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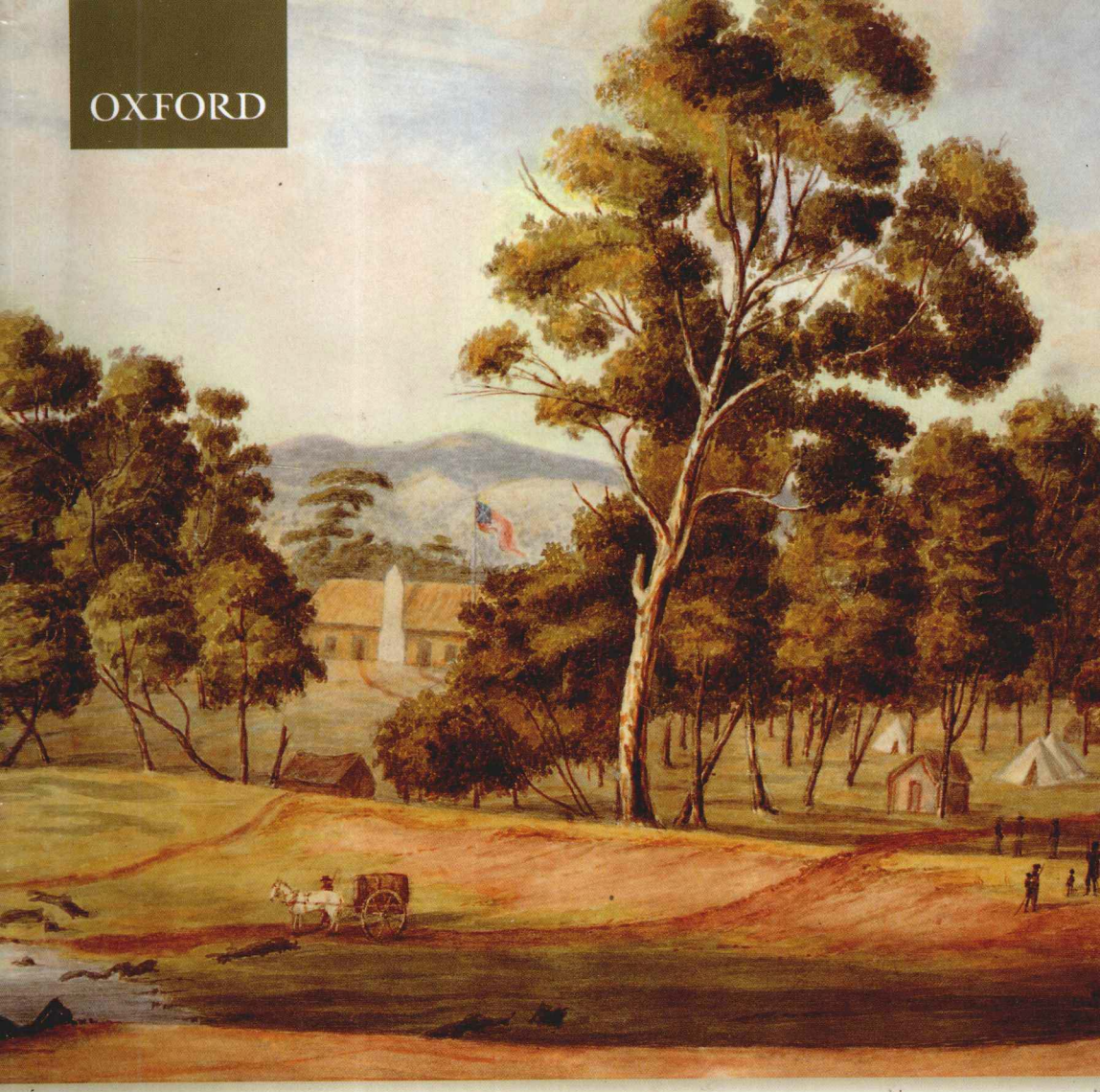

JOHN FINNIS

Philosophy of Law

Collected Essays: Volume IV

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John Finnis

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PREFACE

The earliest of the essays collected in these five volumes dates from 1967, the latest from 2010. The chronological Bibliography of my publications, near the end of each volume, shows how the collected essays are distributed across the volumes. But each volume also contains some essays previously unpublished.

