

Book Review

Natural Law, Positivism, and the Limits of Jurisprudence: A Modern Round

The Authority of Law: Essays in Law and Morality. By Joseph Raz. Oxford: Clarendon Press, 1979. Pp. ix, 292.

Natural Law and Natural Rights. By John Finnis. Oxford: Clarendon Press, 1980. Pp. vii, 425.

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In his recent collection of essays,¹ Joseph Raz presents and defends a version of positivism; in his first book-length contribution to legal philosophy,² John Finnis explores a natural law perspective. These two books, both published by Oxford, may thus serve as a reminder of the persistence of the debate between legal positivists and those adhering to the natural law tradition. As this review will show, the books demonstrate that these apparently contradictory schools of thought both can and must be integrated to enhance our understanding of the complex phenomenon of law. Rather than rival theories of law, positivism and natural law are, and should be taken to be, complementary and equally necessary approaches to a social institution of the utmost importance.

The call to integrate these theories of law is anything but revolutionary. Sensitive legal scholars, even those who clearly identify themselves as adhering to one school or the other, have always granted that the two perspectives are complementary rather than contradictory, and that the appeal of neither is transitory.³ Raz and Finnis, while presenting approaches

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1. J. RAZ, *THE AUTHORITY OF LAW* (1979) [hereinafter cited as RAZ].

2. J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) [hereinafter cited as FINNIS].

3. For example, even Jerome Frank explicitly affirms a commitment to a belief in natural law that is consistent with his positivistic "realistic" approach to the institution of law in society. J. FRANK, *LAW AND THE MODERN MIND* xix-xxi (6th printing 1948). And Hans Kelsen, unquestion-

sufficiently different to justify calling them “positivist” and “natural lawyer” respectively, together make an important contribution in that direction. They differ not so much in their understanding of positive law as in their approach to the study of law and to what context is appropriate for that study.

The books are not primarily polemical; both Raz and Finnis frequently acknowledge the value and usefulness of insights traditionally connected with the other’s perspective. Yet at times each sounds as if he wants to deny what is central to the other’s conception of law. I shall argue that these apparent denials are either misleading or wrong: Finnis must, and indeed does, accept Raz’s version of positivism; and Raz cannot, and does not want to, deny the centrality of the issues discussed by natural law theorists but often neglected by positivists.

Part I of this review seeks to outline some of the theses put forward by Raz and Finnis that give a sense of the way in which the former is a positivist, the latter a natural law theorist. In Part II these theses are analyzed to show that the two views are not incompatible. Part III uses the question of the obligation to obey the law to illustrate four conclusions: that integration is necessary; that Raz and Finnis reach similar substantive conclusions (couched in differing terminologies) through their different approaches; that general analysis within either perspective is limited in providing helpful guidelines for conduct in particular cases; and that neither perspective is generally more conducive to desirable conduct.

I. Raz’s Positivism and Finnis’ Natural Law

A. *Raz*

Raz’s book is a collection of essays written over the last decade, structured around the theme of the authority of law: whether the law’s claim of legitimate authority over its subjects is in fact justified.⁴ His discussion

ably a leading legal positivist, concluded:

At this moment of our intellectual history, the present essay attempts to explore the foundations of natural-law theory and of positivism. It will have succeeded if it has been able to show that the contrast between these two elementary tendencies in legal science is rooted in the ultimate depths of philosophy and personality; and that it involves a never ending conflict. Kelsen, *Natural Law Doctrine and Legal Positivism*, in *GENERAL THEORY OF LAW AND STATE* 446 (1945). For attempts to study the controversy and to integrate the different perspectives, see, e.g., Bodenheimer, *Reason and Reality in Jurisprudence*, 7 *BUFFALO L. REV.* 351 (1958); Ehrenzweig, *Psychoanalytical Jurisprudence: A Common Language for Babylon*, 65 *COLUM. L. REV.* 1331 (1965); Jenkins, *The Match Maker, or Toward a Synthesis of Legal Idealism and Positivism*, 12 *J. LEGAL ED.* 1 (1959); Silving, *Positive Natural Law*, 3 *NAT’L L.F.* 24 (1958). A. Brecht gives a historical account of the controversy that provides some hope that the debate can be terminated. A. BRECHT, *POLITICAL THEORY* 138-42 (1961).

4. The book, arguing that one of the defining features of law is its claim to legitimate authority, opens with a philosophical analysis of authority. The following two parts are devoted to essays refut-

presupposes that in order to answer questions about the authority of law, we must first understand what authority and law are, and further, that we *can* understand what authority and law are without necessarily understanding either how and why they come into being or whether they are justified.

Raz identifies three claims made by positivists and criticized by natural law theorists: the social, moral, and semantic theses.⁵ The social thesis is that law may be identified as a social fact, without reference to moral considerations. The moral thesis is that the moral merit of law is not absolute or inherent but contingent, depending "on the content of the law and the circumstances of the society to which it applies."⁶ The semantic thesis is that normative terms such as "right" and "duty," which are common to moral and legal discourse, are not used in these two contexts with the same meaning.⁷

He claims that the social thesis is the most fundamental, and it is the only one that he endorses. Nevertheless, although Raz shows that the moral thesis does not follow from his version of positivism, he does argue that the claim of all laws to legitimate authority is not necessarily justified, and that individuals do not have a general duty to obey the law.

Raz concedes that the use of the term "law" is too unfocused to justify adoption of the social thesis, and that the accidents of linguistic usage should not be conclusive in any case.⁸ He further accepts that clean separation of description from evaluation of law is a circular benefit of the social thesis: It begs the question whether such separation is possible or useful. His argument for the social thesis relies on the three accepted criteria for the identification of legal systems—efficacy, institutional character, and sources—to demonstrate that the law is indeed an institution conforming to the social thesis.⁹ The institutional character of the law, which

ing "directly, and by implication, a variety of traditional natural law arguments" for the moral authority of law. RAZ at vi. In the process a positivistic picture of law is sketched; the reader interested in a more detailed and systematic account of law from a positivistic point of view is referred to PRACTICAL REASON AND NORMS (1975) [hereinafter cited as PRACTICAL REASON]. RAZ at vii. Finally, the last part of the book directly addresses the question of the law's authority, arguing that individuals have no *general* moral obligation to obey the law.

Of the fifteen essays in this book, eight have been published before. The new essays include four on a subject never before discussed by Raz: moral attitudes to law.

This book should be read together with Raz's previous work in legal philosophy. That work includes CONCEPT OF A LEGAL SYSTEM (2d ed. 1980) [hereinafter cited as CONCEPT], PRACTICAL REASON, *supra*, and *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972).

5. RAZ at 37. The three theses are in fact three clusters of theses revolving around the questions of the identification of law, its moral value, and the meaning of its key terms.

6. *Id.*

7. Compare this analysis of positivism with Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 601-02 n.25 (1958) and S. SHUMAN, LEGAL POSITIVISM 11-30 (1963).

8. RAZ at 41.

9. *Id.* at 42. This argument appears circular. To support the social thesis, efficacy, institutional

is accepted by most students of the law, means that laws are identified by their links to some institutions (either legislatures or adjudicatory organs). Whatever is not admitted by these institutions, even if it is morally justified or is a part of social morality, is not law. Whatever they admit and recognize, even if it clearly is immoral, is law.¹⁰

More controversial is the claim that the law has *purely* social sources, that laws can be identified by their emanation from certain “sources”—from ways that the system recognizes as ways of creating laws—without recourse to moral argument. Raz claims that this “sources thesis” (a strong version of the social thesis) is the essence of positivism,¹¹ and that it is vindicated by two considerations. First, it makes sense of several familiar distinctions: between the legal competence and the moral sensitivity that we require a judge to possess; between settled and unsettled law; and between applying preexisting law and creating new law. Legal competence is required when the law is settled and need only be applied; moral sensitivity, creativity, and integrity are required when we create new law (as we must, according to Raz) to resolve disputes in unsettled areas of law.¹² Second, and more important, the sources thesis accounts for a basic function of law, one often mentioned by those legal scholars who seek to justify positive law rather than merely to describe its defining features: easily identifiable laws “provide publicly ascertainable standards by which members of the society are held to be bound so that they cannot excuse non-conformity by challenging the justification of the standard.”¹³ This function helps to secure social cooperation both by its sanctions and by pointing out the ways in which cooperation can be achieved.¹⁴ Being identified by social sources is thus not simply accidental: it is a central feature of law, which serves an important function.

The moral thesis does not follow from the social thesis because the social facts by which we identify the law may endow it with a moral charac-

character, and sources must be *independent* indices of the existence and identity of legal systems. Yet Raz argues that sources are such an index as a different formulation of the social thesis itself. For an explanation of the nature of the social thesis that may deal with this difficulty (and others), see CONCEPT, *supra* note 4, at 210-16.

10. RAZ at 43-45.

11. *Id.* at 38, 41, 45-48.

12. *Id.* at 48-50. For Raz's argument (contra Dworkin) that gaps in the law, and therefore the need for judicial discretion, are inevitable, see *id.* at 53-77. For a more detailed discussion (from the point of view of the English theory of precedent) of the ways in which application and law-making are intertwined in judging, see *id.* at 180-209. The distinction between applying preexisting law and making new law is also discussed in *id.* at 90-97 (dealing with identity of legal systems). For a less technical refutation of Dworkin's argument against positivism, see Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972).

13. RAZ at 52.

14. *Id.* at 51. Raz points out that this double function of law has often been emphasized by natural lawyers. Among positivists, he says, Hart was most attentive to it. PRACTICAL REASON, *supra* note 4, at 162-70.

ter.¹⁵ And, even if this is not the case, human nature may entail that any system that is efficacious will in fact have some moral merit.¹⁶ Accepting the social thesis thus leaves open the question whether the moral merit of law (either particular laws or law in general) is contingent or inherent. Raz nonetheless rejects much of the traditional natural law critique of positivism on this point; he refutes three often-made arguments seeking to establish the moral authority of law before sketching his own version of the proper moral attitude to law, which is based on a rejection of a general moral obligation to obey it.

The first argument is that positivism's attempt to distinguish in a non-evaluative manner between law and other forms of social control unduly neglects the functions of law, and that, since functions cannot be described in a value-neutral way, all functional accounts of law must involve some evaluation—a conclusion inconsistent with the social thesis.¹⁷ Raz concedes that the functions of law are central to its description,¹⁸ and provides a schematic classification of these functions.¹⁹ He argues, however, that his analysis of those functions is in fact non-evaluative, thus refuting by demonstration the claim that all such analyses must be evaluative.²⁰

The second argument is that it is not true (or possible) that the content of law is determined exclusively by social fact, since any student of adjudication knows that judges must resort to notions such as the spirit of the legislation and the intent of the legislature and that they often explicitly rely on moral considerations. The critics deduce from this, first, that it is impossible always to distinguish between what the law is and what it ought to be (thus rejecting the social thesis) and, second, that since the process of adjudication is a purposeful human action primarily directed at promoting the common good, its application by judges guarantees that law has some moral merit (thus rejecting the moral thesis).²¹ Raz simply concedes that judges do in fact invoke these notions and sometimes rely on (extralegal) moral considerations. He argues that this is inevitable in all source-based systems, that judges are indeed required to “go beyond the

15. *Id.* at 38-39.

16. *Id.* Hart has elaborated this thesis, arguing that some minimal features of human nature suggest that all legal systems must have a “minimal content of natural law.” H.L.A. HART, *THE CONCEPT OF LAW* 189-95 (1961).

17. See Fuller, *Human Purpose and Natural Law*, 3 NAT'L L.F. 68 (1959); Nagel, *On the Fusion of Fact and Value: A Reply to Professor Fuller*, 3 NAT'L L.F. 77 (1959); Fuller, *A Rejoinder with Professor Nagel*, 3 NAT'L L.F. 83 (1959); Nagel, *Fact, Value and Human Purpose*, 4 NAT'L L.F. 26 (1960) [entire series of articles hereinafter cited as the Fuller-Nagel exchange].

