



1990

# The Rule of Law and the Rule of Laws

David F. Forte

*Cleveland State University*, [d.forte@csuohio.edu](mailto:d.forte@csuohio.edu)

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## Original Citation

David F. Forte, The Rule of Law and the Rule of Laws, 38 Cleveland State Law Review 97 (1990)

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# HEINONLINE

Citation: 38 Clev. St. L. Rev. 97 1990

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# THE RULE OF LAW AND THE RULE OF LAWS

DAVID F. FORTE\*

## I. INTRODUCTION

The thesis of this article is that, for the Rule of Law to be maintained in a modern technological society, the legal system must affirmatively tolerate a range of justifiable non-compliance. I begin with a rather strong definition of the Rule of Law, one that encompasses not merely the procedural desiderata of Lon Fuller (which John Finnis accepts), but also the notion that the Rule of Law has a substantive content (the common good) and that it necessarily binds the rulers as well as the ruled.

I posit as an opposite phenomenon to the Rule of Law, the rule of laws, or the term I prefer, Pharisaism. I suggest that Pharisaism is a particular danger in the modern regulatory state and that it unavoidably undermines the Rule of Law and its benefits. To avoid the danger of Pharisaism, I posit two active principles for the legal system to adopt: 1) an obligation to keep its regulatory framework to the minimum, and 2) a recognition of the legitimate place of acts of non-compliance within the legal system.

I conclude with some thoughts as to whether the notion of justifiable non-compliance fits more effectively within the jurisprudential system of Joseph Raz or of John Finnis.

## II. THE RULE OF LAW

John of Salisbury, secretary to Theobald, archbishop of Canterbury and rival to Henry II, later secretary to Thomas Becket, archbishop of Canterbury and rival to Henry II, and later himself bishop of Chartres, attempted to evangelize the English crown with these words:

Between a tyrant and a prince there is this single or chief difference, that the latter obeys the law and rules the people by its dictates, accounting himself as but their servant.<sup>1</sup>

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\* Professor, Cleveland-Marshall College of Law, Cleveland State University. A.B., Harvard University; M.A., University of Manchester; Ph.D., University of Toronto; J.D., Columbia University.

I wish to acknowledge the significant assistance of the Earhart Foundation, whose generous support for my ongoing research on the moral obligations of judges has led to this article as well as an earlier piece, *Natural Law and Natural Laws*, published in *26 The University Bookman* 75 (Summer, 1986).

I am also profoundly grateful for the collegial support of Professor David Barnhizer, whose criticisms of this article in earlier drafts led to significant improvements in form and substance.

<sup>1</sup> SALISBURY, *THE STATESMAN'S BOOK OF JOHN OF SALISBURY* 3 (J. Dickinson trans. 1927) (hereinafter *POLICRATICUS*).

The remarkable statement that the Prince obeys the law, and accounts himself as the servant of the people is as nice a classical summary of John Finnis's notion of legitimate authority as one could find. For Professor Finnis, authority results from valid rules that effectively co-ordinate activities in society for the common good.<sup>2</sup> For John of Salisbury, the Prince rules by the dictates of the law, that is, he rules constitutionally: his rules are "valid;" and, he is the servant of the people, that is, his rules are designed for their good. John of Salisbury also required that the Prince "obey the law," by which we can also take him to mean that the Prince's rules apply to the Prince himself, *qua* man, although they do not necessarily apply to him *qua* Prince. Thus, the Prince may, for example, enjoy sovereign immunity in order that his constitutional authority to rule remains unimpaired, but he would not enjoy immunity from the law for purposes of his own personal gain, for then he would not be serving the people. Finnis has similarly noted this requirement in his discussion on authority.<sup>3</sup>

Although it is evident that John of Salisbury was speaking of the limits of authority, his definition and others like it have traditionally been taken to encompass more than that. A formulation like Salisbury's has often been regarded as the focal meaning (or one of the essential elements of the focal meaning) of the Rule of Law itself and not just one aspect of the notion of legitimate authority. The formula of "the rule of law not of men" stretches from Aristotle<sup>4</sup> to the Code of Justinian<sup>5</sup> to the Magna Carta, and to American formulations in the Massachusetts Constitution of 1780, in Chief Justice Marshall's opinion in *Marbury v. Madison*,<sup>6</sup> and in the justification for the bill of impeachment lodged against President Nixon.

<sup>2</sup> According to Finnis, valid rules derive from a method of rule creation that refer back to a valid and authoritative act by which such valid rules are created and known. J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 268 (1980) (hereinafter *NATURAL LAW*). Effective rules are measured through non-legal studies such as political science. *Id.* at 246. The common good is the set of conditions, including justice, by which members of a community can each participate in the fundamental non-reducible and non-derivative goods of human life. *Id.* at 155.

<sup>3</sup> *Id.* at 252-254 (discussing how rulers are bound by their own rules), and *id.* at 273, (discussing the requirement of "reciprocity" between ruler and ruled).

<sup>4</sup> ARISTOTLE, *POLITICS*, III, 10: 1286a9, cited in FINNIS, *NATURAL LAW*, at 267 n.5. See also *POLITICS*, IV.iv. Judith Shklar asserts that Aristotle's formula was simply that the ruler should adopt a "rule of reason," including norms of justice, over what could be a small, privileged society. She contrasts Aristotle's position with Montesquieu's, of a later historical era, which was designed to establish limits to government in order to protect the ruled. Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY*, 1, 1-3 (A. Hutchinson & P. Monahan, ed., 1987). It seems clear, however, from John of Salisbury's formulation that both meanings were combined as of his time.

<sup>5</sup> "[I]t is indeed a saying worthy of the majesty of royalty that the prince acknowledges himself bound by the Laws." POLICRATICUS, *supra* note 1, at 5 (quoting JUSTINIAN CODE, Vol I § 4, at 14).

<sup>6</sup> "The government of the United States has been emphatically termed a government of laws, and not of men." 5 U.S. (1 Cranch) 137, 163 (1803).