Many of the essays appear with new titles. When the change is substantial, the original published title is noted at the beginning of the essay; the original can of course always also be found in the Bibliography.

Revision of previously published work has been restricted to clarification. Where there seems need for substantive qualification or retractation, I have said so in an endnote to the essay or, occasionally, in a bracketed footnote. Unless the context otherwise indicates, square brackets signify an insertion made for this Collection. Endnotes to particular essays have also been used for some updating, especially of relevant law. In general, each essay speaks from the time of its writing, though the dates given in the Table of Contents are dates of publication (where applicable) not composition—which sometimes was one or two years earlier.

I have tried to group the selected essays by theme, both across and within the volumes. But there is a good deal of overlapping, and something of each volume's theme will be found in each of the other volumes. The Index, which like the Bibliography (but not the 'Other Works Cited') is common to all volumes, gives some further indication of this, though it aspires to completeness only as to names of persons. Each volume's own Introduction serves to amplify and explain that volume's title, and the bearing of its essays on that theme.

LIST OF ABBREVIATIONS

AJJ	American Journal of Jurisprudence
AL	Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP, 1979)
Aquinas	1998d: John Finnis, *Aquinas: Moral, Political and Legal Theory* (OUP)
CL	H.L.A. Hart, *The Concept of Law* (1961; 2nd edn, OUP, 1994)
CLR	Commonwealth Law Reports (of decisions of the High Court of Australia)
CLS	Joseph Raz, *The Concept of a Legal System* (1970; 2nd edn with a new Postscript, OUP, 1980)
CUP	Cambridge: Cambridge University Press
FoE	1983b: John Finnis, *Fundamentals of Ethics* (OUP; Washington, DC: Georgetown University Press)
GTLS	Hans Kelsen, *General Theory of Law and State* (1945)
HUP	Cambridge, Mass.: Harvard University Press
In Eth.	Aquinas, *Sententia Libri Ethicorum* [Commentary on *NE*] (ed. Gauthier) (1969)
In Pol.	Aquinas, *Sententia Libri Politicorum* [Commentary on *Pol.* I to III.5] (ed. Gauthier) (1971)
LJ	Adam Smith, *Lectures on Jurisprudence* (eds R. Meek, D.D. Raphael, and P. Stein) (OUP, 1978)
LQR	Law Quarterly Review
LSLR	Julius Stone, *Legal System and Lawyers' Reasonings* (1964)
MA	1991c: John Finnis, *Moral Absolutes: Tradition, Revision, and Truth* (Catholic University of America Press)
NDMR	1987g: John Finnis, Joseph Boyle, and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (OUP)
NE	Aristotle, *Nicomachean Ethics*
NLNR	1980a: John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP, 2011)
OUP	Oxford: Oxford University Press (including Clarendon Press)

PFL	Julius Stone, *Province and Function of Law* (1946)
Pol.	Aristotle, *Politics*
Sent.	Aquinas, *Scriptum super Libros Sententiarum Petri Lombardiensis* [Commentary on the Sentences [Opinions or Positions of the Church Fathers] of Peter Lombard] (c. 1255)
ST	Aquinas, *Summa Theologiae* [A Summary of Theology] (c. 1265–73)
TMS	Adam Smith, *The Theory of Moral Sentiments* [1759] (eds D.D. Raphael and A.L. Macfie) (OUP, 1976)
TRS	Ronald Dworkin, *Taking Rights Seriously* (1977 rev edn with Reply to Critics) (HUP; London: Duckworth, 1978)

THE COVER PICTURE

Government Hut, Adelaide; painted by Martha Berkeley in Adelaide c. 1839.†

Built in 1837 for the first Governor, Government Hut was made of earth, wood, and thatch, and burned down by a deranged colonist in 1841. Soon after this picture was painted, however, construction of the substantial Government House which stands to this day had begun, a few score yards from the left-hand (eastern) end of the Hut as Berkeley depicted it from a spot near the northern end of the present Parliament House of South Australia. She shows us the Hut from the rear, and above it the flag denoting imperial royal authority. The flagpole was at the Hut's front entrance, which faced Adelaide's newly surveyed and then largely forested square mile from the mid-point of its northern edge.

