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ON FINNIS'S WAY IN

MICHELLE MADDEN DEMPSEY*

I. PRELUDE TO A SPEECH

WHAT follows is the text of a speech I delivered at Villanova University School of Law on the occasion of the sixth Annual John F. Scarpa Conference, honoring the work of Professor John Finnis. The speech as presented was accompanied by a rather elaborate and occasionally ridiculous PowerPoint presentation, in which animated stick figures of John Finnis, John Gardner and others moved to and fro, illustrating different methodological starting points and varying “ways in” to thinking about law.¹

My topic concerned methodological issues in general jurisprudence. My goals were three-fold: (1) to put to rest any lingering methodological debates between Finnis and John Gardner; (2) to clarify the distinctions between Finnis’s methodology and that articulated by Julie Dickson and reflected in the work of Joseph Raz; and (3) to outline a more critical approach to thinking about the law, by drawing on what is most appealing in Finnis’s methodology and yet rejecting Finnis’s view regarding the presumptive obligation to obey law.

The results were mixed. My efforts to call truce between Finnis and Gardner seem to have failed rather spectacularly, with Finnis’s published response (in this volume) breathing new life into the debate.² The key issue that now seems to distinguish their positions is which label to slap on their remarkably similar methodologies: positivist or natural law? As Finnis observes in his reply:

In substance, all current theories descending from Hart, such as Raz’s, Gardner’s and Green’s, are more accurately labeled natural law theories, though one must immediately add that for want of frank recognition of this, they tolerate more gaps and tangles in their accounts than a sound philosophical theory can afford to have.³

* Professor, Villanova University School of Law. Many thanks to Matthew Lister for his insightful commentary and to Laura Ploeg, Brian Boyle, and the staff of the Villanova University Law Review for their superb editorial assistance. My sincere thanks to Professor Finnis for honoring Villanova University School of Law with his presence and for his generous response to the speeches presented at the Scarpa Conference.

1. I have edited the text of the speech in an attempt to convey my meaning without visual aid, but I fear this version has lost some of its whimsy. (As they say, “you had to be there.”)

2. John Finnis, *Response*, 57 VILL. L. REV. 925, 927 (2012).

3. *Id.* at 928.

Not exactly a warm welcome into the natural law tradition, but still, it raises a question: is Finnis a legal positivist (albeit one who remains “studiously unexcited” by so being, as Gardner has claimed⁴), or are Gardner, Raz, Green, and Dickson natural lawyers who tolerate “gaps” and “tangles” in their accounts of law (as Finnis has now claimed)? In any event, I doubt that these players would be willing to admit that they care much about labels of this sort, or the “competing jurisprudence camps” mentality to which such labels give rise.⁵

It seems to me that these labels matter, if at all, only insofar as they tend to reflect adherent’s dispositions toward obedience to law. For the legal positivist, natural lawyers like Finnis display a worrying disposition to obey law. Finnis’s response to my speech is illustrative. Borrowing from Claire Grant’s phrasing, I suggested that we would do well to adopt Finnis’s natural law methodology, but then invited Finnis to take a “critical turn” which would foster a “disposition of wary skepticism and critical vigilance” toward the law. Finnis rejects the invitation, concluding that “even in these corrupt times, it is by and large the case . . . that there are vastly many laws which . . . had better be complied with, applied, and enforced without skepticism but rather with commitment.”⁶

For the legal positivist, skepticism is more comfortable disposition toward law than commitment—and perhaps that is all there is to say about the supposed distinction between these jurisprudential camps. In any event, while I may have fallen short of putting an end to the methodological debates between Finnis and Gardner and failed to convince Finnis to take a critical turn toward a more skeptical disposition toward law, I hope readers will find my attempt to do so illuminating or, at least, “interesting.”⁷

II. THE SPEECH

I would like to take this opportunity to reflect on some of the themes developed in Professor Finnis’s magnum opus, *Natural Law and Natural Rights* and, in particular, its first chapter (which should be mandatory reading for anyone who wishes to think more clearly about *anything*, not only law).

4. John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 227 n.50 (2001).

5. For an example of a jurist who seems eager to foster this “competing camps” mentality, see Ronald Dworkin, *Hart’s Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1, 37 (2004), urging “young scholars who have not yet joined a *doctrinal army*” to endorse his interpretivist methodological commitments. For an amusing take on the “competing camps” phenomenon, see Maris Köpcke Tinturé’s JURISPRUDENTIAL ORIENTATION TEST, <http://users.ox.ac.uk/~univ1907/jot.htm> (last visited Oct. 28, 2012).

