The contemporary British philosopher and legal theorist John Finnis examines the nature of law and argues that law is necessarily connected to morality. He starts by indicating that law involves a set of directives which help people to guide their conduct in desirable ways for the common good, and that a theory about the nature of law must appreciate this point. So, his theory of natural law is an attempt to show the kind of practical principles that right-minded people will use to make laws by which they regulate their conduct for the common good. He then examines how people know what is a basic good for them and what is in the common good. He discusses the notion and requirements of practical reasonableness and its role in determining the nature of common good with respect to law. He then moves on to examine the nature of legal obligation and the issue of whether there is a legal obligation to obey an unjust law. Finnis rejects the stance of legal positivism and its account of the nature of law. He argues that it is not just enough to describe when a law exists and what happens when such law is made and used to guide conduct. An account of law must appreciate the purpose of law, otherwise, a theorist will not know what to observe about the existence of law and what to include in a theory of law.

An appropriate point of departure in accounting for the nature of law is to see it as a purposive activity engaged in by reasonable human beings. This requires that a theorist view the law from the inside to see how people use law to achieve their desired purposes. These purposes can be understood by examining the basic goods that human beings seek. These basic goods are somehow self-evident when they are rationally considered. Finnis assumes that human beings are rational agents and can use such rationality to identify seven basic goods: life, knowledge, play, aesthetic experience, sociability or friendship, practical reasonableness, and elements of spirituality or a desire to find a larger explanation for reality. One of the basic requirements of practical reasonableness is having a rational and coherent life plan. The basic goods do not imply, according to Finnis, certain moral content that the law of a society must have. He argues that human beings must use practical reason-
ableness to determine such moral content in terms of the best means to achieve human basic goods that are elicited in laws. In other words, the laws of a society must meet the requirements of practical reasonableness, which include the basic goods that humans should try to achieve. He argues that practical reasonableness is not simply rationality because there are a number of things that are rational but unreasonable in certain circumstances.

As such, practical reasonableness includes elements of pure rationality in terms of how it is brought to bear on specific circumstances with respect to what is perceived to be the basic goods that human beings must seek to achieve. Practical reasonableness therefore involves a balancing act which requires that people rationally consider the pursuit of all the basic goods against the intrinsic value of each of these goods. This requires that the process by which human beings should try to achieve basic human goods should be fair and not arbitrary: there should be not arbitrary preferences among people and no arbitrary preferences among basic goods or values. This requires in some sense a commitment to a rational life plan and the ability to adopt a detached or disinterested point of view regarding certain goods, values, and persons. There must be sufficient reasons for sacrificing one basic good for another. The fair process of considering alternatives and competing basic goods includes a process of weighing the consequences of achieving certain basic goods against the inability to achieve another basic good. However, these basic goods are fundamental to our process of thinking about the law and what is considered legal, in that practical reasonableness does not allow these basic goods to be entirely ignored or sacrificed. Morality enters into law because law involves the fundamental moral process of considering and weighing the value of these basic goods. This moral process involves a substantive process of considering what is actually good for people in society and how laws can be made to reflect such considerations.

If this activity of human reasoning about morality and law is true, it follows that morality is always part of the nature of law, in that law must always consider the basic human goods, and thus it is always morally justified. But if a law fails to take these basic human goods into consideration, then such law should be rejected and does not deserve to be law, legally binding, or legally obeyed. But the idea that an unjust law is not a law is not the fundamental principle of natural law. All that is implied by natural law theory is that law is supposed to serve certain common good and the authority law or ruler depends on the ability to do this. As such, a ruler’s authority is defective if it does not meet these conditions of common and basic human
goods. Finnis cautions, however, that people are not always right to disobey unjust law. There is an overriding value in making sure that a legal system is stable and that there is orderliness in society. Against this background, he argues that there may be a general obligation to obey what may be considered an immoral law that is, if it is for the sake of maintaining a system of law and order. In other words, no ruler has a right to be obeyed; he has authority to make laws that are morally obligatory, and therefore he has a responsibility to enforce such laws. But if a law is unjust or against the common good, and not consistent with practical reasonableness, then such a law loses its authority.

As you read Finnis, consider and reflect on the following questions: Why is it necessary to include the purpose of law in a theory about the nature of law? What are the basic human goods? How does a consideration of these goods come into law? What does Finnis mean by practical reasonableness? What is its role in law? What is the basis for the authority of law? Does authority imply legal obligation? Under what conditions do people have an obligation to obey unjust laws?

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I EVALUATION AND THE DESCRIPTION OF LAW

1.5 THE THEORY OF NATURAL LAW

Bentham, Austin, Kelsen, Weber, Hart, and Raz all published stern repudiations of what they understood to be the theory of natural law; and Fuller carefully dissociated himself from that theory in its classical forms. But the theoretical work of each of these writers was controlled by the adoption, on grounds left inexplicit and inadequately justified, of some practical viewpoint as the standard of relevance and significance in the construction of his descriptive analysis. A sound theory of natural law is one that explicitly, with full awareness of the methodological situation just described, undertakes a critique of practical viewpoints, in order to distinguish the practically unreasonable from the practically reasonable, and thus to differentiate the really important from that which is unimportant or is important only by its opposition to or unreasonable exploitation of the really important. A the-

Excerpt from *Natural Law and Natural Rights*, by John Finnis, 1980, Clarendon Press.
ory of natural law claims to be able to identify conditions and principles of practical right-mindedness, of good and proper order among men and in individual conduct. Unless some such claim is justified, analytical jurisprudence in particular and (at least the major part of) all the social sciences in general can have no critically justified criteria for the formation of general concepts, and must be content to be no more than manifestations of the various concepts peculiar to particular peoples and/or to the particular theorists who concern themselves with those people.