18. RAZ at 163-65.

19. *Id.* at 176.

20. *Id.* at vii. For another refutation of this argument, see *infra* pp. 1266-67.

21. See Fuller's articles in the Fuller-Nagel exchange, *supra* note 17; Fuller, *Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Fuller, *Positivism and Fidelity to Law—A Reply To Professor Hart*, 71 HARV. L. REV. 630, 661-69 (1958).

law,” sketching the constraints on these judicial activities.²² His argument is, presumably, that there is nothing in the nature of this activity that guarantees moral merit to the law or to judicial decisions.²³

The last of these arguments is that one of the distinguishing marks of law is its “obedience” to the ideal of the rule of law.²⁴ This in itself is held to confer moral merit on the law, making it preferable to systems of arbitrary and capricious discretion. Explicitly addressing this argument,²⁵ Raz analyzes the ideal of the rule of law and its value, stressing the important moral goals served by conformity to this ideal.²⁶ He nevertheless rejects the claim that by conforming to this ideal, law necessarily acquires moral merit. The rule of law, he maintains, is indeed necessary for the law to perform its function as an effective guide for behavior. But this efficiency is not itself morally valuable; its merit depends on the substantive goals that the law in fact seeks to promote.²⁷ Faithfulness to the rule of law minimizes abuse of the power conferred by the law, but it does not confer additional and independent moral merit on the law; the rule of law is a negative virtue, since the risk of arbitrary power is created by the law itself.²⁸

Finally, Raz accepts the traditional natural law rejection of the semantic thesis. To understand that position we must introduce Raz’s distinction between types of statements.²⁹ Statements such as “X has authority,” “there is a valid rule that one should not kill another person,” or “there is an obligation to keep promises” may all be used in at least three different

22. See *supra* note 12.

23. He argues explicitly that it is possible to distinguish between the elements of law and those of value in adjudication. Raz at 180-209. This would preserve the sources thesis, but may still support the judgment that we introduce a guarantee of some moral value through the deliberate application of law by judges. But this part of Fuller’s argument was critically discussed and rejected by both Hart, *supra* note 7; Book Review, 78 HARV. L. REV. 1281 (1965) (reviewing L. FULLER, *THE MORALITY OF LAW* (1967)), and Dworkin, *Philosophy, Morality, and Law—Observations Prompted by Professor Fuller’s Novel Claim*, 113 U. PA. L. REV. 668 (1965); see also *infra* pp. 1267-68.

24. The rule of law is defined as a system of general laws that are prospective, open, clear, relatively stable, governing the making of particular laws, with adjudicatory institutions that (1) are guaranteed to be independent, (2) follow the rules of natural justice, (3) have the power to review activities of other organs, and (4) are easily accessible. See RAZ at 214-19 (eighth principle here subsumed under third); see also FINNIS at 270-71; L. FULLER, *THE MORALITY OF LAW* 33-94 (rev. ed. 1969).

25. See RAZ at 223-25 (identifying Fuller as target).

26. Raz mentions three such goals: curbing arbitrary exercise of power, protecting freedom by securing some predictability of consequences, and protecting human autonomy and dignity by providing some certainty and stability in human affairs. *Id.* at 219-23.

27. He uses the analogy of a knife: some ability to cut is a virtue, but one neutral to the end to which the instrument is put. *Id.* at 225-26.

28. *Id.* at 224.

29. Raz introduces this distinction in PRACTICAL REASON, *supra* note 4, at 171-77, and uses it here in the essay *Legal Validity*, RAZ at 146-59. He also uses it, without explicitly introducing it, in his discussion of authority. *Id.* at 3-27. Finnis is, however, the source of my notation. See FINNIS at 234-37.

senses. The first sense (S_1) is the full-force *normative* statement about the existence and strength of reasons for action: X indeed has legitimate authority³⁰ to do what he does; there are indeed good reasons for not killing another person; people should indeed keep their promises. The second (S_2) is an *empirical* statement about beliefs, intentions, and conduct: people believe that X has authority (S_1), X in fact has the power to make others obey him; individuals believe they should not kill others or break promises and they usually do not do so.³¹ And the third (S_3) is a statement made "from a point of view,"³² saying that there is a point of view from (or a normative system under) which X has authority. The maker of such a statement does not necessarily endorse³³ this authority; he may still want to say that X does not in fact have legitimate authority. Yet S_3 is not an empirical statement like S_2 ; it is a detached normative statement about the existence of legitimate authority within a given system, made without endorsing that system.³⁴

This tripartite distinction enables Raz to reject the semantic thesis.³⁵ He in fact characterizes law as a system that claims legitimate, S_1 authority:³⁶ the law claims that the duties it imposes are moral duties, that people ought to obey the law. It is clear that many people both endorse such claims for efficacious legal systems and are willing to make fully committed statements about the law and the duties it imposes.³⁷ But whether authority is legitimate is a moral question; thus, endorsement by many people is not sufficient. Raz himself, holding that moral considerations do

30. For Raz's excellent analysis of authority, see RAZ at 16-25; see also *infra* note 73.

31. S_2 statements are empirical statements about the beliefs, intentions, purposes, and perceptions of individuals. When they relate to the existence and legitimacy of norms, they must be distinguished from (both S_1 and S_3) normative statements: A particular belief statement is only one instance of a range of possible S_2 statements. Although some S_2 statements *logically presuppose* S_1 statements, their truth does not depend on the normative force or on the justification of the latter. A person may believe X has authority even though X 's claim of authority is not in fact justified.

32. RAZ at 153-57. See also PRACTICAL REASON, *supra* note 4, at 176-77.

33. Raz distinguishes two senses of "endorsement": as meaning that all should obey the rule (strong endorsement), and as being limited to the speaker himself (weak endorsement). RAZ at 155 n.13.

34. Such statements may, in Kelsen's example, be made by an anarchist lawyer asked to describe the state of the law. His answer would describe the normative situation within the legal system without endorsing the system as a whole. RAZ at 156.

35. See *infra* p. 1257. Raz also notes that a semantic thesis that is usually advanced by adherents of natural law theories—that all legal statements are moral statements—is shown only to be modified, not to be rejected outright. Since legal (S_2) statements are normally true for a society in which many believe that they are also moral (S_1) statements, it is true to some extent that we can deduce S_2 statements from the existence of S_1 statements. Thus, legal statements are moral statements in the S_2 sense. See RAZ at 158-59. (This is a somewhat speculative account of Raz's position. His own account may say that we can deduce S_1 statements from the existence of S_2 statements, but such a reading seems inconsistent with his distinction between beliefs about norms and their justification.)

36. RAZ at 28-33.

37. See *id.* at 159 (arguing that statements from legal point of view only likely to be made and only of interest in societies in which many people are willing to make corresponding full-blooded S_1 statements).

Natural Law

not support a general moral obligation to obey the law, denies that the law *always* has legitimate authority.³⁸ In this sense the moral thesis is correct: the fact that something is a legal obligation does not in itself provide a moral reason for doing what the law requires.³⁹

Most lawyers, says Raz, justifiably concentrate on S_3 norms, which are identified by their links to legal institutions.⁴⁰ He suggests that (despite the “derivative” nature of S_3 statements⁴¹) making law in this systemic and institutionalized sense the subject of special study may be desirable, since it is an important social institution.⁴² He thus accepts the separate study of law and the convenience of the distinction between legal philosophy and other branches of philosophy, such as political philosophy or practical reason in general.⁴³ He proposes a rather minimal identifying definition of law,⁴⁴ which he then uses to classify statements as legal or nonlegal⁴⁵ and philosophy as legal or political, stressing that the complex interrelations between law and other institutions and social forces should not be neglected.

All this does not follow ineluctably from his version of positivism; but it is clearly consistent with that positivism and fits in nicely with the centrality he accords to the sources thesis as a necessary part of any adequate

38. For a more detailed analysis of Raz's view on this issue, see *infra* pp. 1271-73.

39. This does not mean the semantic thesis, see *supra* p. 1252, can remain unmodified. Legal statements may be made without endorsing the moral force of the law, *supra* note 34: a person can recognize a legal duty (S_2) to serve in the army in any war being fought by his country, yet challenge the law by arguing that no such duty (S_1) should exist. Such a position is not self-contradictory because the criteria for identifying what the law is (e.g., decision by the highest court of the jurisdiction) and for evaluating the moral merit of the law are different. RAZ at 158 (dubbing this the view of cautious positivist addressing moral thesis). But the term “duty” is not used here in two different senses; the primary meaning is the full normative (S_1) meaning, implying both that there are good reasons for imposing the duty and, accordingly, that people should do what that duty requires. This is true even though “duty” may at times be used in a parasitic S_2 statement, which may be detached and uncommitted and does not necessarily endorse the moral force of the norm imposing the duty.

40. RAZ at 44.

41. *Id.* at 159. See *supra* note 39.

42. Stressing that the complex interrelations between law and other social institutions and forces should not be neglected, he nonetheless adds that “there is also sufficient reason to encourage the general public's consciousness of law as a special kind of institution.” RAZ at 44.

43. Raz identifies the special contribution of legal philosophy to the resolution of practical questions as concern “with the way in which the fact that a certain action has some legal consequences should affect practical deliberation generally and moral considerations in particular.” *Id.* at vi. He describes his own essays as belonging to political philosophy and to analytical legal philosophy. *Id.* at ix.

44. “[P]ut in a nutshell, it is a system of guidance and adjudication claiming supreme authority within a certain society and therefore, where efficacious, also enjoying such effective authority.” *Id.* at 43. He explains that other features of law properly belong to the sociology of law. *Id.* at 44. Oddly, this definition does not include the existence of adjudicative institutions “charged with regulating disputes arising out of the application of the norms of the system,” which he had called a defining feature of law on the same page, see *id.* at 43. Raz later adds other features. See *id.* at 103-21; see also PRACTICAL REASON, *supra* note 4, at 149-54.

45. Raz is sensitive to the impossibility of always applying this distinction in an all-or-nothing fashion. See *infra* note 86.

description of law. "Law" for him is primarily positive, S_3 law: the system of social guidance and control with which we are all familiar, whose working can be analyzed by looking at social reality and at the patterns of reasoning that people use within the system itself—the institution that is of great importance in structuring social life and in guaranteeing some values. Legal philosophy is the enterprise of analyzing and understanding this institution.

B. *Finnis*

Finnis comes to his subject from a very different perspective. His book is not about what he calls "human Law" in isolation: his purpose is to identify the benefits that can be secured only through human (or positive) law and the practical requirements that only its institutions can satisfy, and thus to show when such institutions are justified and how they can be defective.⁴⁶ "Natural law," according to him, provides the criteria for evaluating those institutions: it is "the set of principles of practical reasonableness in ordering human life and human community."⁴⁷ In more conventional terminology, natural law is a combination of ethics with political philosophy.

Consequently, Finnis starts by identifying basic forms of human good (life, knowledge, play, aesthetic experience, friendship, practical reasonableness, religion) and basic requirements of practical reasonableness.⁴⁸ He next considers life in human communities and the notions of justice and rights. Only then does he discuss the need for authority, and law as a means of satisfying that need. Finally, he discusses the idea of obligation, both moral and legal, and the problem of unjust laws. He concludes by putting all this discussion within the broader perspective of "Nature, reason and god."⁴⁹

Thus, Finnis' starting point, as he himself makes clear, is not actual human institutions. His characterization of law⁵⁰ is a result of his analysis

46. FINNIS at 3.

47. *Id.* at 280.

48. He formulates this set of fundamental goods on the basis of the forms of human flourishing that he identifies with the aid of criteria distinguishing between sound and unsound practical thinking. This distinction in turn aids in distinguishing between morally right and morally wrong ways of acting. *Id.* at 23.

49. *Id.* at 371-413.

50.

