FOUR CONTEMPORARY NATURAL LAW THEORIES

This article considers the salient arguments of John Finnis, Philip Soper, Michael Detmold, and Deryck Beyleveld and Roger Brownsword, all of whom published important works on jurisprudence in the 1980s. Their theories challenge the prevalent Legal Positivist assumption that law and morality are logically separate. Some argue that a connection exists between the two in the purpose of law; others in its procedural aspects. Drawing on the insights of Aristotle, Aquinas and Kant, amongst others, these writers have revived and redefined the hitherto moribund tradition of Natural Law theorising.

I. INTRODUCTION

IS there a necessary logical or conceptual connection[1] between law and morality? Just as there are some who will deny such a connection, there are others who affirm it. The debate is a perennial one. Until very recently, the sceptics have prevailed. The proposition that law and morality are logically separate (the Separation Thesis)[2] is central to Legal Positivism, which in one form or another has dominated jurisprudential discourse over the last 150 years or so.

The tenets of Legal Positivism have been vigourously challenged by a number of legal philosophers in the 1980s. Notable among them are John Finnis,[3] Philip Soper,[4] Michael Detmold,[5] and Deryck Beyleveld and Roger Brownsword.[6] This article will present and evaluate their salient arguments for a necessary link between law and morality.

Most of the abovenamed writers regard themselves as Natural Law theorists. Historically too, the term Natural Law has been used in contradistinction to Legal Positivism. For these reasons, these terms are adopted in this article.

1 This article is not concerned with the influence which morality may have had on law, or vice versa. The issue is whether moral criteria are indispensable in constructing a theoretical model of a legal system.

2 As the 19th century English jurist John Austin put it, "The existence of Law is one thing, its merit or demerit is another."

3 Finnis, *Natural Law and Natural Rights* (1980), hereinafter referred to as Finnis, *Natural Law.*

4 Soper, *A Theory of Law* (1984).

5 Detmold, *The Unity of Law and Morality* (1984).

6 Beyleveld and Brownsword, *Law as a Moral Judgment* (1986).

The article is divided into three main parts. The first part recapitulates Hart's and Fuller's respective treatment of the theme of law and morality, and sets up two approaches, *viz*., the Purposive approach and the Procedural approach. In the second part, each of the four contemporary Natural Law theories is considered in turn. The third part briefly examines the topic of unjust laws. The existence of unjust laws has always presented a dilemma to Natural Law theorists seeking to reconcile law with morality. It is proposed to assess to what extent recent theoretical developments may have resolved this dilemma.

II. ANTECEDENTS: HART AND FULLER

In elucidating some necessary connection between law and morality, one approach has been to argue that law serves some moral purpose. Curiously enough, the best known illustration of such an approach prior to 1980 was supplied by a Legal Positivist. The purpose in question is "survival", and it was put forward by Hart.[7]

Hart deliberately eschewed the moral and metaphysical connotations of the words "proper goal or end". He merely remarked on the "contingent fact" that "in general men do desire to live".[8] Such an approach fitted in with his aim of presenting his concept of law as "an essay in descriptive sociology".[9] At the same time, he enumerated five elementary truths concerning human nature and the world in which we live: (i) human vulnerability, (ii) approximate equality - in the sense that "no individual is so much more powerful than others, that he is able, without co-operation, to dominate or subdue them for more than a short period", (iii) limited altruism, (iv) limited resources, and (v) limited understanding and strength of will. Given these "elementary truths", and also given the purpose of securing human survival, Hart argued that "[there are certain rules of conduct which any social organization must contain if it is to be viable."

The "minimum content" of his so-called natural law includes forbearances restraining the use of violence, "a system of mutual forbearances", "some minimum form of the institution of property" and "sanctions". Being premised on a sociological observation, Hart's "minimum content" of natural law does not really contribute to Natural Law theory. As Beyleveld and Brownsword explain:[10]

> "The necessity claimed here, the 'must,' is not a conceptually necessary connection between law and morality. This is both because the impact of a failure to institute these specific requirements is not upon the possibility of a legal order *per se* (at least according to Hart), but only upon the possibility of a stable legal order, and because the connection is not alleged to hold by definition, but as a matter of causal consequence. The claim, in effect, is that the absence of

7 Hart, *The Concept of Law* (1961), at pp. 188-195.
8 *Ibid*., at p. 188.
9 *Ibid*., Preface.
10 Beyleveld and Brownsword, *op. cit*., *supra,* note 6, at p. 9.

> the specific requirements will cause a social/legal order to become unstable. This thesis, whilst asserting that there is a necessary (causal) connection between morality and (stable) law, involves no concession towards Natural Law Theory. In being a naturally necessary connection, not a conceptually necessary one, it involves no denial of the Separation Thesis."

If Hart was until recently the legal philosopher best known for his Purposive approach to Natural Law, then his rival Lon L. Fuller must be the most celebrated spokesman for what one may call the Procedural approach to Natural Law, one which stresses the moral quality inherent in legal procedures and processes. Fuller himself said that he was concerned with "a procedural, as distinguished from a substantive natural law."[11] His contribution centered on the concept of the "inner morality of law", which comprises eight desiderata in the law making process, namely (i) that there be rules and, further, that such rules are (ii) promulgated, (iii) prospective in effect, (iv) intelligible, (v) coherent with one another, (vi) not impossible to comply with, (vii) not changed too frequently, and (viii) implemented consistently and conscientiously. These eight desiderata represent "eight kinds of legal excellence towards which a system of law may strive".