6. Finnis, *supra* note 2, at 931.

7. Dworkin, *supra* note 5, at 37.

In one of my favorite passages from the book, Professor Finnis provides a most memorable explanation of what is required in giving an adequate account of a concept. As Professor Finnis correctly explains, in order to give an adequate account of a concept, one must engage in an *evaluation* of the concept: “there is no escaping the theoretical requirement that a judgment of *significance* and *importance* must be made if . . . [one is to offer] more than a *vast rubbish heap of miscellaneous facts* described in a multitude of incommensurable terminologies.”⁸

In teaching Professor Finnis’s work during jurisprudence tutorials at Oxford, I illustrated this point to my students by simply pointing out the objects in front of us—such as a ballpoint pen in my hand, or the table that sat between us—and asking them to provide an account of what the thing is. Of course, as they soon realized, one can hardly begin to give an adequate explanation of what a ballpoint pen is unless one mentions something about the fact that when you drag it across the paper, it leaves a mark. Similarly, one can hardly begin to give an adequate explanation of what a table is unless one mentions something about the fact that it has a (more or less) flat surface, which is (more or less) horizontal to the ground, such that when you put things on it, they tend to stay there and remain off the ground, etc. There are, of course, pens that do not write anymore or never did, and tables that fall over because they are poorly constructed or broken, but these are defective, borderline cases of pens and tables—and if pushed far enough, borderline cases become better understood as mere rubbish (good for nothing) or memorabilia (valuable for some sentimental reason, unrelated to their purpose as a pen or table).

The upshot is this: in order to give an explanation of anything that actually *explains something worth knowing about what that thing is*, you have to start by understanding what the *purpose or point* of that thing is—that is, what is it about the thing that *matters*—what is significant or important about that thing? If you do not start there, you will fail in your attempt to give an adequate explanation of it and, as Finnis so memorably puts it, you will instead merely list “a vast rubbish heap of miscellaneous facts” about that thing.⁹

This insight strikes me as entirely correct and Professor Finnis is to be commended for having done perhaps more than anyone to direct the attention of legal philosophers to the question of what law is good for—that is, to direct our attention to the “*practical point* of [law].”¹⁰ This starting point illuminates Professor Finnis’s way in to thinking about the law. It informs his way of thinking about what the law is—the set of assumptions

8. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 17 (1980) [hereinafter *NLNR*] (third emphasis added).

9. Finnis limits the point to human practices in his discussion at page 17 of *NLNR*, but the point holds for tools such as pens and tables which, like posited law, are human artifacts. For a further discussion on law as artifact, see 4 JOHN FINNIS, *COLLECTED ESSAYS OF JOHN FINNIS* 186 (2011).

10. *NLNR*, *supra* note 8, at 12 (emphasis added).

he brings to the project of thinking about what law is—and the tools he uses to investigate and answer that question. In other words, it is the key to his jurisprudential methodology.

While I admire many things about Professor Finnis's jurisprudential methodology, I want to invite him to give further consideration to three possible alternative 'ways in' to thinking about what law is. The first two inform the work of John Gardner and Joseph Raz, respectively. Examining these alternatives provides us with an overview of the current state of play in the long-running methodological debates between analytic legal positivism and natural law theory. At the risk of spoiling the punch line, I suspect we have reached something of a methodological stalemate (or perhaps a truce) between Finnis's version of natural law and Gardner's version of legal positivism—and so, Gardner's way may not prove a genuine alternative after all.

Raz, on the other hand, does present a genuine alternative to Finnis's methodology—an alternative that has been helpfully elaborated by Julie Dickson in her writings on direct and indirect evaluative statements.¹¹ While my discussion anticipates what I believe to be Finnis's most likely response to Dickson's argument, I am conscious of the fact that he has yet to comment directly on this analysis of evaluative statements—and thus, I raise it as an invitation for commentary.

Finally, I outline a third alternative, one that shares Professor Finnis's way in to understanding law, yet is more attentive to what Claire Grant has characterized as the "oppressive and emancipatory capacities that are part of law's nature."¹² I will refer to this methodology as taking a critical turn. As suggested below, this critical turn provides an illuminating methodology from the perspective of the law reformer, and serves as an appealing alternative to Professor Finnis's jurisprudential methodology.

A. *Finnis's Starting Point*

Professor Finnis's starting point in thinking about law involves identifying what he calls the central case of law, by which he means to refer "primarily to rules . . . directed to reasonably resolving . . . co-ordination problems . . . for the common good . . ." ¹³ It is the last bit that will

11. See JULIE DICKSON, *EVALUATION AND LEGAL THEORY* (2001).

12. Claire Grant, *Sobering Truths: On Law and Oppression* 14 (Jan. 19, 2011) (unpublished manuscript), available at http://www.academia.edu/454312/Sobering_Truths_On_Law_and_Oppression.

