IN DEFENSE OF FINNIS ON NATURAL LAW LEGAL THEORY

Michael Baur

INTRODUCTION

The term "natural law" is spoken in many ways, but two of the most common ways in which the term is used have to do with "natural law" as a *legal* theory (henceforth NLLT) on the one hand, and "natural law" as a *moral* theory (henceforth NLMT) on the other hand. According to Michael S. Moore, a NLMT is a moral theory which holds that "there are objective moral truths"; by contrast, a NLLT is a legal theory which holds that "the truth of any legal proposition necessarily depends, at least in part, on the truth of some corresponding moral proposition(s)."[1] Philip Soper characterizes the distinction between NLMT and NLLT, and the relationship between them, somewhat differently. For Soper, a NLMT is a moral theory which holds "that moral principles are objectively valid and discoverable by reason"; by contrast, a NLLT is a legal theory which rejects the legal positivist's claim that "no necessary connection exists between law and morality"; the natural law legal theorist "denies that a sharp separation between these concepts [the concept of law and the concept of morality] is possible."[2] Notice already the subtle difference between Moore and Soper. While Moore characterizes NLLT in terms of a dependence-relation between the truth of legal propositions and the truth of moral propositions, Soper characterizes NLLT in terms of the alleged non-separability of legal and moral concepts.[3] According to

[1]Michael S. Moore, "Law as a Functional Kind," in *Natural Law Theory: Contemporary Essays*, edited by Robert P. George (Oxford: The Clarendon Press, 1994), pp. 189-190.

[2] Philip Soper, "Some Natural Confusions about Natural Law," 90 *Mich. L. Rev.* 2393, 2394-2395 (1992).

[3] Jules Coleman expresses positivism's "separability thesis" as follows: "The separability thesis is the claim that there is no necessary connection between law and morality. That claim does express a tenet of positivism." See Jules Coleman, *The Practice of Principle: In Defence of a Pragmatic Approach to Legal Theory* (Oxford: Oxford University Press, 2001), p. 104, n. 4. But note also that some theorists who consider themselves legal positivists have denied the "separability thesis," and thus have held that the truth of legal positivism does not, strictly speaking, depend on the truth of the separability thesis. For an example of this, see the work of Joseph Raz, who argues in favor of

NLLT as characterized by Moore, no legal proposition can be true if it is not somehow dependent on a true moral proposition or propositions; thus for Moore, one cannot be a natural law legal theorist if one is not also a natural law moral theorist. For Moore, both the natural law moral theorist and the natural law legal theorist are necessarily committed to the truth of at least some moral propositions. By contrast, Soper's characterization of NLLT allows him to hold that one can be a natural law legal theorist without necessarily being a natural law moral theorist. As Soper contends, "one might concede a connection between law and morality yet deny that the morality with which law is connected is that endorsed by the natural law moral theorist."[4]

These brief introductory observations should make clear that the grounds of the distinction between NLMT and NLLT, and the nature of the conceptual relation between the two, are far from clear and obvious. Even amongst those who regard themselves as committed "natural law" theorists in *both* senses of the term, there is widespread disagreement on what it is that constitutes a NLMT or a NLLT, and on how the relationship between NLMT and NLLT is to be characterized. My aim in this paper is not to address the rather complex and multifarious issues appurtenant to the nature of NLMT and NLLT and the relationship between them. My aim is simply to give a brief account of Finnis's NLLT, primarily as it is presented in *Natural Law and Natural Rights* (henceforth *NLNR*), and then defend Finnis's NLLT against the recent legal positivist criticism made by Matthew H. Kramer.

FINNIS ON NATURAL LAW LEGAL THEORY

Just as one can—as we have done above—distinguish between NLLT and NLMT, so too one can distinguish *within* NLLT itself between two important issues in legal theory or the philosophy of law. One issue (which we might call the "nature of law" issue) has to do with the grounds

---

legal positivism, but against the "separability thesis." Raz writes: "The separability thesis is ... implausible.... It is very likely that there is some necessary connection between law and morality, that every legal system in force has some moral merit or does some moral good even if it is also the cause of a great deal of moral evil." Joseph Raz, *Ethics in the Public Domain* (Oxford: The Clarendon Press, 1994), p. 211.

[4] Soper, *op. cit.*, at 2395.

and nature of legality or legal validity: what is it that makes a rule or directive legally valid, or a genuine instance of law? The other issue (which we might call the "moral obligation" issue) has to do with the (alleged) moral obligation to obey the law: assuming that a particular rule or directive is legally valid (or a genuine instance of law), does there exist (and why does there exist) a moral obligation to obey it? Not surprisingly, some natural law legal theorists have claimed that "laws necessarily obligate to be laws."[5] Along these lines, Michael Moore—claiming an Augustinian heritage for his view—has argued that "the justness of a norm is *necessary* to its status as law,"[6] so that unjust norms or norms that fail to obligate morally are not even valid as law.[7] But one can contest this claim; one can hold that a particular rule or directive may be valid as law, even if it is unjust or does not obligate morally. This, indeed, is the position presented by Finnis in *NLNR*, and Finnis argues that he can hold this position while still remaining a natural law legal theorist.

