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THE PROBLEM OF UNJUST LAWS

CHARLES E. RICE*

John Finnis has contributed most significantly to our understanding of how "practical reasonableness"¹ has affected creation and evaluation of human law. The main objective of a theory of natural law is to show how sound laws are to be derived from principles based on reason. It is true, as Finnis points out, that "the affirmation that 'unjust laws are not law' . . . is [generally] a subordinate theorem" of natural law theory.² Nevertheless, the experience of the past half century requires that we examine seriously, as Finnis has, the moral obligation of the unjust law.

The Nazi crimes before and during World War II contributed to a postwar revival of natural law thinking, reflecting the phenomenon that the natural law, though often considered moribund, enjoys renewed adherence in times of crisis. This revival prevailed in the German courts as well as in other countries for a few years after World War II. Today, following another period of obscurity, natural law thinking is on the rise again. In America, the "just war" theories espoused by the opponents to the Vietnam War contributed to this development. Another catalyst appears to be the legalization of abortion. The legal prerequisite to abortion, apparently, is the simple declaration that the fetus is a nonperson, reasoning strikingly similar to that employed by the Nazi positivists. If a nation's constitution regards innocent human beings as nonpersons, and, therefore, potentially subject to destruction at the discretion of others, the ultimate appeal against that depersonalization must be to a law higher than that constitution. In this context, jurisprudence has correctly been termed an exercise in "Ultimatology."³ In every legal system, there must be an ultimate criterion for the legitimacy of law. Thus, in a real sense a god must exist in every legal system. The god will take the form

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¹ J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 3 (1980) [hereinafter cited as FINNIS].

² *Id.* at 351.

³ Barret, *A Lawyer Looks at Natural Law Jurisprudence*, 23 *AM. J. OF JURIS.* 1, 9 (1978).

of a spiritual entity or the state. If the state does not recognize a standard of right and wrong higher than itself, higher than the will of the people, and higher than any other human standard, then the state itself will become, in a sense, the ultimate god.

In this century, we have suffered from a lack of serious expositions of the reasoned foundations and workings of the natural law. Finnis' *Natural Law and Natural Rights* will help to remedy that problem. A useful part of Finnis' analysis is his response to the question, "[h]ow does injustice . . . affect the obligation to obey the law."⁴ Finnis correctly emphasizes that a law's injustice does not necessarily deprive that law of all legal validity even though its injustice may deprive it of moral obligation. The injustice of a law may be argued to deprive that law of obligatory power in the "intrasystemic sense," in which, for example, the Constitution itself may incorporate standards of justice. More specific examples are the concepts of due process of law and equal protection under the law embodied in the fourteenth amendment.⁵ If the question as to the obligation of a law involves no higher inquiry than whether the law is constitutional, then a decision on this issue by the highest court will authoritatively settle the matter. Therefore, "it is idle to go on asking the question in this sense . . . 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."⁶ Thus, President John F. Kennedy opposed the efforts of those who sought to reverse the Supreme Court decisions outlawing prayer in public schools, decisions claimed by some to be unjust. The President stated: "I think it is important for us, if we are going to maintain our constitutional principles, that we support the Supreme Court decisions, even though we may not agree with them."⁷ Similarly, the United States Commission on Civil Rights prefaced its report on abortion with this disclaimer:

The Commission therefore takes no position on the moral or theological debate which surrounds the issue of abortion. . . . The commission's sole position is its affirmation and support of each woman's "constitutional right" as delineated by the Supreme Court.⁸

This limited view of the question of legal obligation is constitutional positivism. The Supreme Court has interpreted the fourteenth amendment and other constitutional provisions to embody various natural rights and principles of fairness. These rights, however, are protected only be-

⁴ FINNIS, *supra* note 1, at 354.

⁵ See *id.* at 354-57.

⁶ *Id.* at 357.

⁷ U.S. COMMISSION ON CIVIL RIGHTS, CONSTITUTIONAL ASPECTS OF THE RIGHT TO LIMITED CHILDBEARING 79 (1975).