In the Note overleaf are the operative provisions of the Act of Parliament authorizing the colony's establishment and governance, and of the royal Letters Patent defining the province of South Australia and stipulating what would be its government's duties in relation to the peoples already living there. The new administration's first legislative acts, promulgated six days after disembarkation near Adelaide on 28 December 1836, established magistrates' courts and defined the qualifications of jurors; on the same January day, in London, Letters Patent provided for a Supreme Court of South Australia, endowed with all the common law and probate jurisdiction of the courts of Westminster. This began sitting in May 1837, under the provisions of a new ordinance of the Governor in Council mirroring those Letters Patent.

The first governorship lasted only about eighteen months. London had divided executive power in the colony between the Governor and the Resident Commissioner of Public Lands. But these public officers quarrelled so fiercely that in February 1837 the Resident Magistrates' Court ordered them to keep the peace towards each other. By the time Government Hut was fully completed and the picture painted, the first Governor had been dismissed and a new Governor was in place, vested with all the formerly divided executive powers.

NOTE

† *Instituting a new political community by law*... The South Australia Act 1834, a statute of the United Kingdom Parliament, authorized the British Government (His Majesty in Council) to

> empower any one or more persons resident... to make ordain and establish all such laws institutions or ordinances and to constitute such courts, and appoint such officers... and to impose and levy such rates, duties, and taxes as may be necessary for the peace order and good government of His Majesty's subjects and others within the said province...

(subject to annulment by the authorities in London). The statute presupposes the constitutional doctrine, first clearly enunciated by Coke CJ in *The Case of Proclamations* (1610), that legal rights cannot be adversely affected, or taxes imposed, except by or under the authority of Parliament. The authority conferred by the above provision was first exercised by Letters Patent of 19 February 1836, whose two operative provisions (i) defined the colony's geographical limits and (ii) provided that 'nothing in these our Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their own Persons or in the Persons of their Descendants of any Lands therein now actually occupied or enjoyed by such Natives'. When the first Governor landed near the site of Adelaide on 28 December 1836, he read out a proclamation largely devoted to emphasizing his government's responsibility and determination to use law and practice to protect the existing, native population as subjects of His Majesty like the colonists themselves, and as objects of 'His Majesty's most gracious and benevolent intentions toward them'. These good intentions were not as resolutely, fairly, and carefully pursued and funded, or as unanimously shared, as was needed to fulfil them really well: see the unsparing critique in Eyre, *Journals of Expeditions* (1845) ii 147–204, 412–507; cf. Bull, *Early Experiences of Life in South Australia* (1884) 63–75, 239–43. Nor did the objects of the benevolence respond with the measure of aptitude and energy needed to care for and manage land, stock, and other property as part of a division of labour capable of sustaining civil society and the institutions of the Rule of Law: see the four reports by the Protector of Aborigines which are printed with the Colonization Commissioners' report of July 1842 to the Secretary of State: Parl. Pap. (1843) 320–38; also Eyre, *Journals of Expeditions* ii/2 chs I, IV, VI, VIII.

CONTENTS

INTRODUCTION

Making, acknowledging, and complying with law involves acts of rational judgment. The reasonableness and justification of these acts cannot be assessed without premises about true human goods, the nature of persons and their acts, and the contours of the common good and human rights. So a volume on the philosophy of law fittingly comes *fourth*. Issues of legal doctrine and interpretation resolvable by technique usually have some intellectual appeal. But legal studies are really attractive and worthwhile because law, and juristic argumentation, is an arena where themes and theses in ethics, political theory, and related philosophical domains all come to bear on—and crystallize out in—legislating and adjudicating to make a difference to human persons.