A theory of natural law need not be undertaken primarily for the purpose of thus providing a justified conceptual framework for descriptive social science. It may be undertaken, as this book is, primarily to assist the practical reflections of those concerned to act, whether as judges or as statesmen or as citizens. But in either case, the undertaking cannot proceed securely without a knowledge of the whole range of human possibilities and opportunities, inclinations and capacities, a knowledge that requires the assistance of descriptive and analytical social science. There is thus a mutual though not quite symmetrical interdependence between the project of describing human affairs by way of theory and the project of evaluating human options with a view, at least remotely, to acting reasonably and well. The evaluations are in no way deduced from the descriptions but one whose knowledge of the facts of the human situation is very limited is unlikely to judge well in discerning the practical implications of the basic values. Equally, the descriptions are not deduced from the evaluations; but without the evaluations one cannot determine what descriptions are really illuminating and significant.

II IMAGES AND OBJECTIONS

II.1 NATURAL LAW AND THEORIES OF NATURAL LAW

What are principles of natural law? The sense that the phrase “natural law” has in this book can be indicated in the following rather bald assertions, formulations which will seem perhaps empty or questionbegging until explicated in Part Two: There is (i) a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realized, and which are in one way or another used by everyone who considers what to do, however unsound his conclusions; and (ii) a set of basic methodological requirements of practical reasonableness (itself one of the basic forms of human flourishing) which distinguish sound from unsound practical thinking and which, when all brought to bear, provide the criteria for distinguishing between acts that (always or in particular circumstances)
are reasonable-all-things-considered (and not merely relativetoaparticular purpose) and acts that are unreasonable-all-things-considered, i.e. between ways of acting that are morally right or morally wrong thus enabling one to formulate (iii) a set of general moral standards.

To avoid misunderstandings about the scope of our subject-matter . . . I should add here that the principles of natural law, thus understood, are traced out not only in moral philosophy or ethics and “individual” conduct, but also in political philosophy and jurisprudence, in political action, adjudication, and the life of the citizen. For those principles justify the exercise of authority in community. They require, too, that that authority be exercised, in most circumstances, according to the manner conveniently labelled the Rule of Law, and with due respect for the human rights which embody the requirements of justice, and for the purpose of promoting a common good in which such respect for rights is a component. More particularly, the principles of natural law explain the obligatory force (in the fullest sense of “obligation”) of positive laws, even when those laws cannot be deduced from those principles. And attention to the principles, in the context of these explanations of law and legal obligation, justifies regarding certain positive laws as radically defective, precisely as laws, for want of conformity to those principles. . . .

Since I have yet to show that there are indeed any principles of natural law, let me put the point conditionally. Principles of this sort would hold good, as principles, however extensively they were overlooked, misapplied, or defied in practical thinking, and however little they were recognized by those who reflectively theorize about human thinking. That is to say, they would “hold good” just as the mathematical principles of accounting “hold good” even when, as in the medieval banking community, they are unknown or misunderstood. So there could be a history of the varying extent to which they have been used by people, explicitly or implicitly, to regulate their personal activities. And there could be a history of the varying extent to which reflective theorists have acknowledged the sets of principles as valid or “holding good.” And there could be a history of the popularity of the various theories offered to explain the place of those principles in the whole scheme of things. But of natural law itself there could, strictly speaking, be no history. Natural law could not rise, decline, be revived, or stage “eternal returns.” It could not have historical achievements to its credit. It could not be held responsible for disasters of the human spirit or atrocities of human practice.
II. Legal Validity and Morality

The preceding section treated theories of natural law as theories of the rational foundations for moral judgment, and this will be the primary focus of subsequent sections of this chapter. But in the present section I consider the more restricted and juristic understanding of “natural law” and “natural law doctrine(s).”

Here we have to deal with the image of natural law entertained by jurists such as Kelsen, Hart, and Raz. This image should be reproduced in their own words, since they themselves scarcely identify, let alone quote from, any particular theorist as defending the view that they describe as the view of natural law doctrine. Joseph Raz usefully summarizes and adopts Kelsen’s version of this image:

Kelsen correctly points out that according to natural law theories there is no specific notion of legal validity. The only concept of validity is validity according to natural law, i.e., moral validity. Natural lawyers can only judge a law as morally valid, that is, just or morally invalid, i.e., wrong. They cannot say of a law that it is legally valid but morally wrong. If it is wrong and unjust, it is also invalid in the only sense of validity they recognise.¹

In his own terms, Raz later defines “Natural Law theorists” as “those philosophers who think it a criterion of adequacy for theories of law that they show... that it is a necessary truth that every law has moral worth.”²

For my part, I know of no philosopher who fits, or fitted, such a description, or who would be committed to trying to defend that sort of theoretical or meta—theoretical proposal.

III. Basic Form of Good: Knowledge

III.1 An Example

[T]his chapter [does not] make or presuppose any moral judgments. Rather, [it] concern[s] the evaluative substratum of all moral judgments. That is to say, . . . the acts of practical understanding in which we grasp the basic values of human existence and thus, too, the basic principles of all practical reasoning.
The purpose of this chapter, in particular, is to illustrate (i) what I mean by “basic value” and “basic practical principle,” (ii) how such values and principles enter into any consideration of good reasons for action and any full description of human conduct, and (iii) the sense in which such basic values are obvious (“self-evident”), and even unquestionable. For this purpose, I discuss only one basic value.

The example of a basic value to be examined now is: knowledge. Perhaps it would be more accurate to call it “speculative knowledge,” using the term “speculative” here, not to make the Aristotelian distinction between the *theoretike* and the *praktike*, but to distinguish knowledge as sought for its own sake from knowledge as sought only instrumentally, i.e. as useful in the pursuit of some other objective, such as survival, power, popularity, or a money-saving cup of coffee. Now “knowledge,” unlike “belief,” is an achievement word; there are true beliefs and false beliefs, but knowledge is of truth. So one could speak of truth as the basic good with which we are here concerned, for one can just as easily speak of “truth for its own sake” as of “knowledge for its own sake.” In any event, truth is not a mysterious abstract entity; we want the truth when we want the judgments in which we affirm or deny propositions to be true judgments, or (what comes to the same) want the propositions affirmed or denied, or to be affirmed or denied, to be true propositions. So, to complete the explanation of what is meant by the knowledge under discussion here, as distinct from instrumental knowledge, I can add that the distinction I am drawing is not between one set of propositions and another. It is not a distinction between fields of knowledge. Any proposition, whatever its subject matter, can be inquired into (with a view to affirming or denying it) in either of the two distinct ways, (i) instrumentally or (ii) out of curiosity, the pure desire to know, to find out the truth about it simply out of an interest in or concern for truth and a desire to avoid ignorance or error as such.

