

VALIDITY AND OBLIGATION IN NATURAL LAW THEORY: DOES FINNIS COME TOO CLOSE TO POSITIVISM?

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The law allows it, and the court awards it.¹

I. INTRODUCTION

The relation between law and morality is a point of contention amongst legal philosophers. There are several issues: first, the extent to which law should incorporate moral standards; second, the effect of moral status on legal validity (the “validity question”); third, the effect of legal validity on the obligation created by the law (the “obedience question”). Because most positivists concede that it is desirable for law to accord with notions of justice and morals and that law often incorporates morals,² the first issue features less prominently in the positivism-natural law debate.³

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¹ WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1, l. 296 (Charlotte Whipple Underwood ed., Macmillan's Pocket Classics ed., The Macmillan Co. 1917).

² For example, Hart writes,

These influences [of accepted social morality and wider moral ideals] enter into law either abruptly or avowedly through legislation, or silently and piecemeal through the judicial process The . . . ways in which law mirrors morality are myriad, and still insufficiently studied: statutes may be a mere legal shell and demand by their express terms to be filled out with the aid of moral principles; the range of enforceable contracts may be limited by reference to conceptions of morality and fairness; liability for both civil and criminal wrongs may be adjusted to prevailing views of moral responsibility. No 'positivist' could deny that these are facts, or that the stability of legal systems depends in part upon such types of correspondence with morals. If this is what is meant by the necessary connection of law and morals, its existence should be conceded.

H.L.A. HART, *THE CONCEPT OF LAW* 204 (2d ed. 1994). See also Edward S. Adams & Torben Spaak, *Fuzzifying the Natural Law-Legal Positivist Debate*, 43 BUFF. L. REV. 85, 90 (1995).

Some positivists deny the existence of objective values and argue that morality is a matter of opinion or social convention. Such a view, taken to the extreme, as in the case of deconstructionism, would put the issue of the incorporation of morals into law on a different level where morals are regarded as a matter of one's subjective opinion. Deconstructionism aside, however, even Bentham's relativistic principle of utility, for

This article examines John Finnis's⁴ views on the latter two issues: the validity question and the obedience question.⁵ In doing so, this article points out the implications of the manner in which positivism and natural law theory deal with these questions.

This article examines the extent to which Finnis has been faithful to the natural law position. Finnis believes in a rational foundation of moral judgment⁶ and objectivity, and further takes the view that justified law, in the central case or focal sense, should be derived from these objective morals.⁷ However, as a modern natural law theorist, Finnis does not impact the positivism-natural law debate. Rather, Finnis's only crucial point of departure from positivism lies in his elaboration of the central or focal case, which he clearly employs as his "escape clause" to retreat from the positivist camp to the natural law camp.

In critiquing Finnis's failure to separate the validity and obedience questions, this article argues for the separation of those questions. It shows 1) that there is value in doing so, and 2) that the failure to recognize that there may be an obligation to obey an invalid law, and conversely, that the law is not necessarily valid just because there is an obligation to obey, impoverishes the positivism-natural law debate.

example, involves employing a calculus of felicity, and an overriding principle that laws should further the greatest good of the greatest number. Mill, who takes Bentham's theory further, appears to find the question of the morality of the pleasure relevant in deciding whether it is to be assigned a positive value on the calculus. This article will not engage in any debate on whether there could be such a creature as a secular or relativistic natural law. It suffices to say that there is usually some value desirable for law to incorporate; hence the answer to the first issue is taken for granted, because all would agree that it would be good for laws to incorporate some notion of desirable values, even relativistic ones.

³ The debate has centered on whether there are universal and immutable principles discoverable by reason, which constitute a higher law, and what the effect of the existence of such principles on human law is. See, e.g., J.W. HARRIS, *LEGAL PHILOSOPHIES* 7 (1980).

⁴ JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1981).

⁵ This Article is not concerned with the issues of civil disobedience, which often presuppose, or at least ignore the question of, the validity of the law (or, in more common terminology, "duty to obey the law") and its consequent justification of punishment in accordance with law. See, e.g., Marshall Cohen, *Liberalism and Disobedience* 1 *PHIL. & PUB. AFF.* 283 (1972); H.J. McCloskey, *Conscientious Disobedience of the Law: Its Necessity, Justification, and Problems to Which it Gives Rise* 40 *PHIL. & PHENOMENOLOGICAL RES.* 536 (1980); A.D. Wozzley, *Civil Disobedience and Punishment*, 86 *ETHICS* 323 (1976).

⁶ The nine requirements of practical reasonableness lead to the product of morality. FINNIS, *supra* note 4, at 126-27.

⁷ *Id.* at 290.

II. THE VALIDITY QUESTION: IS AN UNJUST "LAW" LAW?

Positivists contend that legal validity is not dependent on moral status. Hart states the positivist's position as follows: "[I]t is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."⁸ Hans Kelsen is of the view that legal norms may have any kind of content.⁹ It seems from the assertion of positivists that natural law theorists, with whom they are in contention, take the contrary position. John Austin's statement is revealing:

The existence of law is one thing; its merits or demerits is another. Whether it be or be not is one inquiry; whether it be or be not conformable to an assumed standard, is a different inquiry. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. *But simple and glaring as it is, when enunciated in abstract expression, the enumeration of the instances in which it has been forgotten would fill a volume.*¹⁰

Hart similarly believes that one of the forms in which legal positivism, and its thesis that there is only a contingent connection between law and morals, has been rejected "is expressed most clearly in the classical theories of Natural Law: that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid."¹¹ More specifically, with respect to the Thomistic tradition of natural law, Hart writes,

This comprises a twofold contention: first, that there are certain principles of true morality or justice, discoverable by human reason without the aid of revelation even though they have a divine origin; *secondly that man-made laws which conflict with these principles are not valid law. "Lex injusta non est lex."*¹²

Joseph Raz's image of the "Natural Law theorists" as "philosophers who think it a criterion of adequacy for theories of law that they show

⁸ HART, *supra* note 2, at 185-86.

⁹ HANS KELSEN, THE PURE THEORY OF LAW 477-85, 517-22 (1934), *reprinted in* LORD LLOYD OF HAMPSTEAD, INTRODUCTION TO JURISPRUDENCE 307-14 (M.D.A. Freeman ed., 4th ed. 1979).

[Legal norms] are not valid by virtue of their content. Any content whatsoever can be legal; there is no human behavior which could not function as the content of a legal norm. A norm becomes a legal norm only because it has been constituted in a particular fashion, born of a definite procedure and a definite rule.

Id.

¹⁰ JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 184 (1954), *reprinted in* LORD LLOYD OF HAMPSTEAD, *supra* note 9, at 233 (emphasis added).

¹¹ HART, *supra* note 2, at 186.

¹² *Id.* at 152 (emphasis added).

. . . that it is a necessary truth that every law has moral worth"¹³ is consistent with these statements on the prevalence of the views that conflate or necessarily link moral status and legal validity. According to Finnis, Raz adopts Kelsen's version of the image:

Kelsen correctly points out that according to natural law theories there is no specific notion of legal validity. The only concept of validity is validity according to natural law, i.e., moral validity. Natural lawyers can only judge a law as morally valid, that is, just or morally invalid, i.e., wrong. They cannot say of a law that it is legally valid but morally wrong. If it is wrong and unjust, it is also invalid in the only sense of validity they recognise.¹⁴

One expects Finnis to argue that Kelsen's version is incorrect, because the so-called moral validity Kelsen wrote of was legal validity. Law must incorporate morals or else it would not be law. The only sense of validity in question for natural law is legal validity, which hinges on moral status.