I. FOUNDATIONS OF LAW'S AUTHORITY

Very many legal theorists, some moved by one concern, some by another or other concerns, have thought that law is essentially a (kind of) social fact, and that the accounts of it appropriate to legal theory are purely descriptive. The social facts to be described will, of course, include countless evaluations (by law-makers, -finders, and -enforcers), especially ideas about how members of the relevant society should (according to law) behave. But the descriptive accounts themselves, it is usually supposed, can and should be value-free.

One concern motivating these meta-theoretical thoughts was political: Bentham's belief that, absent a social fact as transparent as statutory enactment, law-finding is corrupted by the class prejudices and partisanship of judicial cabals ('Judge and Co.'). Another concern was philosophical: Bentham's empiricist belief that if what we or judges refer to lacks the tangibility of sounds, marks, and mental images, it can be no more than a fiction. A more recent concern is that, given plurality of values and beliefs ('the fact of pluralism'), no method of settling social conflicts

can be as reliably efficient as the legal: reliance exclusively on relatively uncontroversial historical facts ('social-fact sources') such as enactment or the judge's articulation of a *ratio decidendi* and an order of the court. Some of the theorists who hold that law is exclusively social-fact source-based also find an independent, logically indirect support for that thesis in their concern that social science itself be value-free. This concern, in its turn, is fed by emulation of the impressively successful sciences we call natural, and by the sceptical thesis (about which natural science knows nothing) that evaluations all lack objectivity and truth. Theories animated by one or more of these concerns usually describe themselves as 'positivist',[1] and are widely treated as the default position in jurisprudence or philosophy of law.

The modern concerns just mentioned partly overlap with, and partly diverge sharply from, the perennial concern identified and promoted by the mediaeval theorists who first articulated the concept of *positive law* (see essay 7). Countless arrangements needed for a just, peaceful, and prosperous political community could reasonably take more or less different forms, and so can be put in place and maintained only by *decision* between incompatible acceptable alternatives. Such a *determinatio*,[2] once made, can only yield its benefits if it is adhered to with substantial unanimity even absent a persisting consensus about its superiority to the alternatives rejected, ignored, or hitherto unenvisaged. A legal system responsive to human need largely consists, therefore, of rules, principles, standards, and institutions adopted by such past decisions—decisions now treated as binding by reason of their pedigree as validly made by persons with authority to so decide. That is, the law consists largely of rules, standards, and institutions resting on and derived from social-fact sources.

Accounts of law's positivity offered by leading positivists were examined in several of my essays around 1970. Kelsen's main-period thesis that a legal system's norms must not or cannot contradict each other was a

[1] See what I say in essay 1, at the beginning of its sec. IV, about how desirable it is not to talk at all of *positivism*, as if there is such a position (even when qualified as *legal positivism*). At the most, as Joseph Raz says,

> we should think of legal positivism as a historical tradition containing writings some of which bear greater similarity in their central tenets to writings outside it (e.g. to Finnis, and to Aquinas as he understands him) than to each other, a tradition which cannot be characterized by adherence to any central tenet or tenets.... [T]here is little value, other than historical, in using the classification of writings into positivist and non-positivist when considering various accounts of the nature of law (if it has a nature). ('Comments and Responses', 253.)

Still, for all its confused variegations, there is a loose historical tradition, and it is one in which most of my contemporaries, notably Raz, have been very willing to be counted. (Raz's hesitation, here, about whether law 'has a nature' is warranted by that tradition's unclarities about what it was trying to do.)

[2] See e.g. essay 13 at nn. 5–6; essay 7, secs II, III.

starting point.[3] Another focus of investigation was his theses, explicit and implicit, defended and assumed, about the persistence of legal norms after their creation and about their termination by revolutions (even by *coups d'état* intended to preserve them).[4] Appeals to Kelsen's accounts, by courts in the aftermath of *coups d'état* which left the judiciary unchanged, afforded further matter for reflection in the same period.[5] These investigations all converged on the conclusion that treating something as a source of rules (or other standards), like treating rules as derived from a *source*, and as persistingly valid by reason of that derivation, is a form of thought whose premises refer not only to social facts (few or many, stark or subtle) but also to social *needs*. Such needs include the good of flexibility and clarity in social regulation in changing circumstances, the good of fairness across time between those who benefit others by conforming to rules and those who have been so benefited and now are summoned to comply with the same or other rules of the system, and the good of a stability sufficient to merit the expectations needed to make venturesome investments rational.[6]