...
human good; I identified seven. And each of them can be participated in, and
promoted, in an inexhaustible variety of ways and with an inexhaustible
variety of combinations of emphasis, concentration, and specialization. To
participate thoroughly in any basic value calls for skill, or at least a thor-
oughgoing commitment. But our life is short.

By disclosing a horizon of attractive possibilities for us, our grasp of the
basic values thus creates, not answers, the problem for intelligent decision:
What is to be done? What may be left undone? What is not to be done? We
have, in the abstract, no reason to leave any of the basic goods out of
account. But we do have good reason to choose commitments, projects, and
actions, knowing that choice effectively rules out many alternative reason-
able or possible commitment(s), project(s), and action(s).

To have this choice between commitment to concentration upon one
value (say, speculative truth) and commitment to others, and between one
intelligent and reasonable project (say, understanding this book) and other
eligible projects for giving definite shape to one’s participation in one’s
selected value, and between one way of carrying out that project and other
appropriate ways, is the primary respect in which we can call ourselves both
free and responsible.

For amongst the basic forms of good that we have no good reason to
leave out of account is the good of practical reasonableness, which is partici-
pated in precisely by shaping one’s participation in the other basic goods, by
guiding one’s commitments, one’s selection of projects, and what one does
in carrying them out.

The principles that express the general ends of human life do not acquire
what would nowadays be called a “moral” force until they are brought to bear
upon definite ranges of project, disposition, or action, or upon particular pro-
jects, dispositions, or actions. How they are thus to be brought to bear is the
problem for practical reasonableness. “Ethics,” as classically conceived, is
simply a recollectively and/or prospectively reflective expression of this prob-
lem and of the general lines of solutions which have been thought reasonable.

How does one tell that a decision is practically reasonable? This ques-
tion is the subject-matter of the present chapter. The classical exponents of
ethics (and of theories of natural law) were well aware of this problem of cri-
teria and standards of judgment. They emphasize that an adequate response
to that problem can be made only by one who has experience (both of human
wants and passions and of the conditions of human life) and intelligence and
a desire for reasonableness stronger than the desires that might overwhelm
it. Even when, later, Thomas Aquinas clearly distinguished a class of practical principles which he considered self-evident to anyone with enough experience and intelligence to understand the words by which they are formulated, he emphasized that moral principles such as those in the Ten Commandments are conclusions from the primary self-evident principles, that reasoning to such conclusions requires good judgment, and that there are many other more complex and particular moral norms to be followed and moral judgments and decisions to be made, all requiring a degree of practical wisdom which (he says) few men in fact possess.

Now, you may say, it is all very well for Aristotle to assert that ethics can be satisfactorily expounded only by and to those who are experienced and wise and indeed of good habits, and that these characteristics are only likely to be found in societies that already have sufficiently sound standards of conduct, and that the popular morality of such societies (as crystallized and detectable in their language of praise and blame, and their lore) is a generally sound pointer in the elaboration of ethics. He may assert that what is right and morally good is simply seen by the man (the phronimos, or again the spoudaios) who is right minded and morally good, to and that what such a man thinks and does it the criterion of sound terminology and correct conclusions in ethics (and politics). Such assertions can scarcely be denied. But they are scarcely helpful to those who are wondering whether their own view of what is to be done is a reasonable view or not. The notion of “the mean,” for which Aristotle is perhaps too well known, seems likewise to be accurate but not very helpful (though its classification of valuewords doubtless serves as a reminder of the dimensions of the moral problem). For what is “the mean and best, that is characteristic of virtue”? It is “to feel [anger, pity, appetite, etc.] when one ought to, and in relation to the objects and persons that one ought to, and with the motives and in the manner that one ought to.” Have we no more determinate guide than this?

In the two millennia since Plato and Aristotle initiated formal inquiry into the content of practical reasonableness, philosophical reflection has identified a considerable number of requirements of method in practical reasoning. Each of these requirements has, indeed, been treated by some philosopher with exaggerated respect, as if it were the exclusive controlling and shaping requirement. For, as with each of the basic forms of good, each of these requirements is fundamental, underived, irreducible, and hence is capable when focused upon of seeming the most important.
Each of these requirements concerns what one must do, or think, or be if one is to participate in the basic value of practical reasonableness. Someone who lives up to these requirements is thus Aristotle’s *phronimos*, he has Aquinas’s *prudentia*; they are requirements of reasonableness or practical wisdom, and to fail to live up to them is irrational. But, secondly, reasonableness both is a basic aspect of human well-being and *concerns* one’s participation in all the (other) basic aspects of human well-being. Hence its requirements concern fullness of well-being (in the measure in which any one person can enjoy such fullness of well-being in the circumstances of his lifetime) So someone who lives up to these requirements is also Aristotle’s *spoudaios* (mature man), his life is *eu zen* (well-living) and, unless circumstances are quite against him, we can say that he has Aristotle’s *eudaimonia* (the inclusive all-round flourishing or well-being—not safely translated as “happiness”). But, thirdly, the basic forms of good are opportunities of being; the more fully a man participates in them the more he is what he can be. And for this state of being fully what one can be, Aristotle appropriated the word *physis*, which was translated into Latin as *natura*.

So Aquinas will say that these requirements are requirements not only of reason, and of goodness, but also (by entailment) of (human) nature.

Thus, speaking very summarily, we could say that the requirements to which we now turn express the “natural law method” of working out the (moral) “natural law” from the first (premoral) “principles of natural law.” Using only the modern terminology (itself of uncertain import) of “morality,” we can say that the following sections of this chapter concern the sorts of reasons why (and thus the ways in which) there are things that morally ought (not) to be done.