In contrast, Finnis has a view of the Rule of Law that is more technical,<sup>7</sup> although it relates to the older classical notion by necessary implication. Finnis prefers a definition of the Rule of Law that is born of the desiderata authored by Lon Fuller with such impact a generation ago.<sup>8</sup> As Finnis summarizes it, the Rule of Law requires that any particular law be: 1) prospective; 2) capable of being complied with; 3) promulgated; 4) clear; 5) coherent with the rest of the legal system; and 6) having relative stability over time. In addition, 7) if a law is made "applicable to limited situations" it must be "guided by rules that are promulgated, clear, stable, and relatively general." Finally, 8) the Rule of Law requires that authorities are accountable to rules governing their behavior, and that they administer the law consistently and according to those rules.<sup>9</sup>

Finnis does not claim that the exercise of the Rule of Law will necessarily guarantee substantive justice.<sup>10</sup> Yet Finnis so connects his technical definition of the Rule of Law with aspects of the securing of justice that he, in fact, makes a bond between the two. For example, he argues that the Rule of Law is itself one element of justice in that it is designed to treat individuals as selves with the dignity of self-direction.<sup>11</sup> Accepting this thesis then, a ruler who violates the Rule of Law, who rules for his own benefit at the expense of individuals under his authority, would be failing to secure an essential aspect of the common good, something Finnis himself readily admits.<sup>12</sup> Adding in this necessary corollary brings us back to John of Salisbury's definition.<sup>13</sup>

In addition, Finnis states that as a practical matter the Rule of Law limits the efficiency of an evil government because the Rule of Law limits any government's freedom of maneuver to act in its own arbitrary self-interest.<sup>14</sup> In addition to the extent a government utilizes elements of the Rule of Law to govern more efficiently (that is, to co-ordinate the society

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<sup>7</sup> One may infer from Finnis's treatment of the Rule of Law that he might have been influenced by Joseph Raz's view of the limited scope of the Rule of Law. See NATURAL LAW, *supra* note 2, at 270-76, 292, and J. RAZ, THE AUTHORITY OF LAW (hereinafter AUTHORITY OF LAW) 210-29 (1979).

<sup>8</sup> L. FULLER, THE MORALITY OF LAW, 46-91 (1964).

<sup>9</sup> NATURAL LAW, *supra* note 2, at 270-71. See also, F.A. HAYEK, THE CONSTITUTION OF LIBERTY 205-19 (1960).

<sup>10</sup> Finnis notes that the unscrupulous can gain power through adherence to legal forms, and concludes that "the Rule of Law does not guarantee every aspect of the common good, and sometimes it does not secure even the substance of the common good." NATURAL LAW, *supra* note 2, at 274. See also AUTHORITY OF LAW, *supra* note 7, at 211.

<sup>11</sup> NATURAL LAW, *supra* note 2, at 273. In an earlier article, I similarly discern that Fuller's desiderata brought him to a point whereby substantive notions of justice are necessarily implicated in his formula. Forte, *Natural Law and Natural Laws*, 26 The University Bookman 75 (Summer, 1986).

<sup>12</sup> NATURAL LAW, *supra* note 2, at 274.

<sup>13</sup> The summary offered by Joseph Raz is parallel: the Rule of Law "has two aspects: (1) that people [including governmental officials] should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it." AUTHORITY OF LAW, *supra* note 7, at 213.

<sup>14</sup> NATURAL LAW, *supra* note 2, at 274; AUTHORITY OF LAW, *supra* note 7, at 219.

in a more effective way), the more that government establishes a standard by which its own legitimacy is judged. If it acts in such a way as to be seen to be arbitrary and above the law, the moral imperative for obeying the law is necessarily attenuated, resulting in a greater degree of non-compliance and thus less effectiveness. Many governments face such a dilemma. Governments, such as Chile, the Soviet Union, Poland, China, and South Africa, have had to decide whether to accept the costs of such a continuing tension, or to jettison the Rule of Law because it is dangerous, or to move closer as a government into conformity with the Rule of Law.<sup>15</sup>

We arrive at the conclusion, therefore, that the Rule of Law as articulated by Finnis contains, in addition to Fuller's desiderata, a necessary corollary that governments are themselves bound by authenticating (second order) norms and that governmental personalities are (save for appropriate constitutional reasons) bound as persons by the laws that they themselves propound.<sup>16</sup>

### III. THE RULE OF LAWS

The commonly held antipode to the Rule of Law is the "rule of men." Sometimes called the "rule of will," it more precisely signifies the rule by men over other men for the rulers' own interests. The American method of avoiding the rule of men and protecting the Rule of Law was originally effectuated by a series of constitutional structures based on the underlying premise that men in groups were prone to ignore moral commands in favor of baser goals. Rather than trusting to any practical suasion that a moral command—even a written moral command—might have on men in power, James Madison in his famous Federalist 51 offered a sobering analysis on how the baser passions of men in groups might be counterpoised to compel them to act under the Rule of Law in their own self-interest.

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<sup>15</sup> A few years ago, I undertook a large and detailed study of the legal systems that were tried, rejected, and finally decided upon by the Communist governments of the Soviet Union and China. Forte, *Western Law and Communist Dictatorship*, 32 EMORY L. J. 135 (1983). I concluded that each had finally chosen forms, both substantive and procedural, that were derived from Western law because those governments believed that ruling by such forms would be more efficient (in Finnisian terms, would assist in the co-ordination of human actions) than would Marxist, imperial, or customary forms. I failed to appreciate at that time, mentioning the issue only in passing, how the people of those societies would expect and demand reciprocity of concern from their government as they experienced living under a number of the desiderata of the Rule of Law.

<sup>16</sup> F. A. Hayek put it this way: "Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge." F. A. HAYEK, *THE ROAD TO SERFDOM* 72 (1944).

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.<sup>17</sup> In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.<sup>18</sup>

In *Marbury v. Madison*,<sup>19</sup> John Marshall "perfected" that formula by attaching a particular function to each of the governmental elements in counterpoise, and a moral reason for each to keep to its special role. Institutionally, he integrated the moral notion of self-restraint into a structure that had originally been justified primarily by its mechanical capacity to check self-interested power. In doing so, he traded on and confirmed the generally held belief that the willful exercise of self-interested power is at the opposite end of the spectrum from the Rule of Law.