However, Finnis debunks the image of natural law entertained by theorists such as Kelsen, Hart and Raz. Finnis asserts that he knows of "no theory of natural law in which that affirmation ['unjust laws are not law'], or anything like it, is more than a subordinate theorem."¹⁵ He claims that only the central case of law and the focal sense of legal validity necessitated a connection between law and morals. Thus, without that connection, the law did not fall within the central meaning of law, nor was it valid in the focal sense of legal validity. This connection is evident in his translation of Aquinas's theory into Kelsenian terminology:

The legal validity (*in the focal, moral sense of 'legal validity'*) of positive law is derived from its rational connection with (i.e. derivation from) natural law, and this connection holds good, normally, if and only if (i) the law originates in a way which is legally valid (in the specially restricted, purely legal sense of 'legal validity') and (ii) the law is not materially unjust either in its content or in relevant circumstances of its positing.¹⁶

Finnis uses the words "central" (as opposed to borderline) and "focal" (as opposed to secondary) in the sense used by Aristotle.¹⁷ Aristotle uses friendship to illustrate these ideas. There are the central case of friendship and the peripheral cases like friendships of

¹³ FINNIS, *supra* note 4, at 26 (quoting JOSEPH RAZ, PRACTICAL REASON AND NORMS 162 (1975)).

¹⁴ *Id.* at 26 (quoting Joseph Raz, *Kelsen's Theory of the Basic Norm*, 19 AM. J. JURIS. 94, 100 (1974)).

¹⁵ *Id.* at 351.

¹⁶ *Id.* at 27 (emphasis added).

¹⁷ *Id.* at 9-11.

convenience, cupboard love, or business, casual, or play relations.¹⁸ It is now evident that the terms “central” and “peripheral” have nothing to do with the frequency of occurrence. Using the example of friendship, deep, unconditional, and mutual friendship (the central case) is far more rare than the peripheral cases. The study of peripheral cases “is illuminated by thinking of them as watered-down versions of the central cases, or sometimes as exploitations of human attitudes shaped by reference to the central case.”¹⁹ But Finnis opines that one should not go to the extreme of having a definition or explanation so broad as to cover all cases without giving any special emphasis to the central case.

[T]here is no point in restricting one’s explanation of the central cases to those features which are present not only in the central but also in each of the peripheral cases. Rather, one’s descriptive explanation of the central cases should be as conceptually rich and complex as is required to answer all appropriate questions about those central cases. And then one’s account of the other instances can trace the network of similarities and differences, the analogies and disanalogies, for example, of form, function, or content, between them and the central cases. In this way, one uncovers the ‘principle or rationale’ on which the general term (‘constitution’, ‘friend’, ‘law’ . . .) is extended from the central to the more or less borderline cases, from its focal to its secondary meanings.²⁰

Finnis uses “law” with a *focal* meaning not as an appropriation of the term ‘law’ in a univocal sense that would exclude from the reference of the term anything that failed to have all the characteristics (and to their full extent) of the central case.”²¹ Law refers primarily to

rules 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 reasonable 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 that common good of the community, according to a manner and form itself adapted to that 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.²²

¹⁸ *Id.* at 11.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 277.

²² *Id.* at 276-77.

Finnis includes as law those cases which lack something of the central case.²³ For example, customary international law, whilst not truly made in the sense that law (in the central case) is made, would be considered law under his definition. Also, a law that is not entirely adapted to the common good or even one that is unjust would be considered law. But the point of natural law, according to Finnis, is to determine the degree and manner of incorporation of morals into law, which is to say that the relevance of natural law theory is primarily in the realm of law reform, and not legal validity.

[T]he concern of the tradition . . . [of natural law theorizing] has been to show that the act of 'positing' law (whether judicially or legislatively or otherwise) is an act which can and should be guided by 'moral' principles and rules; that those moral norms are a matter of objective reasonableness, not of whim, convention, or mere 'decision'; and that those same moral norms justify (a) the very institution of positive law, (b) the main institutions, techniques, and modalities within that tradition (e.g. separation of powers), and (c) the main institutions regulated and sustained by law (e.g. government, contract, property, marriage, and criminal liability). What truly characterizes the tradition is that it is not content merely to observe the historical or sociological fact that 'morality' thus affects 'law', but instead seeks to determine what the requirements of practical reasonableness really are, so as to afford a rational basis for the activities of legislators, judges, and citizens.²⁴

Finnis also says,

To be . . . authoritative in the eyes of a reasonable man, a *determinatio* must be consistent with the basic requirements of practical reasonableness, though it need not necessarily or even usually be the *determinatio* he would himself have made had he had the opportunity; it need not even be one he would regard as 'sensible'.²⁵

This issue is one that relates to the authoritative or binding force of positive law.²⁶ "The authority of the law depends . . . on its justice or at least its ability to secure justice."²⁷ But it does not mean that a law that is not justified in this sense is not law. Rather, "attention to the principles [of natural law], in the context of these explanations of law and legal obligation, justifies regarding certain positive laws as radically defective, *precisely as laws*, for want of conformity to those principles."²⁸ In the Finnisian sense, the effect of lack of justification relates only to the obedience question, which will be discussed below.

²³ *Id.* at 277.

²⁴ *Id.* at 290.

²⁵ *Id.* at 289-90.

²⁶ *Id.* at 290.

²⁷ *Id.* at 260.

²⁸ *Id.* at 24.

According to Finnis, four kinds of injustice exist in the peripheral cases of law (those cases where the law was not justified as in the central case): 1) defect of intention, where the intent of promulgator was improper but the law may be just in content; 2) defect of author, which includes those cases where the authority in question acted *ultra vires* where the statute or other authoritative rule was concerned; 3) defect of form, where the exercise of authority was contrary to the rule of law as commonly understood; 4) substantial injustice, where the law was either distributively unjust in “appropriating some aspect of the common stock . . . for a class not reasonably entitled to it,” or commutatively unjust in denying to some or all the exercise of a human right where the exercise would not injure the common good.²⁹

Although Finnis may disagree, he is not faithful to the classical Christian natural law position if he believes that laws suffering from these types of injustice would be secondarily or peripherally law, even though they are not captured within the definition of the central case of law. Finnis claims that, while Aquinas may have said that these defective laws were “more outrages than laws” and “not law but a corruption of law,” Aquinas also says that these laws have the character of law in the sense that they were the commands of a superior to his subordinates and were calculated to help the citizens secure the common good, or at least good relative to tyranny.³⁰ Finnis focuses on Aquinas’s statement that a defective law is “not a law *simpliciter* [i.e., straightforwardly, or in the focal sense], but rather a sort of perversion of law.”³¹ Finnis adds that Aquinas has carefully avoided the maxim *lex injusta non est lex*:

For the statement is either pure nonsense, flatly self-contradictory, or else is a dramatization of the point more literally made by Aquinas when he says that an unjust law is not law in the focal sense of the term ‘law’ [i.e., *simpliciter*] notwithstanding that it is law in a secondary sense of that term [i.e., *secundum quid*].³²

Three criticisms may be made of Finnis’s view of Aquinas.

First, it could be argued that Aquinas intended such laws to be legally invalid, say, before a judge. This position is arguably more consistent with the normativity of Thomistic theory and also with Augustinian statements referred to by Aquinas, such as “a law that was unjust wouldn’t seem to be law.”³³ Aquinas says that it is necessary to obey some unjust laws, particularly those contrary to a temporal (rather than eternal) good, to avoid scandal or disturbance or inflicting a more

²⁹ *Id.* at 352-54.

³⁰ *Id.* at 363-64.

³¹ *Id.* at 363.

³² *Id.* at 364.