[R]ules made, in accordance with regulative legal rules, by a determinate and effective authority (itself identified and, standardly, constituted as an institution by legal rules) for a 'complete' community, and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the community's co-ordination problems (and to ratifying, tolerating, regulating or overriding co-ordination solutions from any other institutions or sources of norms) for the common good of that community, according to a manner and form itself adapted to that

of the need for authority⁵¹ and the kinds of constraints to which this authority should be subjected to. Law is presented as the authority required, and it is clear that ideally it is an authority in the S_1 sense.⁵² His conception of law is *not*, therefore, an attempt to describe social reality; rather, it is constructed from the requirements of practical reasonableness.⁵³ To the extent that social reality exhibits systems that are “more legal” in Finnis’ sense, it satisfies those requirements to a greater degree.⁵⁴ To the extent that it does not, or to the extent that the systems fail to meet those requirements in some respects, the evaluation of human reality in terms of this conception of law identifies where social systems (which are in this sense “less” legal) go wrong.⁵⁵

Finnis characterizes legal systems as those governing “a complete community, purporting to have authority to provide comprehensive and supreme direction for human behaviour in that community, and to grant legal validity to all other normative arrangements affecting the members of that community.”⁵⁶ The distinguishing mark of law is that it operates by an attitude of obedience to a set of general and abstract rules and principles, which are to be applied to specific cases, rather than by obedience to particular people; those in authority under the law are regarded as officials, whose powers are defined by the law. Consequently, law brings “definition, specificity, clarity and thus predictability into human interac-

common good by features of specificity, minimization of arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities.

Id. at 276-77.

51. We need authority, argues Finnis, because life in complex communities requires much coordination both to solve existing problems and to promote the common good. This is true even in the absence of any tendency to exploit and to “free ride,” since the community would still need to solve coordination problems, and the number of such problems would increase as members used their ingenuity in promoting the common good. *Id.* at 231-33. For most coordination problems there is a range of acceptable solutions; but none of these solutions will in fact work unless it is adopted to the exclusion of all others. This choice of solution must be made, to be binding, either by unanimity or by authority (promises are not a third way of making decisions, but simply a modality of unanimity, *id.* at 232). Since unanimity is not likely to be achieved, authority is the only practical solution. Moreover, there are good reasons for wanting the question of the locus of authority itself to be determined by authority rather than by unanimity, *id.* at 245-52, the achievement of which is “very taxing and exhausting for all concerned,” *id.* at 249. For this reason Finnis finds the idea that the whole population is the “real” source of authority misleading: authority cannot be exercised by such a large group of individuals, which is precisely why we need authority to begin with. *Id.* at 16, 247-49.

52. For Finnis, as for Raz, the primary sense of “X has authority” is the S_1 sense. *Id.* at 233-37. For the nature of legal authority, see *id.* at 352-54, 359-69.

53. See *id.* at 277; *infra* p. 1260.

54. Finnis argues that most of the factors he mentions can be instantiated to a degree. He insists that a social phenomenon that does not exhibit all these factors (or that exhibits them to a less-than-full extent) is not to be excluded from the realm of the “legal”; repeatedly, he expressly recommends that we call social phenomena more or less legal, rather than simply law or not-law. He perceives his definition to be of the *focal* sense of law. *Id.* at 277-81.

55. *Id.* at 16. One of Finnis’ primary aims, it should be recalled, is to identify the ways in which actual systems are deficient. See *supra* p. 1258.

56. FINNIS at 260; see also *supra* note 50 (citing definition).

tions."⁵⁷ The point of this predictability is to allow people the dignity of coherently planning their own lives, a goal which is achieved to a larger degree the more the law conforms to the requirements of the rule of law.⁵⁸

Finnis clearly states that adherence to natural law theories does not suggest that the content of specific positive laws may be derived from natural law. The principles of practical reasonableness are permanently and universally relevant; but particular laws of particular societies may change. It is a fundamental concern of any "sound 'natural law theory' of law"⁵⁹ to study and understand the relationships between the two. In a suggestive discussion Finnis introduces the distinction between those parts of positive law that incorporate, with some differences of style and specificity, principles of natural law (for example, the prohibition of murder) and those parts that are merely "determinations," also governed by some principles of practical reasonableness, but not directly deducible from any substantive natural law principle.⁶⁰

Like Raz, he clearly rejects the semantic thesis. His discussion of obligation, for example, is meant to be equally applicable to moral and to legal obligations, although he concedes that the two types of obligation differ in some respects. Obligations in general are imposed by the requirements of practical reasonableness:⁶¹ they cannot fully be explained by reference either to (external) sanctions or to the (internal) fear of those sanctions.⁶² Any adequate explanation of *legal* (intra-systemic) obligation would have to account by practical reason for both its existence *and* for its

57. *Id.* at 268. It achieves this benefit by recognizing as valid norms that were created in an accepted way, by allowing individuals to exercise power according to rules, and in general by enabling the past to govern the future actions of individuals. The fiction that all practical problems have already been solved within this system, that there are no gaps in the law, reinforces the predictability of legal outcomes. For, although this belief is misleading as a description and may have undesirable consequences in limiting the development of law by non-legislative organs, it is significant in strengthening the belief that law, as a system that obeys the "rule of law, not rule of men," is capable of bringing certainty and predictability into human affairs. *Id.* at 269. (It is interesting and typical that Finnis discusses the need for authority, *see id.* at 231-33, before he deals with the meaning of authority. On the latter question, he accepts Raz's characterization. *Id.* at 233-34.)

58. *Id.* at 270-73.

59. *Id.* at 281.

60. *Id.* at 281-90.

61. Finnis accepts Raz's distinction between types of normative statements. He can thus argue that it is not contradictory to say that "X is under an obligation to Q, but he should not Q," since the first clause can be understood as an S_e (empirical) or an S_s (intra-systemic) statement. *Id.* at 234-237; *see supra* pp. 1255-57.

62. Finnis congratulates Hart for his distinction between being obliged and being under an obligation, but argues that Hart's own account was deficient on similar grounds, that it too cannot fully explain the normative power of obligations. FINNIS at 313-14. For a similar criticism of Hart, *see* Bechler, *The Concept of Law and the Obligation to Obey*, 23 AM. J. JURISPRUDENCE 120 (1978). Finnis argues that a full explanation of a normative obligation cannot be reduced to the likelihood of incurring sanctions for nonconformity, or even to the fact that individuals obey because they are aware of such a likelihood and want to avoid it. FINNIS at 313-14.

invariant normative force.⁶³ An explanation would, then, need to refer⁶⁴ to the way legal obligations actually operate in the practical reasoning of a reasonable person, both motivating him to obey and providing that obedience with significance and coherence.

To describe the operation of legal obligation, Finnis employs the following scheme:

- A. Promoting the common good and participating in the coordination necessary for it require an individual to be lawabiding, and hence impose an obligation to be lawabiding.
- B. Where the law imposes a duty to *Q*, the only way to be lawabiding is to *Q*.
- C. We have an obligation to obey the law.⁶⁵

Step *A* is a part of the general flow of practical reasoning; hence, the force of the obligation it imposes may vary from situation to situation (it is of variable obligatory force). This moral obligation is nevertheless very weighty, since the law can succeed in attaining its goals of coordination and promotion of the common good only if “individuals drastically restrict the occasions on which they trade off their legal obligations against their individual convenience or conceptions of social good.”⁶⁶

From within the legal system, however, step *A* is an unquestioned axiom, isolated from this general flow. The combination of step *A* (thus seen) with step *B* yields the invariant obligatory force of S_3 , strictly legal, obligation: the law forbids the citizen (and the judge, who swears to work within the law) to recover the moral (variable) force of step *A*.⁶⁷ In the appropriate circumstances, the citizen may disregard the command of the law and return step *A* to the general flow of moral reasoning, thus arriving at a variable moral obligation to obey the law.⁶⁸ This is an obligation of the S_1 type. Such obligations are defeasible: abuses of authority in their creation or injustice in their application can defeat the moral obligation to obey.⁶⁹ Thus, he presents legal obligations as moral, S_1 , as well as strictly

63. Moral obligations are of variable obligatory force in that they can be defeated by a large variety of countervailing reasons. FINNIS at 308-09 (discussing example of obligation to keep promises, which is “very variable, and often quite weak,” *id.* at 308). Legal obligations, on the other hand, are, like legal validity, of invariant force: they are all equally obligatory, and they are fully regulated by legal norms. A person can plead all reasonable excuses when he does not perform a moral duty; but only those excuses recognized by the law may be pleaded in court. *Id.* at 309-14.

64. *Id.* at 312, 314. For the type of explanation required, see *supra* p. 1260.

65. FINNIS at 314-16.

66. *Id.* at 319.

67. The law, says Finnis, tries to isolate “legal thought” from the rest of practical reasoning, to give it the status of dogma. Within the legal system, the moral force of legal obligations is rarely discussed. *Id.* at 317-18; see also *infra* pp. 1276-78 (discussing unjust laws).

68. FINNIS at 318.

69. *Id.* at 318-20, 351-66. See also *infra* pp. 1276-78 (discussing unjust laws).

legal, S₃, obligations.

Finnis' natural law perspective reveals itself in more than his focus on evaluating social phenomena and his concern with universal and invariant principles of practical reasonableness,⁷⁰ even in more than his assertion that the values he lists as forms of human flourishing are self-evident.⁷¹ Ultimately, his strongest tie to this tradition is his belief that the meaning of human existence and of all obligations to participate in the common good must be discussed in terms *transcending* the limited experience of actual individuals or groups.⁷² Because he does not argue that the existence of God can be demonstrated, this insistence on transcendence does not entail thinking of natural law as God's will. But he does show that scholars and thinkers have always needed to postulate an "uncaused cause" when speculating about nature and reason.⁷³ From this he argues that accepting God as this uncaused cause may provide an additional, deeper, basis for explaining obligation, as well as an explanation of the objective meaning of human experience and existence.⁷⁴

On a less fundamental level, Finnis' commitment to natural law leads him to emphasize the misleading effects of studying human—positive—law in isolation from natural law. He holds that such studies would falsify the meaning and significance of law, politics, and ethics, each of which is merely one aspect of the attempt to structure human life in accordance with the requirements of practical reasonableness (itself a basic human good).⁷⁵ He recognizes the practical advantages of artificially and arbitrarily isolating the intra-systemic professional perspective,⁷⁶ but warns against overstating this separability of law from the general flow of moral reasoning. At certain points Finnis appears to endorse even the much stronger view that law *cannot* be studied from a perspective other than his⁷⁷—a view incompatible with Raz's positivism.

70. Finnis himself acknowledges that these principles are only "law" by analogy. He says that others have used the term "law" as a label for such principles; but they "could, without loss of meaning, have spoken instead of 'natural right', 'intrinsic morality', natural reason, or right reason, in action, etc. But no synonyms are available for law in our focal sense." FINNIS at 280-81.

71. As an illustration, Finnis develops support for the idea that knowledge (a basic good) is self-evidently and obviously good. *Id.* at 59-80.

72. *Id.* at 371-78.

73. *Id.* at 378-88. Finnis argues that this postulation is necessary to explain why a unique, rather than some other possible, state of affairs exists.

74. *Id.* at 388-414. Finnis is careful not to argue that his analysis proves the existence of God. He does say, however, that rational speculation that stops short of recognizing God as the "uncaused cause" is "less secure" than speculation based on faith and revelation. *Id.* at 403-10.

75. "The principles of practical reasonableness and their requirements form one unit of inquiry which can be subdivided into 'moral', 'political', and 'jurisprudential' only for a pedagogical or expository convenience which risks falsifying the understanding of all three." *Id.* at 359.

76. See, e.g., *id.* at 279-80, 319. Finnis is, of course, aware of the necessity that lawyers work within the system. See *supra* TAN 65-69; *infra* TAN 103-06.

77. See *infra* TAN 91-112.

The next section will show that this appearance is illusory.