V.2 A COHERENT PLAN OF LIFE

First, then, we should recall that, though they correspond to urges and inclinations which can make themselves felt prior to any intelligent consideration of what is worth pursuing, the basic aspects of human well-being are discernible only to one who thinks about his opportunities, and thus are realizable only by one who intelligently directs, focuses, and controls his urges, inclinations, and impulses. In its fullest form, therefore, the first requirement of practical reasonableness is what John Rawls calls a rational plan of life. Implicitly or explicitly one must have a harmonious set of purposes and orientations, not as the “plans” or “blueprints” of a pipe-dream, but as effective commitments. (Do not confuse the adoption of a set of basic personal or
social commitments with the process, imagined by some contemporary philosophers, of “choosing basic values”!) It is unreasonable to live merely from moment to moment, following immediate cravings, or just drifting. It is also irrational to devote one’s attention exclusively to specific projects which can be carried out completely by simply deploying defined means to defined objectives. Commitment to the practice of medicine (for the sake of human lift), or to scholarship (for the sake of truth), or to any profession, or to a marriage (for the sake of friendship and children). . . all require both direction and control of impulses, and the undertaking of specific projects; but they also require the redirection of inclinations, the reformation of habits, the abandonment of old and adoption of new projects, as circumstances require, and, overall, the harmonization of all one’s deep commitments for which there is no recipe or blueprint, since basic aspects of human good are not like the definite objectives of particular projects, but are participated in.

As Rawls says, this first requirement is that we should “see our life as one whole, the activities of one rational subject spread out in time.” . . .

The content and significance of this first requirement will be better understood in the light of the other requirements. For indeed, all the requirements are interrelated and capable of being regarded as aspects one of another.

**V.3 No Arbitrary Preferences Amongst Values**

Next, there must be no leaving out of account, or arbitrary discounting or exaggeration, of any of the basic human values. Any commitment to a coherent plan of life is going to involve some degree of concentration on one or some of the basic forms of good, at the expense, temporarily or permanently, of other forms of good. But the commitment will be rational only if it is on the basis of one’s assessment of one’s capacities, circumstances, and even of one’s tastes. It will be unreasonable if it is on the basis of a devaluation of any of the basic forms of human excellence, or if it is on the basis of an over-evaluation of such merely derivative and supporting or instrumental goods as wealth or “opportunity” or of such merely; secondary and conditionally valuable goods as reputation or (in a different sense of secondariness) pleasure.

A certain scholar may have little taste or capacity for friendship, and may feel that life for him would have no savour if he were prevented from pursuing his commitment to knowledge. None the less, it would be unreasonable for him to deny that, objectively, human life (quite apart from truth-
seeking and knowledge) and friendship are good in themselves. It is one thing to have little capacity and even no “taste” for scholarship, or friendship, or physical heroism, or sanctity; it is quite another thing, and stupid or arbitrary, to think or speak or act as if these were not real forms of good. . . .

It is quite reasonable for many men to choose not to commit themselves to any real pursuit of knowledge, and it is quite unreasonable for a scholar-statesman or scholarfather to demand that all his subjects or children should conform themselves willy-nilly to the modes and standards of excellence that he chooses and sets for himself. But it is even more unreasonable for anyone to deny that knowledge is (and is to be treated as) a form of excellence, and that error, illusion, muddle, superstition, and ignorance are evils that no one should wish for, or plan for, or encourage in himself or in others. If a statesman or father or any self-directing individual treats truth or friendship or play or any of the other basic forms of good as of no account, and never asks himself whether his lifeplans) makes reasonable allowance for participation in those intrinsic human values (and for avoidance of their opposites), then he can be properly accused both of irrationality and of stunting or mutilating himself and those in his care.

V.4 No Arbitrary Preferences Amongst Persons

Next, the basic goods are human goods, and can in principle be pursued, realized, and participated in by any human being. Another person’s survival, his coming to know, his creativity, his all-round flourishing, may not interest me, may not concern me, may in any event be beyond my power to affect. But have I any reason to deny that they are really good, or that they are fit matters of interest, concern, and favour by that man and by all those who have to do with him? The questions of friendship, collaboration, mutual assistance, and justice are the subject of the next chapters. Here we need not ask just who is responsible for whose wellbeing. But we can add, to the second requirement of fundamental impartiality of recognition of each of the basic forms of good, a third requirement: of fundamental impartiality among the human subjects who are or may be partakers of those goods. . . .

There is, therefore, reasonable scope for self-preference. But when all allowance is made for that, this third requirement remains, a pungent critique of selfishness, special pleading, double standards, hypocrisy, indifference to the good of others whom one could easily help (“passing by on the other side”), and all the other manifold forms of egoistic and group bias. So much so that many have sought to found ethics virtually entirely on this principle.
of impartiality between persons. In the modern philosophical discussion, the principle regularly is expressed as a requirement that one’s moral judgments and preferences be universalizable.

The classical non-philosophical expression of the requirement is, of course, the so-called Golden Rule formulated not only in the Christian gospel but also in the sacred books of the Jews, and not only in didactic formulae but also in the moral appeal of sacred history and parable. . . .

“Do to (or for) others what you would have them do to (or for) you.” Put yourself in your neighbour’s shoes. Do not condemn others for what you are willing to do yourself. Do not (without special reason) prevent others getting for themselves what you are trying to get for yourself. These are requirements of reason, because to ignore them is to be arbitrary as between individuals.