In addition to the "rule of men," or the "rule of will,"<sup>20</sup> however, the Rule of Law can be negated by a system we can term the "rule of laws." A word that carries the meaning (and its historical pejorative connotation) of that kind of legal system is Pharisaism. Pharisaism is the substitution of the rule of laws for the Rule of Law. In Pharisaism, the detailed regulations of the law are themselves the object of loyalty: the very literalness of regulations constitute their own legitimacy. The exclusionary reason for obeying the law becomes the exclusive reason for obeying the law. Pharisaism occurs not simply when the letter of the law is enforced over the spirit of the law, but when the letter of the law becomes the spirit of the law. That form of legalism was, of course, morally condemned in New Testament scripture, but it is present in other religious societies as well, including parts of Islam and fundamentalist Christianity.

Typically, the insistence on the literal application of the laws comes about as a way to preserve the identity of a community in an externalized recognizable way in the midst of a socially hostile environment. Pharisaism often arises when the law makers or law enforcers sense that the underlying norms of a society, the values that bind persons to one another, are dissolving. The Pharisee tries to stem the rot, to freeze the community, by reifying what had been legal manifestations of community values into objects of independent veneration, if not outright idolatry.

<sup>17</sup> Finnis would not agree with Madison, if by these phrases Madison meant that in a world of angels, no legal system would be necessary. *NATURAL LAW*, *supra* note 2, at 269.

<sup>18</sup> A. HAMILTON, J. MADISON, J. JAY, *THE FEDERALIST PAPERS*, No. 51, 322 (1788, C. Rossiter, ed., 1961) (hereinafter *FEDERALIST PAPERS*)

<sup>19</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>20</sup> Reynolds, *Grounding the Rule of Law*, 2 *RATIO JURIS* 1, 7 (1989)

Pharisaism is not, however, a phenomenon limited to particular ancient or religious communities. It can occur in any legal society. Take, for example, Alexander Solzhenitsyn's moral critique of the West.

I have spent all my life under a communist regime and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society with no other scale but the legal one is also less than worthy of man. A society based on the letter of the law and never reaching any higher fails to take advantage of the full range of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legalistic relationships, this creates an atmosphere of spiritual mediocrity that paralyzes man's noblest impulses.<sup>21</sup>

It was this formalism that the legal pragmatists of the later 19th and early 20th centuries rightly or wrongly believed stood in the way of the law as reflecting genuine experience, in Holmes' phrase.

It is ironic that when the shared values of a community begin to dissolve, the rear guard action that is Pharisaism can actually work to block the reformation of a community under the Rule of Law. The rule of laws is a chimerical attempt to maintain the Rule of Law and commonly arises when the Rule of Law is actually breaking down. John Chrysostom had some of the same sense when he declared, "Where custom has died, law is the king."

The essence of the Rule of Law lay in its being based upon the connectedness between persons, by the recognition of one another as selves entitled to dignity and self-direction. Both the ruler's obligations to the ruled and the obligation of those ruled to abide by the law finds its source in the recognition of the other as a subject.<sup>22</sup> The concept of equality under the law is fundamentally that of an I/thou relationship. The person-focused, other-directed aspect of the Rule of Law is reversed when Pharisaism or the rule of laws becomes dominant. Instead of law being a means of subsidiarity, of assistance to human flourishing, the law pretends to be self-sufficiently authoritative and subjects man to its own need for concretization. It teaches people to measure themselves by the letter of the law, and necessarily, all persons will sometime or other fail in that measurement. Today, our fascination with the letter of the "moral" law leads us to a Pharisaism in political ethics. There seems to be little recognition of the difference between the genuine moral lapse, which would scandalize authority, and failures of one's earlier life that are used as weapons to taint the character, no matter how irrelevant the moral failure is to the present state of affairs.

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<sup>21</sup> Solzhenitsyn, *A World Split Apart*, 44 VITAL SPEECHES 687, 680 (September 1, 1978).

<sup>22</sup> See, G. DEL VECCHIO, *JUSTICE: AN HISTORICAL AND PHILOSOPHICAL ESSAY* (1924).



Pharisaism further undermines the Rule of Law by tying persons to the needs of the rulers. Sometimes those needs are ideological. We should here distinguish between a strict enforcement of the law for purposes of instantiating an aspect of the common good from those legalisms insisted upon for the sake of the rulers. Laws designed to assure racial non-discrimination against a recalcitrant population are strictly enforced for the direct advancement of the common good. In a few years, should the United States Supreme Court confirm its change in direction, laws designed to secure the lives of the unborn would be similarly justifiable as instantiating a fundamental, non-instrumental good.<sup>23</sup> In contrast, pharisaical laws are designed to secure the ideological needs of the rulers against the ruled. The ruler disdains those he rules. Distrustful of the goodness or the good faith of the people, the pharisaical ruler typically fashions buffers of laws around the behavior he wants to insure. Layer upon layer of what would otherwise be fully innocent actions are made illegal in order to protect the "core" ideological position from being eroded. Despite the fact that the Pharisee may proclaim that his scheme of regulation is for the "good" of the people, it is really an act of ultimate mistrust, not service, for it subjects people to being condemned for violations of regulations far removed from any efficient connection to their good. Instead of focusing on the moral needs of the community, the Pharisee's objective is self-justification. Any authoritarian or totalitarian state, from South Africa to post-democracy-movement China exemplifies this kind of rule. In doing so, it loses sight of the appropriate objective of the authority of the ruler: legislating for the common good.

One must admit, of course, that even in justifiable crusades for essential human goods, the temptation to adopt the tactics of the Pharisee is present. Prohibition was an inappropriate method to curb the human costs in alcohol abuse, not merely because it was ineffective (a prudent consideration dictated by practical reasonableness), but because it condemned even the otherwise innocent and non-harmful drinking of alcoholic beverages.<sup>24</sup> Attempts to do away with racial discrimination or with abortion run similar risks.<sup>25</sup> The fact that legal mechanisms origi-

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<sup>23</sup> There is a direct implication of the distinction I have made between laws directed in an efficiently causal way toward instantiating a fundamental good, and the web of regulations I have termed Pharisaism. It means that a legal society has a greater moral justification in strictly prohibiting certain kinds of personal behavior, i.e. racial discrimination, abortion, suicide, than it does in formulating prudential rules regulating the interpersonal relationships between its citizens, for example, in its contract, monetary, and licensing regulations.

<sup>24</sup> The otherwise innocent action is in drinking any alcoholic beverage in any amount and in any circumstance. In contrast, every act of drug abuse may be measurably harmful.