Finnis famously challenges what has become a relatively common interpretation of the medieval (and Thomistic) principle that "an unjust law is not a law [*lex injusta non est lex*]." According to Finnis, Thomas Aquinas and the tradition to which Aquinas belonged never propounded the unqualified statement that an unjust law is not a law at all. Indeed it is quite easy to see that such a statement—if taken literally or without qualification—is "pure nonsense" or "flatly self-contradictory";[8] after all, one cannot coherently assert that the very same thing (in this case, unjust law) is both a law and not a law at the same time and in the same respect. So how does Finnis interpret this famous medieval principle, and how does this interpretation square with Finnis's understanding of his own contribution to NLLT?

[5] Moore, *op. cit.*, at 224.

[6] *Ibid.* at 198.

[7] *Ibid.* at 224. But notice that one can draw a further distinction here, namely a distinction between the justness of a law and the capacity of that law to command obedience from a moral point of view. A law—considered on its own terms or considered in isolation—may be relatively just but it may nevertheless fail to obligate (or it may fail to command obedience from a moral point of view) because of some further relevant moral consideration(s).

[8] John Finnis, *Natural Law and Natural Rights* (Oxford: The Clarendon Press, 1980), p. 364. Henceforth this text shall be indicated by the abbreviation *NLNR*.

For Finnis, the medieval principle that "an unjust law is not a law" is not to be taken literally but is best understood as a formula meant to dramatize an important point about the relationship between legal validity and moral validity. The point is that unjust or iniquitous laws do not count as law in the 'central' or 'focal' sense of the term, even though they may be genuine laws and may possess genuine legal validity. On Finnis's reading, Thomas Aquinas and the tradition to which he belonged made use of the principle in order to illustrate the point that unjust laws can indeed count as valid laws, but only in a secondary, derivative, or marginal sense. Thus for Finnis, the medieval tradition's adherence to the principle that "unjust laws are not laws" actually demonstrates the tradition's fundamental agreement with what has come to be identified as a central claim of legal positivism, namely that the existence of law is one thing, and its moral merit (or justness or moral worthiness) is quite another thing. Understood properly, the principle that "an unjust law is not a law" is consistent with the claim that morally iniquitous rules and directives actually can and do exist as perfectly valid laws:

> Far from 'denying legal validity to iniquitous rules', the tradition explicitly (by speaking of 'unjust *laws*') accords to iniquitous rules legal validity, whether on the ground or in the sense that these rules are accepted in the courts as guides to judicial decision, or on the ground and in the sense that, in the judgment of the speaker, they satisfy the criteria of validity laid down by constitutional or other legal rules.[9]

In addition to offering what some may consider to be an idiosyncratic interpretation of the famous medieval principle ("an unjust law is not a law"), Finnis also claims in *NLNR* that the principle—as interpreted by him—is fundamentally correct from a jurisprudential point of view. Thus Finnis can agree with the legal positivist claim that: "The identification of the existence and content of law does not require resort to any moral argument."[10] But by interpreting and endorsing the medieval principle in this way, has Finnis conceded too much to the legal positivist, and has he

[9] *Ibid.* at 365.

[10] See John Finnis, "The Truth in Legal Positivism," in *The Autonomy of Law: Essays on Legal Positivism*, edited by Robert P. George (Oxford: The Clarendon Press, 1996), p. 204.

undermined his own claim to be contributing to a genuinely "natural law" version of legal theory?[11] It will not be possible here to present a full defense of what is required for a genuinely "natural law" version of legal theory; nor will it be possible here to present a complete justification of Finnis's own claims on behalf of NLLT. My aim is simply to defend Finnis against the positivist critique made by Matthew H. Kramer. And in order to present this defense, it will be necessary first to say a few more words about Finnis's NLLT.

Crucial to Finnis's attempt at presenting a defensible NLLT is his distinction between what he calls the 'focal' or 'central' meaning of the concept of law, and secondary, peripheral, marginal, or derivative meanings. By drawing this distinction, Finnis argues, we can "differentiate the mature from the undeveloped in human affairs, the sophisticated from the primitive, the flourishing from the corrupt, the fine specimen from the deviant case...."[12] And just as—following Aristotle—we can observe that there are 'central' and 'peripheral' cases of what we call 'friendship',[13] so too we can observe that there are 'central' and 'peripheral' cases of what we call 'law'. Thus to concede to the legal positivist that there may exist legally valid rules which are nevertheless morally unjust or iniquitous is not to concede that legal positivism is the correct view of the very nature of law. For while instances of unjust law are indeed genuine instances of law, it must be remembered that they represent the merely 'peripheral' or 'marginal' cases of law. They do not adequately represent what it is that constitutes law in its essential core. As Finnis puts it, they represent "watered down versions of the central cases" of law.[14] So while such peripheral, marginal, or watered-down versions of law certainly are instances of law, they are instances of law only because they instantiate—to an imperfect and lesser degree—the traits or principles that characterize the central cases of law and which properly belong

[11] Some thinkers believe that Finnis has, indeed, conceded too much to the legal positivist. See Philip Soper, "Legal Theory and the Problem of Definition," 50 *U. Chi. L. Rev.* 1170 (1983). See also Seow Hon Tan, "Validity and Obligation in Natural Law Theory: Does Finnis Come Too Close to Positivism?" 15 *Regent U. L. Rev.* 195 (2002).