13. NLNR, *supra* note 8, at 276. The full definition of law is stated as referring,

[P]rimarily 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 reasonably resolving any of the community's co-ordination problems (and to ratifying, tolerating, regulating, or overriding co-ordi-

concern us in what follows—the claim that law in its central case is for the common good.¹⁴ Now, as Finnis clearly recognizes, there are plenty of actual laws in existence that do *not* serve the common good. There are, in other words, plenty of morally bad laws that are nonetheless still law in some sense. Professor Finnis refers to such laws as “peripheral,” “deviant,” or “borderline” cases of law.¹⁵ For Professor Finnis, however, these borderline cases of law are of little interest. Rather, according to the central case method adopted by Finnis, the best way to understand what law *is*, is to focus on the central case of law—which is (amongst its other criteria) morally valuable.

So far, so good. The central case of law—the paradigm case of law—is law *as it should be*—which is morally good law. This is a true and important claim about the concept of law. Importantly, however, it is distinct from the matter of which *perspective* or *point of view* one should adopt when engaging with the law. I will return to this issue below when discussing the critical alternative to Finnis’s methodology.

Now, according to Professor Finnis, one implication that follows from understanding the law through the central case of morally good law is this: valid law should be understood to create a presumptive obligation to obey.¹⁶ In other words, the fact that something *is* a law, on Finnis’s account has *normative* implications: the fact that one is subject to a law implies (presumptively) that one *should* obey that law. In this sense, Finnis’s account of law is not, as John Gardner, would put it, “normatively inert.”¹⁷ Rather, Finnis’s account of law has normative implications—it implies (at least presumptively) that we *ought* to obey law.

Let us now turn to John Gardner’s starting point in thinking about the law—a starting point which, unlike Finnis’s, gives rise to a “normatively inert” understanding of law.

B. Gardner’s Starting Point(s)

In his earlier work, John Gardner claimed that the proper starting point for thinking about law is to identify the conditions of legal validity—that is, to identify whether that which *purports* to be law actually *is* law. I explained this to my jurisprudence students as follows: Imagine a piece of

nation solutions from any other institutions or sources of norms) for the common good of that community.

Id.

14. This claim, of course, is not original to Finnis—it’s at the core of all natural law theory. See 1–2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 90.4, (“Law . . . is an ordinance of reason for the common good, made by him who has care of the community . . .”).

15. NLNR, *supra* note 8, at 11.

16. This point is stated somewhat too quickly, in that it skips the relevance of the legal point of view and Finnis’s defense of the central case methodology in selecting a legal point of view. I will return to that part of his argument below.

17. Gardner, *supra* note 4, at 202–04, 210, 213.

paper walks up to you and says, “Hi, I am a law!”¹⁸ Your task is to figure out whether that piece of paper is lying to you. Is this thing, which purports to be a law, actually a law? One way to understand the methodological divisions within general jurisprudence is to figure out what kinds of questions different legal philosophers might ask the piece of paper. Following in the positivist tradition of H.L.A. Hart, folks like John Gardner, Joseph Raz, Leslie Green, and others would start by asking the piece of paper where it came from, who made it, who enacted it: “Did the Queen enact you in Parliament?”¹⁹ “Did you win a majority vote in Congress and get signed into law by the President?” These are the kinds of questions that would be asked by those who self-identify as legal positivists.²⁰ In sum, they would want to know the social facts surrounding the creation of the purported law, and whether those social facts are recognized in the relevant legal systems as acts of law creation. To put the point in Hartian terms, they would want to know whether those social facts conform to the relevant “rule of recognition” of the legal system.²¹

Crucially, however, in trying to find out whether the piece of paper was lying to them, legal positivists (like Gardner, Raz, Green, etc.) would *not* ask whether the rules, standards, or principles it articulates are *good* rules, standards, or principles. To put this point in Gardner’s terms: “In any legal system, whether a given norm is legally valid . . . depends on its sources, not its merits.”²² For legal positivists, questions of the law’s merits—whether it is a good law, whether anyone should actually do what the law says—are secondary matters.²³ Indeed, these questions are not deemed to be the sort of questions that are properly taken up by the legal positivist. Rather, in order to address questions regarding the *merits* of law and whether anyone should do what the law says, legal positivists would have to take off their legal positivist hat, and put on a different hat—perhaps one labeled “moral philosopher” or “political philosopher.”²⁴

In this sense, legal positivism of the sort Gardner defends is normatively inert. The fact that a norm is legally valid simply “does not provide any guidance at all on what anyone should do about anything on any occa-

18. I think I must have had “Bill” from the popular 1970s U.S. “Schoolhouse Rock” cartoons in mind, a reference that, no doubt, was lost on my British students.

19. See H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994) 92.

20. By legal positivists, I mean to refer to exclusive (hard) legal positivists. For reasons of simplicity and scope, I will not attend to versions of inclusive (soft) legal positivism.

21. HART, *supra* note 19, at 94–110.

22. Gardner, *supra* note 4, at 199.

23. Finnis, I explained, would not necessarily be opposed to asking questions about the paper’s pedigree in order to determine whether it was lying to him—but, as Gardner put it, Finnis would be likely to remain “studiously unexcited” about seeking answers to such questions. Gardner, *supra* note 4, at 227 n.50.