³³ *Id.* at 363.

grievous hurt.³⁴ However, this does not aid Finnis's case because it assumes that one must have first concluded that an unjust law is law before one addresses the obedience question. If one believes that the ordinary citizen is generally not in the position to judge whether a purported law is just and, thus, law, it is plausible that the obedience question is relevant even if one holds the maxim *lex injusta non est lex* to be true. To allow every citizen to determine what laws are just and, therefore, valid would lead to great disharmony in society. The applicability of the maxim is in the courts, but the maxim is still a central tenet of classical natural law theory. It is possible that Aquinas's statements on the necessity of obedience are aimed at citizens, not towards qualifying the maxim.³⁵ On this view, Finnis takes a position contrary to other natural law theorists by denying the necessary connection between legal validity and moral status.³⁶

Second, Finnis appears to reject the maxim on a purely semantical ground. He argues that the classical natural law theorists have not used the slogans of modern critics, such as "what is utterly immoral cannot be law" and "certain rules cannot be law because of their moral iniquity."³⁷ Rather, classical natural law theorists like Blackstone have affirmed that "unjust LAWS are not law"³⁸ and have simultaneously affirmed the legal validity of unjust laws:

Far from 'denying legal validity to iniquitous rules', the tradition explicitly (by speaking of 'unjust laws') accords to iniquitous rules legal validity, whether on the ground and in the sense that these rules are accepted in the courts as guides to judicial decision, or on the ground and in the sense that, in the judgment of the speaker, they satisfy the criteria of validity laid down by constitutional and other legal rules, or both these grounds and in both these senses.³⁹

Perhaps Finnis accords unintended significance to the classical formulation. A school of language philosophy, known as ordinary language philosophy, attempts to understand phenomenon of the world by looking at how words are used in ordinary language.⁴⁰ Even if one

³⁴ *Id.* at 360-361.

³⁵ The implication of this possibility is examined in Part III.

³⁶ See, e.g., Adams & Spaak, *supra* note 2, at 43.

³⁷ FINNIS, *supra* note 4, at 364 (quoting H.L.A. Hart, *The Separation of Law and Morals*, 71 HARV. L. REV. 593, 620 (1958)).

³⁸ *Id.*

³⁹ *Id.* at 365.

⁴⁰ Compare Zeno Vendler, *Linguistics and the A Priori*, in LINGUISTICS IN PHILOSOPHY 1, 1-32 (1967), with STANLEY CAVELL, MUST WE MEAN WHAT WE SAY? 1-43 (1969). Rodney J. Blackman also summarizes the position of some legal theorists on the matter:

It can be argued that it is through the use of ordinary language as it applies to widely used legal concepts that the positivists themselves come to reject the notion that "law" has any necessary moral connection. John Austin,

accepts ordinary language philosophy, it does not point conclusively to Finnis's case. It is possible that the first "laws" refers to the secondary meaning and the second usage refers to the central meaning. It is equally arguable, however, that the first "laws" refers to rules (or purported law), and the second refers to law in the only relevant sense of the word, affecting legal validity. Any reliance on Blackstone's use of the statement seems unfair because Blackstone clearly writes that "no human laws are of any validity, if contrary to (the law of nature . . . dictated by God Himself)."⁴¹ Ironically, while Finnis, the natural law theorist, is trying to use language to show that classical natural law takes the view that unjust laws are laws, various positivists, like Hart and Raz, have rejected that very idea. Further, if one wishes to analyze semantics, the analysis could also apply to the way a citizen speaks when his rights, as the citizen understands them, are violated by the government of a wicked regime, which passes rules without complying with the rule of law. An outraged citizen might exclaim, as Blackman points out, that what the regime was enforcing was not law at all. Use of the word "law" by the ordinary person shows that it is understood to incorporate at least procedural justice.⁴² Likewise the citizen also understands it to incorporate more substantive requirements of practical reasonableness.

The third, and most important criticism, is that Finnis relegates Aquinas's theory to the realm of moral philosophy and ethics, as opposed to jurisprudence. Finnis subjects himself to the criticism that what he has written relates to moral validity of laws and not legal validity.

for example, uses "the current of ordinary speech" as a basis for rejecting the notion that "reward" comes within the term "sanction." Hans Kelsen states that, "to arrive at a definition of law, it is convenient to start from the usage of language . . ." He also states that in describing an organ of the state, such as a court, "we largely have to deal with the common use of language."

H.L.A. Hart puts it: "[The utilitarians (Austin and Bentham) expressed] the important truth that a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law, was as vital to our understanding of the nature of law as historical or sociological studies." It should be noted, however, that Hart rejects the thesis that language usage can enable one to decide whether an evil regime acts lawfully: "Plainly we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage."

By contrast, Joseph Raz rejects the usage of language as a guide, stating that "legal philosophy is not and was never conceived to be by its main exponents an enquiry into the meaning of [the word 'law'] or any other word" but rather "the study of a distinctive form of social organization."

Rodney J. Blackman, *There is There There: Defending the Defenseless with Procedural Natural Law*, 37 ARIZ. L. REV. 285, 290 n.17 (1995) (citations omitted).

⁴¹ 1 WILLIAM BLACKSTONE, COMMENTARIES *41 (1765).

⁴² Blackman, *supra* note 40, at 285, 296-97.

Perhaps he is content with that critique, for he writes that the maxim implies

(i) that some normative meaning-content has for some community the status . . . of law, (ii) that that law is unjust (a critical judgment of practical reasonableness, whether correct or incorrect), and (iii) that compliance with that law is . . . *not* justified or required by the derivative and defeasible principle of practical reasonableness that laws impose moral obligations.⁴³

When faced with an unjust law that does not accord with practical reasonableness, Finnis does not say that it is not law or that there is no legal obligation in the legal sense.⁴⁴ Instead, he merely denies its legal validity in the moral sense, which this article argues is no different from "moral validity." As such, he faces the criticism that all he postulated was moral theory.⁴⁵

Perhaps Finnis is concerned with not falling into what Philip Soper has called the "Natural Law dilemma,"⁴⁶ which he might if he spoke of legal validity in the legal sense. This dilemma relates to natural law's opposition to allowing human commands the last word on what amounts to law. The view of natural law is that law should incorporate higher commands. If it conflicts with higher commands, it is not law. Soper's argument is that ultimately some human institution or representative must act on its best assessment of what the higher commands are so that regardless of whether one subscribes to positivism or naturalism, human fiat always controls. Only if one holds that the judge's decision does not necessarily impose obligations does fiat *not* control (or that the

⁴³ FINNIS, *supra* note 4, at 365.

⁴⁴ See *infra* Part III.A.1.

⁴⁵ Philip Soper, *Legal Theory and the Problem of Definition*, 50 U. CHI. L. REV. 1170, 1181-82 (1983).

A classical natural law theorist such as Aquinas was never interested in the positivist's concern to identify the essence of law. The classical problem from the beginning was not to define law but to explain the moral consequences of the fact that something was law. And that, says Finnis, is all that Aquinas was doing . . . there must be a limit to this power of man to make his own will the source of obligation, and that limit is reached when man's will conflicts with God's, with what is already *malum in se* by reference to moral or religious law. Hence, "man-made law" that is unjust is not "God's law": it does not morally obligate. That is all the "slogan" says, and in this form it is a statement that even the positivist can accept. Aquinas, it turns out, was writing moral theory, not legal theory, telling us only what many a positivist will also affirm: some laws are too evil to be obeyed. Now if Finnis is willing to defend this interpretation of Aquinas and to rid his own legal theory of the idea that morality is relevant to determining legal validity, why shouldn't we conclude the same thing of Finnis, that he too is offering only moral theory, not legal theory?

Id.