[12] Finnis, *NLNR*, pp. 10-11.

[13] See Aristotle, *Nicomachean Ethics*, Book VIII, Chapters 3-4.

[14] Finnis, *op. cit.*, at 11.

to the very nature of law. Giving an account of the nature of law on the basis of these merely peripheral cases would be quite like explaining the nature of friendship by reference to the entirely mercenary interactions of two business partners (whose friendship is merely a friendship of utility, as Aristotle would call it).[15] For Finnis, it is the central cases that provide the correct standard or point of reference for apprehending the true nature of law, and thus (derivatively) for explaining any watered-down or diluted or deviant instantiation of law as well.

Now in addition to insisting on the crucial distinction between the 'focal' and 'peripheral' meanings of the concept of law, Finnis also emphasizes the importance of the "internal point of view" for an understanding of law. Following a ground-breaking insight of the legal positivist H.L.A. Hart,[16] Finnis holds that any feasible account of the nature of law must take into consideration the concerns and evaluations of those who have an "internal point of view" with respect to the law, that is, those who do not merely "record and predict behavior conforming to rules," but rather who "*use* the rules as standards for the appraisal of their own and others' behaviour."[17] But going beyond Hart and his positivist followers, Finnis also argues that taking account of this "internal point of view," and doing so with respect to law's central cases, should lead the legal theorist to realize that an adequate understanding of the law cannot prescind from a concern for answering the real practical and moral questions that the legal actors themselves regard as important and seek to answer when they participate in the making and the following of law in its central cases. For Finnis, the legal theorist concerned with identifying the central cases and the focal meaning of the law will have to be concerned about discerning the truth of practical, moral propositions, since the "theorist cannot identify the central case of that practical viewpoint which he uses to identify the central case of his subject-matter, unless he decides what the requirements of practical reasonableness really are...."[18] So for Finnis, a viable NLLT will recognize that the law in its central cases seeks to arrive at cor-

[15] Aristotle, *op. cit.*

[16] See especially H.L.A. Hart, *The Concept of Law* (Oxford: The Clarendon Press, 1992), pp. 86-88.

[17] Finis, *op. cit.*, at 12.

[18] *Ibid.* at 16.

rect answers to real moral and practical problems, and so the natural law legal theorist will also have to be concerned—as the legal participants themselves are concerned—with arriving at correct answers to real moral and practical problems. In short, for Finnis, a viable NLLT must be linked to a NLMT:

> A sound theory of natural law is one that explicitly ... 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 theory 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.[19]

Now with his account of 'central' cases and the 'focal' meaning of law, and his emphasis on the 'internal point of view', Finnis can credibly claim that law—when properly understood—is necessarily a moral concept, or a concept pregnant with moral meaning. This is because the law for Finnis represents a solution to a genuine practical and moral problem, namely the problem of coordinating the various ways in which individuals within a complete community can intelligently and harmoniously pursue the various goods at which they aim, and in so doing realize not only their own individual goods but also the common good of the community. Finnis acknowledges that there can be many senses attached to the 'common good,' but the sense that is of most concern to a NLLT is the sense of the common good as "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 (positively and/or negatively) in a community."[20] Now according to Finnis, a community's coordination problems can be solved, and its common good realized, in only one of two ways: either all members of the community reach unanimous agreement on the commitments, orientations, projects, methods, and pri-

[19] *Ibid.* at 18.

[20] *Ibid.* at 155.

orities that the community ought to adopt in securing its common good, or else the members of the community establish a proper authority in whom will be vested the rightful power and means for solving the community's coordination problems on its behalf. Since unanimity is "far beyond the bounds of practical possibility,"[21] Finnis argues, the only practicable and reasonable solution to a community's coordination problems will be the establishment of a valid authority; and in the case of a complete community, this means a valid legal authority and legal regime. Because law "shapes, supports, and furthers patterns of co-ordination,"[22] it enables a complete (legal) community to achieve the common good for itself. With this, Finnis can credibly claim to be proffering a genuinely "natural law"version of legal theory; for on Finnis's account, law—when understood in its focal sense and from an internal point of view—is necessarily bound up with a moral concern for the common good. Not surprisingly, Finnis's formal definition of the law—while lacking the quotable pithiness of Aquinas's more famous definition[23]—emphasizes the essential connection between lawfulness and a moral concern for the common good. For Finnis, the law consists in:

> ... rules made, in accordance with regulative legal rules, by a determinate and effective authority (itself identified and, standardly, constituted as an institution by legal rules) for a 'complete' community, and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the community's co-ordination problems (and to ratifying, tolerating, regulating, or overriding co-ordination solutions from any other institutions or sources of norms) for the common good of that community, 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

21 *Ibid.* at 233.