<sup>25</sup> Quotas may be such a pharisaical tactic designed to assure racial tolerance, if the external arithmetic formula of racial percentages, whether related or not to actual discrimination, is taken as the standard by which to judge non-discrimination. Similarly, once abortion may be directly prohibited by law, harassing regulations on the medical profession (e.g., extraordinary bookkeeping requirements, or burdensome surgical clinic certifications) may likewise turn out to be pharisaical. At present, however, since these kinds of regulations are the only legal means to protect unborn life, they are in fact directed towards that human good in a prudential way.

nally designed to insure the common good can be abused compels us to enter a caveat here. Pharisaism is not a binary phenomenon. Just as the Rule of Law has a focal meaning and may be generally though not totally present in a legal structure, and just as a legal system can be, on the whole, reasonably though not perfectly just, aspects of the rule of laws may be present at many times and in many circumstances. Although the rule of laws is a denigration from the Rule of Law, and a danger to it, it may be present in certain degrees in different parts of the legal system without supplanting the central force of the Rule of Law. But since the rule of laws does, in fact, constitute a danger to the Rule of Law, the question on how it arises and how it can be limited becomes of significant practical importance.

The danger of the rule of laws becomes evident when a literal insistence upon the law can be seen to work counter to the genuine purpose of the law. That was the point of many of the debates Jesus had with the Pharisees.<sup>26</sup> It should also be recalled, however, that Jesus saved his greatest wrath for those who used the law to yoke others for their own purposes.<sup>27</sup> Both the ancient and modern Pharisee burden others for the sake of their own scheme of how people should behave externally. The reason why the Rule of Law subjects rulers to the law is that only when rulers see themselves as part of the affected group, can they determine whether what they do is for the common good. The Pharisee separates himself from the ruled. It is more than a prophylactic to say that being bound by one's own rules will operate as a check upon the selfish use of power. The very yoking of others and not oneself to a set of rules asserts that the rules are not made for the *common* good, but for the ruler's good. The tyrant and the Pharisee are often the same person. In any age, that type of ruler will lay rule upon rule in the (ultimately vain) quest of the security of his own set of values or interests. The vice of scrupulosity translated into legal form is the hallmark of the Pharisee.

In the end, therefore, there comes a congruence between the rule of laws and the rule of will. The difference is technical, not substantive. In the rule of will, exemplified in daily Party decrees under revolutionary Bolshevism, for example, little or none of the technical forms of the Rule of Law are present. On the other hand, Pharisaism may partake of some of the technical elements of the Rule of Law, clarity and prospectivity, for example, but it is not the Rule of Law in its focal sense, and reflects the Rule of Law only in an apparent or secondary sense.<sup>28</sup> Professor Noel Reynolds makes the point nicely:

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<sup>26</sup> See, e.g., *Mark* 2:23-27; *Matthew* 12:10-12.

<sup>27</sup> See, e.g., *Mark* 12:38-40; *Matthew* 23:1-8.

<sup>28</sup> See the distinction derived from Aquinas that Finnis uses to characterize focal and secondary meanings. *NATURAL LAW*, *supra* note 2, at 365-66.

Where laws are really commands or regulations designed to mobilize the actions of individuals to further the objectives of the state or the rulers independently of the preferred life plans of individuals, they are not laws in the same sense. And "rule of law" is not an applicable descriptor. Rather, the "laws" are really instruments of will by which some men rule others, marshalling the resources, time and talents of the ruled in pursuit of the rulers' purposes.<sup>29</sup>

All authoritarian regimes of the twentieth century are pharisaical in that sense, as are latter-day Communist regimes that moved from direct Party decree to a regime of insistent "socialist legality." Since pharisaical legal systems are, in a focal sense, opposed to the common good, it is little wonder that authoritarian regimes ultimately risk and often lose their authority and legitimacy in the eyes of the ruled and thereby become vulnerable to forced fundamental changes.

In the legal system of the United States, the danger of Pharisaism comes less from easily identifiable ideological sources than from the uncounted plethora of laws and regulations designed to meet the needs of a complex and highly interrelated society. The sheer numbers of rules and the belief that such complex problems can be solved legislatively can encumber a society with so many legal details that the critique of Solzhenitsyn gains credibility.

In some ways, the danger to the Rule of Law is more insidious with this kind of Pharisaism than with the traditional ideological sort. It is difficult to resist the premise of modern day regulations. We find it desirable for the common good to have a stable monetary system and an environment that is healthful. Further, the mechanism of the modern technological state is to divide and compartmentalize the regulatory actors. Indeed, such specialization seems to be necessary. Thus, it is all the more difficult to dislodge this form of Pharisaism. The regulator can always retreat to this premise for the legislation: "You do want clean air, don't you?" Before long, the goal of "clean water" or "a safe workplace," originally formulated and directed to the common good, can itself become an ideology insistent on success irrespective of the burdens imposed. The scrupulous regulator can become democracy's Pharisee.<sup>30</sup> There are, in addition, so many loci of regulations that attempting any effective reform is an extraordinarily daunting task.

Wherein do we find a correction? In the modern highly regulated technological environment, a modern legal system can avoid the degeneration of the Rule of Law into the rule of laws only through the establishment

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<sup>29</sup> Reynolds, *supra* note 20, at 7.

<sup>30</sup> The point is also made, in his own terms, by F.A. Hayek: "It would scarcely be an exaggeration to say that the greatest danger to liberty today comes from the men who are most needed and most powerful in modern government, namely, the efficient expert administrators exclusively concerned with what they regard as the public good." F.A. HAYEK, *THE CONSTITUTION OF LIBERTY*. 262 (1960).

of a set of limitations and corrections based on principles of practical reasonableness. We can understand what those limitations should be only in the context of the "bonding" that makes a society into a legal community, namely, the moral obligation to obey the law, a moral obligation that the modern Pharisee turns to his advantage.