II. The Compatibility of the Perspectives

Before dealing with the apparent conflicts between these scholars, it should be mentioned that the two analyses are similar in ways not obvious from the foregoing exposition. Since Raz's work precedes Finnis', at first glance the similarity seems to result from Raz's evident influence on Finnis. For example, Finnis accepts Raz's analysis of authority and his distinction between types of normative statements;⁷⁸ his discussion of the rule of law is very similar to Raz's;⁷⁹ and the identifying marks of positive law in Finnis' scheme are very similar to those listed by Raz.⁸⁰ The similarity, however, has deeper sources than the explanation of influence would suggest.⁸¹ The two books share a commitment to the value and importance of general jurisprudence. Furthermore, they share a basic concern with the authority of law and with the circumstances in which that authority is justified:⁸² both raise the question of whether acceptance of any authority is consistent with autonomy,⁸³ and both, for similar reasons, answer that question affirmatively.⁸⁴

There are nevertheless three main areas of apparent tension between their positions: the way we form and assess our conceptions of law; the utility of defining the limits of jurisprudence and of permitting reliance on

78. See *supra* note 61.

79. For Raz's analysis, see *supra* p. 1255; for Finnis', see FINNIS at 270-76; *supra* pp. 1259-60. Finnis criticizes Raz's knife analogy, FINNIS at 274, but notes that "in other respects the article is a valuable study of the content and point of the Rule of Law," *id.* at 293 n.X.5.

80. Both stress law's claim of authority, its supremacy, its comprehensiveness, its regulation of its own making and application, and its function of legitimating private arrangements. See *supra* notes 44, 50.

81. The two writers apparently encountered at least parts of each other's work before publication, see RAZ at 37 n.*; FINNIS at vii. They were educated in the same tradition of analytical legal philosophy, see FINNIS at vi, and are familiar with the basic works of that school. For a review of that school, see Twining, *Academic Law and Legal Philosophy: The Significance of Herbert Hart*, 95 L.Q. REV. 557 (1980). Finnis clearly brings to his work a wide knowledge of natural law literature as well.

82. Raz states that the main question that his book attempts to answer is what authority we should acknowledge to be due to the law. RAZ at v. For Finnis' general purpose, see FINNIS at 3; *supra* p. 1258.

83. FINNIS at 231. Raz's discussion of legitimate authority is structured around this theme. See *infra* note 84.

84. Finnis says that individuals may recapture the variable force of the obligation to obey the law by putting it back into the general flow of practical reasoning. See *supra* pp. 1260-61. Raz disputes R.P. Wolff's conclusion, see R. WOLFF, IN DEFENSE OF ANARCHISM (1970), that authority and autonomy are never compatible. Raz agrees with Wolff that individuals are never justified in abandoning autonomy (the right and duty to act on one's own judgment as to what ought to be done, all things considered). He further agrees that accepting authority is accepting a reason not to act on the balance of first-order reasons; thus, authoritative commands become a type of second-order reason that Raz calls an exclusionary reason. The reconciliation of autonomy with authority is based on the possibility of deciding autonomously and justifiably that one should not act on the first-order balance of reasons but should accept some exclusionary reasons for action. RAZ at 25-27. For a detailed account of Raz's notion of exclusionary reasons, see PRACTICAL REASON, *supra* note 4, at 35-48.

this demarcation; and the question of our moral obligation to obey the law. I shall deal with the last issue in part III. Here, I shall argue that as to the first two issues the appearance of incompatibility is misleading. I shall demonstrate, first, that some of the theses that Finnis may be read as adopting⁸⁵ are wrong, and that the only acceptable interpretation of Finnis' position on concept formation is compatible with Raz's social thesis. Second, I shall show that Raz and Finnis themselves develop their views on the limits of jurisprudence in terms of utility *for some purposes*, and that those views may be reconciled.

A. *Conceptions of Law*

The conceptions of law used by Raz and Finnis are very different in status. Raz's conception is an attempt to provide an adequate description of law. If his conception does not cover something that is frequently regarded as an instance of law, he will have either to argue that the phenomenon is not in fact law, and that his account has the merit of pointing this out, or to modify his account.⁸⁶ His ultimate justification for the social thesis itself is grounded on his perception that the law, when seen as an institution, behaves according to that thesis;⁸⁷ that is, on contingent, observable facts. His conception of law is descriptive or analytical.

Finnis' conception, on the other hand, does not purport to describe social reality. Instead, he constructs a regime that it would be *desirable* to have in human communities. If valid, it will hold good as long as human nature remains what it is, even if all social orders lack many of the elements that make a system legal in his account. The resulting conception may be used in studying actual societies to identify where those societies succeed, and where they fail, in meeting the desired criteria; it is an evaluative conception.

Raz says little about evaluative conceptions of law; but he probably would not deny that for some purposes they are useful and valuable. He would merely insist that any complete theory of law must include some criterion for identifying law⁸⁸ and that this criterion must be social, not

85. Finnis' position is unclear. *See infra* pp. 1265-67.

86. This does not mean that his conception can always clearly classify a standard or a system as legal or not legal. Raz observes that, since his characterization of the uniqueness of law is multifaceted, and since some of the elements are matters of degree rather than all-or-nothing features, it is sometimes only possible or useful to point out similarities and dissimilarities and to leave it at that. RAZ at 116. In this sense Raz's conception of law is similar to Finnis': both have a number of traits that can be instantiated to a greater or a lesser extent, and thus neither can always be used for a yes-or-no identification of law. What is peculiar to Raz's account is his insistence that theories of law must also contain some criterion for identifying law within the legal system.

87. RAZ at 42.

88. He realizes that not all legal philosophers were moved to concede the importance of such a criterion in a legal theory. He argues, nonetheless, that the question of identification clearly is an

moral. He would insist, further, that for some purposes the identificatory function of the “rule of recognition” is a central feature of legal systems, and that a conception of law built around this insight would be useful and legitimate in some contexts.⁸⁹ All this is quite consistent, according to him, with the view that the law is also moral.⁹⁰

Finnis’ statements about concept formation are open to several interpretations, which I characterize as “strong” and “weak” theses. His position is that all conceptions of law (and all conceptions in social science) must be evaluative, whether designed to be used in evaluation or in description and analysis.⁹¹ The different theses grow out of three possible senses of “evaluative.”

That term may mean that, if all conceptions of law are evaluative, something which is “more legal” under such a conception is also more morally desirable: the strong thesis. Finnis’—but not Raz’s—conception of law is evaluative in that sense.

But “evaluative” may be read in two other ways. It may mean, first, that the application of an evaluative conception requires making judgments about features of social reality, or that in forming the conception we make judgments about the importance or significance of certain features and the insignificance of others. Second, it may refer to the practice of taking account, in describing social and human activities, not only of external conduct but of the way actors think of their actions, purposes, and motives, and of their perceptions of the meaning of what they are doing: the rejection of behaviorism. Nonbehavioristic accounts do refer to the way an agent perceives his actions, which is evaluation of a sort; but such evaluations are not necessarily moral.

Many believe that all social concepts, including the concept of law, must indeed be evaluative in these two senses: the weak thesis. Both Raz’s⁹² and Finnis’⁹³ conceptions of law are evaluative in the weak sense;

important jurisprudential question, so that theories not addressing it are incomplete theories of law. *Id.* at 40.

89. *Id.* at 44. See also PRACTICAL REASON, *supra* note 4.

90. RAZ at 158.

91. Finnis starts by denying that it is possible to separate description and evaluation; but he then proceeds to the more cautious statement that “a theorist cannot give a theoretical description and analysis of social facts, unless he also participates in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.” FINNIS at 3.

92. Raz both explicitly and implicitly (by his choice of approach) rejects behavioristic accounts of law. RAZ at 40, 50. And his search is for significant aspects of social reality, as is indicated by his refusal to rely exclusively on usage. The question for him is whether the suggested conception “helps identify facts of importance to our understanding of society.” *Id.* at 41.

93. Finnis mentions both the need to take into account the perceptions of actors, FINNIS at 3-4, and the fact that the search for a conception is one for “what is *important* and *significant* in the field of data and experience” with which all scholars are “equally and thoroughly familiar,” *id.* at 9 (emphasis in original).

in Max Weber's terminology, both conceptions are "ideal types."⁹⁴

It is possible that Finnis would accept the strong thesis.⁹⁵ Let me say, then, why the strong thesis must fail before I point out that Finnis himself accepts positions that suggest that he meant only to advance the weak thesis.

The strong thesis may involve one or more of the following claims:

1. All concepts used in the analysis and description of social reality must be evaluative in the strong sense.

This claim may be refuted by a number of counterexamples. We use non-evaluative concepts such as "stratification," "division of labor," and "means of production" in our social analysis. Nothing moral follows immediately and inevitably from a description of one society as being more stratified than another, or as having more, or more diversified, means of production. Finnis is obviously right when he says that such concepts do not come to us ready-made as a part of social reality;⁹⁶ we do form and choose them, and in the process we make judgments about the significance of certain facts and of certain connections between facts. Yet these judgments have nothing to do, in these cases, with any inherent moral value or depravity of the phenomena.⁹⁷

2. Descriptions of human activities (or artifacts) that have functions cannot be non-evaluative.⁹⁸

It is true that a description of a thing that is defined by its func-

94. Ideal types are theoretical constructs designed to highlight and emphasize features of social reality. See Weber, *Objectivity in the Social Sciences*, in MAX WEBER ON THE METHODOLOGY OF THE SOCIAL SCIENCES 49-112 (E. Shils & H. Finch eds. 1949); see also *infra* note 108. Weber insists that the construction of ideal types is based on judgments of significance, and that the perceptions of agents are an important ingredient of such judgments.

95. He congratulates Raz (and Hart) for realizing that a conception of law must be formed from a practical point of view (a position that rejects behavioristic accounts), then argues that the most appropriate practical point of view is that of people who have a distinct interest in the use of law in preference to other ways of structuring society, that is, the point of view of people who accept the moral superiority of law. Among these, he continues, we should choose those whose judgments about practical reason are indeed reasonable. FINNIS at 6-18. He thus advocates forming the conception of law from the point of view of the moral man whose moral reasoning is sound. Following this procedure will result almost inevitably in Finnis' own conception of law, which he constructed in that way; in any event, it must yield a conception of law that is evaluative in the strong sense. Finnis criticizes Raz and Hart for choosing the wrong point of view in forming their own conceptions of law. *Id.* at 12-15. The implication is that Hart and Raz are *wrong*, not merely that their choice of point of view has limited applicability. My reading of Finnis as not adopting those theses is strengthened by his own use of conceptions of law that would be unacceptable under the strong thesis. See *infra* pp. 1269-70.

96. "The subject matter of the theorist's description does not come neatly demarcated from other features of social life and practice." *Id.* at 4.

97. This is true even though we may be interested in the phenomena only because we expect them to be related (directly or indirectly) to other things we value, or to provide a conceptual framework within which to investigate those things.

98. See *supra* p. 1254.

tion must affirm that it has some minimal capacity to perform the function; but such functional affirmations are morally evaluative only if the function itself has a determinate moral value. Nothing will be called a knife if it could not cut; yet knives are not inherently morally good or bad.⁹⁹

Raz and other positivists have long conceded that the law can indeed be defined by its functions; Raz's essay on the classification of functions was included in this book precisely to show that a value-neutral description of the functions of law was possible, that the functional nature of law does not necessarily bestow on it moral value.¹⁰⁰ Calling something law does entail the (evaluative) claim that it has at least minimal effectiveness in carrying out legal functions (say, dispute resolution), but says nothing about its moral value (unless we assume that some moral value inheres in resolving disputes through the legal system).