22 *Ibid.* at 267.

23 See Thomas Aquinas, *Summa Theologica*, I-II, Q. 90, a. 4: "Law is nothing other than an ordinance of reason for the common good, made by the one who has care of the community, and promulgated."

> law both amongst themselves and in their relations with the lawful authorities.[24]

In addition to asserting a necessary conceptual connection between morality and law (understood in its focal sense), Finnis also argues that there is a generic and presumptive (though defeasible) moral obligation to obey the law. The reason why there is such a moral obligation is that the law provides the best means for solving a complete community's coordination problems and achieving the common good for that community; and since the achievement of the community's common good is morally obligatory, the maintenance of the best or only means for achieving that common good is also morally obligatory.[25] Of course, Finnis also holds that there can be unjust laws which fail to live up to the nature of law (in its focal sense) and thus which fail to obligate. Thus the generic moral obligation to obey the law is presumptive but defeasible. But law understood in its focal meaning and from an internal point of view bears a necessary connection to a moral good, which is the community's common good. Furthermore, Finnis argues that even unjust laws may continue to obligate—in spite of their unjustness—since a refusal to obey the law may bring the law into contempt, and thereby destroy the moral good that is lawfulness itself.[26]

KRAMER ON NATURAL LAW LEGAL THEORY

In the face of the NLLT that Finnis presents, the legal positivist Matthew H. Kramer denies that law is a moral concept or a concept pregnant with moral meaning, and—in consequence of this—denies that there is a generic and presumptive (even if defeasible) moral obligation to obey the law. While acknowledging with Finnis that legal discourse is necessarily normative, Kramer argues that the normativity of legal discourse need not be tied to any moral concerns or to any concerns for the com-

[24] Finnis, *op. cit.*, at 276-277.

[25] For a helpful account of Finnis's reasoning about the generic and presumptive moral obligation to obey the law, see S. Aiyar, "The Problem of Law's Authority: John Finnis and Joseph Raz on Legal Obligation," 19 *Law and Philosophy* 465 (2000).

[26] Finnis, *op. cit.*, at 361-362. Thomas Aquinas makes a similar point in the *Summa Theologica*, I-II, Q. 96, a. 4.

munity's common good, but may be linked instead only to the prudential, self-interested, and perhaps entirely nefarious concerns of the legal officials themselves. In making this claim, Kramer is careful to point out that—on his account—a norm need not be a moral norm and need not be followed for moral reasons. "A norm is any general directive that lays down a standard with which conformity is required and against which people's conduct can be assessed."[27] Understood in this way, a legal regime may enforce norms and the citizens may adhere to such norms for entirely self-interested and prudential (perhaps even nefarious) purposes. Thus for Kramer, the use of normative language in legal discourse may or may not have anything to do with any concern for the common good or the demands of practical reasonableness or morality. While there may be a connection between legal requirements and practical reasonableness (or morality) in a benevolent legal regime, such a connection is merely contingent and does not pertain to the very essence of law, even when law is understood in its focal sense. Kramer writes:

> To be sure, no one should doubt that benevolent legal regimes are characterized by such a function [social coordination for the sake of the common good]. But in certain other *full-fledged* legal systems, the paramount function resides in the sustainment of the officials' oppressive dominance and the pursuit of their sundry flagitious objectives.... The internal perspective of the officials is oriented toward the accomplishment of that function and is thus entirely prudential in its tenor. Yet, in connection with that very function, there will be strong reasons for those officials to endow their regime with the essential characteristics of law.... When the evil officials act on those reasons, their regime in all its monstrousness is a straightforward instance (a *central* case) of legal governance.[28]

What is crucial here is Kramer's claim that a legal regime whose only purpose is to reinforce the power of self-interested and perhaps even deeply wicked officials can and should be regarded as a 'central case' of a legal regime, or a 'full-fledged' instance of law in its focal sense; and

[27] Matthew H. Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (Oxford: Oxford University Press, 1999), p. 80.

[28] *Ibid.* at 237-238.

correspondingly, that benevolent legal regimes (regimes aimed at solving social coordination problems for the sake of a common good) have no unique claim to be 'central cases' or to exemplify law in its 'focal' sense. Thus from Kramer's point of view, Finnis is wrong to hold that the concept of law in its focal sense is a concept pregnant with moral meaning, and equally wrong to hold that there is a generic and presumptive moral obligation to obey the law as such.