#### IV. THE OBLIGATION TO OBEY THE LAW

John Finnis bluntly argues that without the Rule of Law, the legal system would not be entitled to be regarded as "the source of authoritative solutions."<sup>31</sup> On the other hand, laws formulated in accordance with the dictates of the Rule of Law and its corollaries carry with them a legitimacy and a saliency that gives rise to the moral obligation of obedience by those on whom the law impacts.<sup>32</sup> Much of the system propounded by John Finnis hangs upon that proposition. Finnis is careful, however, to deny that the moral obligation to obey the law derives from a tacit or express contractual relationship between the ruler and the ruled.<sup>33</sup> Rather, he argues that the moral obligation to obey the law as law comes from the exercise of practical reasonableness by the individual as an individual. The individual "reasons" that the expansive, interconnected, and mutually supporting aspects of the "law" (i.e., the entire legal system including all its positive enactments on which he relies) gives him benefits without which he would have little practical opportunity to develop his own particular life plan.<sup>34</sup> It provides an exclusionary reason for obedience, and, in the context of the structure of the legal system, bars the citizen from picking and choosing among laws on the basis of the moral justification of each enactment.<sup>35</sup>

The coherence of the system adduced by Professor Finnis depends upon a strong moral obligation of the individual to obey the law *qua* law. Inasmuch as Finnis's picture of the legal system is complete spatially and temporally, a law validly emanating from the legal system carries enormous moral force. Being spatially complete, the legal system regards itself as "gapless," that is, it covers every human action either by explicit or tacit permission or restriction.<sup>36</sup> It is "a seamless web . . . forbidding its

<sup>31</sup> Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory* 1 NOTRE DAME J. OF LAW, ETHICS & PUBLIC POLICY, 115, 136 (1984) (hereinafter *Authority of Law*).

<sup>32</sup> NATURAL LAW, *supra* note 2, at 314-18.

<sup>33</sup> *Id.* at 247-252.

<sup>34</sup> *Authority of Law*, *supra* note 31, at 119-120. Finnis, *Law as Co-ordination* 2 RATIO JURIS 97, 101-02 (1989) (hereinafter *Law as Co-ordination*). Query: what if the entire range of positive enactments, each one reasonable in itself, creates such a web (Finnis's favorite metaphor of the legal system) of restrictions that the individual's opportunity to constitute himself is severely hampered? See *infra* discussion in Part IV of the text.

<sup>35</sup> See NATURAL LAW, *supra* note 2, at 318-319.

<sup>36</sup> See *id.* at 269.

subjects to pick and choose.”<sup>37</sup> Since there can be no “gaps” between legal obligations, neither can there be overlapping, or conflicting legal requirements. Temporally speaking, there are no variable legal duties. Every single legal obligation has invariable and continuous formal force.<sup>38</sup> Time and circumstance may determine when a legal rule applies, but the legal rule remains extant nevertheless (until validly modified or repealed). There can be “no degrees of legal obligation.”<sup>39</sup> Past acts that produce either secondary or primary norms are “beyond the reach of persons in the present. . . .”<sup>40</sup>

Within such an extensive and complete structure, the possibilities of a citizen having a valid reason for disobedience are few. Professor Finnis offers some options for valid acts of disobedience to the laws, but in nearly every case, he offers reasons for one to withhold such disobedience. Indeed, occasions of valid disobedience must necessarily be narrow, lest his structure of moral obligation lose its theoretical and practical trenchancy.

One limit to the moral obligation to obey the law that Finnis avers is that a practicably reasonable person should withhold his acquiescence from regulations promulgated by those who, by reference to prior validation-creating rules, do not have the authority to promulgate regulations. In other words, governmental authorities who act *ultra vires* need not have their directives acquiesced in. However, a practically reasonable subject on whom those regulations impact should still consent, if the common good is furthered thereby.<sup>41</sup> Finnis does not emphasize what kind of trauma the Rule of Law can suffer from those emergency exceptions undertaken by rulers.<sup>42</sup> It is clear from his context, however, that so long

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<sup>37</sup> *Law as Co-ordination*, *supra* note 34, at 101; *See, e.g., Authority of Law*, *supra* note 31, at 120.

<sup>38</sup> *See* NATURAL LAW, *supra* note 2, at 310-311.

<sup>39</sup> *Id.* at 309.

<sup>40</sup> *Id.* at 269. “Those who participate in the life of the polity must go on, day-in and day-out, acknowledging that what was done by way of selecting a scheme did settle that question not only for then but also for now. *Authority of Law*, *supra* note 31, at 135.

<sup>41</sup> NATURAL LAW, *supra* note 2, at 250-251. Such a caveat is logical in Finnis’s system. If, indeed, the obligation of obedience were contractual, then there would be absolutely no moral reason to obey an *ultra vires* act. But since the obligation to obey derives from practical reasonableness, even an “illegal” act of a ruler might still be accepted if the common good would require such an acquiescence. However, we should note that this kind of moral structure gives an opening to rulers to adopt a temporary and emergency suspension of constitutional requirements for the sake of maintaining the survivability of an otherwise valid legal system. *Id.* at 275. Such acts, though *ultra vires*, should still be acquiesced to for the sake of the common good. One example might be the extra-constitutional actions taken by Abraham Lincoln during the Civil War.

<sup>42</sup> In Federalist 25, Alexander Hamilton argued against a restriction to the Constitution proposed by some anti-federalists, namely that a standing army not be permitted during times of peace. In answering that argument, he made the general point that too many restrictions on a government might force it to disobey the Constitution merely for survival, and that this might encourage further breaches on less necessary grounds.

as the diversion is done to maintain the common good, that it is brought about by extreme necessity, and that it is regarded and expressed by the ruler as a temporary aberration, then there may be sufficient cause to acquiesce in the action.

The notion of a justifiably disobedient act trumped by notions of the common good is paralleled in the case where a person in authority decrees an unjust law, one that is contrary to the common good. The first consideration Finnis offers is that:

[A]uthority . . . is useless for the common good unless the stipulations of those in authority . . . are treated as exclusionary reasons, i.e. as sufficient reason for acting notwithstanding that the subject would not have himself have made the same stipulation and indeed considers the actual stipulation to be in some respect(s) unreasonable, not fully appropriate for the common good.<sup>43</sup>

That point of departure is, of course, necessary, for without it, there would indeed be the right of the subject to pick and choose among legally obligatory laws. But does it leave any room for justifiable disobedience nonetheless? For Finnis it does, but with the same kinds of considerations as a limitation and a corrective. An unjust law does, in fact, lack authority,<sup>44</sup> at least for the particular subject who would suffer an injustice from that law.<sup>45</sup> However, the suffering subject may still be morally obliged, not because of the law but because of the common good, to withhold his non-compliance for the sake of "not rendering ineffective the just parts of the legal system."<sup>46</sup>

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Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.