⁴⁶ See Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393, 2407 (1992) [hereinafter *Confusions About Natural Law*].

law – which in this sense includes what the judge, even one considering higher commands, says it is – cannot be said to impose obligations just because he has decided it to be morally sound).⁴⁷ Thus, Soper writes that one view of this situation is that, in the case in which fiat controls, “natural law’s protest against fiat is irrelevant,” and, in the case in which one decides that fiat does not control, “legal obligations collapse entirely into moral obligations.”⁴⁸ If this is one dilemma Finnis was trying to avoid, it helps to note that Soper’s paradox is illusory. Soper has presented the issue in too sleek a manner, dismissing the very real distinction between fiat *per se* of a tyrant and the judgments that take into account a more objective assessment, not the judge’s view of his personal morals. This more objective assessment does not derive from considering conscience *per se*, but is perhaps akin to what Dworkin’s Justice Hercules would do.⁴⁹ Such a judge would survey the community’s view of morals in order to form an opinion about what higher commands were, but his survey would not be limited to the particular society’s materials, as in the case of Justice Hercules. Even so, the judge’s view would not be conclusive. Thus, one does not fall into the trap Soper describes: the trap of exalting the judge instead of the legislature, and, ultimately, taking a positivistic stance.⁵⁰ This solution may only be a theoretical one because in practice, what the judge (including the appellate judge or the judge in subsequent decisions) decides is binding. Nevertheless, theory is important because the point of the maxim is to function as a check on judges and legislators. Also, if in taking such a conclusion fiat does not control, it does not logically or necessarily follow that legal obligations collapse into moral ones. Once our starting point is that law must conform to moral standards, then it follows that what is immoral cannot create a legal obligation. Morality is incorporated into this test.

III. THE OBEDIENCE QUESTION: “OBLIGATION TO OBEY THE LAW”

The following discussion comprises two parts. The first part discusses Finnis’s answer to the obedience question if an unjust law is found to be law. The second part discusses an alternative that is conventionally ignored, i.e., the obedience question is relevant even when one holds to the maxim *lex injusta non est lex* – a possibility Finnis failed to address, which may have led to his questionable interpretation of Aquinas’s theory.

⁴⁷ *Id.* at 2412.

⁴⁸ *See id.* at 2415-16.

⁴⁹ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 126 (1977).

⁵⁰ *Confusions About Natural Law*, *supra* note 47, at 2415-16.

A. *The Position That Unjust Law Is Law*

Granting that a law not justified in the focal sense is valid, the question arises as to the obligation to obey an unjust law. If there is an obligation to obey the law, there arises a further question of what amounts to obedience or compliance.

1. Senses of Obligation to Obey the Law

Finnis lists four possible meanings of the phrase "obligation to obey the law":

- (i) empirical liability to be subjected to sanction in event of non-compliance; or
- (ii) legal obligation in the intra-systemic sense ('legal obligation in the legal sense') in which the practical premiss that conformity to law is socially necessary is a framework principle insulated from the rest of practical reasoning; or
- (iii) legal obligation in the moral sense (i.e. the moral obligation that presumptively is entailed by legal obligation in the intra-systemic or legal sense); or
- (iv) moral obligation deriving not from the legality of the stipulation-of-obligation but from some 'collateral' source⁵¹

Finnis writes that when one asks how injustice affects the obedience question, the first sense of obligation, the concern of the Holmesian "bad man," is unlikely to be intended.

Finnis urges us to pause at the second sense of obligation, which at first blush seems pointless if one has already decided that it is law. Some theorists believe that we are, by definition, legally bound to obey the law and the only remaining question is whether this legal obligation corresponds to a moral one.⁵² Finnis rejects the extreme Austinian view of banishing the question to "another discipline" on the grounds that "the Court of Justice will demonstrate the inconclusiveness of my reasoning [that unjust law is not law and hence I will not obey it] by hanging me up, in pursuance of the law of which I have impugned the validity."⁵³ Finnis takes the view that the question is of limited relevance intra-systemically because lawyers may raise the question before a court of law, claiming that something is in truth not obligatory because it is unjust.⁵⁴ He points out that they do, in fact, do that, for example, when they raise the "golden rule" that statutes are to be interpreted so as to

⁵¹ FINNIS, *supra* note 4, at 354.

⁵² R. George Wright, *Legal Obligation and Natural Law*, 23 GA. L. REV. 997, 997 (1989).

⁵³ FINNIS, *supra* note 4, at 355.

⁵⁴ *Id.* at 357.

avoid absurdity or injustice.⁵⁵ It is “not conducive to clear thought, or to any good practical purpose,” however, to deny the legal obligatoriness in the legal sense once the highest court has decided that the “law” was either not unjust or even if it was unjust, that it was law.⁵⁶

Pertaining to the third sense of obligation, the question is whether one has a moral obligation to obey an unjust law, given that the system is by and large just. Finnis criticizes positivists for dismissing the question to ethics or political philosophy, for three reasons: first, in practice, lawyers and judges often employ moral arguments; second, there is no sharp distinction between ethics and the principles of practical reasonableness used in legal theory, and any legal theory that is more than descriptive must draw on it; third, positivists themselves often draw on these principles in their works.⁵⁷

Finnis believes that unjust laws fail to create any moral obligation because they lack the justification by reference to the common good, where injustice occurs in the following cases: “stipulations made for partisan advantage, or (without emergency justification) in excess of legally defined authority, or imposing inequitable burdens on their subjects, or directing the doing of things that should never be done.”⁵⁸

He qualifies this by identifying two cases of injustice where a moral duty of compliance exists: first, where the motives of the author are bad but the law is for the common good and second, where the moral obligations of those who are not unjustly burdened by a distributively unjust law are concerned.⁵⁹ Finnis claims this view is consistent with that of classical natural law:

[M]y response to the question in its third sense corresponds to the classical position: viz. that for the purpose of assessing one’s legal obligations in the moral sense, one is entitled to discount laws that are ‘unjust’ in any of the ways mentioned. Such laws lack the moral authority that in other cases comes simply from their origin, ‘pedigree’, or formal source. In this way, then, *lex injusta non est lex* and *virtutem obligandi non habet*, whether or not it is ‘legally valid’ and ‘legally obligatory’ in the restricted sense that it (i) emanates from a legally authorized source, (ii) will in fact be enforced by courts and/or other officials, and/or (iii) is commonly spoken of as a law like other laws.⁶⁰

The fourth sense of obligation addresses the moral obligation to obey law that arises from a collateral fact, that of complying to the

⁵⁵ *Id.* at 356 (quoting JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE* 279 n.1 (Special ed., The Legal Classics Library 1984) (1832)).

⁵⁶ *Id.* at 357.

⁵⁷ *Id.* at 357-59.

⁵⁸ *Id.* at 360.

⁵⁹ *Id.*

⁶⁰ *Id.* at 360-61.

degree necessary to avoid bringing the law as a whole into contempt. Finnis states that the exact degree of compliance varies according to time, place and circumstance.⁶¹ In limited cases (e.g., courts and officials) the morally required obligation may be full compliance.

Several criticisms may be made of Finnis's analysis of obligation. Discussing his second sense of obligation, Finnis states that it is senseless to argue that something did not lead to a legal obligation after the highest court had decided that it was law.⁶² Surely this puts him in the positivist camp, or at least in one where the courts, instead of the legislature, reign.

Finnis calls the third sense "legal obligation in the moral sense" but later switches to calling it "moral obligation."⁶³ Presumably, his reference to the third sense as "legal obligation in the moral sense" is an attempt to escape the criticism that he is merely postulating moral theory. But can he create a category of legal obligation in the moral sense and insist that it is what classical natural law theory meant? Is his stance really positivistic? A positivist might not quarrel with the point that there is no moral obligation to obey such laws. Further, if Finnis's only point of contention with the positivist is that moral obligations are legitimately considered under legal theory, he is enlarging the scope of legal theory, as opposed to incorporating morals within the definition of law. Perhaps positivists would argue that morality is a matter for ethics and not legal theory; thus, in his attempt to enlarge the scope of legal theory, Finnis is actually debating with the positivists in a limited sense.