24. As Leslie Green observes, no one can be just a legal positivist. Leslie Green, *Legal Positivism*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 3, 2003), <http://plato.stanford.edu/entries/legal-positivism/>.

sion.”²⁵ On this view, it is perfectly consistent to hold that a law is *valid*, but that it is nonetheless “entirely worthless and should be universally attacked, shunned, ignored, or derided.”²⁶

It is not surprising then, that legal positivists (at least from Hart onward²⁷) have tended to reject the normative thesis defended by Finnis—that law, simply in virtue of being law, creates a presumptive obligation to obey. Rather, legal positivists tend to believe that something *extra* is required before law creates an obligation to obey. Indeed, for legal positivists, it is this point that marks one of the key differences between law and morality: for “law (unlike morality) is something that one needs (further) reasons to obey.”²⁸ The mere fact that something is law just will not cut it.

To be sure, there is disagreement amongst positivists as to what that something extra might be. Some popular candidates include things like a promise to obey whatever is posited as law—such as the oath I took when I became a prosecutor, to “uphold the laws of the State of Illinois and the United States of America,” or the oath a judge might take to adjudicate cases according to the law of the relevant jurisdiction. Another candidate for the “something extra” might be the fact that by complying with the law’s requirements, the subject will better conform to the reasons that apply to her anyway. The most famous version of this thought was defended by Raz, as his “service conception of authority.”²⁹ But the point I wish to emphasize here is simply that when legal positivists take up the question of whether there is an obligation to obey the law, they take themselves to be doing something quite distinct from the tasks appropriate to legal positivism.

So, what does all of this mean in terms of starting points for thinking about law? Think of it this way: exclusive legal positivists are like jurisdictional border police—they start out at the border between what counts as law and what does not count as law. They are particularly concerned to think about whether that which *purports* to be law actually *is* law. Basically, *qua* legal positivists, they just want to know whether the piece of paper is lying to them when it says, “Hi, I am a law!” For the positivist, whether any law is *good* law and thus should be *obeyed* is a wholly separate question. Professor Finnis, on the other hand, starts in the middle—with the central case of law—law as an ideal type—law which (as he claims) is morally good law. Starting from this point, law is viewed as presumptively good and as creating presumptive obligations to obey.

25. Gardner, *supra* note 4, at 202.

26. *Id.* at 210.

27. HART, *supra* note 19, at 208.

28. John Gardner, *Nearly Natural Law*, 52 AM. J. JURIS. 1, 11 (2007).

29. *See, e.g.*, JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* (1995); JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1988); Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003 (2006).

Why, you might wonder, are legal positivists so persnickety on the matter of starting points? Why do they take on the role of jurisprudential border police, as if anything much turns on whether a purported law falls inside or outside that line?

I suspect there are at least two reasons motivating the legal positivist jurisprudential methodology. The first has to do with a desire for clarity—and a concern that a lack of clarity in the concepts we employ when we are talking about things like law and morality will lead (or perhaps allow or encourage) people to change the topic rather than engage directly with one another's arguments.³⁰ Of course, it is easy enough to understand why philosophers like clarity, insofar as it enables them to engage one another in philosophical arguments rather than merely chasing one another's non sequiturs. Insofar as clarity is an important virtue in philosophy generally, this consideration explains, at least somewhat, why the legal positivist's starting point is one that focuses on our getting *very clear* about what counts as law and what does not. It does not, however, explain legal positivists' beef with Finnis—for no one can reasonably accuse Finnis of sloppy thinking.

Perhaps a second reason motivating the legal positivist "border police" methodology has to do with what one might call a skepticism (or even paranoia) that informs the legal positivist outlook. The worry here may be that people will mistakenly think, "Ah, well—if this is a law, then I should obey it." As noted above, legal positivists tend to reject the notion that legal validity entails an obligation to obey—but they do not trust that everyone *else* is going to see it that way. They know they live in a world where many folks think that if something is law, then that provides at least a presumptive moral obligation to do what it says. Given that widespread mindset, and the risks and realities of morally repugnant laws, it becomes particularly important to police the borders of what gets counted as valid law.³¹

30. While the desire for clarity is a concern of legal philosophers more generally, it is particularly an obsession of legal positivists working within the analytic general jurisprudence tradition. The point Jeremy Waldron makes regarding legal philosophers generally (as compared to legal theorists) is perhaps all the more apt a reflection on legal positivists (as compared to legal anti-positivists and some natural lawyers):

The practitioners of legal philosophy often comport themselves like the inhabitants of a small Pacific island . . . threatened by something like global warming: the waters of sloppy thinking are rising all around them and they must huddle closer and closer together on the vanishingly small piece of high ground that they currently occupy.

Jeremy Waldron, *Legal and Political Philosophy*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 375 (Jules Coleman & Scott Shapiro eds., 2004).