To bring such needs into the light of social theory, and to show how, in themselves and in their juristic effects, they are needs not peculiar to the societies that have responded to them juridically, is to breach the confines of a value-free social science. But these are confines that, as the first chapter of *Natural Law and Natural Rights* argued, any *general* theory of human affairs must break. In no general theory of human institutions could such bounds be maintained without self-imposed arbitrariness in selecting the terms and concepts in which it is articulated, and an unreflective inattention to the explanations and theses actually deployed in every descriptive theory that succeeds in being more than a juxtapositing of local histories and vocabularies. An example (besides those given in that chapter): Weber's decision to call the central type of governmental *Herrschaft* 'legal-rational authority', when put alongside his accounts of ways of legitimating authority, shows that this type gets clear of mere rule fetishism (and of rule by fear and favour) just insofar as it rests on acknowledging intrinsic intelligible human goods in a way that (as he knew) only natural-law theories of law systematically articulate and defend.[7] What is that way? It surely is the way traced, doubtless imperfectly, in Part II of *Natural Law and Natural Rights* and recalled in many of the programmatic essays in this volume: identifying the forms of human flourishing, the inter-dependencies of persons, the need for authority to preserve and promote

[3] See essay I.6 (1970a), sec. I. On Kelsen's abandonment of that thesis in his last period, see essay 5, sec. III.

[4] See essay 21. [5] See at n. 30 below. [6] See e.g. essay 2, sec. III; essay 3, sec. III.

[7] See essay 9, sec. III.

common good, and the desirability of regulating authority by the Rule of Law, that is, of positive law judicially interpreted and enforced. Weber, like his philosophical masters Hume and Kant, never (when philosophizing) clearly and reflectively understood, even to reject, the basic principles of practical reason that pick out the forms of flourishing with which the whole 'way' just recalled begins. In rejecting what he rightly took to be the only eligible explanation of the rationality of 'legal-rational' authority, Weber was rejecting only the distorted images presented to him by his era's philosophical culture.

But we do not need to concern ourselves with these historical and philosophical issues to be able to see how problematic is the modern 'sources thesis' (or 'social-fact sources thesis') that:

> *All* law is source based. A law is source-based if its existence and content can be identified by reference to social facts *alone*, without resort to any evaluative argument.[8]

To this 'exclusive' legal positivism, the most closely relevant reply is not the 'inclusive' positivist's, that the sources in some legal systems may make and/or authorize reference to moral or other evaluative considerations and thereby include them in (incorporate them into) the law. Rather, it is that the easygoing phrase 'identified by reference to social facts alone', offered as a translation of 'source-based', is doubly problematic.

For, first, no one ever can rationally treat a *fact alone* as giving reason for anything, let alone something as demanding and choice-restricting as a law. There must always be some 'evaluative argument' for treating any fact or combination of facts as a 'basis' for identifying a proposition as obligation-imposing or in some other way directive or normative. What reason have I as citizen or judge for identifying certain utterances as now legally directive (for me or for anyone else), utterances made on some past occasion by an assembly styling itself constituent or legislative or a tribunal styling itself a superior court of record? The answer must, to make sense, refer to some good or goods (human need or needs) that will be promoted if I make the identification or prejudiced if I do not.[9]

[8] Raz, *Ethics in the Public Domain*, 211 (emphasis added); likewise *AL* 39, 47; Raz, *Between Authority and Interpretation*, 386.