In regard to the fourth sense of obligation, Finnis's conclusion that the collateral moral obligation may necessitate full compliance with unjust laws in some cases seems to contradict Aquinas's views. Aquinas says that there may be no obligation to prevent civil disobedience or to prevent a corrupting example where the injustice of the law is such that it promotes something that, according to divine law, ought never be done. Although Aquinas mentions that laws in such instances are not binding in conscience, he also suggests that they do not seem to be law.⁶⁴ Such absolute adherence to divine law, in the example Aquinas gives (cited by Finnis), seems to target even "unimportant" matters like

⁶¹ *Id.* at 361.

⁶² *Id.* at 357.

⁶³ *Id.* at 354, 357.

⁶⁴ *Id.* at 360-61. As an aside, it has been argued that natural law theorists often do not adequately justify the duty to obey non-iniquitous but morally neutral laws. Some have suggested that in a system that is by and large fair, there is a duty to obey all the rules because there is an agreement to obey positive laws (without needing to assess each individual rule) in return for the continued protection of our central interests afforded by the legal system. See, e.g., Robert N. McLaughlin, *On a Similarity Between Natural Law Theories and English Legal Positivism*, 39 PHIL. Q. 445 (1989).

keeping a secret.⁶⁵ If this is the case, Finnis may be contradicting Aquinas. For example, imagine if the system was by and large just, but had a law that required all persons to bow in worship to all judges and officials. Also suppose the law had a dual purpose of inculcating respect for law-enforcement authorities and of symbolizing that the law is god. Divine law prohibits this, for the first Mosaic commandment is to worship no God but Yahweh.⁶⁶ However, because of the first purpose of the law, disobedience would throw the system into contempt. This example is far-fetched but shows the point at which Finnis deviates from Aquinas, though he claims to have been faithful to the classical tradition.

Finally, it is unclear how one applies the third and fourth senses of obligation in practice. Suppose a system is by and large just, but a particular law is oppressive to a racial minority by imposing extremely heavy taxes solely on this group. Is secret disobedience in the form of a quiet refusal to pay the taxes allowed? Under the third sense of obligation, this particular law would not create any moral obligation on the part of the minority citizens. Arguably, however, it is unclear if the citizens would bring the law as a whole into contempt by their quiet disobedience, because, although they form a small group, they constitute the entire group of persons to whom the law is directed. Such disobedience, even to a very specific law, could set a bad example. It might encourage others to read exceptions into their moral obligation in the third sense by relying on injustice in the form, for example, of inequitable burdens. Finnis seems to intend the fourth sense of obligation to set a limit on the acts of disobedience allowed. But one queries whether it effectively requires compliance to the point of nullifying the implications of the third sense.

2. The Issue of Compliance or Obedience, Supposing There is an Obligation

Assuming there is an obligation whether one must comply or obey depends on the *sense* of obligation to which one is referring. Finnis discusses the theme of obligation⁶⁷ by analogy with promissory obligations in civil law, explicable in three ways. The first level of obligation points to the "complex practice in which promissory

⁶⁵ FINNIS, *supra* note 4, at 360-61.

⁶⁶ *Exodus* 20:3.

⁶⁷ For another discussion on the factual and value element in obligations, see Philip Soper, *Legal Theory and the Obligation to Obey*, 18 GA. L. REV. 891, 905 (1984). For the argument that a complete explanation of obligations leads inevitably to a theistic version of natural law, see Wright, *supra* note 52, at 1015-16 (1989). Wright argues that once one concludes that God is benevolent, all knowing, and that His judgments are always right, it is only reasonable to obey the law if that is consonant with His nature. Thus, if this sort of God exists, He is the sole possible source of obligation; if not, then there can be no rationally binding moral obligation in a legal context. *Id.*

undertakings are rooted." When one acts in a way that amounts to making a promise against such a backdrop, there is an obligation to do what one promised.⁶⁸ At the second level of explanation, there is an obligation to perform in order to perpetuate trust.⁶⁹ The third level of explanation refers to the act of making a promise and following through in order to promote the common good.⁷⁰

[A]n individual acts most appropriately for the common good, not by trying to estimate the needs of the common good 'at large', but by performing his contractual undertakings, and fulfilling his other responsibilities, to ascertained individuals, i.e. to those who have particular rights correlative to his duties. Fulfilling one's particular obligations in justice, even within the restricted sphere of private contracts, family responsibilities, etc., is necessary if one is to respect and favour the common good, *not* because 'otherwise everyone suffers', or because non-fulfilment would diminish 'overall net good' in some impossible utilitarian computation, or even because it would 'set a bad example' and thus weaken a useful practice, but simply because the common good *is* the good of individuals, living together and depending upon one another in ways that favour the well-being of each.⁷¹

Beyond the context of promissory obligations, obligations between individuals exist and must be complied with for the sake of the common good, especially because each individual operates within the framework that exists for the common good. Some laws may not be for the common good and defying them may actually be better for the common good. However, the rules of that framework of coordination are better if complied with than if each individual judged those rules:⁷²

- A. We need, for the sake of the common good, to be law-abiding;
- B. But where ϕ is stipulated by law as obligatory, the *only* way to be law-abiding is to do ϕ ;

⁶⁸ FINNIS, *supra* note 4, at 300.

⁶⁹ *Id.* at 301.

⁷⁰ *Id.* at 303. It is questionable if others would put this obligation in the moral or natural realm. Kent Greenawalt distinguishes between the natural duty, which arises because one is a member of a society or because one occupies some status (e.g., a parent), and moral duty, which in the context of promises arises because one has voluntarily subjected oneself. He notes, however, that the "obligation to obey the law" has not been constrained to cases of voluntary submission. Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1, 3-4 (1985).

Greenawalt also offers an alternative set of explanations for this natural duty gleaned from the various theories: first, the traditional, classic natural law explanation; second, the Rawlsian duty to obey just institutions; third, Honore's argument that necessity is a ground of duty; fourth, Soper's respect for officials exercising authority in good faith since coercive government is necessary for human beings; and finally, Mackie's derived prima facie obligation included by virtue of conventional (as opposed to objective) morality. *Id.*

⁷¹ FINNIS, *supra* note 4, at 305.

⁷² *Id.* at 317.

- C. Therefore, we need [it is obligatory for us] to do ϕ where ϕ has been legally stipulated to be obligatory.⁷³

The criticism of Finnis's explanations for obligation is that he does not seem to go far enough. Pertaining to the first level of explanation, why should one follow convention? This has plagued international lawyers as far as *opinio juris* and the formation of customary norms are concerned. How does one bind himself to a certain behavior? By simply acting in a manner? Because Finnis does not think this is a definitive explanation, the focus should be on Finnis's third level of explanation. Even this seems to be a half-hearted attempt to make a value judgment (by reference to it being for the common good) without a proper foundation in a normative system of morality. Finnis seems to have conflated two distinct explanations. The first is an absolute explanation by reference to the common good; that is, it is *ipso facto* good to comply with obligations for the sake of the common good, since the obligations exist for the common good. The second explanation, the duty of fair play, requires compliance with rules by those who have chosen to accept benefits provided under the rules.⁷⁴ If by the third level Finnis means the *ipso facto* good, his explanation fails by stopping at the penultimate question: Why should one act in favor of the common good? He adds a qualification that suggests he does not presuppose this explanation is the deepest, but he leaves the issue to his final chapter on God.⁷⁵ In view of the fact that throughout the book Finnis seems to give the impression that the "secular" portion can be read separately from his final chapter, it seems that Finnis is trying to have his cake and eat it, too. He cannot claim that the third level of explanation is not the deepest and still leave readers satisfied. On the other hand, if it is about the duty of fair play, it seems to be premised on the fiction of voluntariness where obligations from laws (as opposed to promissory obligations) are concerned.