However, Fuller too readily concedes that this "inner morality" is, over a wide range of issues, indifferent toward the substantive aims of law.[12] For example, the "inner morality of law" has "nothing to say on such topics as polygamy, the study of Marx, the worship of God, the progressive income tax, or the subjugation of women."[13] In allowing for the conceptual possibility of laws which comply with the eight desiderata yet are "immoral" in content, Fuller's Procedural approach leaves intact the Separation Thesis.

Elsewhere in his writing, Fuller adopts a Purposive approach. He characterizes law as a "purposive enterprise". He takes issue with Hart's assumption that "the proper end of human activity is survival", and doubts that "an overwhelming majority of men do wish to live, even at the cost of hideous misery", as Hart claims. For Fuller, the principle behind any human striving is "the object of maintaining communication with our fellows". "Communication", Fuller claims,[14]

> "... is something more than a means of staying alive. It is a way of being alive. It is through communication that we inherit the achievements of past human effort. The possibility of communication can reconcile us to the thought of death by assuring us that what we achieve will enrich the lives of those to come. How and when we accomplish communication with one another can expand and contract the boundaries of life itself."

[11] Fuller, *The Morality of Law* (1969), at p. 96.
[12] *Ibid*., at p. 153.
[13] *Ibid*., at p. 96.
[14] *Ibid*., at p. 186.

III. PURPOSIVE NATURAL LAW, THE COMMON GOOD AND BASIC VALUES

The Purposive approach begs the question "What purpose?". We have seen two suggestions: "survival" (Hart) and "communication" (Fuller). John Finnis proposes a third: "the common good". The sense of common good here intended is not an Utilitarian calculus of the "the greatest good of the greatest number", which Finnis criticizes as arbitrary,[15] but:[16]

> " ... a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other ... in a community."

Finnis acknowledges that there are "countless" objectives and forms of good. However, he also says that every such objective or form of good is analytically one of seven "basic values" or "ways or combination of ways of pursuing ... and realizing ... one of the seven basic forms of good".[17] According to Finnis, the seven basic values are:- (i) life, (ii) knowledge, (iii) play, (iv) aesthetic experience, (v) friendship, (vi) practical reasonableness and (vii) religion.[18] These values are "basic" in two senses. Firstly, each one is analytically irreducible, so that the list of seven is exhaustive. Secondly, all of them are equally fundamental, there being no objective hierarchy amongst them. If one were to accept the foregoing, it follows that the seven basic values are objectively incommensurable and that any Utilitarian attempt to "maximize the net good" would be an impossible exercise.

Because the basic values "can be participated in, and promoted, in an inexhaustible variety of ways,"[19] "practical reasonableness" (itself a basic value) is needed to shape our participation in the other basic goods. Finnis identifies nine or ten "basic requirements of practical reasonableness".[20] The product of these requirements is "morality": "every moral judgment sums up the bearing of one or more of the requirements."[21] Given the complexity and the range of the requirements of practical reasonableness, not much play should be made out of the diversity of

[15] Finnis, *Natural Law, supra,* note 3, at pp. 114-117.
[16] *Ibid*., at p. 155.
[17] *Ibid*., at p. 90.
[18] *Ibid*., at pp. 86-90. The term 'religion' is used to describe questions of the origins of the cosmic order and of human freedom and reason.
[19] *Ibid*., at p. 100.
[20] The basic requirements of practical reasonableness are:- Have a harmonious set of orientations, purposes and commitment (i). Do not leave out of account, or arbitrarily discount or exaggerate: any of the basic human goods (ii), or the goodness of other people's participation in human goods (iii). Avoid fanaticism in your projects (iv); but pursue your general commitments with creativity and do not abandon them lightly (v). Do not waste your opportunities by using inefficient methods, do not overlook the foreseeable bad consequences of your choices (vi). Do not choose directly against any basic value (vii). Foster the common good of your communities (viii). Follow your conscience (ix). Finnis, *Natural Law, supra,* note 3, at pp. 103-126. See also Finnis, *Fundamentals of Ethics* (1983), at pp. 75-76, hereinafter referred to as Finnis, *Ethics.*
[21] Finnis, *Natural Law, supra,* note 3, at p. 126.

moral opinion, for such diversity "has its source in too exclusive attention to some of the basic value(s) and/or some basic requirement(s), and inattention to others."[22]

Finnis' concept of morality is predicated on the existence of some (not necessarily Finnis') basic values. How does he arrive at his particular list of seven basic values? How do we know that these are indeed basic values?