3. All adequate descriptions of deliberate and purposeful human action must be evaluative.¹⁰¹

The case for this thesis is stronger, because we feel that—unlike impersonal functions—all purposeful human actions have some moral *significance*. Nonetheless, it is not persuasive. In the context of this debate it would mean that, since the making and application of laws are purposeful human activities, they necessarily have some moral worth. But moral significance is a broader notion than moral worth: moral depravity is morally significant. Since we are all familiar with deliberate evil, and with deliberate purposeful activities that are morally neutral, deliberateness alone will not do: killing after long deliberation is usually considered more, not less, reprehensible than spontaneous, undeliberate killing under provocation. Finnis' thesis that law is necessarily a human *good* thus would require the (false) assertion that all deliberate human actions are val-

99. This is Raz's point. RAZ at 225-26; see also *supra* pp. 1254-55 (efficiency not morally valuable in itself). Finnis refers to it in his own discussion. See *supra* note 79. He argues that the rule of law does not function merely as a neutral way of achieving efficiency, that it also "systematically restricts the government's freedom of manoeuvre." FINNIS at 274. But he concedes that "conspirators against the common good" may seek to capitalize on the popularity of the ideal of the rule of law by adhering to its requirements while pursuing their evil aims. *Id.* Thus, even according to him, a functional description of law in terms of "obedience" to the ideal of the rule of law need not guarantee law's overall moral worthiness. Moreover, Finnis is here considering the claim that all law must promote the ideal of the rule of law (which Raz and other positivists see as of moral value), not the inevitable moral evaluativeness of all functional accounts. I do not think Finnis has any reason to insist that functional analyses are necessarily moral evaluations. See the Fuller-Nagel exchange, *supra* note 17.

100. See *supra* p. 1254.

101. Finnis may hold to this thesis. See FINNIS at 3-4. Fuller clearly accepts it. See Fuller, *Human Purpose and Natural Law*, *supra* note 17, at 70.

uable as such.

Human actions should be evaluated by their goodness, not by formal criteria that do not guarantee goodness. There may be some types of human activities, such as teaching, helping the suffering, or relieving pain, which are so defined that their deliberate performance is necessarily good. But the making, enforcement, and application of law may be done either with deliberate conscientiousness or with deliberate corruption.¹⁰²

It follows from this refutation of the possible arguments for the strong thesis that there is nothing methodologically unsophisticated about advancing conceptions of law that are not morally evaluative. The claim may still be made, however, that a non-evaluative conception of law, although methodologically acceptable, involves a falsification of the nature of law, and that such conceptions should thus be rejected for all purposes and in all contexts. But even this final attempt to save the strong thesis must fail, on the ground that conceptions are judged by their utility.

No one denies that strongly evaluative conceptions of Finnis' type may be helpful and useful in some contexts. Finnis himself, however, mentions the special importance of isolating law from the flow of practical reasoning so that it can bring specificity and predictability into human life.¹⁰³ To do that, we must be able to identify laws unambiguously. This was, we should recall, one of Raz's arguments for the social thesis: the judge must know whether a given standard is the law by which he is bound; the citizen, whether a command is law when he considers whether to obey it; parties to transactions, what the law governing their transaction is—and these determinations should be *final*, excluding moral arguments.¹⁰⁴ In all these situations, the functions of law require that the law be identified in an all-or-nothing fashion that is not open to moral argument. But evaluative conceptions of law of the type advanced by Finnis inevitably fail when put to the task, for which they are not designed, of providing a yes-or-no answer to the question of what the law on a certain question is.¹⁰⁵ It fol-

102. It is not even clear that public perception of the activities of lawyers and advocates is not evaluative in the negative sense. It is clear that these functions and purposeful actions are regarded with at least some ambivalence.

103. FINNIS at 266-70, 279; see also *infra* p. 1269. For Finnis' general account of the importance of relative autonomy for human law, see *supra* TAN 56-59.

104. See *supra* p. 1253; see also CONCEPT, *supra* note 4, at 210-16 (identifying major function served by social thesis as finality).

105. Finnis is well aware that his conception does not identify law so as to distinguish it from non-law. FINNIS at 278-80; see also *supra* note 59. A definition of law that identifies it, he says, is a technical device for use *within* legal systems. It is not applicable to the different pursuit of understanding law "from the outside," as one among many social forces. He is quite right, and Raz himself uses an "external," non-identificatory characterization of law for these purposes, see *supra* note 86. Finnis' point does not deal with the need for a conception of law usable in work within the legal

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laws that for these concededly important purposes we need a nonmoral criterion for identifying law. There seems no reason for not constructing a conception of law based only on this criterion. This conception, like the criterion generating it, will be non-evaluative (in the strong or moral sense) and will enable us to identify law and to distinguish it from non-law.¹⁰⁶

Finnis himself seems to accept all these arguments. First, he invokes the authority of Weber,¹⁰⁷ a well-known champion of the view that social concepts involve judgments only about importance, who vehemently denies that construction of ideal types requires making moral judgments.¹⁰⁸ Mentioning Weber without referring to his critics on this point suggests an endorsement only of the weak thesis.¹⁰⁹ Moreover, Finnis himself accepts that sometimes it may be useful to define law by a single element, so as to highlight a particular relationship; such conceptions of law apparently may be formed without making moral evaluations.¹¹⁰ Finally, Finnis also recognizes, as he must, that there are cases in which it is essential to identify law clearly. When a law of questionable moral merit is declared legally binding by the highest court of the land, “[i]t is not conducive to clear thought, or to any good practical purpose, to smudge the positivity of

system.

106. While it is clear that a conception of law designed for work within the legal system must be non-evaluative, it is not clear that all conceptions of law from the point of view of the social theorist *must* be evaluative in the strong sense. Weber’s definition of law, for example, is both external to the legal system and non-evaluative in that sense: “An order will be called *law* if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or to avenge violation, will be applied by a *staff* of people holding themselves specially ready for that purpose.” M. WEBER, *LAW AND ECONOMY IN SOCIETY* 5 (M. Rheinstein ed. 1954) (emphasis in original). Raz’s external characterization of the unique features of law is similarly non-evaluative.

107. Weber’s methodology (forming “ideal types”), says Finnis, is similar to his own suggestion that conceptions should be seen to have focal meanings without relegating non-focal cases to another discipline. FINNIS at 9, 18; *see also id.* at 21 n.I.4 (referring to Weber’s position on need to make judgments about significance in formation of concepts).

108. Weber took special care to explain that his types are “ideal” in the sense that they do not describe anything that obtains, that they are theoretical constructs imposed on phenomena to make them intelligible. He stressed that they are not ideal in the sense of being desirable: “An ‘ideal type’ in our sense, to repeat once more, has no connection at all with value judgments, and it has nothing to do with any type of perfection other than a purely logical one.” Weber, *supra* note 94, at 98-99; *see also id.* at 91-92, 96-98.

109. Finnis notes enigmatically that Weber did not think a real appreciation of the requirements of practical reasonableness was necessary for the objective part of a theorist’s work. FINNIS at 21 n.I.4. He deals at length with Weber’s position on the nonobjectivity of moral judgments, referring to Strauss’ discussion of Weber in STRAUSS, *NATURAL RIGHT AND HISTORY* (1953). FINNIS at 50-51 n.II.3. But Strauss discusses and criticizes Weber’s methodology precisely on the point of the inability to form non-evaluative concepts. Finnis’ failure to cite him on this issue thus supports the conclusion that he accepts Weber’s own position on this question.

110. FINNIS at 277-78. Here too Finnis refers to the fact that empirical/historical importance can only be measured, in the last analysis, by reference to the principles of practical reasonableness. *Id.* at 277 n.8. Nevertheless, he accepts the legitimacy of saying dramatically that, for example, a system without sanctions “is not law” if the purpose is to emphasize, and to draw attention to the empirical/historical importance of, that element of law. (He rejects relying on such a conception “to banish the other non-central cases to some other discipline”). *Id.* at 278.

the law by denying the legal obligatoriness *in the legal or intra-systemic sense* of a rule recently affirmed as legally valid and obligatory by the highest institution of the 'legal system.'¹¹¹ Thus, for Finnis too the law may be identified for some purposes by purely social criteria, without recourse to moral arguments.

All this suggests that the positions of Raz and Finnis as to conceptions of law are indeed compatible. Both believe external conceptions of law must be evaluative in the weak sense. Both believe that, for some purposes, a non-evaluative internal criterion for identifying law from within the system is necessary (Raz's social thesis). Their differences are important, but do not rise to the level of contradiction.¹¹²

B. *The Limits of Jurisprudence*

Some scholars say that jurisprudence deals only with legal reasoning, with the analysis of basic concepts of the law, and with the nature of law. Others add "normative jurisprudence," the articulation of what law and laws should be and how legal entities should act.

Raz does not explicitly state his conception of the limits of jurisprudence, which must consequently be extracted from some scattered observations. He distinguishes between general practical philosophy and legal philosophy by saying that the latter deals only with the consequences of something being a law, describing his own essays on moral attitudes to law as belonging to political philosophy rather than to jurisprudence.¹¹³ Although his own characterization of law includes many elements that cannot be applied in an all-or-nothing fashion,¹¹⁴ he accepts and stresses the need to distinguish clearly between law and non-law within a legal system, seeing this as an identifying mark of legal systems.¹¹⁵ Furthermore, he justifies the study of law as a separate subject, to be defined by the professional view of the field, and the encouragement of public awareness of the distinctness of law, with due attention to its relations with other social forces and institutions.¹¹⁶ In all these, Raz is squarely within the positivistic tradition, which similarly seeks to emphasize the distinctive marks of law and to study it as a special form of social control.

Finnis is much less interested in the intra-systemic perspective and in professional needs. His perspective is that of the social theorist or of the person who wishes to use the law to improve society. In neither of these

111. *Id.* at 357.

112. Raz explicitly mentions this lack of contradiction. CONCEPT, *supra* note 4, at 213 n.11.

113. *See supra* note 43.

114. *See supra* note 86.

115. RAZ at 39-40.

116. RAZ at 44; *see also supra* p. 1257.

capacities does he have to distinguish sharply between laws and not-laws.¹¹⁷ He grants that the distinction between ethics, politics, and jurisprudence may be pedagogically useful, but he warns that taking this separation as more than convenient falsifies all three disciplines: all should be studied together.¹¹⁸ More particularly, Finnis objects to the tendency of lawyers and legal scholars to end their inquiries with a determination of the existing state of the law; he believes the moral obligation to obey the law should be discussed as a part of jurisprudence, and be seen as an integral part of lawyers' concerns.¹¹⁹ Further, he objects to the similar professional tendency to view the question whether a rule or a regime is legal as requiring an all-or-nothing determination, claiming that social phenomena should be described as "more legal" or "less legal" rather than as "law" or "not law."¹²⁰

I believe Finnis is right to complain, in the natural law tradition, that positivistic accounts have been perceived to imply a narrow vision of law and its relation to morality. None of the great positivistic thinkers was guilty of this myopic view;¹²¹ but legal practitioners soon discovered the convenience of saying that they were there to study the law and use it, that what went beyond the law was beyond their competence and responsibility. Positivists, who simply resisted the tendency to collapse law into morality or religion, never encouraged such views.¹²² Finnis probably feels that the positivists' efforts have been successful, so that we are now free to stress the close relationship, not the differences, between law and morality. Some, however, disagree with this view.¹²³ In any event, what we need

117. See *supra* note 105.

118. See *supra* note 75.

119. Finnis, in one of his rare uses of the label, calls "positivists" those who encourage the view that the moral obligation to obey the law should not be discussed within jurisprudence. FINNIS at 357-59.

120. *Id.* at 278-79. For a similar argument, see J. Griffith, *The Division of Labor in Social Control: A Reformulation of the Relationship Between Law and Social Control* (1980) (unpublished manuscript on file with *Yale Law Journal*).

121. Finnis' criticism singles Austin out. See FINNIS at 354-55, 357. When Austin is read in his entirety, it is clear that he believes that jurists must undertake to discuss moral principles (for him, utility): Although he defines jurisprudence to exclude the "science of legislation," three out of his six lectures are devoted to a discussion of morality. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 126-27 (1954). He advocates critical examination—even, at times, disobedience—of the law, concluding, like Finnis, that the moral (utilitarian) obligation to obey the law is normally quite weighty, but not absolute. *Id.* at 184-85.