31. This skeptical outlook is suggested by Hart in motivating his own account of legal positivism:

What surely is most needed in order to make [people] clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive

Perhaps inspired by these twin concerns, John Gardner in his early work on jurisprudential methodology (circa 2001) boldly claimed that starting at the border of law has “logical priority” over starting with the central case of law. According to his earlier arguments, before we can ask what counts as *successful* law, we must first be able to figure out what counts as *law*. We must, in other words, understand “[w]hat makes something a candidate for being accounted a success or failure in these terms.”³²

In a 2003 article, Professor Finnis criticized Gardner’s policing of the border over attention to the central case. Reiterating the themes from chapter one of *Natural Law and Natural Rights*, Finnis explained:

[T]he assumption that . . . you can answer the question “What is it?” before you tackle the question “Why choose to have it, create it, maintain it, and comply with it?” . . . is a philosophical mistake, induced or at least made apparently plausible by the surface grammar of the latter question.³³

Now, as I intimated above, things have changed somewhat in the debate between Finnis and Gardner regarding which starting point has priority. In a 2007 lecture entitled, “Nearly Natural Law,” Gardner conceded the point to Finnis, stating that he (Gardner) had “erred in [his earlier claim that] the study of the conditions of legal validity has ‘logical priority’ over the study of law’s point or objective.”³⁴ Instead, Gardner concluded that these matters present “relatively independent questions” regarding which there is “no general explanatory priority.”³⁵

Perhaps after that concession, we might better understand Gardner’s starting point as one in flux—moving back and forth between the center and the border, seeking to understand law both as a moral ideal and as a defective instance of its type.

After conceding this point to Finnis, however, Gardner posed a challenge which, to my current understanding, Finnis has not yet addressed:

Finnis criticises some “legal positivists” for focusing all their attention on the limit cases of law at the expense of attention to the central case, and thereby offering incomplete theories of law. But the criticism can be turned on its head and aimed back at Finnis himself. There can be nothing resembling a theory of law—a complete explanation of law’s nature—that includes only

of the question of obedience A concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these [two] separate issues

HART, *supra* note 19, at 210–11.

32. Gardner, *supra* note 4, at 226–27.

33. John Finnis, *Law and What I Truly Should Decide*, 48 AM. J. JURIS. 107, 129 (2003).

34. Gardner, *supra* note 28, at 16 n.27 (citation omitted).

35. *Id.* at 15.

treatment of law's central case and shows no parallel interest in . . . "the limits of law" . . .³⁶

As I noted in the introduction, I remain uncertain as to whether Gardner's starting point represents a genuine alternative to Finnis's. Indeed, if we look back to the first chapter of *Natural Law and Natural Rights*, we may find that this movement between attention to the central case and attention to the border was just what Finnis had in mind all along. For, as Finnis wrote then: "There is thus a movement to and fro between, on the one hand, assessments of human good and of its practical requirements, and on the other hand, explanatory descriptions . . . of the human context . . ."³⁷

If Gardner's starting points can be understood properly as being in flux—at the border *and* the center, with neither taking priority—and if Finnis's starting point can be understood properly in terms of the "to and fro" set out in the above passage, then perhaps there is no genuine conflict between Finnis's and Gardner's jurisprudential methodologies after all. Perhaps they both stake out not a single starting point, but instead multiple starting points—moving "to and fro" between them, with neither point taking logical or explanatory priority over the other.

If that is so, then it would drive a final nail into the coffin of the supposed debates between the legal positivists and natural lawyers (debates which, at least since Hart, have had more life in student textbooks than in reality).³⁸ I, for one, would be happy to see it end once and for all. And so, I offer Professor Finnis a metaphorical hammer, to drive a nail into the coffin of this methodological debate.

C. *Raz's Staring Point/Dickson's on Indirect Evaluation*

Perhaps I was too quick to suggest that Finnis and Gardner happily moving "to and fro" between the central case and the borders of law puts an end to methodological debates between natural lawyers such as Finnis and legal positivists—for, of course, Gardner is not the only legal positivist commenting on such matters. Most notably, Gardner's teacher and most evident jurisprudential influence, Joseph Raz, might be understood to have staked out a different way into understanding law.

To be sure, Raz and Finnis do have points of agreement on their way in: both agree that one must make evaluations of what is important or significant about the law in order to offer an illuminating explanation of

36. *Id.* at 14 (footnote omitted) (citing Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 823 (1972)).

37. NLNR, *supra* note 8, at 17.

38. See, e.g., RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY 151–53 (2005) (distinguishing legal positivism from natural law based, in part, on former's alleged adherence to view that there is "no necessary connection between law and morality"). *But cf.* Gardner, *supra* note 4, at 222–23.

law. For Raz, however, this evaluation is merely one of *salience*, not a full-blooded moral evaluation of law. It is, as Julie Dickson puts it, merely a matter of “indirect evaluation” of law—an evaluation which picks out the *important features* of law.³⁹ In contrast, Finnis holds that understanding what law is requires one to engage in what Dickson calls “direct moral evaluation”—that is, evaluating law not merely in terms of identifying its salient features, but in terms of whether it is good or bad.