But what are the bounds of reasonable self-preference, of reasonable discrimination in favour of myself, my family, my group(s)? In the Greek, Roman, and Christian traditions of reflection, this question was approached via the heuristic device of adopting the viewpoint, the standards, the principles of justice, of one who sees the whole arena of human affairs and who has the interests of each participant in those affairs equally at heart and equally in mind—the “ideal observer.” Such an impartially benevolent “spectator” would condemn some but not all forms of self-preference, and some but not all form of competition. The heuristic device helps one to attain impartiality between the possible subjects of human well-being (persons) and to exclude mere bias in one’s practical reasoning. It permits one to be impartial, too, among inexhaustibly many of the lifeplans that differing individuals may choose. But, of course, it does not suggest “impartiality” about the basic aspects of human good. It does not authorize one to set aside the second requirement of practical reason by indifference to death and disease, by preferring trash to art, by favouring the comforts of ignorance and illusion, by repressing all play as unworthy of man, by praising the ideal of self-aggrandizement and condemning the ideal of friendship, or by treating the search for the ultimate source and destiny of things as of no account or as an instrument of statecraft or a plaything reserved for leisured folk. . . .

Therein lies the contrast between the classical heuristic device of the benevolently divine viewpoint and the equivalent modern devices for eliminating mere bias, notably the heuristic concept of the social contract. Consider Rawls’s elaboration of the social contract strategy, an elaboration which most readily discloses the purpose of than strategy as a measure and
instrument of practical reason’s requirement of interpersonal impartiality. Every feature of Rawls’s construction is designed to guarantee that if a supposed principle of justice is one that would be unanimously agreed on, behind the “veil of ignorance,” in the “Original Position,” then it must be a principle that is fair and unbiased as between persons. Rawls’s heuristic device is thus of some use to anyone who is concerned for the third requirement of practical reasonableness, and in testing its implications. Unfortunately, Rawls disregards the second requirement of practical reasonableness, viz. that each basic or intrinsic human good be treated as a basic and intrinsic good. The conditions of the Original Position are designed by Rawls to guarantee that no principle of justice will systematically favour any life-plan simply because that life-plan participates more fully in human well-being in any or all of its basic aspects (e.g. by favouring knowledge over ignorance and illusion, art over trash, etc.).

And it simply does not follow, from the fact that a principle chosen in the Original Position would be unbiased and fair as between individuals, that a principle which would not be chosen in the Original Position must be unfair or not a proper principle of justice in the real world. For in the real world, as Rawls himself admits, intelligence can discern intrinsic basic values and their contraries. Provided we make the distinctions mentioned in the previous section, between basic practical principles and mere matters of taste, inclination, ability, etc., we are able (and are required in reason) to favour the basic forms of good and to avoid and discourage their contraries. In doing so we are showing no improper favour to individuals as such, no unreasonable “respect of persons,” no egoistic or group bias, no partiality opposed to the Golden Rule or to any other aspect of this third requirement of practical reason. . . .

V.5 Detachment and Commitment

The fourth and fifth requirements of practical reasonableness are closely complementary both to each other and to the first requirement of adopting a coherent plan of life, order of priorities, set of basic commitments.

In order to be sufficiently open to all the basic forms of good in all the changing circumstances of a lifetime, and in all one’s relations, often unforeseeable, with other persons, and in all one’s opportunities of effecting their well-being or relieving hardship, one must have a certain detachment from all the specific and limited projects which one undertakes. . . .
So the fourth requirement of practical reasonableness can be called detachment.

The fifth requirement establishes the balance between fanaticism and dropping out, apathy, unreasonable failure or refusal to “get involved” with anything. It is simply the requirement that having made one’s general commitments one must not abandon them lightly (for to do so would mean, in the extreme case, that one would fail ever to really participate in any of the basic values). . . .

V.6 The (Limited) Relevance of Consequences: Efficiency, Within Reason

The sixth requirement has obvious connections with the fifth, but introduces a new range of problems for practical reason, problems which go to the heart of morality. For this is the requirement that one bring about good in the world (in one’s own life and the lives of others) by actions that are efficient for their (reasonable) purpose(s). One must not waste one’s opportunities by using inefficient methods. One’s actions should be judged by their effectiveness, by their fitness for their purpose, by their utility, their consequences. . . .

There is a wide range of contexts in which it is possible and only reasonable to calculate, measure, compare, weigh, and assess the consequences of alternative decisions. Where a choice must be made it is reasonable to prefer human good to the good of animals. Where a choice must be made it is reasonable to prefer basic human goods (such as life) to merely instrumental goods (such as property). . . . Over a wide range of preferences and wants, it is reasonable for an individual or society to seek to maximize the satisfaction of those preferences or wants.

But this sixth requirement is only one requirement among a number. The first, second, and third requirements require that in seeking to maximize the satisfaction of preferences one should discount the preferences of for example, sadists (who follow the impulses of the moment, and/or do not respect the value of life, and/or do not universalize their principles of action with impartiality). The first, third, and (as we shall see) seventh and eighth requirements require that cost-benefit analysis be contained within a framework that excludes any project involving certain intentional killings, frauds, manipulations of personality, etc. And the second requirement requires that one recognize that each of the basic aspects of human well-being is equally basic, that none is objectively more important than any of the others, and thus that none can provide a common denominator or single yardstick for
assessing the utility of all projects: they are incommensurable, and any calculus of consequences that pretends to commensurate them is irrational.

V.7 Respect for Every Basic Value in Every Act

The seventh requirement of practical reasonableness can be formulated in several ways. A first formulation is that one should not choose to do any act which of itself does nothing but damage or impede a realization or participation of any one or more of the basic forms of human good. For the only reason for doing such an act, other than the non-reason of some impelling desire, could be that the good consequences of the act outweigh the damage done in and through the as itself. But, outside merely technical contexts, consequentialist “weighing” is always and necessarily arbitrary and delusive for the reasons indicated in the preceding section. [Ed. note: This argument has been omitted.]

Now an act of the sort we are considering will always be done (if it is done intelligently at all) as a means of promoting or protecting, directly or indirectly, one or more of the basic goods, in one or more of their aspects. For anyone who rises above the level of impulse and acts deliberately must be seeking to promote some form of good (even if only the good of authentically powerful self-expression and self-integration which he seeks through sadistic assaults or through malicious treachery or deception, with “no ulterior motives”). Hence, if consequentialist reasoning were reasonable, acts which themselves do nothing but damage or impede a human good could often be justified as parts of, or steps on the way to carrying out, some project for the promotion or protection of some form(s) of good. . . .