122. Bentham and Austin, for example, stressed the positive character of law, J. AUSTIN, *supra* note 121, at 184-91; J. BENTHAM, *A FRAGMENT ON GOVERNMENT* (1823), in opposition to such statements as Blackstone's famous definition of law, see 1 W. BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* *44-46.

123. Thus, Charles Black has argued recently that there is a modern tendency to argue directly from moral principles and to underestimate the need to expect courts to decide according to law, not according to morality. See C. BLACK, *DECISION ACCORDING TO LAW* (1981). Similarly, Jenkins argues that we sin against the constraints of law and adjudication by expecting judges to apply moral principles directly, without the mediation of legal rules and principles. Jenkins, *The Rule of Law vs.*

is a balanced account both of relationships between law and morality and of the differences between them. Both Finnis and Raz seem to give such accounts, with different emphases;¹²⁴ this is not a bone of contention between them, or between their versions of natural law and positivism.

Finnis is clearly right that intra-systemic reasoning often involves discussion of moral considerations,¹²⁵ that there are cases in which judges have to consider what the law ought to be in order to decide what it will be. Raz concedes this may happen.¹²⁶ Nevertheless, it is important not to blur the distinction between judicial and general practical reasoning. Judges employ "legal logic": they usually justify their decisions by processes of reasoning based on subsuming the instant case under a more general norm, whether settled and preexisting (derived from a statute or a line of precedents) or new and articulated for that case. These canons of legal reasoning, coupled with constitutional principles about the proper limits of judicial activity, exert a real and an important force on the "administration of justice," making it quite distinct, at times, from the administration of justice proper.¹²⁷ This element, too, should not be obscured in attempting to stress the relationships between law and morals. What is needed is an integrated perspective that properly stresses both the autonomy of the law and law's ties to morality, with sufficient flexibility to emphasize more the element that the "temper of the time" tends to obscure, to insure that all the questions that should be dealt with are indeed discussed. On this score Finnis has little to complain of: the question of the nature and the scope of the obligation to obey the law is anything but neglected in recent legal and political philosophy.¹²⁸

Emphasis on the autonomy of law is needed not only to achieve a bal-

The Call of Conscience, 23 AM. J. JURISPRUDENCE 169 (1978).

124. RAZ at 157-59. Finnis insists that it is a distortion of natural law theories to accuse them of blurring the distinction between positive law and morality. FINNIS at 25-29.

125. FINNIS at 355-57; see also *infra* p. 1277.

126. See *supra* notes 12, 22; see also CONCEPT, *supra* note 4, at 215. Ronald Dworkin denies this view, arguing that judges always seek to find the one right answer embedded in legal material. R. DWORIN, TAKING RIGHTS SERIOUSLY, 14-45, 81-130 (1977). This position is unacceptable under Raz's thesis that the law has limits and is identified by the sources thesis. See PRINCIPLES, *supra* note 4; RAZ at 53-77.

127. Raz's tenth essay, RAZ at 180-209, helps identify situations in which law-elements alone decide cases. For a systematic discussion, see N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978). For a sensitive discussion of a conflict between the requirements of judicial office and of general moral reasoning that was resolved in favor of the former, see R. COVER, JUSTICE ACCUSED 197-238 (1975); see also *supra* note 123.

128. Finnis himself observes that those who argue that the moral merits of law are not a jurisprudential issue persistently "smuggle" into their discussions comments about those merits. FINNIS at 358-59. What he is criticizing is unclear: those writers do not maintain that all books dealing with jurisprudence should contain *only* jurisprudential statements. Raz's book, for example, explicitly seeks to deal with both jurisprudence and political philosophy. For a survey of discussions in recent literature of the scope of the obligation to obey the law, see *Symposium in Honor of A.D. Woosley on Law and Obedience*, 67 VA. L. REV. 1 (1981).

anced account of law. It is important to take separable areas of study out of the general realm of intellectual activity, to enable people to specialize and thus to make more sophisticated contributions than would otherwise be possible. Specialists—both scholars and practitioners—do need to return at times to the general, to see their fields in their larger contexts; nonetheless, Finnis can make passing reference to many issues only because other people have been working on a variety of jurisprudential questions.¹²⁹ Not all of them spend much, or any, time thinking about principles of practical reasonableness; yet their work helps Finnis form his own synoptic view of the field.

Clearly, a full understanding of society requires an understanding of law, morality, and politics in their complex interrelations. But understanding of interrelations requires conceptual distinctions. The fear is not unreal that such distinctions may lead to a tendency to overlook the interrelations when convenient. Unfortunately, it is real because the distinctions are real; obscuring this fact cannot be very helpful or effective.¹³⁰

It is not really very important whether the discipline of jurisprudence is seen as encompassing only attempts to understand and describe law, or as including evaluation as well. What is important are two things. First, the independent utility and general permissibility of the intra-systemic study of law should be recognized. Second, the study of the interaction of law with other social forces, and its subjection to moral criticism, should be acknowledged to be indispensable.¹³¹

Finnis' perspective and concerns make him highly sensitive to the dangers of extending professional perspectives beyond their proper area of applicability. Raz would probably concede that this sensitivity is one of the benefits of the natural law perspective: for, although positivists may in fact be similarly sensitive, nothing structured into their approach forces such awareness in the way the natural law tradition does. Nevertheless,

129. Some examples are Dworkin's work on the role of principles in legal reasoning, *see supra* note 126, at 14-45 (mentioned by Finnis, FINNIS at 280), and recent work on the need for authority and norms to solve coordination problems (mentioned by Finnis, *id.* at 255 n.IX.1).

130. Finnis is correct in saying that it is a mistake, a falsification of the understanding of law, politics, and ethics, to move from acceptance of the limits set by positivists to the discipline of jurisprudence to a belief that jurisprudence is completely independent of politics and morality. *See supra* pp. 1262, 1271. But trying to overlook the extent to which the law is in fact autonomous—the extent to which we can and do make statements, without full moral endorsement, about the law—may be as false to the nature of law, politics, and ethics as the first danger.

131. Nothing in positivism compels positivists not to address the question of moral attitudes to law. Moreover, for many of them the adoption of a positivistic theory of law was motivated in part by their belief that positivism contributed to a proper understanding of the dilemma of the moral obligation to obey the law. *See infra* p. 1274. Raz contributes to this practice both by holding the claim of legitimate authority to be one of the characteristic features of law and by acknowledging that the law is normative “from the legal point of view” (S_2) only when many people are willing to endorse its legitimate authority (S_1), calling the intra-systemic obligation “parasitic” on the full-blooded moral obligation. *See supra* pp. 1256-57.

the two positions are clearly compatible. Raz acknowledges the need to study law within the broader framework of its relationships with other institutions, with positive morality, and with other social forces,¹³² and himself transcends what he sees as the limits of jurisprudence in some of his work. Finnis advocates the broader vision, but concedes the practical importance of the intra-systemic insulation.¹³³

III. Political Obligation and Legal Theory

Whether the positivistic or the natural law perspective is superior has been argued on two separate grounds, at least since the Hart-Fuller debate in 1958.¹³⁴ One ground is cognitive and descriptive: that one perspective more accurately (and the other more falsely) describes the phenomenon of law. The second is practical and evaluative: that one perspective is more conducive to the development and maintenance of proper moral attitudes to law than the other.

The light shed on the discussion of the practical ground is one of the greatest benefits of seeing that the descriptions offered by the two perspectives are not necessarily inconsistent. If one of two competing theories is true and the other false, to consider pragmatic reasons for adopting the false theory may signify lack of intellectual integrity. Only because the accounts of Raz and Finnis are not incompatible is it legitimate to investigate whether one of them is superior for some (practical) purposes and to advocate exclusive use in such contexts of the superior theory.

Yet analysis of Raz and Finnis on political obligation suggests that, although they operate within somewhat different frameworks of discussion and their positions differ in at least one important respect, it is impossible to predict how adopting either's theory will affect actual conduct. Moreover, their differences are not entailed (although they are affected) by Raz's positivistic and Finnis' natural law orientation. Thus, no valid argument results for preferring one perspective on practical grounds. Once the two approaches are integrated in the way suggested above, each individual may work with the procedure he prefers: the substance of the treatment of the question of political obligation will not change.

A. *Raz and Finnis on Moral Attitudes to Law*

Raz argues that there is no general obligation, either moral or pruden-

132. See *supra* note 42 & p. 1270.

133. E.g., FINNIS at 279.

134. HART, *supra* note 7; Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, *supra* note 21.

tial, to obey the law.¹³⁵ Even when the law is good and just, there are no “grounds which make it desirable, other things being equal, that one should always do as the law requires.”¹³⁶ Arguments from bad effects, encouragement to disobey the law, promises to obey, and estoppel may indeed support *special moral* obligations to obey the law, but they fail to provide *general* grounds for such an obligation. The law often does provide *prudential* reasons for obeying it, primarily the wish to avoid legal sanctions. These reasons are not sufficiently extensive, however, to support a general obligation to obey the law.

In the absence of such a general obligation, the law performs its function of guiding behavior by relying on two main techniques. First, most laws do provide prudential reasons for obedience. Second, the law aids in “the marking in a publicly ascertainable way, of standards required by the organized society.”¹³⁷ This marking does not in itself create reasons for action; it invokes and relies on independent moral reasons to obey those standards. The prevalence of prudential and independent moral reasons for doing what specific laws require makes the law an important and effective social institution even without any general obligation to obey it. Thus, both techniques can be used effectively to protect morally valuable interests and worthwhile forms of social cooperation.

Because no such general obligation exists, good citizens are not in general *required* to obey their law, even when the legal system is, by and large, good and just. Raz argues that in such circumstances the citizen *may* adopt a moral position of respect for law, as an expression of loyalty to his community (although his allegiance may be expressed in other ways).¹³⁸ A general obligation to obey the law is created by that choice, as an obligation is created by a promise or in the context of relationships such as friendship.

The absence of a general obligation to obey does not, for Raz, imply a right to civil disobedience.¹³⁹ Acts of civil disobedience, which attempt to attract attention to some political grievance, do have undesirable consequences that create a moral reason to obey. Adopting the principle that individuals need to claim a *right* to do a thing only when they cannot claim that they were doing “the right thing,”¹⁴⁰ Raz argues that, in re-

135. RAZ at 233. See also Raz, *Authority and Consent*, 67 VA. L. REV. 103 (1981).

136. RAZ at 234.

137. *Id.* at 246.

138. *Id.* at 250-61.

139. *Id.* at 262-75.

140. Raz argues that individuals can use two types of arguments to convince others that they are entitled to perform an action: that the action is right; and that they have a right to perform it. The latter type shows entitlement to perform even when the action is wrong. RAZ at 273-74.

The language of rights has become very central to legal and political philosophy. Some have seen this as an indication that positivism is on the decline, since the affirmation of rights has always been

gimes where the right to political participation is reasonably well protected, people are entitled to disobey only in circumstances that make it morally right; the justification of the act must rest on its own merits.

The case for a right to conscientious objection—a general immunity from being required by law to violate one's strong convictions—seems more persuasive.¹⁴¹ Such a prima facie right may exist; that right nonetheless may be defeated by the need to protect values besides autonomy and respect for moral convictions as such. Raz, without stating a firm conclusion, simply outlines a few of the relevant considerations on this question.¹⁴²

For Raz, the question of moral attitudes to law belongs to political philosophy rather than jurisprudence, and is to be addressed after identifying the law according to the social thesis; that question is whether a moral (S₁) duty exists to perform legal (S₃) duties. He does not examine why people in fact do obey the law in most cases. And he stresses that the social thesis is consistent with the claim that all legal obligations are moral obligations as well.