Now as Kramer points out, a response by Finnis that simply re-asserts the 'true' meaning of the concept of law in its focal sense, or that defends the 'central' purpose of law as promotive of the common good, would be unhelpful and question-begging.[29] For the very thing at issue between Kramer as a legal positivist and Finnis as a natural law legal theorist is the meaning of the concept of law in its focal sense and whether this meaning is necessarily pregnant with moral significance. For Kramer, law in the focal sense of the term may or may not have anything to do with morality, and the features that necessarily belong to law in its focal sense (or to central cases of law) are features that pertain only to the (1) generality and (2) durability of the norms contained within a putative system of law, and the (3) regularity or consistency with which those norms are enforced.[30]

Now is there any way to rebut Kramer on Finnis's behalf without begging the very questions through which Kramer poses his challenge to NLLT? At first glance, it might seem possible to rebut Kramer by arguing that the generality, durability, and regular enforcement of legal norms—three features which Kramer admits are intrinsic to the nature of law in its focal sense—point to the necessarily (even if implicitly) moral purpose or function of the law. After all, one might ask, why must the norms of a legal regime be general and durable, and enforced with regularity or consistency, if not for the moral purposes of furthering the common good, securing fairness, and respecting the dignity of persons who are subject to the law? In the face of such a natural law rejoinder, Kramer is quite willing to acknowledge that the sustenance of these aspects of the rule of law (generality, durability, and regularity) *might* be motivated—

[29] *Ibid.* at 238.

[30] *Ibid.* at 95-96.

especially in a benevolent legal regime—by moral concerns. But, Kramer insists, such moral concern or purposiveness is not an *intrinsic* feature of law in its focal sense; and in an evil legal regime, officials might insist for entirely self-interested and nefarious reasons that legal norms be general, durable, and consistently enforced. In other words, Kramer argues that moral purposiveness is only an accidental and not an essential feature of law in its focal sense. Most crucially, Kramer insists that a thoroughly evil legal regime, so long as it sufficiently exhibits the features of generality, durability, and regularity of enforcement (even if these features are maintained solely in order to serve the self-interested, unjust, and nefarious aims of the legal officials themselves) will qualify (just as much as a benevolent legal regime displaying the same three features) as *a central case of law* and will represent *law in its focal sense.* Indeed, Kramer goes so far as to argue that a Mafia-like criminal syndicate "that exerts a comprehensive reign over the populace of some territory via norms that are general and durable and regularly applied . . . should be designated as a legal regime" in the focal sense of the term.[31] The question of whether a particular regime should or should not be designated as a 'legal' regime in the focal sense of the term depends entirely on the degree of generality, durability, and regularity of enforcement displayed in the regime's directives, and not on the regime's moral worthiness, or even its approximation to moral worthiness or its claim to moral worthiness.

Now in furthering his case for legal positivism, Kramer explains that the regularity which necessarily belongs to a legal regime's enforcement of its norms should not be misunderstood as implying any sort of moral purpose (such as concern for fairness or respect for the citizens' capacity for self-determination). For Kramer, the regularity that is an integral and defining feature of what constitutes a 'legal system' in the focal sense might be sustained by legal officials solely for the self-interested, entirely nefarious purpose of reinforcing the citizens' incentives to obey. The purpose of such evil legal officials might be:

> ... to make clear that violations of applicable legal requirements will indeed trigger punishments and that punishments

[31] *Ibid.* at 97.

> are not inflicted on anyone who abstains from such violations. In emphasizing the connection between the breaching of duties and the incurring of penalties, the officials need not be motivated by a desire to establish that their rulings are fair. They may simply want to sustain people's incentives for conformity with the law's evil demands.... If people presume that they will often undergo penalties notwithstanding the lawfulness of their conduct, or if they presume that they will often escape penalties notwithstanding the unlawfulness of their conduct, then a crucial motivation for their adherence to the terms of wicked laws will have been undercut.[32]

Explaining this point further, Kramer argues:

> If a legal system is known to depart frequently from the terms of its own norms by punishing lawful conduct or by conniving at unlawfulness, then citizens' incentives for compliance with the norms will greatly diminish. Hence, given that wicked rulers will doubtless want their malevolent laws to operate effectively, they will have good grounds for insisting that the laws be enforced in accordance with the terms thereof. A policy of strict enforcement is what best sustains incentives for obedience. Thus law's continuousness [or durability] helps to ensure its regularity-which means one distinctive feature of law ... helps to ensure the existence of another indispensable feature.[33]

Kramer also acknowledges that legal officials sometimes announce and explain their legal decisions in language that seems to carry with it a justificatory (and thus implicitly moral) meaning. But once again, Kramer argues that the apparently justificatory language use by legal officials need not imply anything about *moral* justifications. Even in legal systems where publicly accessible explanations are rather common, there is nothing about such explanations that requires us to attribute any moral significance to them. Such explanations may be nothing more than another means (like the regularity of the enforcement of norms) by which

[32] *Ibid.* at 90-91.