Assuming that one accepts the explanation of "obligation" with reference to the common good, can one determine what amounts to compliance with one's obligation? Finnis speaks of the two controversies, which have "very different origins and concerns, but raise overlapping and parallel questions."⁷⁶ The controversies relate to the questions of what the legal obligation entails in both a legal and a moral sense. Again, by analogy to promissory undertakings in contracts, one could ask whether the legal obligation is to perform the contract or simply to pay compensation in the event of breach.⁷⁷ Finnis argues in the case of

⁷³ This is a simplified version of the framework of coordination in FINNIS, *supra* note 4, at 316. The more complex version is found in FINNIS, *supra* note 4, at 315.

⁷⁴ On the duty of fair play, see, e.g., Greenawalt, *supra* note 70, at 5.

⁷⁵ FINNIS, *supra* note 4, at 306.

⁷⁶ *Id.* at 321.

⁷⁷ *Id.*

contracts that the legal obligation, if read in the disjunctive sense of being able either to perform the contract or to compensate for loss, does not serve the common good as much as one that explicitly allows parties to have such disjunctive contracts or be deemed to have a legal obligation to perform otherwise.⁷⁸ This latter form of contracting style would give the parties relatively more certain expectations. Disjunctive legal obligations arising from the contract cannot serve the common good because social costs are often incurred from the court's adjudication of whether there has been a breach and what damages are due. The process of analyzing whether there are disjunctive legal obligations can go further. Even after the court has held a person liable for damages, one must decide if there is an obligation to pay the damages or to pay the penalty for contempt and to allow the sheriff to seize one's goods.⁷⁹ Finnis then asserts that, even "[w]ithout collapsing the clear distinction between law and morals, it is possible to see and say that the law's ambitions are higher than this."⁸⁰ Finnis concludes that the legal obligation is really to perform the contract. This accords with "the way authoritatively chosen as the common way to [the common good]."⁸¹ Presumably, the reasoning applies *mutatis mutandis* to criminal and other laws.

It is difficult to see why legal obligations in the legal sense do not exist in the disjunctive sense. Finnis's ideas of the common good and the nine principles of practical reasonableness (the product of which, according to him, is morality) used to structure the legal framework were non-legal or pre-law (in the sense of that which exists prior to the formation of the legal system). It is thus reasonable to say that the obligation to act in a manner to secure the common good, which is best achieved by requiring performance, is simply a moral one. Why should the aspirations of law be higher? This article is not contending that the aspirations of the law should not be higher. It seems contradictory for Finnis to have such high aspirations here but deny that unjust laws are not laws, even though they are unjust or not for the common good.

The controversy amongst moralists relates to the moral obligation to obey a legal-obligation-creating rule of law. The question is substantially the same one, that is, whether the moral obligation is to do what the rule of law implicitly or explicitly directs the subject to do or only to submit to the penalty provided for in case of acts or omissions.⁸² It seems that the answer depends on the legal obligation. If one takes the view that the

⁷⁸ *Id.* at 324.

⁷⁹ *Id.* at 324-25.

⁸⁰ *Id.*

⁸¹ *Id.* at 325.

⁸² *Id.* at 321.

legal obligation is to perform the act rather than merely pay the penalty, there is a presumptive moral obligation to perform the act as well.⁸³

Finnis claims that the moral obligation to obey laws is “relatively weighty,”⁸⁴ and that it arises from the fact that “an ambitious attempt as the law’s can only succeed in creating and maintaining order, and a fair order, inasmuch as individuals drastically restrict the occasions on which they trade off their legal obligations against their individual convenience or conceptions of social good.”⁸⁵ Thus, individuals cannot be allowed to assess whether the law is justified by conforming to the principles that help one secure the common good. Of course, as argued above, Finnis primarily addresses this question from the viewpoint of the citizen considering whether to obey the law.⁸⁶

This differs from the position of classical natural law. On the point of compliance and obligation, Aquinas believes that one may have to obey unjust law to avoid bad example or civil disturbance, which is what Finnis would call the “collateral moral obligation.”⁸⁷ But, as previously noted, there is a limit to this view where it conflicts with divine law.

One question relating to classical natural law is why, having first concluded that the starting point of law is God’s law to which human

⁸³ *Id.* at 335. Interestingly, under the heading “Legal Obligation in the Moral Sense: Performance or Submission to Penalty?”, Finnis discusses Suarez’s “purely penal law” theory instead of answering directly the moral controversy. *Id.* at 325-30. This comes immediately after the section where Finnis concludes that the law’s ambitions are higher than to impose the disjunctive obligation and claims that he comes to such a conclusion without collapsing the distinction between laws and morals. *Id.* at 325. Finnis explains Suarez’s theory, that some laws imposed a legal obligation – and hence, presumptively moral obligation – in either the disjunctive sense of giving one the choice to perform or suffer a penalty, or in the sense that one merely has to undergo the penalty. *Id.* at 325-30. In rejecting the purely penal theory, Finnis argues that it is a fiction to think that legislative will is ever expressed in the disjunctive, or at all. *Id.* at 331. This is complicated by the attempt to find legislative will in the manner the legislation is drafted. *Id.* For example, in the case of cigarette duties, would one know if the legislature merely wished to raise revenue or wanted to discourage smoking by making the person pay a price to do so? Or was smoking contrary to the common way? *Id.* at 332. He later says that the theory suggests a closer attention to “problems of conscience created by burdensome and insensitive laws.” *Id.* at 330.

⁸⁴ *Id.* at 319.

⁸⁵ *Id.* George W. Constable has also written,

[A] natural law which is apparently deduced from the thin air of metaphysics or theology can easily amount to no more than a rational articulation of unconscious personal inclinations having no relation to a universal or transcendent reality. It, therefore, serves to give a false certainty to the uncertain, thereby clouding vision and stifling progress. By making arbitrary opinion sacrosanct, it prevents legitimate inquiry, experiment, and reform.

George W. Constable, *Who Can Determine What Natural Law Is?*, 7 NAT. L.F. 54, 55 (1962).

⁸⁶ See *supra* note 71 and accompanying text.

⁸⁷ FINNIS, *supra* note 4, at 354.

posited law has to conform, God's will as manifested in general principles seems to be secondary to civil harmony. Some argue that, if God's law is supreme, surely unjust law cannot be binding for any reason. This objection may be met in three ways. First, it must be noted that not all natural law theorists claim that unjust law must be obeyed. Second, perhaps such a view reflects a higher principle of subservience to authority, which is viewed as being instituted or at least permitted by God.⁸⁸ Third, this view considers the possibility of human error in interpreting what conclusions conform with general principles. The fact that most citizens think differently from an instituted body is no reason to allow for disobedience.

Further, Aquinas states that where human law violates an eternal, as opposed to temporal, good, the rule in question must not be obeyed, because one must obey God rather than Man.⁸⁹ According to Aquinas's classification, divine law refers to the Ten Commandments⁹⁰ and the 613 rules⁹¹ derived from it. This is a substantial body of law, and many of the rules may be interpreted to pertain to eternal goods. For example, Exodus 20:13 contains the prohibition against murder. There is arguably great latitude for the devoted natural law theorist to find that a law requiring fellow citizens be killed arbitrarily or for disproportionate reasons conflicts with divine law and cannot be obeyed. Thus, while Aquinas requires a citizen to obey a corrupt law to avoid a bad example or civil disobedience, this requirement does not swallow up the overriding principle that God must be obeyed first. Aquinas's and Finnis's views differ substantially when the concept of eternal good is brought in. According to Finnis, obligation in the fourth sense usually requires compliance by citizens toward unjust laws.⁹²

⁸⁸ *Romans* 13:1-13. "Let every person be in subjection to the governing authorities. For there is no authority except from God, and those which exist are established by God. Therefore he who resists authority has opposed the ordinance of God; and they who have opposed will receive condemnation upon themselves." *Romans* 13:1-2 (New Int'l).