[9] Of course, once a community has, with sufficient stable consensus, treated a set of laws as sufficient reasons for action, historians, sociologists, and other observers (including its own members) can refer to that fact by stating that those laws exist as laws of that community. But as is plainly acknowledged in Raz, *Practical Reason and Norms*, 171–7 esp. 172 and Raz, 'Promises and Obligations' at 225 (see *NLNR* 234–6), such statements are altogether parasitic upon the basic and primary thoughts and statements about the existence, validity, and obligatoriness of laws, viz. the thoughts and statements of those subjects and officials who thereby express their judgment that, in the factual situation they presuppose or identify, these are laws giving them sufficient legal and

And second, in no legal system responsive to human needs do citizens, judges, or other officials look to the bare social fact of a past legislative act or act of adjudication. Always the reference is to such acts in their intra-systemic context. And that context is, first and foremost, a set of propositions identifying necessary and sufficient conditions of validity both of legislative and adjudicative acts and of the legal rules identifiable by reference (directly but in part!) to those acts. And such validity conditions pertain not only to the circumstances and form of those acts but also to the consequent rules' persistence through time as members of a set of propositions whose membership changes constantly by addition, subtraction, amendment, clarification, explanation, and so forth. Contributing both rationale and countless details of content to this complex of propositions and intellectual acts (juristic interpretation), will be found 'references'—often silent but detectable by inference—to the desirability of coherence here and now, of stability across time, of fidelity to undertakings, respect for legitimate expectations, avoidance of tyranny, preservation of the community whose laws these are (and of its capacity for self-government), protection of the vulnerable, incentives for investment, maintenance of that condition of communal life we call the Rule of Law, and many other 'evaluative arguments'. Of course, these references, whether tacit or expressed, are themselves social facts, which like all other social facts could, instance by instance, be given a value-free, descriptive report. But their pervasiveness witnesses to the rational *need* for them. Only by looking to such desirabilities can there be a sensible response to the plain questions to which a consistent, rigorous positivism[10] is so unresponsive: Why treat past acts or social facts as sources of guidance in deliberation and reasonable decision-making today? How can any social fact validate? Or bind? And why *these* facts, not those?

However, as sec. III of this Introduction will reiterate and refine, those wholly evaluative desirability considerations can contribute to answering these fundamental questions about even 'easy cases', and to resolving a 'hard case' juristically, only when taken in combination with another, further range of factual considerations. These concern not past acts of legislation or adjudication but past conflicts and compact-like settlements of them,

moral *reason(s) to act* in the way they validly direct (reasons over and above avoidance of immediate sanctions).

[10] Positivists themselves are another matter: see at nn. 19, 20 below. On this incoherence of a consistent, rigorous legal positivism *with the explanatory task it sets itself*, see secs III, IV, and VII of essay 5, or 2000d, which begins:

> Legal positivism is an incoherent intellectual enterprise. It sets itself an explanatory task which it makes itself incapable of carrying through. In the result it offers its students purported and invalid derivations of *ought* from *is*.

present circumstances of various kinds, and future likely outcomes and consequences, threats, risks, and opportunities as estimated against wide ranges of background scientific and historical knowledge and belief.

Essay 4 reaches similar conclusions about how to understand authority. It shows that 'conceptual analysis' of authority cannot yield anything worth counting as a jurisprudential achievement unless it proceeds with attention to the intelligible human goods at stake, and to means of attaining them which are both effective and respectful of other such goods that the pursuit of them may affect. One can discern an 'analytically' possible concept or concepts of governmental authority entailing only that its possessors are entitled not to be usurped or impeded, and not that anyone has any obligation to attend to their directives. But any such concept will be simply inferior, to the point of irrelevance, compared with a concept of authority—just as analytical and even more clearly discernible—in which its exercise standardly results (and is intended and taken to result) in obligation. That obligation will be 'legal obligation' in two senses, or of two kinds: an intra-systemic legal obligation[11] extending as far as the scope of the authority supports and the juristically sound interpretation of its directive or other act determines; and a moral obligation, of presumptively the same extent, the force and effect of which, however, varies according to a number of morally relevant considerations about the justice of the law and the other moral obligations of its subject(s). Joseph Raz's ambivalent efforts to detach legal authority from presumptive (generic, prima facie, defeasible) moral obligatoriness[12] fail analytically, by failing to concede that between the extremes to which he exclusively attends—either a mere prima facie reason for action or an unqualified moral obligation to act just as the law requires[13]—there stands the desirable and coherent middle position: legal

[11] See *NLNR* 308–20, esp. 309–10, on the invariant strength or force of legal obligation 'in contemplation of law', i.e. intra-systemically.