[33] *Ibid.* at 96.

purely self-interested and evil legal officials seek to maintain their own power:

> Thus, faced with the task of providing strong inducements for people to behave in accordance with the prevailing legal norms, the officials who administer those norms in a malevolent regime are well advised to explain their decisions by reference to citizens' legal duties. Highlighting the correlations between nonfulfillment-of-duty and subjection-to-punishment is the means of promoting a pattern of incentives that will secure the efficacious functioning of a scheme of imperatives.[34]

It is at this point in his defense of legal positivism that a certain ambiguity enters into Kramer's account. The ambiguity has to do with the question of whether publicly accessible explanation (even granting *arguendo* that such explanation has no moral meaning or purpose) is a necessary or only contingent feature of law in its focal sense. Kramer is not entirely clear on the matter. On the one hand, he argues that legal officials would be "well advised to explain their decisions by reference to citizens' legal duties," thus suggesting that publicly accessible explanation is only a contingent feature of law in its focal sense. On the other hand, Kramer raises the possibility that such explanation by officials (again, where the explanation need not imply any essential connection to morality) might be a necessary and defining feature of law in its focal sense:

> ... even if we allow that publicly accessible explanations of official decisions are an integral feature of anything that counts as a full-fledged legal system, we should recognize that explanations need not be present as moral explanations. Both the actual purpose and the avowed purpose of the explanations can consist in the reinforcement of incentives for submission to evil dictates, rather than in the ascription of fairness to the decisions that apply those dictates.[35]

[34] *Ibid.* at 91.

[35] *Ibid.*

Here we can see Kramer wavering between two different propositions:

> *Proposition A:* "Publicly accessible explanations are not an integral feature of what counts as a legal system in the focal sense of the term."

> *Proposition B:* "Publicly accessible explanations are an integral feature of what counts as a legal system in the focal sense of the term, but the *actual* and *avowed* purpose of such explanations may have nothing to do with morality, and may pertain only to the reinforcement of incentives for the citizens' ongoing submission to the evil and self-serving dictates of the legal officials themselves."

In assessing the feasibility of the two possible propositions that Kramer might be endorsing here, it is important to keep in mind that the crucial question is not whether law in *any* sense of the term must involve publicly accessible explanations. The crucial question is whether law in its *focal* or *full-fledged* sense must involve publicly accessible explanations. And in what follows, I would to like to show that Kramer's position (whether it be represented by Proposition A or Proposition B) is not a feasible position regarding law in its *focal* sense.

If Kramer is taken to be asserting Proposition A, then his position is that a legal system which sufficiently displays the three integral features of law (generality, durability, and regularity in enforcement), but in which legal officials offer no publicly accessible explanation whatsoever for their directives, qualifies as a 'full-fledged' legal system or a legal system in the focal sense of the term. Such a legal system would be one in which the citizens are given no reasons whatsoever for complying with the directives of legal officials. Now of course, it is quite possible (and even likely) that citizens living under such a system would try to come up with reasons of their own (even if such reasons pertained only to their own entirely selfish interests) for complying with the directives of the system's legal officials. But it is also conceptually possible—on Kramer's account, if Kramer is taken to be asserting Proposition A—that citizens living under such a system might fail in their attempts to come up with reasons of their own for continued compliance. Even if the citizens are living under a system of social control where the norms of the system are general, durable, and consistently applied (thus qualifying the system as

a full-fledged legal system on Kramer's account), the citizens may nevertheless fail in their attempts to come up with reasons for their compliance. They may simply comply for no reason at all, and there is nothing in Kramer's account of law in its focal sense (assuming that Kramer is affirming Proposition A) to rule out this conceptual possibility. Indeed, the citizens living under such a system may not even seek to come up with reasons for their own compliance. They may simply comply without having any reasons and without even caring about having reasons. In such a case, the citizens' continued compliance in the face of the officials' unexplained norms would not differ in any theoretically significant respects from the continued compliance of a group of zombies that are subjected to (unexplained) directives which are general, durable, and applied with regularity. On Kramer's account (if he is asserting Proposition A), it would seem that a system of directives applied to a group of zombies (provided only that the norms implied by such directives were sufficiently general, durable, and consistently applied) would qualify as a legal system *in the focal sense*. Just as no explanation is needed on the part of the legal officials, so too—and correlatively—no understanding would be needed on the part of those who comply with the directives of such legal officials. On Kramer's account (if it includes Proposition A), a system of general, durable, and regularly applied norms that happened to elicit the continued compliance of a group of zombies (who comply, but not for any reason) would qualify as law *in its focal sense*.