A. Hamilton, FEDERALIST PAPERS, *supra* note 18, No. 25, 167. This creates a tension, of course, between the need to structure the government so that its parts check one another to prevent the "rule of men" from arising, *see infra*, Federalist 51, at 320, and at the same time giving it sufficient power to provide for the common good and meet emergencies without the need to violate those same restrictions. Such a line, Finnis would argue I believe, is required by his theory of law, but its exact contours could only be provided by history, sociology and political science.

<sup>43</sup> NATURAL LAW, *supra* note 2, at 351-52.

<sup>44</sup> "[T]he ruler has, very strictly speaking, no right to be obeyed . . . ; but he has the authority to give directions and make laws that are morally obligatory and that he has the responsibility of enforcing. He has this authority for the sake of the common good. . . . Therefore, if he uses his authority to make stipulations against the common good, or against any of the basic principles of practical reasonableness, those stipulations altogether lack the authority they would otherwise have by *virtue of being his*." *Id.* at 359-60.

<sup>45</sup> "[I]t should not be concluded that the distributive injustice of a law exempts from its moral obligation those who are *not* unjustly burdened by it." *Id.* at 360.

<sup>46</sup> *Id.* at 361.

For its part, the legal system may justifiably demand through coercion that its regulations be complied with, not just to protect against and constrain the "recalcitrance of the selfish," but to limit the corrosive influence of "high-minded, conscientious opposition to the demands of this or that (or perhaps each and every) stipulation."<sup>47</sup> Beyond that, the coercive element of the law has an heuristic efficacy. Each member of the community is made aware by the criminal law and its effective sanctions that "no one is made to live his life for the convenience of others," and that each member knows of the appropriately decided common way of developing one's plan of life.<sup>48</sup>

Even in the civil law, similar constraints obtain. The legal force of a contract is invariable. Its application varies, of course, depending on the circumstances in which the parties to the contract find themselves, but the legal obligations remain constant. If parties are relieved of their obligations, such as by a fundamental change in circumstances or by force majeure, the legal obligation has simply been replaced by another legal obligation; the first legal obligation was, within itself, subject to further legal modification. Indeed, even where exceptional circumstances require a change in the previously relied upon obligations within the contract, the legal system requires that such changes be validated by authoritative institutions such as arbiters, courts, and referees, each of which itself has legally defined limits of authority and discretion.<sup>49</sup>

To summarize, it is clear from Finnis's structure that the moral force of the law comes from the individual's exercise of practical reason which tells him that since the legal system is effectively co-ordinating actions for the common good, his good logically requires him to obey each positive law that impacts upon him. There are two escapes from the logical enclosure. First, it may be that the positive law is not validly enacted according to the terms of the legal order itself. It has no *legal* force. There is, therefore, no reason to obey it as an aspect of the legal order. But there still may be a reason to obey it, by referring back to the same notions of the common good that impel one to obey legal enactments.<sup>50</sup> If the common good would benefit, then I am morally obliged, though not legally obliged, to obey that "law."

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<sup>47</sup> *Id.* at 261. "Practical reasonableness . . . demands that conscientious terrorism, for example, be suppressed with as much conscientious vigour as other forms of criminality." *Id.* at 260-61.

<sup>48</sup> NATURAL LAW, *supra* note 2, at 261. Further, "[t]here is the need of the actually or potentially recalcitrant (which includes most members of society, in relation to at least some activity or other) to be given palpable incentive to abide by the law when appeals to the reasonableness of sustaining the common good fail to move." *Id.* at 262.

<sup>49</sup> *Id.* at 310-12.

<sup>50</sup> It is here that Finnis comes closest to conceding to his positivist critics that the moral validity of the law comes from a system of ethics outside of the law. His response, as I understand it, is that the legal system is an essential aspect of the instantiation of the common good, and that although reasons of the common good provide a possible basis for questioning the moral obligation of one to obey a particular law, the same considerations of the common good return one towards respecting the legal order's enactments, even those particular ones that suffer from moral lapses. See his discussion, *id.* at 314-320.

On the other hand, what if I am obliged by the terms of the legal system to obey a validly enacted law, but my practical reason informs me that such a law is contrary to the common good? It is at this point that the wide ranging considerations of the common good enter into my determination of what to do. I must first of all consider whether the legal system as a whole is directed toward the common good from which I receive an incalculable benefit. That at least gives the legal enactment the benefit of the doubt, even if it be a significant doubt. This is partly what Finnis means when he says that a law gives "presumptive and defeasible exclusionary reason(s) for action."<sup>51</sup> Further, if the legal system is fundamentally just, I will have less justification in disobeying even an unjust enactment unless it impacts on my own participation in the field of good. Even if the law does restrict aspects of my participation in the field of good, the integrity of the generally just legal system can be a strong enough moral reason for me to forego my moral right of disobedience.

Finnis does seem to agree that if the act of disobeying that kind of unjust law does not create a significant "rent in the fabric of the law,"<sup>52</sup> then such an act of disobedience based on grounds of practical reasonableness would be *morally, though not legally*, justifiable. That last qualification is critical to Finnis. Even where moral considerations justify a departure from the requirements of a particular law, that consideration does not feed back into the law as a *legally* justifiable reason to be exempted from the law.<sup>53</sup> In such a circumstance, the legal system must be blind to moral exceptions. It would seem, therefore, that a morally prudent person would also calculate the possibility of his being sanctioned (i.e. caught) in disobeying a morally unjust law. The sanction may constrict one's participation in fundamental goods (even by experiencing the shame of contesting a structure one's friends benefit from) to a greater degree than would complying with the enactment. Nor would there be, in Finnis's structure, the possibility of such a moral act revising the legal prohibition. The legal system does not provide for such a feedback. There would, therefore, be no legal benefit in having one's justifiable disobedience brought to light through discovery and prosecution. All these prudential calculations would weigh on the side of obeying even an unjust law.