⁸ *Id.* at 1.

cause the Court chose to find them in the Constitution. Their protection is not based on the fact that they are *above* the Constitution and are binding whether or not they are found in the Constitution. Rather, such natural rights are protected only if they are found at least implicitly in the Constitution. If the Constitution is interpreted by the Supreme Court to exclude one of those rights, there is no further appeal. An uncritical reading of Supreme Court opinions on issues of due process in criminal procedure and other matters might lead one to think that the Court recognizes a higher natural law. The natural law, however, is applied only to the extent that it is determined to exist in the Constitution itself. George Mason might well be ridiculed if today he asserted the argument he first posited in the 1772 case of *Robin v. Hardaway*:⁹ "[n]ow all acts of legislation apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God; whose authority can be superseded by no power on earth."¹⁰

Another manner in which Finnis examines the question whether the injustice of a law affects the obligation to obey it arises when a nation's highest court has ruled that an allegedly unjust law is not unjust or, if unjust, that it is still binding law.

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?¹¹

The Finnis analysis is particularly strong on this point. He convincingly rejects the argument by the "positivists," that the question belongs not in jurisprudence but in some other discipline such as political philosophy or ethics.¹² On the contrary, Finnis states, "the principles of practical reasonableness and their requirements from one unit of inquiry which can be subdivided into 'moral,' 'political,' and 'jurisprudential' only for a pedagogical or expository convenience which risks falsifying the understanding of all three."¹³ The positivist, however, will respond: If people could choose which laws they will regard as moral and therefore obey, the system will fall apart. It will be a legal Disneyland of eclecticism. This is one of the strongest practical arguments made against the doctrine of natural law and Finnis responds to it convincingly. He begins his response by

⁹ 1 Jefferson's Va. Rep. 109 (1772).

¹⁰ *Id.* at 114.

¹¹ FINNIS, *supra* note 1, at 357 (emphasis in original).

¹² *Id.* at 357.

¹³ *Id.* at 359.

noting 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."¹⁴ There is no license to exalt at will one's own judgment above that of authority. Nevertheless, Finnis clearly states:

Therefore, if the ruler 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.¹⁵

An otherwise just law enacted for the common good, however, is not "deprived of its moral authority by the fact that the act of enacting it was rendered unjust by the partisan motives of its author."¹⁶ Furthermore, Finnis applies a principle of "standing to sue" when he concludes that "the distributive injustice of a law [does not exempt] from its moral obligation those who are *not* unjustly burdened by it."¹⁷

The above criteria enunciated by Finnis operate to qualify the principle that "an unjust law is no law," thus preventing the natural law from creating the means by which public authority and the common good might be undermined. The moral obligation to obey the law is a serious one and it can be ignored only after serious reflection and only for weighty reasons. As a West German court said in 1947, "[w]henver the conflict between an enacted law and true justice reaches unendurable proportions, the enacted law must yield to justice, and be considered a 'lawless law.'"¹⁸ Finnis adheres to the classical position that an unjust law is lacking in moral obligation, but he notes that it may still be "legally valid" or "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.¹⁹ This may be no more than a recognition of the reality that a regime which enacts an unjust law may retain the power to enforce it and that the populace may recognize it as a law despite its injustice. As

¹⁴ *Id.*

¹⁵ *Id.* at 359-60 (emphasis in original).

¹⁶ *Id.* at 360 (emphasis in original).

¹⁷ *Id.* (emphasis in original).

¹⁸ Von Hippel, *The Role of Natural Law in the Legal Decisions of the German Federal Republic*, 4 NAT. L.F. 106, 111 (1959) [hereinafter cited as Von Hippel].

¹⁹ FINNIS, *supra* note 1, at 360-61.