The Raz/Dickson way into thinking about the law provides a genuine alternative to Finnis’s approach—although, for reasons with which I think Professor Finnis will agree, it does not provide a more appealing alternative.

If we conceive of direct and indirect evaluation as representing different stopping points on a road toward understanding law, then the key difference between Raz and Finnis, as Dickson explains, is that for Finnis, “once we have started down the evaluative road there is no place to stop.”⁴⁰ We can build on Dickson’s metaphor of an “evaluative road” by imagining Raz and Finnis starting off on a journey toward understanding law together, sitting side by side—as if they were on a bus headed down the road to an adequate understanding of the law. There they would sit on their evaluative bus, in full agreement that *some* form of evaluation is required in order to understand the law (and thus avoid the mistake of winding up with nothing “more than a vast rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies.”⁴¹). Raz, however, would get off bus at the stop marked “indirect evaluation.” Upon alighting, so the story goes, Raz would be in a position to pick out the salient features of law (that is, to engage in what Dickson calls indirect evaluation of law). Finnis, on the other hand, would stay on the bus and continue the journey all the way to the stop marked, “direct evaluation.” Upon alighting at this final stop on the evaluative road, Finnis would then be in a position to engage in a full-blooded moral evaluation of law as something that is good or bad.

It is clear that Dickson’s point in distinguishing direct and indirect evaluation is to motivate the idea that there *is* indeed a place to stop before we get all the way to direct evaluation of law. She, along with Raz, believe that Finnis stays on the bus far longer than necessary—that there is no need to engage in direct evaluation of law as Finnis does—and that getting off earlier with Raz, at the stop marked “indirect evaluation,” is sufficient to put someone in position to give an adequate account of law’s salient features.

As noted previously, Professor Finnis has yet to comment directly on Dickson’s distinction between direct and indirect evaluation. My guess is that Finnis’s response to Dickson’s argument would (or at least should) go

39. DICKSON, *supra* note 11, at 51–70.

40. *Id.* at 57.

41. NLNR, *supra* note 8, at 17.

something like this: it is a mistake to suppose that Raz and Finnis start off the journey heading in the same direction. Instead, Finnis begins his journey from an entirely different starting point, at the stop marked, “fully developed account of basic human goods and practical reasonableness”—which is far beyond even the “direct evaluation” of law which Dickson supposes is Finnis’s alighting point. Finnis begins his journey with an account of basic goods and practical reasonableness—and it is *this* starting point which places him in a position to provide an account of law.

It is only because Finnis starts with a fully developed account of basic human goods and practical reasonableness—and in virtue of the insights he gains by such an account—that he is able to reach the point of engaging in direct evaluation of law and in so doing recognize that (in its central case) law is morally good. From there, Finnis is then able to carry on his journey to the stop marked, “indirect evaluation” and pick out the salient features of law. Without having made the journey from a starting point of basic human goods and practical reasonableness, Finnis would be unable to pick out the salient features of law when he arrived at the stop marked, “indirect evaluation.” He would not be able to make those judgments of salience, because he would not have an understanding of *what law is good for* (that is, that law is good for humans) or (more importantly) what *is good* for humans.

The conclusion to be drawn is two-fold. First, insofar as they attempt to make the journey toward understanding law by traveling from the wrong end of the evaluative road, the Raz/Dickson approach is ill-equipped to pick out the salient features of law when they arrive at the stop marked, “indirect evaluation.” They can get off the bus and look around—but they will not know what bits are worth seeing or describing in providing an account of law. In other words, they will simply have no basis upon which to pick out what is important about law if they do not *first* attend to what is good for humans and appreciate that law (in its central case) is the kind of thing that is good for humans.

Second, insofar as the Raz/Dickson account of law *has* seemingly been able to illuminate many of the salient aspects of law (e.g., laws are norms, officials claim authority on law’s behalf, laws can provide a service through solving coordination problems, etc.), this fact suggests that some insights regarding what is good for humans, and a direct evaluation of law, must be present in their account. It is as if these insights have been smuggled into their methodological suitcases (which they take with them on their journey along the evaluative road), even if they won’t admit it. For, without those insights, they would not be able to offer the illuminating account of law that they have indeed offered—they would, instead, have merely offered a “vast rubbish heap of miscellaneous facts” about law. Since these insights are present yet unaccounted for, unexplained, undefended—it seems that legal positivists of this ilk have some more explaining to do. It is in this sense, I believe, that Finnis rightly charges some

legal positivists with offering an incomplete account of law. Insofar as legal positivists have gotten so much right about the salient features of law, they must be smuggling into their methodological suitcases some insights gained from reflection on these issues.