V.8 The Requirements of the Common Good

Very many, perhaps even most, of our concrete moral responsibilities, obligations, and duties have their basis in the eighth requirement. We can label this the requirement of favouring and fostering the common good of one’s communities. The sense and implications of this requirement are complex and manifold.

V.9 Following One’s Conscience

The ninth requirement might be regarded as a particular aspect of the seventh (that no basic good may be directly attacked in any act), or even as a summary of all the requirements. But it is quite distinctive. It is the require-
ment that one should not do what one judges or thinks or “feels” all-in-all should not be done. That is to say one must act “in accordance with one’s conscience.”

This chapter has been in effect a reflection on the workings of conscience. If one were by inclination generous, open, fair, and steady in one’s love of human good, or if one’s milieu happened to have settled on reasonable mores, then one would be able, without solemnity, rigmarole, abstract reasoning, or casuistry, to make the particular practical judgments (i.e. judgments of conscience) that reason requires. If one is not so fortunate in one’s inclinations or upbringing, then one’s conscience will mislead one, unless one strives to be reasonable and is blessed with a pertinacious intelligence alert to the forms of human good yet undeflected by the sophistries which intelligence so readily generates to rationalize indulgence, time-serving, and self-love. (The stringency of these conditions is the permanent ground for the possibility of authority in morals, i.e. of authoritative guidance, by one who meets those conditions, acknowledged willingly by persons of conscience.) . . .

V.10 The Product of These Requirements: Morality

Now we can see why some philosophers have located the essence of “morality” in the reduction of harm, others in the increase of well-being, some in social harmony, some in universalizability of practical judgment, some in the all-round flourishing of the individual, others in the preservation of freedom and personal authenticity. Each of these has a place in rational choice of commitments, projects, and particular actions. Each, moreover, contributes to the sense, significance, and force of terms such as “moral,” “[morally] ought,” and “right”; not every one of the nine requirements has a direct role in every moral judgment, but some moral judgments do sum up the bearing of each and all of the nine on the questions in hand, and every moral judgment sums up the bearing of one or more of the requirements.

XII Unjust Laws

XII.1 A Subordinate Concern of Natural Law Theory

The long haul through the preceding chapters will perhaps have convinced the reader that a theory of natural law need not have as its principal concern, either theoretical or pedagogical, the affirmation that “unjust laws are not law.” Indeed, I know of no theory of natural law in which that affirmation, or anything like it, is more than a subordinate theorem. The principal concern of
a theory of natural law is to explore the requirements of practical reasonableness in relation to the good of human beings who, because they live in community with one another, are confronted with problems of justice and rights, of authority, law, and obligation. And the principal jurisprudential concern of a theory of natural law is thus to identify the principles and limits of the Rule of Law, and to trace the ways in which sound laws, in all their positivity and mutability are to be derived (not, usually, deduced from unchanging principles—principles the have their force from their reasonableness not from any originating acts or, circumstances. Still, even the reader who has no been brought up to believe that “natural law” can be summed up in the slogan “*lex injusta non est lex*” [Ed note: “unjust laws are no laws”] will wish a little more to be said about that slogan and about the effect of unjust exercises of authority upon our responsibilities as reasonable persons.

The ultimate basis of a ruler’s authority is the fact that he has the opportunity, and thus the responsibility, of furthering the common good by stipulating solutions to community’s coordination problems: Normally, though not necessarily, the immediate source of this opportunity and responsibility is the fact that he is designated by of under some authoritative rule as bearer of authority in respect of certain aspects of those problems. In any event, authority is useless for the common good unless the stipulations of those in authority (or which emerge through the formation of authoritative customary rules) are treated as exclusionary reasons, i.e. as sufficient reason for acting notwithstanding that the subject would not himself have made the same stipulation and indeed considers the actual stipulation to be in some respect(s) unreasonable, nor full appropriate for the common good. The principles set out in the preceding three sentences control our understanding both of the types of injustice in the making and administration of law, and of the consequences of such injustice.

**XII.2 Types of Injustice in Law**

First, since authority is derived solely from the needs of the common good, a ruler’s use of authority is radically defective if he exploits his opportunities by making stipulations intended by him not for the common good but for his own or his friends’ or party’s or faction’s advantage, or out of malice against some person or group. In making this judgment, we should not be deflected by the fact that most legal systems do not permit the exercise of “constitutional” powers to be challenged on the ground that that exercise was improperly motivated. These restrictions on judicial review are justified, if at all,
either by pragmatic considerations or by a principle of separation of powers. In either case, they have no application to the reasonable man assessing the claims of authority upon him. On the other hand, it is quite possible that an improperly motivated law may happen to be in its contents compatible with justice and even promote the common good.

Secondly, since the location of authority is normally determined by authoritative rules dividing up authority and jurisdiction amongst separate office-holders, an office-holder may wittingly or unwittingly exploit his opportunity to affect people’s conduct, by making stipulations which stray beyond his authority. Except in “emergency” situations in which the law (even the constitution) should be bypassed and in which the source of authority reverts to its ultimate basis, an *ultra vires* act is an abuse of power and an injustice to those treated as subject to it. (The injustice is “distributive” inasmuch as the official improperly assumes to himself an excess of authority, and “commutative” inasmuch as the official improperly seeks to subject others to his own decisions.) Lawyers sometimes are surprised to hear the *ultra vires* actions of an official categorized as abuse of power, since they are accustomed to thinking of such actions as “void and of no effect” in law. But such surprise is misplaced; legal rules about void and voidable acts are “deeming” rules, directing judges to treat actions, which are empirically more or less effective, *as if* they had not occurred (at least, as juridical acts), or *as if* from a certain date they had been overridden by an *intra vires* act of repeal or annulment. Quite reasonably, purported juridical acts of officials are commonly presumed to be lawful, and are treated as such by both fellow officials and laymen, unless and until judicially held otherwise. Hence, *ultra vires* official acts, even those which are not immune-for-procedural-or-pragmatic-reasons from successful challenge, will usually subject persons to effects which cannot afterwards be undone; and the bringing about of (the likelihood of) such effects is an abuse of power and an unjust imposition.