Finnis' conception of law is formed, as we have seen, from the point of view of those for whom the law (at least presumptively) should be obeyed.¹⁴³ He accepts the moral theorem that all must be lawabiding for the sake of the common good.¹⁴⁴ But this obligation to be lawabiding presupposes that the rulers exercise their authority to promote the common good, as they should. If they do not, and if the actual laws they enact are unjust, the presumption that obedience is required may be rebutted.¹⁴⁵

Finnis analyzes in four steps, based on four different senses of the ex-

part of natural law traditions. Thus, Ronald Dworkin argues that a neglect of rights is one of the inadequacies of legal positivism. R. DWORKIN, *supra* note 126. Nozick is another champion of rights who invokes natural-law arguments. R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974). See also Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 826 (1979). This question clearly is beyond the limits of this review; but it should be noted that rights-talk (like duty-talk) is not inconsistent with legal positivism, as evidenced by Raz's own discussion. For both kinds of talk, the semantic thesis is of only limited application (although dealing with rights-talk is in fact simpler for Finnis, see FINNIS at 198-230).

141. The relevant difference between civil disobedience and conscientious objection is that the first is a public act designed to change public policies and, thus, necessarily to attract attention to the fact of disobedience. Conscientious objection, on the other hand, is a private attempt by an individual to avoid public coercion. RAZ at 276-89.

142. Raz argues for a prima facie right not to have one's conscience coerced by the law, a right entailed by an interpretation of humanistic ethics that highly regards moral autonomy and pluralism. He advances three considerations against the introduction of a general right to conscientious objection: the possibility of easy abuse, since the objector's word is the only direct evidence of the moral attitudes concerned; the encouragement of self-doubt and of morbid introspection into the complexities of one's motives for action; and the likelihood of invasion of privacy unless mere declaration by the objector is sufficient. *Id.* at 287-89.

143. See *supra* p. 1266.

144. See *supra* pp. 1260-61.

145. FINNIS at 318-19.

pression “an obligation to obey the law,” the question of what effect the injustice of a law may have on the obligation to obey it.¹⁴⁶

1. The expression may mean that I may be punished if I do not comply. (This is what Raz calls the prudential obligation.) The practical question then asked is that of Holmes’ “bad man”: am I likely to be punished?¹⁴⁷ Finnis complains that this is the one sense of the question that is least interesting to individuals concerned with doing the right thing.¹⁴⁸ Clearly, the injustice of the law does not affect this prudential obligation.
2. It may mean that, within the legal system, the law is considered to be binding and obligatory (S_3). The practical question then is whether, despite claims that some action is unjust, the law indeed requires that it be performed. Finnis argues that, the intentional and justified isolation of legal norms from the general flow of practical reasoning notwithstanding, this question is not redundant, since legal systems often consider the requirements of justice in determining the *legal* validity of a law.¹⁴⁹ Once the high court of a jurisdiction decides that a law is intra-systemically valid and binding, this sense of the question is settled, and an obligation to obey the law is identified.¹⁵⁰
3. A third meaning of the expression refers to the moral obligation to obey all laws (what Raz calls the “general moral obligation to obey”). The corresponding practical question is whether this presumptive obligation holds for an unjust law. Finnis says no: since the presumptive authority of law is based on the importance of au-

146. *Id.* at 354-62.

147. Holmes’ “bad man” is the person who is concerned only with prudential reasons for obeying the law, which he defines as Holmes does: “The prophecies of what the courts will do in fact, and nothing more pretentious, is what I mean by the law.” O.W. HOLMES, COLLECTED LEGAL PAPERS 173 (1921). Holmes did not mean to imply that most people are “bad” in this sense; he wanted only to identify an important set of reasons for obedience and the corresponding conception of law. Much American legal thought has been elaboration, critique, and defense of his views. The first “round” was in the 1930’s, when both the realists and their critics claimed to be disciples of Holmes. See Cohen, *Justice Holmes and the Nature of Law*, 31 COLUM. L. REV. 352 (1931); Yntema, *The Rational Basis of Legal Science*, 31 COLUM. L. REV. 925 (1981). Fuller criticized Holmes for being the father of positivism, starting another exchange on the subject. See Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951); Hart, *Holmes’ Positivism—An Addendum*, 64 HARV. L. REV. 929 (1951); Howe, *Rejoinder*, 64 HARV. L. REV. 939 (1951). Finnis similarly discusses Holmes’ related claim that contractual obligations are obligations to pay damages, not to perform the contract. FINNIS at 320-25.

148. FINNIS at 354-55.

149. *Id.* at 355-57. Openness to claims that a law’s injustice is some evidence of its invalidity is particularly apparent in systems with American-style Bills of Rights coupled with a power of judicial review. *Id.* at 356. For a discussion of this unique feature of the American system and its effect on the types of claims that may be made in courts, see Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 969-71 (1977).

150. FINNIS at 357. See also *supra* p. 1270.

thority to the common good, an unjust exercise of authority cannot benefit from this moral force. In this sense, "unjust laws are not laws."¹⁵¹

4. Finally, "obligation to obey" may mean an obligation all-things-considered, which is not derived from the mere fact that a duty was prescribed by recognized authority. Although an unjust law is not binding in itself, there may be other moral reasons—such as the danger that disobedience will be seen as a license to disobey just laws and will bring the law in its entirety into contempt—to conform to the unjust law.¹⁵²

Both Raz and Finnis are aware that their treatments of this problem cannot provide any specific guidance for the individual who has to decide whether to obey the law in a particular instance.¹⁵³ Raz comments broadly that no general considerations can ever dictate answers to specific practical problems.¹⁵⁴

B. *Proper Moral Attitudes to Law*

Raz and Finnis clearly share the view that it is important to try to articulate proper moral attitudes to law. The most important difference between their views concerns Finnis' affirmation of a presumptive general moral obligation to obey the law; Raz questions the applicability of such a presumptive obligation to a legal context,¹⁵⁵ and argues that the mere existence of law does not create a general moral reason for obedience. Even this difference, however, may be more limited than it first appears, since Raz himself believes that many people are likely to adopt an attitude of respect for law: their moral attitude to law is that of Finnis' reasonable man. Moreover, although there is no general moral reason for obedience, there are a number of valid moral reasons, some of which are very extensive, for obeying particular laws. Finally, Finnis' presumptive obligation does not apply to unjust laws: once a law is judged *unjust*, Finnis' and Raz's positions are indistinguishable. And, since even Raz agrees that there are independent moral reasons to do what a *just* law requires, the two approaches lead in practice to the same results.

151. FINNIS at 360-61, 363-66. "Unjust laws are not laws" is not contradictory because "law" is used in two senses. The first is the intra-systemic (S_2) sense: a norm is legally valid if it "(i) . . . emanate[s] from a legally authorized source, (ii) will in fact be enforced by courts and/or officials, and/or (iii) is commonly spoken of as a law like other laws." *Id.* at 360-61. The second is the (S_1) conception of the reasonable man with his "unrestricted perspective." *Id.* at 361.

152. *Id.* at 361-62.

153. *Id.* at 362; RAZ at 261.

154. RAZ at v-vi.

155. *Id.* at 234-35. At the same time, he observes that most people believe they have an obligation to obey the law, and that they regard this obligation as much more stringent than a *prima facie* reason. *Id.*

Thus, the pressing practical question is not that of the presumptive obligation, but that of the obligation to obey all-things-considered. On this question there seems to be an impressive, if vague, consensus between most scholars in the field, Raz and Finnis included. This consensus holds that, under the legal systems we are familiar with, in most cases and for most individuals there is a moral obligation to obey the law, either because it is the law or because there are independent moral reasons to do what the law requires. When legal authority is abused, however, at times it may be permissible not to obey. In extreme cases, that permission may even become a moral obligation to resist and to disobey.

There is no indication that the difference between Raz and Finnis on the presumptive obligation to obey would dictate any different stand on the moral merits of obedience or disobedience in particular cases. Moreover, Raz's rejection of this general moral duty to obey does not follow from his version of positivism: he himself states that the social thesis is compatible with the claim that every legal system's claim to authority is justified;¹⁵⁶ and many positivists have incorporated a general moral obligation to obey the law into their theories of law.¹⁵⁷ Nonetheless, this difference is real and important. It relates to the question that both Finnis and Raz consider central: to what extent, and under what circumstances, is it justified to "accept authority" and to suspend one's own judgment about the moral merits of a case?

Both scholars accept that some acceptance of authority may be justified and consistent with autonomy. But Raz recommends relying on one's own judgment about the moral merits of each case. The adoption of a general attitude of respect for law is sometimes permissible, but never required. Finnis, on the other hand, considers more important the need for effective authority for attempts at coordination and promotion of the common good. He emphasizes that the *existence* of law is good for the community, thus justifying a general presumptive obligation to obey.

Both Raz and Finnis advocate moral criticism of positive law. The difference between endorsing and rejecting a general presumptive moral obligation to obey the law affects moral deliberations only in cases where no circumstances clearly alert one to the possibility of injustice. In such cases, Finnis' reasonable man (and Raz's respectful citizen) may tend to obey without independent moral evaluation. Moral citizens who reject the general obligation, thus retaining their freedom to act on the moral merits of the case, may after consideration reach the conclusion that they ought to obey. But they may also realize that a moral reason for not obeying exists,

156. *Id.* at 39.

157. *See, e.g.,* Hart, *Are There any Natural Rights?* 64 *PHIL. REV.* 175 (1955).

leading them to conclude that this particular law does not deserve obedience.¹⁵⁸

The positivistic and natural law perspectives do not differ as to the complementary facet of the proper moral attitude to law: the duty to resist. Both agree that sometimes positive law is so hideous that there is a moral obligation not to obey it. The general analyses provided by both Raz and Finnis fail to identify the turning point.¹⁵⁹

C. *Effects of Legal Theory on Moral Attitudes and Obedience*

Rationally, a theory about law would be relevant to the attitudes people adopt and to the way people act only if and to the extent that, first, people in fact tend to act on moral considerations and reasons and, second, the theory comments on the proper moral attitude to law and on the scope of the duty to obey.

Whether an individual's choice of attitude or his actions in general are effectively motivated by moral reasons are empirical questions. It seems plausible that some people may be completely unresponsive to moral arguments, that others may invariably act on their moral judgments, and that for most people moral reasons for doing something count but may not actually decide the issue. In other words, it seems safe to say that awareness of the existence of a moral reason for obeying (or disobeying) the law is likely to affect behavior. The likelihood that such reasons will be searched out may depend, to some extent, on the moral attitude to law one adopts—an action that also may be affected by moral reasons. The way decisions are affected by this awareness may vary: people may do what they think they should do, explaining their behavior in moral terms; or they may do something else, and acknowledge the disregarded moral reasons by offering an excuse or a justification. Other things equal, knowing what one's duty is can only strengthen the tendency to do the morally right thing.

Since a theory's relevance to behavior depends on its saying something about the propriety of alternative courses of action, it seems to follow that a descriptive theory of law, which does not purport to say anything at all about that question, is not relevant to conduct. As such, it can neither be praised as encouraging moral conduct nor condemned for its failure to do so. The question does not even exist for Finnis and for natural law theory,

158. When a law's injustice is clear, Finnis' citizen will nevertheless "retrieve" the moral obligation from the general flow of practical reason and consider the merits of the case. *See supra* p. 1261. The presumptive moral obligation to obey will make no difference.

159. *See supra* notes 153-54. Some maintain that general philosophical positions do decide cases. *E.g.*, B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 5 (1977) ("Philosophy decides cases; and hard philosophy at that.") I take this to be metaphorical language.

denying as they do the possibility of such a division. For them, a presumptive moral obligation to obey is a part of the (descriptive) conception of law. But even positivistic descriptive theories of law have *some* practical implications: what they say about the nature of law includes data relevant to the moral decision of whether to obey. The question of relevance does not exist, naturally, for Raz's statements about proper moral attitudes to law.