As I noted above, many legal positivists respond to Finnis's charge by separating out the philosophical tasks that are proper to their role as legal positivists from the tasks that are proper to their role as moral or political philosophers. But this response does not meet Finnis's objection. His complaint is that *even in order to pick out the salient features of law*—that is, to do the work of indirect evaluation—one must begin from the other end of the evaluative road—the place where one reflects on the big issues of moral philosophy—of what is good for humans—and how we truly should live. His complaint, as I understand it, is not so much that legal positivists are wrong about the law, but simply that they are not recognizing (or at least not articulating) all of the insights that inform their understanding of the law and, in that sense, their accounts are incomplete.

That, in any event, is my best guess as to how Professor Finnis might respond to the intriguing distinction between direct and indirect evaluation Dickson draws. Moreover, it is a response which preserves what is most appealing about Finnis's jurisprudential methodology—his “way in” to understanding law.

D. *A Critical Turn?*

The third alternative I wish to propose begins with Finnis at his starting point, attending to issues of basic human goods and practical reasonableness. It follows along with Finnis on his journey along the evaluative road, embracing a similar understanding of the central case of law. However, this approach parts ways with Finnis as we reach the stop marked “indirect evaluation,” and by taking a critical turn, this approach winds up at a very different ending point on the question of whether there is a presumptive obligation to obey to the law.

For Finnis, of course, there is a presumptive moral obligation to obey the law.⁴² According to the approach I wish to consider, however, the conclusion to be drawn from a proper understanding of law is that there is a presumptive obligation to adopt what Claire Grant characterizes as a “disposition of wary skepticism and critical vigilance.”⁴³ By adopting this disposition, one remains keenly attuned both to “law's distinctive oppressive and emancipatory potential.”⁴⁴ I will refer to this approach as taking “the critical turn.”

The critical turn recognizes, along with Finnis, that law in its central case is (amongst its other qualities) morally good law—but it also recognizes that this quality *is often not present in actual laws*. The central case of

42. *See id.* at 318.

43. Grant, *supra* note 12, at 16.

44. *Id.* at 11.

law, or anything else for that matter, is a paradigm, not a universal. Central cases serve to show how the other cases *ought* to be—they do nothing to show that other cases actually *are* that way.⁴⁵ According to the critical turn, when we evaluate the salient features of law from the proper (critical) perspective, we will see that many cases of actual law are morally evil.

Finnis (following Hart, and along with Gardner, Raz, Dickson and any legal philosopher worth his or her salt) would agree that identifying the salient aspects of law requires one to adopt a point of view—a perspective from which to judge law’s salient features. In selecting a point of view, Finnis once again applies his central case method—differentiating the central case of the legal point of view from its peripheral cases.⁴⁶ One example of a peripheral case of the legal point of view would be the point of view of anarchists who oppose the very existence of law,⁴⁷ while another example would be the viewpoint of those who do what the law would have them do simply because they have a tendency to do what authority figures tell them to do, or because they live in a generally law-abiding community and simply do not want to be seen as a trouble-makers—but these folks never view law as genuinely normative.⁴⁸

In relegating these points of view to the periphery, Finnis correctly recognizes that none of these viewpoints provide adequate perspective from which to understand law. As Finnis puts it, they are all “manifestly deviant, diluted or watered-down instances of the practical viewpoint that brings law into being as a significantly differentiated type of social order and maintains it as such.”⁴⁹

Let me pause to emphasize the main point of that passage: for Finnis, none of these viewpoints are adequate because they are not the viewpoint that brings law into being and maintains it. They are not, in other words, the viewpoint for which “it is a matter of overriding importance that law . . . should come into being, and thus become an object of the theorist’s description.”

This move is key to Finnis’s selection of the central case of the legal point of view:

If there is a point of view . . . [for which] it is a matter of overriding importance that law . . . should come into being, and thus become an object of the theorist’s description . . . then such a

45. As Gardner puts it: “It is part of the very idea of a central case that there might be cases (even statistically preponderant cases) that do not exhibit all the features that make the central case a central case.” Gardner, *supra* note 28, at 3–4.

46. For Finnis’s criticism of Hart and Raz to differentiate the central from peripheral points of view, see NLNR, *supra* note 8, at 13.

47. *See id.* at 13–14 (discussing Raz and Hart).

48. *See id.* (discussing Hart’s subjects who adopt “unreflecting . . . traditional attitude . . . or mere wish to do as others do” (citing HART, *supra* note 19, at 203)).

49. NLNR, *supra* note 8, at 14.

viewpoint will constitute the central case of the legal point of view.⁵⁰

By way of clarification, Finnis then goes on to explain that the central case of the legal point of view is:

[T]he viewpoint of those who not only appeal to practical reasonableness but also *are* practically reasonable, that is to say: consistent; attentive to all aspects of human opportunity and flourishing, and aware of their limited commensurability; concerned to remedy deficiencies and breakdowns, and aware of their roots in the various aspects of human personality and in the economic and other material conditions of social interaction.⁵¹

In other words, the central case of the legal point of view is the viewpoint of those who began the journey with Finnis—at the end of the evaluative road where we attend to issues of basic human goods and practical reasonableness—and then took what they learned with them as they traveled down this road toward an understanding of law.