Finnis tells us that they are self-evident goods, their intelligibility resting on no further principles:[23]

> "They are not inferred from speculative principles. They are not inferred from facts. They are not inferred from metaphysical propositions about human nature, or about the nature of good and evil, or about 'the function of a human being', nor are they inferred from a teleological conception of nature or any other conception of nature. They are not inferred or derived from anything. They are underived (though not innate).... When discerning what is good, to be pursued *(prosequendum),* intelligence is operating in a different way, yielding a different logic, from when it is discerning what is the case (historically, scientifically, or metaphysically); but there is no good reason for asserting that the latter operations of intelligence are more rational than the former."

It is impossible to underestimate the importance of this passage. If we accept the claim that Natural Law theory does not infer values from "facts" or any "metaphysical propositions about human nature", then two of the most common objections to Natural Law theory will fall away. These are the Humean objection[24] and the contention by Hans Kelsen, among others, that Natural Law theory necessarily presupposes belief in a transcendental being. Furthermore, Finnis' epistemology is directly opposed to Kelsen's proposition that norms are created by acts of will but cannot be known by reason.[25]

One of the basic values, knowledge, is used to illustrate how intelligence can "reflexively" "grasp" a value. By the retorsive argument, he demonstrates that scepticism about this value is indefensible:[26]

22 *Ibid*., at p. 127. This effectively rebuts one of Hans Kelsen's arguments against Natural Law Theory, namely the existence of a variety of purported absolute norms. See also Finnis, *Ethics, supra,* note 20, at pp. 76-78.

23 Finnis, *Natural Law, supra,* note 3, at pp. 33-34 (footnotes omitted).

24 The 17th Century philosopher David Hume is generally credited with formulating the principle that it is logically impossible to infer "ought" from "is", *i.e*., to deduce moral (evaluative) propositions from factual (non-evaluative) propositions. See Finnis, *Natural Law, supra,* note 3, at pp. 36-48 for a critical and historical analysis of Hume's celebrated passage. Apart from Finnis, other contemporary Natural Law writers have also been careful not to make such an illicit inference in their theories. See, for example, Beyleveld and Brownsword, *op. cit*., *supra,* note 6, at pp. 18-23.

25 For Finnis, an "act of will" is needed to enable one to participate actively in a good but must first be "motivated and directed by one's understanding ... that there is some good at stake ...": Finnis, "On 'Positivism' and 'Legal Rational Authority' " (1985) 5 O.J.L.S. 74 at p. 88.

26 Finnis, *Natural Law, supra,* note 3, at pp. 74-75.

> "The sceptical assertion that knowledge is not a good is operationally self-refuting. For one who makes such an assertion, intending it as a serious contribution to rational discussion, is implicitly committed to the proposition that he believes his assertion is worth making, and worth making *qua* true; he thus is committed to the proposition that he believes that truth is a good worth pursuing or knowing. But the sense of his original assertion was precisely that truth is not a good worth pursuing or knowing. Thus he is implicitly committed to formally contradictory beliefs."

It should be noted that this argument does not prove that the "basic value" of knowledge is self-evident: it only demonstrates that counter arguments are invalid. "But to make even this limited defensive point, in relation to only one basic value, may help to undermine sceptical doubts about all and any of the basic principles of practical reasoning."[27] Thus, in respect of the other basic values, Finnis offers no parallel arguments but supplies the following remarks:[28]

> "At this point in our discourse (or private meditation), inference and proof are left behind (or left until later), and the proper form of discourse is: '... is a good, in itself, don't you think?'."

Such a line of argument differs radically from the canons of deductive and inductive reasoning.[29] It is not surprising then that several commentators[30] have expressed reservations about Finnis' epistemology. And yet, precisely because the basic values are indemonstrable, each reader must ask himself whether he accepts them.[31]

IV. A DEFINITIONAL CONNECTION: FINNIS' PRACTICAL VIEWPOINT

How the foregoing is connected to law becomes evident in Finnis' definition of law. This is long but deserves to be repeated in its entirety. For ease of exposition, it may be divided into three limbs.

The term "law", according to Finnis, refers primarily to:[32]

> "[a] rules made, in accordance with regulative legal rules, by a determinate and effective authority (itself identified and, standardly, constituted

27 *Ibid*., at p. 73.
28 *Ibid*., at pp. 85-86.
29 Finnis reminds us that in their respective ethical theories, Aristotle and Aquinas both employed precisely such a mode of reasoning. They called it "practical", as opposed to "theoretical" or "speculative" reasoning: Finnis, *Natural Law, supra,* note 3, at p. 20.
30 See Bankowski, Review (1982) 98 L.Q.R. 473, at p. 474; Lloyd, *Introduction to Jurisprudence* (1985), at p. 142.
31 Harris, Review (1981) 43 M.L.R. 729 at p.730, asks rhetorically "But supposing someone wished to rejig the list, arguing that its members are not all independent and irreducible ...; or radically to qualify its components ...; or even to cross items off the list...", but is quick to add "Personally, I would dissent from all three claims ...". MacCormick, in "Natural Law Reconsidered" (1981) 1 O.J.L.S. 99 at p. 107, "largely" agrees with Finnis's list of basic goods, but doubts the "objective" standing of such values.
32 Finnis, *Natural Law, supra,* note 3, at pp. 276-277.