¹ *Peter* 2:13-14 states, "Submit yourselves for the Lord's sake to every human institution, whether to a king as the one in authority, or to governors as sent by him for the punishment of evildoers and the praise of those who do right." *Id.* (New Int'l).

⁸⁹ ST. THOMAS OF AQUINAS, *SUMMA THEOLOGIAE*, question 96, art. 5 (Fathers of the English Dominican Province trans., Christian Classics ed., 1981) (1273). Here, Aquinas cites *Acts* 5:29. Granted, he does not say explicitly here that the posited law is not law, but this passage follows from his earlier statement as to unjust laws not being law, but a corruption of law. In any event, it is submitted that there is no need to give Aquinas's statements the narrow import some theorists have accorded to them. See, e.g., Wright, *supra* note 67 at 1019-20.

⁹⁰ *Exodus* 20:1-17.

⁹¹ THE 613 COMMANDMENTS, Shavuot with Aish, http://www.aish.com/holidays/shavuot/The_613_Commandments.asp (last visited Mar. 7, 2003).

⁹² See *supra* Part III.A.1 and p. 15.

According to Blackstone, laws of nature are dictated by God Himself, and “superior to any other.”⁹³ Further, “no human laws are of any validity, if contrary to this.”⁹⁴ Finnis denies that Blackstone sought to advance the thesis that unjust laws are not laws.⁹⁵ In contrast, positivists have interpreted Blackstone to advance such a thesis. For example, Austin writes, “[T]he meaning of this passage of Blackstone, if it has a meaning, seems to be this: that no human law which conflicts with Divine law is obligatory or binding; in other words, that no human law which conflicts with Divine law *is a law*”⁹⁶

In the end, one must ask if Finnis’s conclusion regarding the obligation to obey unjust laws in a substantially just system renders the link between morality and law too tenuous and too positivistic. It must be noted that despite their assertions that unjust laws are laws, the fathers of positivism, Austin and Bentham, said that “if laws reached a certain degree of iniquity then there would be a plain moral obligation to resist them and withhold obedience.”⁹⁷ Hart, too, does not disagree that laws may be too evil to be obeyed.⁹⁸ If injustice in laws affects only moral obligations, Finnis’s natural law theory comes too close to positivism.

⁹³ BLACKSTONE, *supra* note 41, at *41 .

⁹⁴ *Id.*

⁹⁵ Finnis denies that Blackstone sought to advance any thesis that *lex injusta non est lex*, as Blackstone’s definition of municipal law was free from any reference to natural law, even though his interest in natural law was “real and sustained.” John Finnis, *Blackstone’s Theoretical Intentions*, 12 NAT. L.F. 163, 163 (1967). Rather, Finnis argues that Blackstone simply meant to say that no human law had any *moral* validity or force against a natural law, i.e. Finnis is of the view that Blackstone relegated the question of validity of law to the moral realm. *Id.* at 170. Finnis said this in the context of rebutting the arguments of some critics of Blackstone who said that natural law, to Blackstone, was purely decorative and that he believed in the principle of parliamentary sovereignty. *Id.* at 169-70.

If Finnis derived his conclusion solely from the fact that Blackstone’s discussion of municipal law was devoid of any reference to natural law, it may be counter-argued that this does not mean that Blackstone meant to leave the question of validity to the moral realm. Rather, just as Finnis concluded that Blackstone’s introductory chapters were not purely ornamental, Blackstone failed to discuss natural law in the context of his writing on municipal law simply because his introductory chapters undergirded the rest of his discussion. That there was no reference to natural law was at best ambivalent to the question of whether the violation by posited law of the law of nature affected merely its moral, or also its legal, validity. After all, it must be noted that Blackstone framed his thesis in his introductory chapter very broadly: “[N]o human laws are of any validity, if contrary to (the law of nature).” BLACKSTONE, *supra* note 41, at *41.

⁹⁶ J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED 184-85* (1954), *quoted in* H.L.A Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 597 (1958).

⁹⁷ HART, *supra* note 96, at 617.

⁹⁸ *See id.* at 620-21.

B. *The Relevance of the Obedience Question If an Unjust Law Is Not Law*

It emerges from the foregoing analysis that the most relevant issue for the person to whom the law is addressed is whether the law must be obeyed, rather than whether it is law. At first blush it appears impossible to raise the obedience question unless one has answered the validity question affirmatively to say that an unjust law is still law. Does the classical natural law theorist necessarily and implicitly conclude that unjust law is law if he raises the obedience question?

There are several reasons for holding onto the maxim *lex injusta non est lex* and regarding the obedience question as relevant. The failure to recognize this point stems from viewing the phenomenon of unjust law solely or primarily from the viewpoint of the citizen. As Finnis states, the citizen may have to obey unjust laws because the whole system cannot be thrown into disharmony, by leaving the citizen to judge whether each individual law is unjust.⁹⁹ Furthermore, there is a moral obligation to obey some laws to avoid bringing the entire system into contempt. But from the viewpoint of law-enforcement authorities (a term used here to include adjudicating authorities), the stakes are different. Finnis says that his discussion “pass[es] over the dilemmas faced by conscientious officials charged with the administration of unjust laws,”¹⁰⁰ but perhaps a consideration of it would yield such different findings that it really should not have been passed over.

If one holds to the maxim *lex injusta non est lex*, it follows that a judge enforcing laws (statutory rules or judicial precedents) must consider the justice of the law in question. If it is unjust, the judge must strike it down, for it is not law. If a judge confronts a law, such as the Fugitive Slave Act, enacted by Congress before the Civil War, the judge would invoke the maxim and strike the law down. However, if the maxim is rejected, the judge who refuses to enforce it has no option but to resign to comply with the demands of his conscience or face the consequences of arbitrarily and subjectively having refused to enforce it.¹⁰¹ Likewise, a body may, in promulgating subsidiary legislation, take the view that a statutory rule is not law and, hence, cannot be the source of subsidiary legislation. These examples show the value in holding onto the maxim.

It is no answer to argue that an evil judge would execute a man for failure to comply with an unjust law, and hence, from the Holmesian

⁹⁹ FINNIS, *supra* note 4, at 361.

¹⁰⁰ See *id.* at 362. Finnis says that the ruler has the responsibility of repealing rather than enforcing his unjust law, but places the citizen and the official together when considering their obligations. *Id.*

¹⁰¹ Dworkin uses the example of the Act for a different purpose in RONALD DWORCKIN, *LAW'S EMPIRE* 219 (1986).

“bad man’s point of view,” it is law. One can just as easily say that the judge was acting illegally because unjust laws are not laws and the judge ought to have known better. And in an era where international courts are being established, there are additional mechanisms for adjudicating the acts of authorities in evil regimes. From a theoretical point of view, the reference to international courts begs the question of what these international institutions ought to do about unjust laws. It is submitted they should consider the maxim. Even without such mechanisms, from a philosophical point of view, there possibly exists a perspective external to the enterprise of law from which one can judge the judge’s actions. That there may be difficult cases in which the judge errs does not deviate from the theoretical holding onto the maxim.

It is also no answer to argue that the obligation of the judge to uphold or strike down a law is a moral one. This may be true,¹⁰² but this article is not addressing the issue of the source of the judge’s duty and authority. The issue relates to the legal validity of the law with which the judge is faced. If the maxim is valid, only those with the authority to assess the justice of the law in question are allowed to employ the maxim. To them, the obedience question is irrelevant, because there is no law and, hence, no legal obligation. Where the person to whom the law is addressed is concerned, the limited conclusion is that the unjust law, in certain cases, might have to be obeyed to avoid civil disobedience.