The central case of the legal point of view is the perspective of the person of practical reasonableness. It is not the point of view of Holmes's "bad man," the scoundrel or tyrant who wishes to use law for his own selfish or evil purposes. Nor is it the point of view of "the servile slave who affirms the rightness of the oppressive regime of the slave-masters."⁵² These viewpoints stand at the periphery, unable to discern what the central case of the legal point of view can see from the perspective of practical reasonableness.

So far, so good. On all of these points, Finnis's approach is entirely consistent with the critical turn. The difference comes when Finnis claims that the person in the central case of the legal point of view will view "legal obligation . . . as at least presumptively a moral obligation."⁵³ To sustain that conclusion, Finnis requires an additional premise to his argument: that one who is genuinely practically reasonable will find that *actual* laws are worth obeying—that is, that the laws we actually have—the artifacts we made through positing the laws as human beings do—are laws that are not *opposed* to basic human goods and practical reasonableness.

Insofar as actual laws often do institute, sustain and perpetuate practices that threaten important human goods, then it is hard to understand why the person of practical reasonableness should treat legal obligation as a presumptive moral obligation. As Hart warned, "so long as human be-

50. *Id.* at 14–15. The quote is flipped to simplify Finnis's phrasing.

51. *Id.* at 15.

52. Grant, *supra* note 12, at 9.

53. NLNR, *supra* note 8, at 14.

ings can gain sufficient cooperation from some to enable them to dominate others, they will use the forms of law as one of their instruments.”⁵⁴

If Hart’s warning is anything more than unfounded paranoia, then the conclusion we should draw is clear. If there is a point of view in which legal obligation is treated with a disposition of wary skepticism and critical vigilance, where the oppressive potential of law is kept in view, and law’s emancipatory potential is treated as at least presumptively a reason for *reforming* the law so as to realize that potential, then *that* point of view will constitute the central case of the legal viewpoint. For only in such a viewpoint is it a matter of overriding importance that law as distinct from other forms of social order *has* come into being. My point is that law becomes an object of a theorist’s description not only in virtue of its coordinative capacity to serve the common good—but also because of its oppressive capacity to harm important human goods and its emancipatory potential that can be realized if the law-as-it-is were reformed so as to become law-as-it-should-be.

The critical turn, in other words, takes us to the point of view not of the anarchist or servile slave—but of the *law reformer*: the person of practical reasonableness who engages the law whilst remaining attentive to its risks of oppression, and alive to its potential for empowerment.⁵⁵ Insofar as the law often is opposed to important human goods, then the central case of the legal viewpoint is that of the skeptical and vigilant *law reformer*—rather (or in addition to) law’s obedient subject. Insofar as Professor Finnis shows no parallel interest in the viewpoint of the law reformer and focuses exclusively on the viewpoint of one who treats legal obligation as presumptively moral obligation, his account of law remains incomplete.

III. CONCLUSION

There is much to admire about Finnis’s “way in” to thinking about law. His starting point of focusing on basic human goods and practical reasonableness—of what is good for human beings—strikes me as the right way to begin understanding just about anything worth understand-

54. HART, *supra* note 19, at 210. For an illuminating explanation of the sense in which the central case of law instantiates the ills of law *as part of its necessary features*, rather than as merely regrettable contingencies, see Timothy Endicott, *The Irony of Law*, in REASON, MORALITY AND LAW: THE JURISPRUDENCE OF JOHN FINNIS (Robert P. George & John Keown eds., Oxford Univ. Press, forthcoming 2012).

55. It should be noted that characterizing this point of view as that of the “law reformer” should not be taken to imply that there should be a presumption in favor of reforming all laws simply because they exist as law. I can happily agree with Professor Finnis that “there are vastly many laws which had better not be reformed . . . since if they are . . . it will be the vulnerable who unjustly suffer.” Finnis, *supra* note 2, at 932. Rather, as stated above, the point of view of the law reformer identifies the point of view of the person of practical reasonableness who engages the law whilst remaining attentive to its risks of oppression, and alive to its potential for empowerment. This point of view is disposed toward skepticism, rather than commitment.

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ing. Moreover, if I have captured the gist of the arguments between Finnis and (some) legal positivists correctly, I think Finnis has a compelling critique that the legal positivists' methodology remains incomplete, insofar as they claim to be able to find another way into thinking about law. My only worry about Professor Finnis's jurisprudential methodology is that by selecting the viewpoint of law's obedient subject as the central case of the legal viewpoint, he obscures a more critical perspective—one that is attentive both to law's emancipatory *and* oppressive potential.

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