> as an institution by legal rules) for a 'complete' community, and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions, [b] this ensemble of rules and institutions being directed to reasonably resolving any of the community's co-ordination problems (and to ratifying, tolerating, regulating, or overriding co-ordination solutions from any other institutions or sources of norms) for the common good of that community, [c] 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."

Limb [a] is a more or less Positivist definition of law, embracing the Hartian concept of union of primary and secondary rules as well as Austin's and Kelsen's emphasis on the role of sanctions. The elements of Natural Law theory are found in limbs [b] and [c]; they represent the Purposive approach and the Procedural approach respectively.

We had earlier defined a Natural Law theory as one which posits a necessary connection between law and morality. It will be seen from above that Finnis defines law in terms of morality, morality finding expression in limbs [b] and [c]. But is that enough? The Legal Positivist will argue that any connection that [b] and [c] may have with [a] is contingent rather than necessary and that the former should accordingly be severed from the latter in theoretical discourse of law *(viz.*, the Separation Thesis). Finnis' reply is that "a theorist cannot give a theoretical description and analysis of social facts, unless he also participates in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness."[33]

This "work of evaluation", which Aristotle called the identification of "focal meaning", involves understanding the importance and significance of matters such as actions, practices, discourses, constituting a social phenomena such as law. A legal theorist is thus obliged to "know and describe ... things which ... make it important from a *practical* viewpoint to have law...".[34] By "practical", Finnis means "with a view to decision and action" rather than "workable".[35] Finnis notes that the recent generation of Legal Positivists such as Hart, Joseph Raz (and, one may add, Neil MacCormick[36]) have paid increasing attention to the practical viewpoint. However, their refusal to differentiate the practical viewpoint of the ideal law-abiding judge from those of, for example, Hart's unreflecting traditional judge or Raz's "anarchistic judge" (who follows the law most of the time so that he can disobey it when it matters most) has made their positions "unstable and unsatisfactory".[37] On a different plane, the Legal Positivists' conception of practical viewpoint is too narrow, being

33 *Ibid*., at p. 3.
34 *Ibid*., at p. 16.
35 *Ibid*., at p. 12. For a detailed consideration of what is meant by "practical" in this context, see Finnis, *Ethics, supra,* note 20, at Chapter I.
36 MacCormick, *Legal Reasoning and Legal Theory* (1978).
37 Finnis, *Natural Law, supra,* note 3, at pp. 13-14.

essentially judge-centered. Finnis' theory, by contrast, accommodates the practical viewpoint not only of those who apply laws (judges) but also those who make laws (statesmen) and those who are subject to laws (citizens).[38]

V. SOPER'S "GOOD FAITH" ARGUMENT

The citizen's obligation to obey the law is an important issue in legal theory.[39] Hart rightly differentiated such an obligation from the state of being obliged to hand money over to a gunman.[40] However, this "obligatedness" to obey the law is ambiguous, for it lends itself to two possible interpretations. It may be no more than an uncoerced acceptance of the law, which may be characterized as a "weak" attitude. Alternatively, it may entail a strong attitude paralleling moral obligation, an attitude of acceptance based on the belief that to do so is good or just. Hart is content to accept the former.[41] Finnis, on the other hand, explicitly chooses the latter: a citizen has a presumptive obligation to obey the law because law is for the common good.[42]

Soper's argument is a variant of Finnis':[43]

> "Instead of interpreting the definition to limit 'law' to those ordinances that do in fact serve the common good, one interprets it instead to require only that legal directives aim at serving the common good, however wide off the mark they may fall. Legal systems are essentially characterized by the belief in value, the claim in good faith by those who rule that they do so in the interests of all. It is this claim of justice, rather then *[sic]* justice in fact, that one links conceptually to the idea of law."

In other words, since we dignify with the name of law those demands which we are satisfied we have an obligation to obey, as opposed to those which we comply with merely as a matter of prudence, an explanation of how such an obligation arises must go towards defining what is law. The gist of Soper's theory is that there are two bases for this all important obligation: the sincerity of the law-enforcing officials and "the fact that the enterprise of law in general ... is better than no law at all."[44] They are jointly sufficient and necessary to establish the obligation to obey the laws of a state.

[38] *Ibid*., at p. 18.
[39] See Kent Greenawalt, *Conflicts of Law and Morality* (1987).
[40] Hart, *op. dr*., *supra,* note 7, at pp. 80-84.
[41] "... allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so." *Ibid*., at pp. 198-199.
[42] Finnis, *Natural Law, supra,* note 3, at pp. 14-15 and pp. 314-320.
[43] Soper, *op. cit*., *supra,* note 4, at p. 55 (footnotes omitted).
[44] *Ibid*., at p. 80.

It is not proposed to discuss the Hobbesian point about some law being better than none at all. To the extent that order is preferable to anarchy because it ensures group survival, it does not appear to differ significantly from Hart's truism about the minimum content of Natural Law. Suffice it to say that Natural Law theorists ought to be able to make a stronger claim for law's purpose: that it not only secures survival but also makes possible the multifarious forms of human flourishing.[45] The more interesting question for legal theorists, however, is Soper's "good faith" argument. This may be summarized as follows:

(a) Rulers who make good faith efforts to rule for the common good deserve their subjects' respect.