Now if Kramer is asserting Proposition A, he might seek to defend his account against this *reductio ad absurdum* by adding an important further requirement to his notion of law in its focal sense. In order to distinguish the sort of compliance at work in a legal system from the reason-less compliance of a group of zombies, Kramer might acknowledge that law-abiding citizens—unlike zombies—at the very least *see themselves as having a reason or reasons* for complying with the directives of the legal system (no matter what the specific content of such reasons might be). But once Kramer allows this further requirement—as I believe he would have to, in order to present a credible account of what law is, *in its focal sense*—he would have already conceded enough to undermine his own position. For when citizens see themselves as having a reason or reasons for compliance with the directives of a legal system, they inevitably see

those reasons (no matter what the specific content of those reasons might be) as *good reasons*, all things considered. Of course, the citizens may be wrong in thinking that the reasons they have for continued compliance really are *good* reasons, all things considered. From the point of view of objective moral standards (assuming that there are objective moral standards), the citizens' reasons might be altogether bad or misdirected. But insofar as the citizens see themselves as having reasons for continued compliance, and insofar as their seeing themselves as having reasons is actually the cause or ground of their continued compliance (i.e., insofar as they actually *act on those reasons* and comply), it must be the case that the citizens see themselves as having *good* reasons, all things considered.[36] For if the citizens did not see themselves as having such *good* reasons, then their having of reasons (whatever those reasons might be) would not be the cause or ground of the citizens' continued compliance with the law (i.e., they would not *act on those reasons* and would not choose to comply). The only kinds of reasons that can serve as the cause or ground of the citizens' acting to comply with the law, are reasons that the citizens apprehend as *good* reasons, all things considered.

Now if this appeal to reasons (which the citizens take to be *good* reasons, all things considered) is the only way in which Kramer can endorse Proposition A and nevertheless present a credible account of law *in its focal sense* (one which distinguishes credibly between the compliance of zombies and the compliance of citizens under the law), then Kramer—I believe—must concede the relevant point here to Finnis as natural law legal theorist. For once again, the crucial point is not that the citizens actually *do* have (objectively, morally) good reasons for continuing to comply with the law. The crucial point is only that the citizens *see themselves* as having good reasons for doing so (no matter how mistaken they may be). But even this is enough to undercut Kramer's alternative legal

[36] Given the limited scope of this paper, I am unable here to present any extended justification of this claim. But for now, let it suffice to say that in making this claim, I take myself to be doing nothing other than endorsing two central Aristotelian claims: (a) all distinctively human actions are undertaken for the sake of achieving some good or some perceived good (*Nicomachean Ethics*, Book I, Chapter 1); and (b) the conclusion of a practical syllogism is not just a statement about what is 'good', but consists in some human action, and—conversely—all actions that are distinctively human (i.e., undertaken voluntarily and with reason) are the conclusions of practical syllogisms (*Nicomachean Ethics*, Book VIII, Chapters 1-3).

positivist' account. For even the *apparent* or *perceived* goodness of reasons held by citizens is enough to establish a crucial conceptual link between the citizens' ongoing *compliance* with the legal system (and thus its ongoing durability or continuousness) and the apparent or perceived *goodness* of what the legal system does. And as Kramer himself acknowledges, if a legal system's *being perceived* or *appearing* to be good is crucial to its being a legal system, then the concept of a legal system cannot—after all—be entirely separated from concepts that are pregnant with moral meaning.[37]

If I am correct here about the conceptual implications of Proposition A (and assuming that Kramer's positivistic account includes Proposition A), then the citizens' ongoing compliance with legal directives (and thus the durability of the legal norms under which they live) must be connected to their seeing themselves as *having reasons* for such compliance; and their seeing themselves as having reasons for such compliance amounts to their seeing themselves as having *good* reasons for compliance; and finally, their seeing themselves as having *good* reasons for compliance inevitably links their compliance (and with it, the durability and very existence of the law *as* law in its focal sense) with a concern for making correct judgments about what is good. Thus against Kramer's positivistic account (assuming that this account includes Proposition A), the concept of law cannot be separated from the concept of the good or the perceived good. On my analysis here, the fundamental problem with Kramer's account is that his impoverished understanding of 'norms' allows him to think of norms simply as directives which are externally

[37] Kramer makes this point in his analysis of Lon Fuller's jurisprudence. See Kramer, *op. cit.*, at 66: "Hence, if officials adhere to Fuller's principles solely for the sake of appearing to take account of citizens' interests, their pattern of conduct will lend support to the characterization of those principles as morally pregnant.... To clarify this point, let us return briefly to the example of the smoker who renounces his habit. Suppose that a person X has decided to act upon the proposition 'I ought to stop smoking'. If his only reason for abandoning the habit of smoking is the enhancement of his reputation by appearing to show solicitude for the interests of others, then his decision—though purely prudential—is a testament to the moral significance of the proposition on which he acts. In such circumstances, we are not justified in inferring (from the purely prudential character of his conduct) that the proposition 'I ought to stop smoking' has no intrinsic moral force. Indeed, if the only credible prudential ground for desisting from smoking were the desire for plaudits that has motivated X, we could safely conclude that the aforementioned proposition does partake of an inherent moral worthiness."

applied to citizens so that the citizens' compliance is no longer meaningfully distinguishable from the compliance of reason-less zombies. And with his impoverished understanding of 'norms,' Kramer essentially abandons the 'internal point of view' regarding law-abiding citizens and regarding the reasons that they *see themselves as having* for ongoing compliance with the law.