Thirdly, the exercise of authority in conformity with the Rule of Law normally is greatly to the common good (even when it restricts the efficient pursuit of other objectives); it is an important aspect of the commutative justice of treating people as entitled to the dignity of self-direction, and of the distributive justice of affording all an equal opportunity of understanding and complying with the law. Thus the exercise of legal authority otherwise than in accordance with due requirements of manner and form is an abuse and an injustice, unless those involved consent, or ought to consent, to an
accelerated procedure in order to cut out “red tape” which in the circumstances would prejudice substantial justice.

Fourthly, what is stipulated may suffer from none of these defects of intention, author, and form, and yet be substantively unjust. It may be distributively unjust, by appropriating some aspect of the common stock, or some benefit of common life or enterprise, to a class not reasonably entitled to it on any of the criteria of distributive justice, while denying it to other persons; or by imposing on some a burden from which others are, on no just criterion, exempt. It may be commutatively unjust, by denying to one, some, or everyone an absolute human right, or a human right the exercise of which is in the circumstances possible, consistent with the reasonable requirements of public order, public health, etc., and compatible with the due exercise both of other human rights and of the same human rights by other persons.

XII.3 Effects of Injustice on Obligation

How does injustice, of any of the foregoing sorts, affect the obligation to obey the law?

It is essential to specify the exact sense of this question. Any sound jurisprudence will recognize that someone uttering the question might conceivably mean by “obligation to obey the law” either (i) empirical liability to be subjected to sanction in event of non-compliance; or (ii) legal obligation in the intrasystemic sense (“legal obligation in the legal sense”) in which the practical premiss that conformity to law is socially necessary is a framework principle insulated from the rest of practical reasoning; or (iii) legal obligation in the moral sense (i.e. the moral obligation that presumptively is entailed by legal obligation in the intrasystemic or legal sense); or (iv) moral obligation deriving not from the legality of the stipulation-of-obligation but from some “collateral” source (to be explained shortly). None of these interpretations is absurd, and a sound jurisprudence will show to what extent the answers to each will differ and to what extent they are interrelated.

The first of the four conceivable senses of the question listed above is the least likely, in practice, to be intended by anyone raising the question. (Nevertheless, it is the only sense which Austin explicitly recognizes.) Someone who asks how injustice affects his obligation to conform to law is not likely to be asking for information on the practically important but theoretically banal point of fact, “Am I or am I not likely to be hanged for non-compliance with this law?”
The second of the four listed senses of the question of obligation might seem, at first glance, to be empty. For what is the point of asking whether there is a legal obligation in the legal sense to conform to a stipulation which is in the legal sense obligatory? This objection is, however, too hasty.

The legal system, even when conceived strictly as a set of normative meaning-contents (in abstraction from institutions, processes, personnel, and attitudes), is more open than the model suggests—open, that is to say, to the unrestricted flow of practical reasoning, in which a stipulation, valid according to the system’s formal criteria of validity (“rules of recognition”), may be judged to be, or to have become, unjust and, therefore, after all, wholly or partially inapplicable.

Those who doubt or minimize the presence of open-ended principles of justice in professional legal thought will usually be found, on close examination, to be making a constitutional claim, viz. that the judiciary ought to leave change and development of law to the legislature. Conversely, those who stress the pervasiveness of such principles and minimize the coverage of practical problems by black-and-white rules will usually be found to be advancing the contradictory constitutional claim. In other words, what is presented as a dispute about the “legal system” qua set of normative meaning-contents is in substance, typically, a dispute about the “legal system” qua constitutional order of institutions.

In short, even in well-developed legal orders served by a professional caste of lawyers, there are (and reasonably) quite a few opportunities of raising “intra-systemically,” for example before a court of law, the question whether what would otherwise be an indubitable legal obligation is in truth not (legally) obligatory because it is unjust. On the other hand, since there is little point in meditating about the legal-obligation-imposing force of normative meaning-contents which are not treated as having legal effect in the principal legal institutions of a community (viz. the courts), it is idle to go on asking the question in this sense (the second of the four listed) after the highest court has ruled that in its judgment the disputed law is not unjust or, if unjust, is none the less law, legally obligatory, and judicially enforceable. It is not conducive to clear thought, or to any good practical purpose, to smudge the positivity of law by denying the legal obligatoriness in the legal or intra-systematic sense of a rule recently alarmed as legally valid and obligatory by the highest institution of the “legal system.” (Austin’s concern to make this point, in the “hanging me up” passage, was quite reasonable. What was unreasonable was his failure to acknowledge (a) the limited relevance of the
point, and (b) the existence of questions which may be expressed in the same language but which are not determinately answerable intra-systemically).

The question in its third sense therefore arises in clear-cut form when one is confident that the legal institutions of one’s community will not accept that the law in question is affected by the injustice one discerns in it. The question can be stated thus: Given that legal obligation presumptively entails a moral obligation, and that the legal system is by and large just, does a particular unjust law impose upon me any moral obligation to conform to it?

What, then, are we to say in reply to the question whether an unjust law creates a moral obligation in the way that just law of itself does? The right response begins by recalling that the stipulations of those in authority have presumptive obligatory force (in the eyes of the reasonable person thinking unrestrictedly about what to do) only because of what is needed if the common good is to be secured and realized.

All my analyses of authority and obligation can be summed up in the following theorem: the ruler has, very strictly speaking, no right to be obeyed; but he has the authority to give directions and make laws that are morally obligatory and that he has the responsibility of enforcing. He has this authority for the sake of the common good (the needs of which can also, however, make authoritative the opinions—as in custom—or stipulations of men who have no authority). Therefore, if he uses his authority to make stipulations against the common good, or against any of the basic principles of practical reasonableness, those stipulations altogether lack the authority they would otherwise have by virtue of being his. More precisely, stipulations made for partisan advantage, or (without emergency justification) in excess of legally defined authority, or imposing inequitable burdens on their subjects, or directing the doing of things that should never be done, simply fail, of themselves, to create any moral obligation whatever.