(b) The respect provides a moral reason for subjects to do what rulers think the subjects should do.

(c) Rulers think that subjects should obey the law.

(d) Therefore, subjects should obey the law.

Step (b) is the weak link in the foregoing argument. Respect for someone may compel us to listen to and consider carefully what the person has to say. It does not follow that we are for that reason obliged to obey what he may direct us to do. It is submitted that a stronger notion than "respect", such as the idea of "authority" advanced by Raz and Finnis,[46] is required to establish the obligation of one person to obey another.

VI. DETMOLD AND THE JURIDICAL PERSPECTIVE

In a developed legal system, judges mediate between legislators and citizens. They are responsible for applying stipulated rules to a particular fact situation and making the appropriate legally binding orders. Legal Positivists hold that a judgment may be legally valid without prejudicing the question of whether it is morally justified.

Michael Detmold[47] has argued that the Separation Thesis exposes itself to a formal contradiction at the level of the judge's practical reasoning. He cites the example of a judge who, following the legal rules, sentences a prisoner to hang. If the Separation Thesis were correct, there would be no contradiction in the following proposition: "(i) Legally the prisoner ought to hang, but (ii) it is not the case (morally) that the prisoner ought to hang."

Leaving aside "appeals, prerogatives of mercy, hangmen's strikes and such like", limb (i) must be taken to be a conclusive and binding sentence,

45 See *supra,* note, 16.
46 Finnis, *Natural Law, supra,* note 3, at Chapter IX.
47 See *supra,* note 5.

since a *prima facie* sentence is not a proper sentence.[48] At the same time, the moral judgment in limb (ii) provides a compelling reason for action, but in the opposite direction. It is because each of (i) and (ii) is a normative statement justifying practical decision that the above statement is contradictory.

The criticism is narrowly focused. Detmold is not concerned with the practical reasoning of legislators, *i.e.* if the making of the rule were at issue, would it be morally justified to make the same rule? Rather, he is concerned with the practical reasoning of a judge, *i.e.* given that this rule exists, is it morally justified that I follow it? Detmold claims that the latter is philosophically more interesting: "The issue in Nazi Germany was whether to obey the rules, not whether to repeal them".[49]

Detmold's own position is stated thus: " ... judgment under rules is a moral judgment.... This follows from a simple idea of moral judgment: a conclusive judgment about life, liberty, property and the like (matters of importance, certainly including all matters of the law) is a moral judgment."[50] According to him, there is one unified field of normative discourse, regardless of whether the norms are characterized as legal or moral, and the only question is that of compellingness.[51] On this rests Detmold's claim for "the unity of law and morality", which is the title of his book.

Before pursuing this connection between law and morality, it is worthwhile examining Detmold's understanding of law in general and rules in particular. He characterizes law as "a settlement, an end to questions, a substitution of certainty for truth ..."[52], acknowledges that "the sense of boundary ... is critical in the analysis of rules,"[53] and says that "if 1 have a rule, then when the time comes to implement the rule, I do not go into its merits unless I cancel it or suspend it.... While it subsists, I assume its bindingness upon my action."[54] Much of this is common ground between Natural Law theorists (Detmold, Finnis[55]) and Legal Positivists (Raz,[56] MacCormick[57]) - and, it would seem, even those outside the Anglo-American jurisprudential tradition (Alexy[58]).

[48] Detmold examines different formulations of limb (i), but regardless of the way it is expressed, it is either non-conclusive or conclusive. If it is non-conclusive, it contradicts limb (ii). *Ibid*., at pp. 22-27.

[49] Richard Susskind, Review (1986) 49 M.L.R. 125, regards the narrow scope of Detmold's enquiry as a limitation: "by confining his attention to the judicial reasoning agent, he fails to account for legal reasoning as undertaken by all other reasoning agents such as lawyers, advocates, non-judicial legal officials, legal theorists, legal textbook writers, and even citizens." (p. 128) Like Dworkin, Detmold is open to the criticism of attempting to construct a general theory of law on the narrow foundations of a theory of adjudication.

[50] Detmold, *op. cit.. supra,* note 5, at p. 34.

[51] *Ibid*., at p. 47.

[52] *Ibid*., at p. 21.

[53] *Ibid*., at p. 46.

[54] *Ibid*., at p. 65.

[55] Finnis, *Natural Law, supra,* note 3, at pp. 314-320.

[56] Joseph Raz, *Practical Reason and Norms* (1975).

[57] Neil MacCormick, "Contemporary Legal Philosophy: The Rediscovery of Practical Reason" (1983) 10 Journal of Law and Society (reproduced in Lloyd, *op. cit*., *supra,* note 30, at pp. 459-473).

[58] *Ibid*., at p. 465.