However, this view on the obedience question, which hinges on the distinction between law-enforcement authorities and the addressee of the law, has consequences far beyond avoiding civil disobedience. More than mere semantics differentiates this position from the more conventional view, which assumes the obedience question is irrelevant once the unjust law is deemed not to be law. The practical difference is summarized in the three positions that follow.

Position 1: One takes the view that unjust law *is* law and raises the obedience question. When faced with an unjust law, three options exist. First, if the question has not been decided with finality before a court, one may argue there is no legal obligation and hope to persuade the court. Second, one may decide that there is no moral obligation to obey the law that presumptively flows from the legal obligation. Third, one may nonetheless have a moral obligation to prevent the system from being thrown into contempt. Thus, technically, where the court has decided with finality that the unjust law in question is law, one may decide not to obey it if one’s conscience demands otherwise. But if one is hauled before a court, one must face the punishment for disobedience.

Position 2: If the position is that an unjust law *is not* law, one may, in conventional jurisprudence, deem the obedience question irrelevant

¹⁰² See *Confusions About Natural Law*, *supra* note 47, at 2409.

because there is nothing on which the *obligation* can attach itself. Prior to a court deciding the issue of the justice of the law, an individual is free to disobey it. When he later appears before the court for disobeying it, the ideal court would reach the conclusion that it is not law and would impose no obligation whatsoever. If one obeyed the law in question and did something heinous (and illegal since the law which allowed it was really not law at all) as necessitated by the law, it would then seem that one could be punished because there is no separate obedience question. No provision is made for human frailty.

Position 3: The question of obedience arises even when one concludes that the law in question is not law. A private citizen may conclude that he had an option or even an obligation to obey the law. Thus, if he obeys it and does something heinous as allowed or required, he would not be held liable by a humane court for doing something illegal because the law allowed or required it. The commitment to this position varies according to the heinous nature of the law in question and whether the citizen would be punished for not obeying the law. For example, if the law was deeply heinous and the citizen suffered no serious consequence for disobedience, then a citizen who chose to obey should perhaps be punished. But where the law stipulated death for disobedience for a citizen who does not report his neighbor for treason (as was the case of the famous Nazi laws), and there was a real chance of detection of that disobedience and real threat of punishment, the citizen might not be severely punished in a humane court for his cowardice and preference of his own life. That said, however, one is not commending the morality of preferring one's own life, but merely suggesting a possibility of pardoning human weakness.

As far as the court was concerned, it had to strike down the law using the maxim as soon as it came to its attention. One practical difference of this alternative from Position 2 occurs when the citizen did what the law necessitated. Under Position 2, if the law had required something and the citizen did it, the court could not uphold that law, and hence the citizen was doing something not actually permitted (supposing the law required an act not ordinarily permissible without the authority of law), and might be punished accordingly. Under Position 3, he might not be punished.

Position 3 may seem to be similar to Position 1, but it could make a real psychological difference to a court faced with an unjust law within an unjust regime. Under Position 1, the court has to decide that the unjust law is law, since unjust laws can be laws; whereas under Position 3, the court is compelled by the maxim to strike it down. The same applies *mutatis mutandis* to other law-enforcement agencies.

There is, however, a difficulty with Position 3. As an illustration, suppose an evil government promulgates The Red Socks Act. Section 1

states that citizens are not to wear red socks in public, and if they do, they face either the death penalty on being brought before a court or immediate shooting by a policeman. Section 2 states that every policeman must shoot a person wearing red socks in public, and if he does not, the policeman faces the death penalty. The Red Socks Act is promulgated in accordance with procedure. There is no constitutional provision forbidding this. Citizens are given adequate notice not to wear red socks in public. Still, it seems repugnant to shoot human beings for such a violation. Yet, a policeman is compelled to shoot a citizen in obedience to Section 2. But suppose a new regime comes into power and takes the view that the so-called laws were not law because they were repugnant to the idea of justice. The policeman who carries out his duties under Section 2 is now charged with murder. If each citizen had to obey the law so as to avoid civil disobedience (because the citizen was not in the position to judge if the law was unjust) nobody should wear red socks. But, if the court had heard the case, it should have struck the law down, and hence the citizen who wore red socks should not be punished. The difficulty lies with the policeman. Is a law-enforcement officer in the position to judge whether he should obey the law? If the officer was not subject to the death penalty for failure to comply, then the officer's position would be akin to the judge's, and the officer should have deemed the law to be an unjust one and refused to obey it. However, the policeman is also the person to whom the law is addressed, insofar as he is subject to the death penalty. The complexities are obvious. He has obeyed an unjust law because he cannot, in his position as the subject of the law, be allowed to judge whether the law is just. Thus, it is possible under Position 3, but not Position 2, to argue that the humane court cannot hold him liable.

This conclusion is still unappealing, because it seems tantamount to saying that, although there is no law, a legal obligation exists, or at least that obedience is permissible. Despite this discomfort Position 3 is a viable way of interpreting the position of the classical natural law theorist who addressed the obedience question. Such an interpretation does not require one to argue that the maxim *lex injusta non est lex* is irrelevant, and it allows the maxim to have full force as a check whilst achieving, in the view of some, the more palatable results of leaving one who obeyed the law in an evil regime unpunished or punished less severely.

The conceptual difficulty remains, however, because, if such a position is adopted, it is plausible that any legislative body can convert a law-enforcement authority into a subject of the law simply by imposing the sanction. This difficulty is only an administrative one though, which can be resolved by drawing the line, for example, with judges so that no sanction could turn the judiciary into an addressee of the law. One

should not be averse to accepting the theory for the need to draw a line as that is done in all aspects of law, and even life.

IV. CONCLUSION

Finnis propounds a theory of natural law,¹⁰³ which he intends, at the outset, to be prescriptive: “[A theory of natural law] may be undertaken, as this book is, primarily to assist the practical reflections of those concerned to act, whether as judges or as statesmen or as citizens.”¹⁰⁴ The aim of this article has been to assess Finnis’s commitment to the classical Christian natural law position on the relation between law and morality.

Finnis is positivistic in his view as to the effect of immorality of the impugned law on its legal validity. Finnis contends that unjust laws are law, and that there is a legal obligation in the legal sense, but sometimes not a legal obligation in the moral sense, to obey them. This is qualified by an overarching moral obligation to obey laws to avoid the situation of the whole system being thrown into contempt. He agrees that, in some cases, laws may be so iniquitous that obedience may be withheld, but so do the positivists, Austin and Bentham.

His only point of departure from positivism seems to be his elaboration of the definition of law in the central or focal sense, where he argues that law should incorporate his principles of practical reasonableness, be tailored to help one secure the basic good according to his theory, and be consistent with the rule of law. He also argues that true authority must come from acting in favor of the common good. But again, it is questionable if the positivists would disagree. Hart certainly thinks that morals do, in fact, influence laws, albeit not in a necessary sense. As for the justification for authority, that is a question that positivists simply have failed to discuss.

Finnis started out by contending that the maxim *lex injusta non est lex* is but a subordinate theorem of natural law theory. By that he surely could not have meant that it usually takes up only a small fraction of a book on natural law theory. He must have meant it is of subordinate importance. It seems from the preceding arguments that, unless natural law theory holds dear to the maxim, it does not differ very significantly from positivism. This article’s proposed separation of the validity and obedience questions, which Finnis does not recognize, addresses the fear of the chaos that would result if the maxim was invoked by every person to whom the law is addressed, whilst retaining the full force of the maxim where it matters most, which is before an adjudicating or law-enforcement authority.

¹⁰³ FINNIS, *supra* note 4, at 25.

¹⁰⁴ *Id.* at 18.

In the final analysis, Finnis vacillates between wanting to engage in the natural law task to prescribe, and the positivistic one of describing the practice of upholding certain rules, however unjust, as laws. In doing so, he has come too close to positivism for his ideas to be labeled as natural law theory.