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2012]

THE USE AND ABUSE OF PRESUMPTIONS:  
SOME COMMENTS ON DEMPSEY ON FINNIS

MATTHEW LISTER\*

**I**N the short space available to me I want to do two things; first, to offer a brief defense of one aspect of John Finnis's account of law that is criticized by Michelle Dempsey in her contribution, and second, to see if I might re-cast the objection in such a way that it might yet pose a worry for Finnis's account. I am not certain that even the re-cast objection does pose a worry for Finnis's views, as deciding this issue that would require some empirical knowledge that I do not have, and that is perhaps not easily available. But, I do think the re-cast objection is one that ought to make us hesitate from adopting Finnis's account whole-heartedly.

In her paper, Dempsey expresses concern about Finnis's claim that valid laws create a presumptive obligation to obey. The concern comes in two forms. The first, which she attributes to various legal positivists,<sup>1</sup> is that people might feel obliged to obey certain non-laws which they mistakenly take to be laws, because they think there is an obligation to obey law generally. This objection seems somewhat obscure to me. Even if we follow Hart in thinking that we are more likely to encourage people to oppose unjust laws by pointing out that legality need not imply morality than we would be by claiming that an unjust law is no law,<sup>2</sup> it is not clear to me why this would justify a heavy focus on the conditions of legality as a means to avoid a feeling of obligation to obey unjust law. If avoiding allegiance to morally repugnant law is our goal, it is not clear to me why we would not be better off directly arguing that an unjust law imposes no moral obligation, without the detour through questions about conditions of legality. This may well be a view held by certain positivists, but if so, it seems confused, or at least unnecessarily circuitous, to me, so I shall leave it aside from here.

The more interesting way that the concern comes up is in relation to what Dempsey calls a "critical" perspective on the law. This is one that turns a skeptical and critical eye towards the law, and looks for ways that it may be oppressive and harmful. Dempsey's concern seems to be that, if

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1. In particular, Dempsey attributes this view to Hart. *See* H.L.A. HART, *THE CONCEPT OF LAW* 210 (2nd ed. 1997). By implication, the view seems to be attributed to John Gardner and Joseph Raz as well. This implication seems plausible to me.

2. *Id.*

we follow Finnis in thinking that valid laws (where we take that to mean laws that have the proper pedigree in the relevant legal system) create a presumptive obligation to obey, then we will tend not to take up a healthy skeptical and critical view, and if we fail to take up this critical view, we will miss many ways that law in general, a legal system, or particular laws (the three should be kept separate) can be oppressive or harmful.

I am in favor of keeping a skeptical and critical eye on the law, and for challenging laws that are oppressive and harmful. This is a virtue that we ought to inculcate in our law students, in particular, it seems to me. And, I am modestly confident that, at least in many circumstances, there is no moral obligation to obey such laws, if they are harmful or oppressive enough. There might be some exceptions to this, mostly related to collateral or systemic effects, but we may leave them aside for now. But, it is not clear to me why Finnis cannot agree with this, and accept the need for a critical perspective in this sense. After all, on his account, valid laws provide only a presumptive obligation to obey, and it is the nature of presumptions that they can be over-come. It seems perfectly reasonable to me that one place the presumption could be over-come is in the case of laws (or perhaps whole legal systems, though this is a harder case) that are oppressive or harmful to the human good. I am not sure what it would mean to say that the obligation to obey is a “presumptive” one unless it could be over-come, and this seems to me to be a clear case where the presumption might be over-come, if the oppression or harm engendered by a law or legal system were serious enough. If that is right, then I am not sure that the “critical” view needs to be seen as a distinct alternative to Finnis’s view. It is even plausible, I think, that such a critical perspective might be a necessary part of Finnis’s view, if the “presumptive” aspect of the obligation to obey is to have any force.

This does not mean, however, that we should be entirely happy to stop here. Presumptions like this are dangerous tools, in that they can easily make a theory vapid. If any case where it looks like laws or a legal system should not be binding on us can be dealt with by noting that the obligation is only a “presumptive” one, then it is hard to know what could count against the theory. But if the theory is thereby insulated from counter-examples, we should have doubts as to why it is something we should care about.<sup>3</sup>

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3. One possible approach here would be to claim that this is a definitional matter. This is a possible reply, but an unsatisfactory one, for two reasons. First, if we are satisfied with this reply as such, it is not clear why it cannot be invoked by competing accounts of law, too. Second, and more importantly, if we want our definition to be of any use, it must correspond, at least much of the time, to our practices. We may, of course, maintain a definition that has the result of making in the case that law exists much less often than we think it does, but this seems like an implausible approach, both philosophically and sociologically.

Here I think we should go back to a central element of Finnis's account, the idea that law is directed towards "the common good."<sup>4</sup> If this is to be interesting, it cannot just be an analytical claim about the word "law". But many people have rejected this claim, and it does not seem to me to be a self-evident or obvious truth. Marxists and anarchists, for example, have held that law is merely a means for those in power to dominate the majority, and hold that the claim that law is directed towards the common good is a sham.<sup>5</sup> The very idea that law is directed towards the common good, on this account, helps law achieve its real aim, that of benefiting a privileged few. My own thought is that Finnis's account is closer to right than that of the Marxist or anarchist, though there is much to consider and worry about in their views, too.

But, it seems to me, to decide between the two stories, we need to be able to look at law (and perhaps legal systems) from the outside, with something like a sociological perspective. I think that legal positivism can play an important role in developing that perspective, and so is a valuable research program, though one engaged in an importantly different project than is Finnis. For example, while Hart has been criticized for characterizing his project as "descriptive sociology",<sup>6</sup> there seems to me to be more that is right in that remark than is usually thought. This sort of critical perspective on the law is one that cannot just be answered by the use of the presumptive nature of our duty to obey the law, as we need this perspective to decide whether the presumption has validity or not, and if it threatens to make the theory vapid or not. When we see the need for this perspective on law, we can see the importance and force of Finnis's view without worrying that it will lead us to accept oppressive laws, or without it turning out to be vapid.

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4. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 276 (1980). For very useful discussion of this idea, see MARK C. MURPHY, *PHILOSOPHY OF LAW: THE FUNDAMENTALS* 11–13, 81–83 (2006).

5. For useful discussion of this claim in relation to Marxism, see JONATHAN WOLFF, *WHY READ MARX TODAY?* 56–66 (2003), and Louis Althusser, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 127, 137 (1971). See also MURPHY, *supra* note 4, at 195–98, for a useful, if skeptical, discussion of this sort of critique.

6. HART, *supra* note 1, at vi. For a mild version of this criticism, see Stephen R. Perry, *Hart's Methodological Positivism*, in *HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 311, 314–15 (Jules Coleman, ed. 2001). I agree with most of Perry's account in this article, but also think there is much to gain by taking Hart at his word as to his approach.

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