Where the Natural Law theorists would take issue with the Legal Positivists is over the significance of such an analysis. MacCormick suggests that it might be seen to entail the conceptual independence of law from morality and is, as such, "unquestionably the best defence yet offered for [the Separation Thesis]."[59] Detmold disagrees: "If further questions are excluded, then the legal reasons are not merely good ones, they are conclusive."[60]

He also observes: "If a rule is made, the whole field of moral thought is appropriated; there is no ground left for further questions."[61]

Only in the absence of rules ("hard cases") is there scope for unrestricted practical reasoning. Even then, the process of "weighing" principles, whether of the moral or legal sort, is done "internally". Because each of us has only one capacity to weigh reasons, legal reasons are indistinguishable from moral reasons. This, Detmold argues, is inconsistent with the Separation Thesis:[62]

> "It is not possible, as proponents of that thesis would want to have it, for a judge to weigh legal principles and then separately to consider the bindingness of the result of the balance. If a judge did that, it would follow that he was not committed to the principles; his (legal) decision could, therefore, only have been an arbitrary one. Legal judgment in these matters is moral judgment...."

VII. BEYLEVELD AND BROWNSWORD'S KANTIAN ARGUMENT

Beyleveld and Brownsword, too, proclaim the theme of "law as moral judgment." Whereas legal norms operate *as* moral reasons in Detmold's theory, Beyleveld and Brownsword offer a "transcendental essentialist" argument where moral considerations define what counts as legal material in the first place.

They reject the idea that conceptual analysis of law involves defining the word "law"[63] and the underlying assumption that the field of law is identifiable quite neutrally between theorists. Instead, they advance the concept of law as the concept of morally legitimate power, of a moral right to enforce rules,[64] thereby establishing a necessary connection between law and morality. The basis of their argument is the Kantian idea that engagement in practical discourse of any kind logically presupposes a commitment to a moral form of discourse.[65] More particularly, they adopt Gerwirth's "dialectically necessary" argument that anyone who acts is committed to a supreme moral principle, namely the principle that one

59 *Ibid*., at p. 464.
60 Detmold, *op. cit*., *supra,* note 5, at p. 33.
61 *Ibid*., at p. 155.
62 *Ibid*., at p. 90.
63 Beyleveld and Brownsword, *op. cit*., *supra,* note 6, at p. 86.
64 *Ibid*., at p. 119.
65 *Ibid*., at pp. 110 and 126.

should act in accordance with the generic rights of one's recipient as well as oneself (the Principle of Generic Consistency, or PGC).[66] This proposition is held to be true irrespective of the agent's purposes.

"The fundamental obligation of legal officials," they claim, "is to make a good faith attempt to apply the PGC to their work, to act *intra vires* with respect to practical authority."[67] *Prima facie,* this resembles Soper's thesis that law is essentially characterized by the sincerity of officials and the fact that some law is better than no law at all.[68] At the same time, they take the view that "paradigmatically", legal validity is to be judged at the level of achievement rather than at the level of attempt.[69] Accordingly, a social phenomenon which possesses functional or structural features that distinguish the characteristic legal relationship from other social relationships, but lacks moral validity "in some sense", "will not *be* a legal phenomenon."[70]

The reference to moral validity "in some sense" exposes an uneasy tension in Beyleveld and Brownsword's theory. This is the tension between achievement and attempt, between their moral absolutism on the one hand and the idea of rational defensibility on the other. To enable them to straddle the ambiguity, Beyleveld and Brownsword employ a range of stipulative terms in their analysis: distinctions are drawn between "Legal" and "legal", between "Judge" and "judge" and between law "in the primary ontological sense" and that which is merely "provisionally" legal. This "Humpty Dumpty"[71] approach leads them to affirm *as a matter of definition* a logical and necessary connection between law and morality.

Even assuming, for the sake of argument, that some such connection is affirmed at the methodological level, it is at the expense of the very concepts of law and morality:[72]

> "Usages of the term 'law', being essentially conventions and therefore, in principle, infinite, have no intrinsic claim on our attention."

With regard to morality, Beyleveld and Brownsword claim that the PGC is unlike the other egalitarian principles *(e.g.* "Love thy neighbour as thy self", "Treat others as you would have them treat you") in that it specifies substantive rights to freedom and well-being by ordering goods

66 *Ibid*., at p. 133.
67 *Ibid*., at p. 300.
68 For Beyleveld and Brownsword, though, the latter proposition is not a definitional aspect of law. The "possibility of social disorder (the possibility of a problem of social order from the point of view of those who wish order)" is merely a necessary presupposition in conceiving of law: *ibid*., at p. 121.
69 *Ibid*., at p. 215.
70 *Ibid*., at p. 113.
71 Lewis Carroll, *Through the Looking Glass and What Alice Found There,* in *The Annotated Alice* (ed. M. Gardner, revised edition, 1970) at p. 269:
" 'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean - neither more nor less.'
'The question is,' said Alice, 'whether you *can* make words mean so many different things.'
'The question is,' said Humpty Dumpty, 'which is to be master - that's all.' "
72 Beyleveld and Brownsword, *supra,* note 6, at p. 218.

into basic goods, non-subtractive goods, and additive goods.[73] But the authors merely quote Gerwirth. Nowhere is it explained how the ordering is arrived at or even what these goods are.

The inconclusiveness of Beyleveld and Brownsword's ethical inquiry reveals a serious deficiency in Kantian philosophy. As Finnis points out:[74]

> "... Kant's understanding of understanding (reason) overlooks the *intelligible* goodness of the specific, substantive aspects of human flourishing, and seeks to make do with reason's 'a priori' power of universalizing."