Is either theory about the proper moral attitudes to law always or generally more conducive to morally right conduct? We saw that Finnis and Raz differ only as to the presumptive moral obligation to obey, and that this difference cannot be ascribed to their belonging to different schools of thought. Nonetheless, positivists and natural lawyers have always debated which theory is superior in application.

Thus, natural lawyers accuse positivists of obscuring the moral obligation to obey the law, which exists in most situations, by emphasizing prudential reasons for obedience and by analyzing legal obligation as if the question were exhausted by those prudential reasons (only the first step in Finnis' analysis of the obligation to obey the law).¹⁶⁰ Yet positivists are also said to encourage blind obedience to all mandates of *de facto* authorities, since they identify law by its emanation from such purely social sources.¹⁶¹ Positivists, on the other hand, accuse natural lawyers of obscuring the nature of the dilemma of disobedience. On their account, natural lawyers give the impression that one is *always* morally obliged to obey the law; they introduce the possibility of disobedience only by playing with the meaning of "law," denying that honorable name to some exceptionally evil edicts. This, the positivists say, confuses the issue, and may generate two dangers: that of extreme conservatism, by lulling people into the belief that all positive law is necessarily justified and thus worthy of obedience; or that of easy revolution, by stripping positive law of all validity by claiming that it conflicts with "natural law."¹⁶²

The symmetry alone of these accusations should evoke suspicion of their validity.¹⁶³ We have seen that Raz attends to the moral dimensions of legal obligation, and that Finnis deals with the pragmatic need for sanctions and with providing prudential reasons for obedience. Both Raz and Finnis argue against the reduction of all conforming behavior, or all legal techniques, to the fear of sanctions. If Raz and Finnis may be taken as repre-

160. Finnis criticizes in these terms Hume's analysis of promissory obligation, FINNIS at 301-03, and Hart's of legal obligation, *id.* at 313-14. This is also part of his critique of Austin's discussion of the obligation to obey the law. See *supra* note 121.

161. See Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, *supra* note 17, at 657-61.

162. Hart, *supra* note 7, at 597-98 (describing Bentham's view).

163. For an illuminating account of this symmetry, see Jenkins, *supra* note 3.

sentative of their respective schools, it is clear that neither positivists nor natural lawyers advocate blind obedience to positive law.

Although neither gives detailed guidelines for action, the general frameworks of Raz and Finnis are designed to stress what each sees as important—a point of real difference between them. For Finnis, it is of great importance to emphasize the morality of obeying just laws, that all moral persons should participate in their society's attempt to promote the common good by coordination and cooperation. He challenges the view implied in Holmes' "bad man" theory of law,¹⁶⁴ and in Hart's¹⁶⁵ and Raz's¹⁶⁶ characterization of the legal point of view as not requiring that people obey the law because of moral considerations. For Raz, on the other hand, it is important to stress that, even though authority may be consistent with autonomy, claims of authority should be carefully evaluated, especially when made by powerful systems. Further, pointing out that not all who obey the law do so for moral reasons, he holds that an adequate explanation of general obedience cannot rest solely on moral considerations.¹⁶⁷

I do not think we can *know* whether insisting on the presumptive morality of law or stressing the social nature of law is the better way to increase moral sensitivity to and criticism of law. Both accounts concede that effective authorities may be abused, that particular laws may be unjust, that there are moral aspects to attitudes to law and to obedience to it. In clear cases, we do not need a theory to identify the right thing to do; when a situation is complex, only more detailed analyses than these can help us.¹⁶⁸

Neither does history show that one approach better indicates when to disobey. Natural law rhetoric has been used to support, justify, and demand obedience to laws that today are considered blatantly unjust.¹⁶⁹ In-

164. See *supra* note 147.

165. H.L.A. HART, *supra* note 16, at 198. Hart offers his own dimension of the "internal point of view" as an improvement over Holmes' account, which Hart criticizes as a form of "rule skepticism." *Id.* at 55-57, 132-50. Finnis reasons that individuals who obey the law only for prudential reasons have no concern for the law as providing an answer to social problems. Thus, such people will not try to bring law into being, or to maintain it rather than another effective system of social control. FINNIS at 12-15.

166. *Id.* at 11-18; see also *id.* at 322-25 (discussing Holmes).

167. RAZ at 245-49. Finnis concedes, of course, that many people do obey for prudential reasons. FINNIS at 301-03.

168. See *supra* notes 153-54.

169. One vehicle for such claims was the "right to property," used to oppose any redistribution of goods "justly" acquired. The United States Supreme Court relied on such rhetoric to invalidate some progressivist legislation, see, e.g., *Lochner v. New York*, 198 U.S. 45 (1905), and recently Robert Nozick has made similar claims, see R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974). This is not a necessary feature of natural law theories, however. Finnis, for example, does not stipulate a natural right to property; he concedes that some private property is necessary for the common good, but argues that the details of the regimes should be considered under the general good of justice. FINNIS at 169-88.

voking their oath to obey the law while resisting arguments that morally unjust laws were legally invalid, judges have justified enforcement of laws they themselves despised.¹⁷⁰ Fuller accuses positivism of contributing to the moral insensitivity that enabled the Nazis to come to power in Germany;¹⁷¹ yet Italian officials and private individuals said that Kelsen's positivism helped them to maintain the autonomy of the law and to resist immoral political pressures.¹⁷²

The unsurprising lesson is that frames of thought, although indispensable, do not dictate answers to practical questions. Particular practical conclusions cannot be deduced from or predicted by general approaches, and thus cannot successfully be used to evaluate them.

I take it that all agree that it is desirable that people will have the right moral attitudes to law. I believe the only way of promoting this goal is both to stress in all possible ways the moral requirement of sensitive critical appraisal of the law (including the usually conclusive moral reasons for obeying) and not to tie that requirement too closely to any particular conception of law. The diffuse, common-sense positivist conception of law suffices for this purpose.

And, primarily because of pragmatic considerations to which neither Raz nor Finnis appears to refer, I believe Raz has the better of their dispute. The balance of convenience usually tends to favor obeying authority.¹⁷³ Thus, there is a danger that, if accepting legal authority as binding is considered permissible or obligatory, people will tend to avoid critically examining the merits of particular cases and acting on their own judgment. Raz's position has the advantage that it requires some awareness of the moral merits of the case in all situations.¹⁷⁴ In most cases, there

170. For a discussion in these terms of the refusal of abolitionist Northern judges to invalidate Fugitive Slave Acts, see R. COVER, *supra* note 127. Cover claims that if these judges had been less "positivistic," they would have found a way to invalidate the objectionable laws. *Id.* at 159-74. I cannot deal with this claim here; but its problematic nature should be stressed.

171. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, *supra* note 21, is not alone. Some feel that the *coup de grace* was dealt to American Legal Realism because of the widely shared view that its positivism did not contain the necessary guarantee against such catastrophes, whereas the natural law perspective (with its structural guarantee that moral issues will always be thought about) did. See Purcell, *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424-46 (1969). For more accusations and some critical discussion, see S. SHUMAN, *supra* note 7, at 177-99.

172. See Falk & Shuman, *The Bellagio Conference on Legal Positivism*, 14 J. LEGAL EDUC. 213-28 (1961). This account suggests that moral awareness is a prerequisite to moral behavior, and that positivistic legal theories do not prevent or even discourage such awareness.

173. That this tendency may go quite far was suggested in a very disturbing way by the famous Milgram experiments, in which people were willing to inflict what they thought was great pain on people they thought to be failing students, despite the pleas of the "students" for mercy, merely because the experimenter insisted that they had to go on. There was no sanction for "disobedience," not even the withdrawal of any financial benefit for participating, and the experimenters were not in an institutionalized position of authority. S. MILGRAM, *OBEDIENCE TO AUTHORITY* (1975).

174. This is true at least for those who have *not* decided to adopt an attitude of respect for law as

will be many moral reasons for obeying, and no serious moral doubts; a moral obligation to obey will thus exist.¹⁷⁵ But even this obedience is deliberately affirmed by the individual, not merely accepted on authority. The need to make such an affirmation, and the awareness that it must be critically made, may help to counteract tendencies to obey when there are no such good moral reasons for obedience.

The danger Finnis identifies is, I think, quite real and serious. When the law is just, it is better that people should obey for moral reasons, not merely for fear of legal sanctions. But Finnis cannot persuade a bad man (if he exists) to fulfill his moral obligation to obey the law; yet a good and weak man could be persuaded that, because such an obligation exists in most cases, one should resolve doubtful cases in favor of obedience. In combination with an authority's editing of the facts, with its dismissals of complaints and protests, this attitude may encourage the blind obedience that natural lawyers have accused positivists of cultivating.¹⁷⁶

It is frustrating and somewhat disappointing that no clearer guidelines result from analyzing right moral attitudes to law. Such nonresolutions are not unique to the question of the obligation to obey the law: they pervade the debate between positivist and natural lawyers. This grayness stems in part from the refusal of most scholars to adopt an absolute position on the obligation to obey the law. That this loss of clarity is justified can be seen by studying those endorsing an absolutist position.

While no one argues that there is never a moral obligation to obey law, some have advanced the view that there exists an absolute moral obligation to obey all laws, under all circumstances.¹⁷⁷ Whether this position is held by so-called positivists or by so-called natural lawyers, it deserves nothing but criticism.¹⁷⁸ One of the chief virtues of these two books is that,

a manifestation of their allegiance.

175. This obligation exists because of considerations of fairness, estoppel, or the need both to contribute to the welfare of the society from which individuals benefit and to participate in the scheme for achieving coordination it accepts. Finnis stresses the last reason, but probably would accept the moral force of the others as well. Raz concedes that all these reasons may support moral reasons for obeying the law, which are at times very extensive, but argues that they are not broad enough to support, for all individuals and in all instances of application, a general obligation to obey all laws. See *supra* TAN 134-35.

176. Fuller held positivism responsible for some of the complacency that helped the Nazis come to power. See Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, *supra* note 21, at 658-59. In post-war Germany many people invoked the defense of justification, coupled with ignorance of the facts that would make this defense inapplicable. This is the danger that I am afraid Finnis' account may reinforce. For a detailed account of some of the problems of post-war German legal institutions, see Pappé, *On the Validity of Judicial Decisions in the Nazi Era*, 26 MOD. L. REV. 260 (1960).

177. For a general account, see Wasserstrom, *The Obligation to Obey the Law*, in *ESSAYS IN THE PHILOSOPHY OF LAW* (R. Sumner ed. 1968). For an argument for an absolute duty of obedience, see A. FORTAS, *CONCERNING DISSENT AND CIVIL DISOBEDIENCE* (1968). Some such arguments are refuted in H. ZINN, *DEMOCRACY AND DISOBEDIENCE* (1968).

178. For the positivist, who identifies law by its pedigree, such a position would amount to blind

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rather than opt for clearer (but wrong) positions on either extreme of the range of possible answers, they acknowledge the complexity and the agony that may be involved in choice.

Conclusion

As a way of making better use of their insights, I have chosen to stress the agreement between Raz and Finnis, to emphasize the breadth of the subjects they cover and the many contributions they make (rather than the possible weaknesses of and problems with their accounts). Too much in the history of legal thought has been lost by granting primacy to debates and polemics. As Finnis says, the data about law and its functions are something with which we are all intimately familiar.¹⁷⁹ Like the six blind men, we try again and again to describe an elephant, forever finding that we fail by emphasizing just one aspect, by illuminating one element while obscuring others.

Maybe we can never do better than that. But the two books under review illustrate what can be gained by working from the different perspectives of natural law and positivism. They show that, by refraining from battling caricatures, each side may benefit from the insights of the other.

obedience to the law. A natural lawyer, who insists that there is always some moral obligation to obey, only escapes this undesirable outcome by defining "law" in a way other than by pedigree, so that extremely evil edicts, although emanating from authority, will not be considered "laws." This tool clearly is not subtle enough to deal with injustice in laws, and it distorts and obscures the nature of the dilemma of disobedience.

179. FINNIS at 9.