On the other hand, we may be able to add at least one caveat to the reasons that Finnis suggests for obeying even an unjust law. If the unjust enactment, *e.g.*, racial segregation or unrestricted abortion, is one that scandalously deprives large segments of the society of a fundamental good, then my disobeying that unjust enactment is less of a scandal to the (otherwise just) legal system, for such an egregiously unjust law itself

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<sup>51</sup> *Id.* at 319.

<sup>52</sup> *Id.* at 318.

<sup>53</sup> Unless, of course, the legal system itself provided for an institutional mechanism for determining legally sanctioned and validated exceptions for that particular law. NATURAL LAW, *supra* note 2, at 317.



stands as a scandal to the legal system. Finnis has accepted these overriding considerations for certain extreme situations. If the legal system actually requires one to "perform immoral acts," violating such requirements "would be permissible and even obligatory."<sup>54</sup> One would even be justified in destroying property "specifically dedicated to wicked activities."<sup>55</sup> Finally, in confronting situations of serious injustice, one may engage in "civil disobedience" provided one's actions are heuristically motivated, they respect the validity of the legal system (i.e., by accepting punishment), they do not otherwise offend moral principles, and that the purpose of the disobedience is not self-seeking.<sup>56</sup>

In sum, in all cases, one may go outside of the law to the grounds of the common good as a basis for disobeying a validly enacted but unjust law, but the grounds of the common good necessarily include the benefits enjoyed by reason of the continuing respect for and vitality of an effective legal system. The question now arises whether the system propounded by John Finnis can protect the Rule of Law from the corrosive effects of Pharisaism, or whether, on the other hand, it actually tends to legitimate a turn towards Pharisaism and, in so doing, undermines one of its core elements.

#### V. THE NECESSITY FOR NON-COMPLIANCE

If the Rule of Law is an essential aspect of morally justifiable legal system, and if, as I have suggested, Pharisaism is a negation of the Rule of Law, it follows that a legal system ought to avoid mechanisms that would degenerate into a rule of laws. Indeed, since, as Finnis holds, "it is the values of the Rule of Law that give the legal system its distinctive entitlement to be treated as the source of authoritative solutions,"<sup>57</sup> a system risks its very existence if it permits Pharisaism to displace the Rule of Law. The dilemma is this: without the universal moral obligation to obey valid laws, the coherence and structure of Finnis's system begins to unravel. The common good cannot logically abide or tolerate the legitimacy of act utilitarianism by individuals faced with a legal peremptory command. On the other hand, a complex, seamless, and developed legal structure seeking to co-ordinate millions of daily actions in a technological society can easily stifle the individual's flourishing, undermine the common good, and disassemble the Rule of Law.

The first principle is that there is a limit to what authority can impose upon persons without necessarily intruding upon their ability to formulate a life plan according to the dictates of practical reasonableness and consonant with the range of primary goods. An excess of positivism will undermine the Rule of Law. The government simply cannot demand too much.

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<sup>54</sup> J. FINNIS, J. BOYLE, & G. GRISEZ, *NUCLEAR DETERRENCE, MORALITY AND REALISM* 354 (1987).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 355.

<sup>57</sup> *Authority of Law*, *supra* note 31, at 136.

A legal system has to be relatively lean in the number of positive laws it attempts to enforce, not only because it must leave a wide area of individual flourishing through a free choice of participation in essential goods, but in a formal sense because a system rife with laws and rife with strict enforcement of the laws can spiral into Pharisaism and defeat the essential underpinnings of the Rule of Law itself.<sup>58</sup>

Knowing that any set of regulations in a modern society will necessarily have a restrictive and narrowing effect on human activities, the burden is on the rule-maker, the legislature, to demonstrate that the proposed set of regulations will further the common good, not only in the area of human activity to which the regulation applies, but in considering the impact the impediments of the law in all its reasonably foreseeable effects will have on the life plans of individuals. These other effects include not only the bare costs of enforcing the law, but also the costs of having a more intrusive presence of the government in the inspection and evaluation of the ongoing activities of its individual citizens.

The second rule—and the central thesis of this paper—is this: the Rule of Law can best be protected against degenerating to the rule of laws if the legal system incorporates an acceptable range of justifiable non-compliance. Whether this would require a modification of a number of Finnis's central aspects of the legal system, *e.g.* seamlessness, will be looked at later.

For purposes of describing this proposition, I am choosing to distinguish between non-compliance and disobedience.<sup>59</sup> I use the term disobedience in a strong sense where one willfully acts contrary to the law because he believes the particular policy the law seeks to bring about should not occur, for either right (*i.e.*, morally justified reasons) or wrong (self-seeking) reasons. Sometimes the act of disobedience may be public and designed to scandalize the particular law, to demonstrate its moral bankruptcy. We (and Finnis<sup>60</sup>) traditionally call this civil disobedience. By its nature, disobedience is an affront to the legal system, although it may be justified in certain situations.

Non-compliance, on the other hand, is an act whereby a person refuses to abide by a law in a particular circumstance. Again it may be for morally justified or unjustified reasons. The difference is that the non-complying person does not contest the overriding legitimacy of this particular law. He only seeks an exception in his particular case. The nature of non-compliance therefore is that it is spatially and (normally) temporally limited. It is designed to affect a particular person in a particular circumstance.<sup>61</sup>

<sup>58</sup> In this principle, one finds an echo of the insight of F.A. Hayek, also reflected in Finnis, that general laws, under the Rule of Law, are properly designed to leave a wide range of human freedom and are less restrictions on that freedom, than a support to it. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 148-161 (1960).

<sup>59</sup> The distinction roughly parallels Raz's differentiation between civil disobedience and conscientious objection. *AUTHORITY OF LAW*, *supra* note 7, at 276-89.

<sup>60</sup> See *supra* text accompanying notes 54-56.

<sup>61</sup> In speaking of disobedience or non-compliance, I am presuming that "morally

Any person who owns his own home today is confronted by myriad building and zoning regulations, and is nearly always ignorant of the vast bulk of them. The average business person is faced with similar regulations multiplied by many factors. Most home owners in some fashion or another are in current violation of a regulation. Even if they were aware of the violations, many, for justifiable reasons, would continue not to comply with a number of the promulgated standards. An older house may not have an attic stairway meeting current code requirements for tread or for ceiling height. Two young children may be housed in a bedroom which is smaller than the square footage required by law. A person may illegally have an extra range, refrigerator and sink in her basement. Someone may be running a mail order business out of a residence not zoned for business uses. Commonly, businessmen complain of analogous problems with environmental, worker safety, equal protection, social security, and other regulations.