By insisting on principles "given a priori in pure practical reason" in his moral philosophy, Kant has precluded any basic value based on "contingent", "empirical" and "anthropological" principles. Evacuated of all content save the power and activity of reason itself, a Kant-derived Natural Law theory such as Beyleveld and Brownsword's is necessarily premised on a 'thin theory of the good', *i.e.* a theory which identifies as the basic human goods those goods which *any* human being would need *whatever his objectives.* This is precisely what the PGC upholds, no more and no less.

Clearly, a moral principle such as the PGC cannot ground a Purposive Natural Law theory, given that no specific purpose is recognised as preferable to any other. Nor does it represent a Procedural approach of the type exemplified by Fuller and Soper. The "procedure" is that employed in moral reasoning and does not correspond to the processes operating within a legal system. Because Beyleveld and Brownsword view legal institutions and procedures not from an intra-systemic perspective but as ideal-types,[75] it is difficult to relate their Natural Law theory to the reality of a legal system as we know it.

VIII. UNJUST LAWS

Before concluding, it would be appropriate to pause and examine briefly the doctrine of unjust laws, particularly in relation to Finnis' and Soper's understanding of the obligation to obey the law. This doctrine has been too closely associated with Natural Law theory. Finnis has put the issue into perspective. The maxim *lex injusta non est lex* (unjust laws are not laws), he reminds us, is not a principal concern of Natural Law but merely a subordinate theorem.[76] What matters is how to fit it into a Natural Law theory.

Finnis' efforts in this respect seem to have been the most fruitful, and Beyleveld and Brownsword have found themselves "remarkably in

[73] *Ibid*., at p. 141.
[74] Finnis, *Ethics, supra,* note 20, at p. 74.
[75] We are told, for example, that "the Rule of Law quite simply *is* the Rule of the PGC". Beyleveld and Brownsword, *op. cit*., *supra,* note 6, at p. 440.
[76] Finnis, *Natural Law, supra,* note 3, at p. 351.

sympathy" with the structure of Finnis' analysis.[77] Finnis' thesis that law is for the common good enables him to analyse with precision what is meant by "unjust".[78] He then considers the effects of injustice on obligation. While the citizen has a presumptive moral obligation to obey the law, it is a necessary corollary that a ruler must have "the authority to give directions and make laws that are morally obligatory";[79] both the citizen's obligation and the ruler's authority are for the sake of the common good. Thus, when the ruler uses his authority to make stipulations against the common good - in brief, creates "unjust laws", "those stipulations altogether lack the authority which they would otherwise have *by virtue of being his"*.[80]

In those circumstances, the presumption that there is an obligation to obey the law may be rebutted. It does not always follow, though, that a citizen is thereby entitled to disobey the unjust law in question. A moral obligation to obey such a law may be derived from some "collateral" source:[81]

> "It may be the case ... that if I am *seen* by fellow citizens to be disobeying or disregarding this 'law', the effectiveness of other laws, and/or the general respect of citizens for the authority of a generally desirable ruler or constitution, will probably be weakened, with probable bad consequences for the common good. Does not this collateral fact create a moral obligation? ... [This obligation to comply with the law] is not based on the good of *being* law-abiding, but only on the desirability of not rendering ineffective the just parts of the legal system.... The ruler still has the responsibility of repealing rather than enforcing his unjust law.... But the citizen, or official, may meanwhile have the diminished, collateral, and in an important sense extra-legal, obligation to obey it."

The vexed issue of unjust laws does not fit into Soper's theory so neatly. Firstly, following his argument, a citizen would not have a *prima facie* obligation to obey substantially just laws administered by rulers who are lacking in good faith. Given that the law in question is just in effect, we may well want to argue a case for obedience: Finnis' "collateral" obligation enables one to do so. By overstressing the theme of respect between ruler and citizen as a source of the obligation to obey the law, Soper has overlooked the fact that a citizen's respect for other citizens may generate such an obligation as well. The converse scenario yields an equally unsatisfactory conclusion. By Soper's reasoning, a citizen

77 Beyleveld and Brownsword, *op. cit., supra,* note 6, at p. 338.
78 Finnis, *Natural Law, supra,* note 3, at pp. 352-354, where he characterises four types of injustice in law.
79 *Ibid.*, at p. 359.
80 *Ibid.*, at p. 360.
81 *Ibid.*, at pp. 361-362. Kent Greenawalt, in "The Natural Duty To Obey The Law" (1985) 84 Mich. L. Rev. 1, at p. 44, agrees with Finnis that "the duty to obey is different in its application to unjust laws than it is when it applies most forcefully to just laws." However, there is disagreement to the extent that Greenawalt takes the view that "in terms of a duty to obey no sharp distinction exists between unjust laws and all just laws." See especially pp. 40-45.

faced with unjust laws is still bound to obey them so long as they are administered in good faith. Soper tries to pre-empt our objection by emphasizing that it is the good faith which holds the key to obligation. Such good faith may be tested by the process of "discourse".