Now in light of the foregoing analysis, it might seem that Kramer's 'legal positivist' account may fare better if it is understood as incorporating Proposition B instead of Proposition A. But further analysis reveals that Kramer's version of legal positivism remains infirm, even if understood as incorporating Proposition B. Recall that the main problem with Kramer's version of legal positivism (understood as incorporating Proposition A) was that it abandoned a genuinely 'internal point of view' regarding law-abiding citizens and regarding their reasons for complying with the law. Proposition B may seem to allow Kramer to overcome this problem, since Proposition B includes the claim that "publicly accessible explanations are an integral feature of what counts as a legal system in the focal sense of the term." If Kramer can acknowledge that the giving of publicly accessible explanations by legal officials is an integral feature of law, then it seems that he should also be able to take the next step and acknowledge that the citizens *having of reasons* for compliance is also an integral feature of law (after all, the giving of explanations by legal officials seems quite naturally to imply the citizens' having of reasons for compliance, or at least to imply the *desirability* of this having of reasons). But Kramer explicitly refuses to take this further step (perhaps because he realizes that the further proposition about the citizens' having of reasons would lead him quite ineluctably to a positivism-adverse proposition about the citizens' having of reasons which they take to be *good* reasons).

Kramer's rejection of this further step is indicated by what is contained in the latter portion of Proposition B. While asserting that publicly accessible explanations by legal officials is a necessary feature of law, Proposition B also asserts that the *avowed purpose* of these explanations may pertain only to the reinforcement of incentives for the citizens' ongoing submission to the dictates of legal officials. Thus on Kramer's account (understood as incorporating Proposition B), the content of the publicly accessible explanation(s) required of legal officials may refer only to the reinforcement of incentives for the citizens' ongoing compli-

ance with the legal officials' directives. In other words, the content of the explanation(s) given by legal officials might run as follows: "The reason why we officials enforce the norms of the prevailing (legal) system is to reinforce the incentives that you citizens will have for complying with these norms." But what is the legal officials' explanation for reinforcing the incentives that citizens will have for ongoing compliance? On Kramer's account (understood as incorporating Proposition B), the legal officials may give no explanation for their reinforcing of the incentives that citizens will have for compliance, other than the 'explanation' that such reinforcement will allow the officials themselves to remain in power and succeed in enforcing the norms that they happen to enforce. Thus on Kramer's account (understood as incorporating Proposition B), the publicly accessible explanation(s) required of legal officials can be entirely circular. The content of the explanation(s) required of legal officials can conceivably run as follows: "The reason why we officials enforce the norms of the prevailing (legal) system is to reinforce the incentives that you citizens will have for complying, so that we can succeed in enforcing the norms that we enforce." But to say that the publicly accessible explanations required of legal officials can be entirely circular is to say that they can fail at being explanations at all. After all, an apparent explanation that explains nothing, but only re-asserts the very fact to be explained, is not really an explanation, even if it is presented nominally or linguistically in the form of a real explanation. So on Kramer's account (understood as incorporating Proposition B), the publicly accessible explanations required of legal officials might not be explanations at all; nominally they might appear to be explanations, but they may fail to explain anything at all. And so the critique presented earlier regarding Proposition A (according to which no explanations are required of legal officials) is a critique that applies equally well with regard to Proposition B (according to which no *real* explanations are required of legal officials).

CONCLUSION

What I hope to have shown in this paper is that Kramer's legal positivist account of law in its focal or full-fledged sense—through which he seeks to undermine Finnis's natural law account—is ultimately not credible. It does not follow, however, that I have succeeded in presenting a

complete defense of Finnis's natural law legal theory. After all, some legal theorists have remained legal positivists (and have continued to challenge Finnis's 'natural law' conclusions), even while accepting the claim that (implicit or explicit) explanations by legal officials (and even explanations that are justificatory or moral in their tenor) are an essential ingredient of law in its focal sense. Indeed, this is the sort of claim that Joseph Raz endorses as part of his own version of legal positivism. However, it is this sort of claim that also leads Raz to reject the "separability thesis" of traditional legal positivism.[38] And as least one commentator has argued, it is Raz's acceptance of this claim (regarding explanations or justifications by legal officials) that ultimately destroys his legal positivism 'from within'.[39] But we can leave any discussion of Raz's legal positivism for another occasion. In this paper, my limited aim has simply been to show that Kramer's particular version of legal positivism cannot be proffered—as Kramer seeks to do—as a credible alternative to Finnis's natural law theory.

[38] See note 3 above.

[39] See Jeffrey D. Goldsworthy, "The Self-Destruction of Legal Positivism," 10 *Oxford J. Legal Studies* 449 (1990). Indeed, it seems that Kramer is so intent on rejecting this claim (regarding the necessity of explanations or justifications by legal officials) precisely because he agrees with Goldsworthy that any acceptance of this claim is ultimately fatal to legal positivism. See Kramer, *op. cit.*, at 79.