[12] *AL* 234–7; Raz, *Between Authority and Interpretation*, 169–75. One of the several aspects of this ambivalence is that Raz (e.g. at 188; cf. 331, 332 at n. 4) also maintains that legal authorizations and obligations, since they authorize or require important interferences in other people's lives, *are* moral claims. (Contrast *AL* 158.) Another aspect: contrary to *AL* 236, Raz *ibid.*, 379 maintains that judges consider themselves entitled to break ('flout') the law.

[13] Raz *ibid.* 169–71 retains essentially the same false contrast (contrast between non-exhaustive, implausible alternatives). Similarly: Gardner, 'How Law Claims, What Law Claims', argues for the (Razian) thesis that, in asserting or stipulating obligations, 'the law claims' that what these are is moral obligations. This argument fails most importantly by assuming the very point in issue, viz. that morality and self-interested prudence exhaust the realm of reasons and that there cannot be normativity (and thus obligation) which is *legal* (and so far forth not moral). *NLNR* 308–18 argues that there can be and is, even though its independence from the general flow of practical reasoning is incomplete and provisional. And of course, as the book also argues, a sound morality holds that obligation-stipulating laws, not on their face immoral, should be presumed, defeasibly, to create a moral obligation the strength of which is not invariant in face of competing moral responsibilities; and morally decent law-makers and law-appliers (who instantiate the central case of law-making and -applying) will try to ensure that the law they make or apply is fit to impose moral obligations

obligation in the moral sense, and with the qualified force and extent,[14] just summarized as *presumptive*.

Reflections such as these yield a general result. A disciplined *normative* legal theory can do all that a would-be value-free general theory can, and can do it with much greater power, not only as justification or critique but also as explanation. The normative foundations of such a legal theory are vindicated against some main forms of scepticism in essays I.1, I.2, and I.5. The theory's many-levelled normative structure is outlined and applied to legal issues in essay I.14, and the importance to it of a sound, non-fictitious understanding of the person and of political community in essays II.1 and II.6–7 respectively. How to consider law's proper scope and limits is thematic in essays III.1 and III.5. Essay 1 in this volume expounds and illustrates the fundamental method and some main theses of a normative theory of law's positivity, in direct debate with the leading contemporary positivist theories and theorists.

But that same last-mentioned essay, like the rest of my work hitherto,[15] fails to convey clearly enough the sheer oddity of the 'debate' that still dominates the construction of textbooks and distracts the attention of students. It is said to be a debate about *whether there is any necessary connection between law and morality*. It is supposed that until positivism cleared the air by its robust denial that there is such a connection, legal philosophy was entangled with moralizing and obfuscated by misplaced idealism. This supposition rests on simple inattention to the idiom of classic western philosophy, in which the propositions 'An invalid argument is no argument', 'A tyrannical constitution is no constitution', 'A false friend is no friend', and 'An unjust law is no law' *presuppose and entail* that arguments are not necessarily valid, constitutions are sometimes tyrannical, friends are not necessarily faithful, and law is not necessarily moral. But besides the inattention or ignorance, there is—and this is more interesting—the odd illogicality of supposing that the question whether there is 'any necessary connection' could be answered without conducting a *moral* inquiry.

What does morality say about whether law needs to be moral? Obviously, the morality (moral belief) handed down in our civilization vigorously asserted the moral necessity (requirement, stringent moral need, and duty)

that could only be overridden by moral responsibilities applicable in particular kinds of circumstance not provided for by law: see n. 14 below.

[14] Qualified, that is to say, by moral considerations (relating to the justice of the rule in general and/or the competing moral responsibilities of particular subjects in their circumstances) *going beyond* whatever moral considerations have been built into the legal meaning and content of the rule itself by the design of the law-maker and/or by other rules and principles of the legal system that bear upon the rule in question and modify its tenor.

[15] Even essay 10 n. 66, and *NLNR* 364–5.