It may be doubted if his defence is entirely successful. After all, it is not difficult to think of rulers who are so convinced what they are doing is in the interests of the community that they refuse to entertain alternative conceptions of the common good. At this point, Soper changes tack from "sincerity" to "tolerance":

> "But discourse is also necessary because the reason that honest belief deserves respect stems from the individual's recognition of and tolerance for value disagreement: if that recognition and tolerance is not mutual, obligation again does not result."[82]

On closer analysis then, Soper's argument seems to be that obligation derives not only from sincerity of belief, but also from willingness to engage in "discourse". Thus he reveals himself to be an advocate of Procedural Natural Law and the intellectual heir to his compatriot Lon Fuller. The affinity is evident in the following extract:[83]

> "It is not the actual correctness or justice of the purposes invoked that is crucial to law but the fact that purposes are invoked at all - that reason and justification rather than fiat and will dominate the manner in which rules are formulated, defended, modified and reformulated. The conceptual claim need only be that there is a link between law and a particular process of rule justification rather than between law and any particular substantive outcome that may result from the process."

IX. CONCLUSION

Attention was focused on arguments put forward by each of the four contemporary Natural Law theories to establish some necessary logical or conceptual connection between law and morality.

It is clear from the preceding overview that legal philosophy can no longer be kept distinct from other branches of philosophy. Detmold's refutation of the Separation Thesis, for example, is based principally on the application of logic to normative statements.[84] A particularly notable development has been the rediscovery of practical reason (to borrow the title of MacCormick's essay), which is increasingly seen to underpin and provide an explanation for the workings of a legal system. This has taken jurisprudence into the territory of ethics and political philosophy. A Natural

82 Soper, *op. cit*., *supra,* note 4, at p. 141.
83 *Ibid*., at pp. 53-54.
84 Critics such as Richard Susskind would argue that Detmold mis-applies logic, on the ground that "it does not make sense to talk without qualification of logical contradiction, or non-contradition, between normative statements emanating ... from two distinct authorities or sources." See *supra,* note 49, at p. 135.

Law theory such as Finnis' is no less a moral and political philosophy than a philosophy of law. Allied to the discovery of practical reasoning has been a growing awareness of epistemology, culminating in the intricate theoretical framework of Beyleveld and Brownsword's model.

With hindsight, Hart's and Fuller's comments on law and morality appear methodologically naive. Perhaps the most serious flaw was their unwillingness and/or inability to analyse in detail what is meant by morality in the first place. In the case of Hart, he does no more than make certain value-free sociological observations. In the case of Fuller, he champions "communication" as a suitable purpose for a legal system, but refuses to be drawn on the substantive aims of law.

Much has happened in the discipline of ethics since the days of the Hart-Fuller debate. The writings of Rawls[85] and Gerwirth,[86] amongst others, have lent support to the idea of a neutral framework for moral choice. The conception of morality represented by such writers is evident in varying degrees in Soper's and Beyleveld and Brownsword's Natural Law theories. Opposed to such thin theories of the good is the 'perfectionist' ethics of John Finnis. It is not surprising that he alone among contemporary Natural Law theorists has adopted a Purposive approach. Even a purpose as widely stated as the common good must rest on certain identified or identifiable substantive goods if it is to serve as more than a platitude.

Given such fundamental differences (and others besides), does it make sense to categorise the abovementioned writers as Natural Law theorists? To the extent that Natural Law theory contends that *some* necessary logical connection exists between law and morality, then the answer is 'yes'. However, if by Natural Law theory we mean a theory which "trace[s] the ways in which sound laws, in all their positivity and mutability, are to be derived ... from unchanging principles",[87] then Finnis' is the only one which unequivocally qualifies. Arguably, so does Beyleveld and Brownsword's, although their "unchanging principles" would be moral categories rather than specific goods. Soper's probably does not; he even rejects the label "natural law".[88] As for Detmold's theory, there is little doubt that it falls outside this wider definition of Natural Law theory, for he denies the existence of an objective morality.[89]

Thus, even as these writers undermine the validity of the Separation Thesis, the seeds of disagreement are already apparent in their divergent and incompatible approaches. Future developments in Natural Law theory will no doubt be shaped to a large degree by developments in political philosophy and ethics.

85 See Rawls, *A Theory of Justice* (1972).
86 See Gerwirth, *Reason and Morality* (1978).
87 Finnis, *Natural Law, supra,* note 3, at p. 351.
88 Soper, *op. dr., supra,* note 4, at p. 51. However, his rejection rests on a misunderstanding that Natural Law theory is primarily concerned with unjust laws; for a different view, see *supra,* note 76.
89 "Those who think there are no objective values are right." Detmold, *op. cit., supra,* note 5, at p. 39.

Of the Natural Law theories under consideration, Finnis' has a number of particularly attractive features. Firstly, he clearly states the purpose of law and the legal system. Secondly, he includes the idea of a neutral (but not arbitrarily value-free) framework ("practical reasonableness") as a basic value, but alongside, rather than to the exclusion of, other intelligible goods. Thirdly, he gives the most coherent analysis of unjust laws. Provided one accepts the self-evidence of his basic goods, it is submitted that his is the most complete and satisfactory model of Natural Law theory today.

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