

The preceding analysis suggests, what most people already know from practical experience, that choice is an essential aspect of moral reflection. Philosophical debates about free will and determinism aside, nobody genuinely engaging in moral deliberation would deny that we have the capacity to make moral choices. It does not follow, however, that everything is permitted. Indeed, the opposite is true. The insight that choice is integral to moral deliberation leads us to realise the pre-moral importance of freedom. Once this insight is obtained, it becomes impossible to engage in genuine, sustained moral reflection without receiving practical reinforcement about the value of choice in facilitating moral experience.

The pre-moral realisation that freedom is valuable is by no means confined to our own ability to choose. Rather, it is presented to us as an irreducible ontological truth. As an existentialist perspective helps us to recognise, the ethical subject finds her or himself embedded in a normative social world. It follows that an ethical question is never simply a question one asks oneself.⁸⁷ It is a question received from elsewhere; the response is inherently outward-directed. Our experience of the value of freedom is always an experience received in the unsettling presence of the other.⁸⁸ In this sense, any attempt to appropriate freedom as a purely subjective value is inconsistent with the fundamental orientation of ethical experience.

The above analysis enables us to understand why human communities tend to place a strong emphasis on moral expression. Moral freedom is a complicated notion and people can reasonably disagree about how it is best realised. However, very few human societies lack clearly designated spheres for morally significant action. Social institutions such as religion, politics, marriage and friendship have evolved so as to allow individuals to express ethical meaning through choices that are generally acknowledged as significant. The particular social mechanisms arising from this process reflect wisdom collected and shared over generations by individual humans seeking to realise their common ontological nature.

It is interesting to note the overlap between these evolved social spheres for ethical expression and the basic values described by Finnis.⁸⁹ Finnis argues that values such as friendship and religion are reflected in social institutions because their goodness is self-evident to anyone engaging in moral deliberation.⁹⁰ However, this appeal to universal goodness is not essential to understand the value attending the

⁸⁶ Finnis, above n 15, 94.

⁸⁷ Cf Lyotard and Thébaud, above n 84, 22–4.

⁸⁸ Cf Sartre, above n 62, 50.

⁸⁹ Finnis, above n 5, 81–99.

⁹⁰ *Ibid* 33–4, 69.

relevant social institutions. People engaging in moral deliberation naturally come to recognise their ontological nature as free agents.⁹¹ This realisation leads them to embrace social institutions allowing meaningful choice. Finnis may or may not be correct that the specific areas social institutions tend to designate for such choice reflect natural priorities concerning value.

V CONCLUSION

In this way, the theoretical perspective outlined above provides qualified support for the type of natural law theory advocated by Finnis. It affords a promising methodological structure for investigating the pre-moral basis for social judgements of ethical significance. The approach in question also offers a framework for an existentialist moral discourse that avoids some of the most common objections to such a project. It remains to be seen whether this explanatory approach to ethics can cast light on the second element of the natural law tradition described by Hart; namely, the view that a law's validity depends on its coherence with our shared ethical principles. That, however, is a question for another paper.

⁹¹ Cf *ibid* 90.