Finnis notes, an unjust law may still be a "de facto" law.²⁰ Finnis echoes Aquinas when he notes that one may be required to obey even an unjust law to the extent that is "necessary to avoid bringing 'the law,' as a whole, 'into contempt.'"²¹ Finnis clarifies this "collateral" obligation to obey the law stating that it may arise from varied circumstances but notes Aquinas' point that this obligation "does not obtain where the injustice of the law is that it promotes something which ought never to be done (forbidden by divine law)."²²

How might this be applied in practice? Let us take a common example. What should an American judge do when a father asks him to enjoin the mother from aborting their unborn child? The Supreme Court has stated that a woman has a constitutional right to abort her unborn child. The father, whether married to the mother or not, may not interfere.²³ Is the American judge morally bound to apply the Supreme Court's edict and permit the abortion to proceed? Does he have the moral right to do so? Should he deny the injunction to the father and perhaps be content with an expression in his written opinion that he wishes the Supreme Court would reverse its position on abortion? Should he state his own position, issue the injunction, and let an appellate court reverse him? In short, should he refuse to enforce the rulings of the Supreme Court perhaps even at the risk of losing his job?

We are not discussing the question whether the judge *should* view the Supreme Court's abortion ruling as unjust. The issue is whether a judge who is convinced that the laws are unjust has a moral right or duty to refuse to enforce them. As Finnis shows, the answer cannot be found by merely examining the Constitution or the opinions of the Supreme Court.²⁴ Indeed, the Court's interpretations of the Constitution offer no solace to the judge who perceives abortion as intrinsically unjust.

If positivism is the controlling jurisprudence, the unborn child does not have much chance. A half century ago, the acceptance of positivism disarmed those who should have protested the early stages of the Nazi depersonalization of the Jews. As Gustav Radbruch stated "[s]uch an attitude toward the law and its validity [i.e., positivism] rendered both lawyers and people impotent in the face of even the most capricious, criminal or cruel of the laws."²⁵

The American legal system can hardly be equated with that of Nazi Germany. In its overall character, the American system is just and legiti-

²⁰ *Id.* at 367 (citing P.T. GEACH, *THE VIRTUES* 128 (1977)).

²¹ *Id.* at 361.

²² *Id.* at 360 n.6.

²³ *See, e.g.,* *Planned Parenthood v. Danforth*, 428 U.S. 52, 69-70 (1976).

²⁴ FINNIS, *supra* note 1, at 275-76.

²⁵ Von Hippel, *supra* note 18, at 110.

mate. With respect to the issue of the inviolability of innocent life, however, the theory and practice of the American state have a disquieting similarity to those of Germany in the 1920's and 1930's. In both nations, the rejection of the natural law as a limit on the power of the state contributed to a ready acceptance by the courts of policies hostile to the sanctity of life. In recent years, American courts and law schools have uncritically accepted positivistic premises. It is fair to note that the rejection of natural law proved in Germany to be an indispensable prerequisite to the abuses that followed the Nazi accession to power. During the Weimar Republic, "the greatest obstacle to the recognition of natural law was the doctrine of positivism which equated right and might to begin with and, hence, assigned to the legislator full discretion as to the detailed content or provisions of the law, to the point of injustice, indeed to the point of complete, high-handed arbitrariness."²⁶ A 1927 decision of the German Supreme Court quoted by the German scholar Ernst Von Hippel, makes this quite clear: "[t]he legislator is absolutely autocratic, and bound by no limits save those he has set for himself either in the constitution or in some other laws."²⁷ With the assumption of power by Hitler, who believed in the closest collaboration between the state and the judiciary, the identification of legality with right became complete.

The value of John Finnis' book is its rehabilitation of reason and natural law as respectable topics for discussion and as inescapable criteria for the legitimacy of any legal system.