This conclusion should be read with precision. Firstly, it should not be concluded that an enactment which itself is for the common good and compatible with justice is deprived of its moral authority by the fact that the act of enacting it was rendered unjust by the partisan motives of its author. Just as we should not be deflected from adjudging the act of enactment unjust by the fact that improper motivation is not, in a given system, ground for judicial review, so we should not use the availability of judicial review for that ground, in certain other systems of law, as a sufficient basis for concluding
that a private citizen (to whom is not entrusted the duty of disciplining wayward officials or institutions) is entitled to treat the improper motives of the authors of a just law as exempting him from his moral duty of compliance. Secondly, it should not be concluded that the distributive injustice of a law exempts from its moral obligation those who are not unjustly burdened by it.

Understood with those precisions, my response to the question in its third sense corresponds to the classical position: viz. that for the purpose of assessing one’s legal obligations in the moral sense, one is entitled to discount laws that are “unjust” in any of the ways mentioned. Such laws lack the moral authority that in other cases comes simply from their origin, “pedigree,” or formal source. In this way, then, le\textit{x injusta non est lex} and \textit{virtutem obligandi non habet},\textsuperscript{12} whether or not it is “legally valid” and “legally obligatory” in the restricted sense that it (i) emanates from a legally authorized source, (ii) will in fact be enforced by courts and/or other officials, and/or (iii) is commonly spoken of as a law like other laws.

But at the same time I must add that the last-mentioned facts, on which the lawyer qua lawyer (normally but, as I have noted, not exclusively) may reasonably concentrate, are not irrelevant to the moralist, the reasonable man with his unrestricted perspective.

At this point there emerges our question in the \textit{fourth} of the senses I listed at the beginning of this section. It may be the case for example, 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? The obligation is to comply with the law, but it should not be treated as an instance of what I have called “legal obligation in the moral sense.” For it is not based on the good of being law-abiding, but only on the desirability of not rendering in effective the just parts of the legal system. Hence it will not require compliance with unjust laws according to their tenor or “legislative intent,” but only such degree of compliance as is necessary to avoid bringing “the law” (as a whole) “into contempt.” This degree of compliance will vary according to time, place, and circumstance; in some limiting cases (e.g. of judges or other official administering the law) the morally required degree of compliance may amount to full or virtually full compliance, just as if the law in question had been a just enactment.
So, if an unjust stipulation is, in fact homogeneous with other laws in its forma source, in its reception by courts and officials, and in its common acceptance, the good citizen may (not always) be morally required to conform to that stipulation to the extent necessary to avoid weakening “the law,” the legal system (of rules, institutions and dispositions) as a whole. The ruler still has the responsibility of repealing rather than enforcing his unjust law, and in this sense has no right that it should be conformed to. But the citizen, or official, may meanwhile have the diminished, collateral, and in an important sense extra-legal, obligation to obey it.

The foregoing paragraphs oversimplify the problems created for the conscience of reasonable citizens by unreasonableness in lawmaking. They pass over the problems of identifying inequity in distribution of burdens, or excessive or wrongly motivated exercise of authority. They pass over the dilemmas faced by conscientious officials charged with the administration of unjust laws. They pass over all questions about the point at which it may be for the common good to replace a persistently unjust law-maker, by means that are prohibited by laws of a type normally justified both in their enactment and in their application. They pass over the question whether, notwithstanding the normal impropriety of bringing just laws into contempt, there may be circumstances in which it is justified to use one’s public disobedience, whether to an unjust law itself or to a law itself quite just, as an instrument for effecting reform of unjust laws. And they pass over the question whether, in the aftermath of an unjust regime, the responsibility for declaring its unjust laws unjust and for annulling and undoing their legal and other effects should be undertaken by courts (on the basis that a court of justice-according-to-law ought not to be required to attribute legal effect to radically unjust laws), or by retrospective legislation (on the basis that the change from one legal regime to the other ought to be explicit).

Much can be said on such questions, but little that is not highly contingent upon social, political, and cultural variables. It is universally true that one has an absolute (liberty) right not to perform acts which anyone has an absolute (claim) right that one should not perform. But beyond this, one should nor expect generally usable but precise guides for action in circumstances where the normally authoritative sources of precise guidance have partially broken down.

ENDNOTES

2 *Practical Reason*, p. 162. This formulation corresponds to the contradictory of the characterization of “Legal Positivism” constructed by Hart in order to define “the issue between Natural Law and Legal Positivism”: *Concept of Law*, p. 181. See also *Practical Reason*, pp. 155, 162; all these formulations seem to be intended by Raz to apply equally to “definitional” and “derivative” approach theories of natural law. (Since no one uses the “definitional” approach, there is no need to inquire into the value of the supposed distribution between “definitional” and “derivative” approaches.)


7 *Nic. Eth.* X, 10:1176b17–18; cf. III, 6:1113a33; IX, 4:1166a12–13: see also 1.4. above.


10 *Theory of Justice*, p. 328.


12 Aquinas, *S. T.* III. q. 96, a. 6c; he is referring back to the discussion in a. 4, which (having quoted Augustine’s remark about unjust laws not seeming to be law) concludes: “So such [unjust] laws do not oblige in the forum of conscience (except perhaps where the giving of a corrupting example [scandalum] or the occasioning of civil disorder [turbationem] are to be avoided—for to avoid these, a man ought to yield his right”). He adds that the last-mentioned “exceptional” source or form of obligation to obey the law does not obtain where the injustice of the law is that it promotes something which ought never to be done (forbidden by divine law). Later he speaks similarly of unjust judgments of courts (for “the sentence of the judge is like a particular law for a particular case”: II-II, q. 67, a. 1c): e.g. II-II, q. 69, a. 4c, mentioning again scandalum and turbatio. See also II-II, q. 70, a. 1 ad 2 (the obligation de jure naturali to keep a secret may prevail over human law compelling testimony).