If American lawyers and judges are to give serious consideration to the problem of the unjust law, whether in the abortion context or elsewhere, they must first overcome the tendency to consign questions of morality and religion to a private realm divorced from law and policy. This tendency can be overcome by increasing the conviction that objective moral principles are accessible to human reason. The Finnis book will be of great value in this regard. "What truly characterizes the [natural law] tradition," says Finnis, "is that it is not content merely to observe the historical or sociological fact that 'morality' thus affects 'law,' but instead seeks to determine what the requirements of practical reasonableness really are, so as to afford a rational basis for the activities of legislators, judges, and citizens."²⁸ When lawyers and judges once again discuss what the law cannot do as well as what it should do, we will be on the way to a solution of the problem of the unjust law.

One of the main virtues, however, of the Finnis book is that it does not rule God out of the equation. Finnis does a masterful job of discussing "practical reasonableness," but acknowledges that natural law reason-

²⁶ *Id.* at 109.

²⁷ *Id.*

²⁸ FINNIS, *supra* note 1, at 290.

ing stops at the common good. In order to account for our obligation "to favour [the] common good" we need God.²⁹ Natural law reasoning alone is not sufficient for a "coherent plan of life."³⁰ At this juncture, it is significant to note that Thomas Aquinas himself "was a writer not on ethics alone but on the whole of theology."³¹ His jurisprudence is logical only in the context of his theology. Today, the divergence of the human law from reason is so pronounced on issues such as abortion that a greater corrective measure than mere reason is necessary. In the face of the dilemma presented by the anti-life policies of the humanistic state we need to offer some higher motivation. As Finnis acknowledges, even "Plato and Aristotle seem to claim a certain experiential access to the divine."³² Finnis indicates his belief that some revelation is necessary if we are to know God as "a guide that one should follow, or a guarantor of anyone's practical reasonableness."³³ It is difficult to see how one can coherently theorize with respect to a natural law without attempting to identify the lawgiver. Yet, much of what passes for natural law theorizing today is horizontal because it assumes that the reason of each is its own ultimate norm. To Finnis' credit, he does not shrink from the question of God. His discussion of "practical reasonableness" would provide the judge in our hypothetical abortion case with a reasoned justification for intervening in order to prevent the abortion. Finnis' reference to God as the source of that natural law is that justification.

One further question, however, lies beyond Finnis' excellent treatment of the unjust law. He acknowledges that inevitably there are many controversies regarding the meaning of "practical reasonableness," including "many moral questions which can only be rightly answered by someone who is wise, and who considers them searchingly."³⁴ If we are to rely upon the natural law as a justification for refusing to obey a law considered to be unjust, there ultimately must be some acknowledged arbiter of the meaning of that natural law. Without such an arbiter, the reliance upon a natural law will tend to become a mere subjectivism. Finnis recognizes that the Roman Catholic Church has been the "principal bearer" in our civilization "of any explicit theory about natural law."³⁵ This function of the Church is not a relic of medievalism. In fact, the Church's claim of being the guardian of the meaning of the natural law is more compelling today than ever. The Second Vatican Council asserted that "the Church

²⁹ *Id.* at 406-07.

³⁰ *See id.* at 103.

³¹ *Id.* at 35.

³² *Id.* at 394.

³³ *Id.* at 398.

³⁴ *Id.* at 30.

³⁵ *Id.* at 124.

is, by the will of Christ, the teacher of the truth. It is her duty to . . . declare and confirm by her authority those principles of the moral order which have their origin in human nature itself."³⁶

It is evident that the natural law position is consistent with the teaching Church—the Pope and the bishops in union with him—acting as the moral arbiter of the application of the secondary principles of that law. Without an acknowledged arbiter, natural-law theory will become entrenched in an endless debate among advocates claiming no authority beyond the persuasive power of their own reasoning. This theorizing will become a matter of mere consensus and consequent irrelevance. Indeed, the basic recognition of the natural law as a standard of reason higher than human law is light years ahead of positivism. John Finnis has contributed decisively to our ability to articulate the need for the acknowledgment of a lawgiver as the source of that natural law.

³⁶ *Dignitatis Humanae*, DECLARATION ON RELIGIOUS LIBERTY ¶ 14 (December 7, 1965).