Justifiable non-compliance can occur for many reasons. The reasons for the law may be demonstrably absent in the application of the law itself. For example, the local prohibition against a second kitchen in a single family home was designed as a prophylactic against someone renting out a basement apartment contrary to zoning code restrictions. Such a law is quintessentially pharisaical: using one law restricting what would normally be a totally innocent act to provide a zone of protection against the violation of another law. In point of fact, many women in this area of the country in single family homes use a second kitchen in the basement for overflow cooking and storage needs for large family celebrations, or for canning and preserving. The law is phrased without that exception. It is easy to see how having a second kitchen could be necessary to one's participation in a number of essential goods. On that basis, the non-compliance is justifiable. In fact, the local legal community tolerates this form of non-compliance. Non-compliance to this law is widespread. Building inspectors will ignore such a violation unless there is a compliant lodged by a neighbor.

Another reason for justifiable non-compliance can be derived from the sheer bulk of the regulations. They may be "promulgated" in the formal sense. They may be accessible to lawyers. But these regulations are directed at the ordinary homeowner and the ordinary businessman (as well as the professional builder and the sophisticated corporation), and it would be unreasonable to expect one to divert oneself to such a significant degree in order to learn and familiarize oneself with such regulations to the obvious detriment of being able to get on with one's individual life plan. Similarly, there may not only be a great burden in having to find out about the regulations (in order to avoid possible sanction), but the regulations may, taken as a whole, constitute an undue burden on the normal and morally justified activity of running a business or maintaining a home. The requirement that laws be relatively lean and frugal allows for a prudent amount of non-compliance when they are not.

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justified reasons" can be objectively determined (following the structure of Finnis's argument). The question of mistake, however, remains a practical issue and influences the way a legal system treats assertions of morally justifiable acts of disobedience or non-compliance.

In each case, the non-compliant person would "reason" that the law was validly enacted, that its underlying purpose is reasonable, but that in the particular circumstance in which the person finds himself, the application of the law would hinder his own otherwise lawful and morally justified pursuit of his life plan. The person would also have to conclude that the temporary suspension of his compliance would not undermine the effectiveness of the law in its general application, either in the practical effect on the social program underlying the regulation or on the scandal to one's co-operating neighbors should his action be evident. As part of that conclusion, the non-compliant person might also reasonably calculate whether the chances are great or slim of his being caught. Such a calculation, of course, is morally relevant to the decision not to comply only if the motivating source was a reasonable and genuine concern for the moral values that make up the common good.<sup>62</sup> The moral reason must always be framed in an exceptional way also. The moral authority of the law *qua* law is not contested when good and sufficient reasons are adduced for its temporary suspension. But a sanction would lessen the non-compliant person's opportunities for self-development and might weaken the regard of others for the generally just and effective legal system under which he and they live.<sup>63</sup> In all these concerns, the non-compliant person would be deriving conclusions based on the exercise of practical reasonableness.

Rather than seeing whether non-compliance is justified entirely by non-legal moral considerations (with the integrity of the legal system fed back as a constituent moral consideration),<sup>64</sup> in the schema I have adduced, non-compliance can be a healthy sign of a people committed to the Rule of Law when the laws themselves become an obstacle to the Rule of Law. Of course, like any moral human action, non-compliance can become a habit, as Aristotle understood the term,<sup>65</sup> and in that case, widespread non-compliance ultimately saps away at the Rule of Law.<sup>66</sup> A permanent

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<sup>62</sup> Looking out for the government inspector not only means that I am concerned with the effective range of legitimate action left to me, and that I am concerned with the moral saliency of the legal system if my non-compliance comes to light, but it also means that I recognize that the inspector not only can, but has a valid right to stop me.

<sup>63</sup> Finnis disdains whether getting caught is a question having to do with one's moral obligation to obey the law. "Someone who asks how injustice affects his obligation to conform to law is not likely to be asking for information on the practically important but theoretically banal point of fact, 'Am I or am I not likely to be hanged for non-compliance with this law?'" However, because the question is practically important, it is not theoretically banal, for the person of practical reason would be concerned about whether the reasons for his otherwise justified non-compliance would be overcome by a public sanction. *NATURAL LAW*, *supra* note 2, at 355.

<sup>64</sup> See discussion of Finnis's notion of justifiable disobedience, *supra* text accompanying notes 41-46.

<sup>65</sup> *ETHICS*, II.i.1-8.

<sup>66</sup> Thus, the justifiably non-compliant person will not withhold his obedience willy-nilly, but "will always be looking out for new and better ways of attaining the common good, . . . of playing his own role." *NATURAL LAW*, *supra* note 2, at 231. When it becomes a habit, non-compliance is not morally appropriate, but

justification for non-compliance becomes disobedience, and that justification goes not to the particular application of the law in certain circumstances but to the effect of the application of the law in all circumstances. The same caution observed by Alexander Hamilton in regard to the rulers applies here: if there are too many legal restrictions upon one's range of action, the citizen will find it necessary to act outside of the law, and thus the system runs the risk of losing the sacred regard for the law that is necessary for its continued existence.<sup>67</sup> In order to prevent acts of non-compliance from becoming routine and in order to limit the number of free-riders, (i.e., those who do not comply because of self-seeking reasons), a responsible legal system will devise easily accessible mechanisms to ratify or permit acts that would otherwise have been legally prohibited.

One mechanism is the development of affirmative defenses or excuses in the law itself. Unfortunately, defenses and excuses are often answers to formal complaints, and usually must show a need of an extreme and unavoidable character. Affirmative defenses by their nature, therefore, have limited uses in a complex regulatory scheme.

More germane mechanisms for limiting the need for non-compliance attach to the regulatory process itself. Typically, the legislature, Congress for example, will set objectives and policies, and establish a regulatory agency to promulgate rules effectuating those standards and adjudicating violations of the rules. In United States practice, a regulatory agency typically promulgates a proposed regulation (often after hearings where those to be regulated are heard) and invites comments from affected parties. Such a process permits modifications and nuances to be incorporated in the regulation at the final promulgation stage, limiting the range of justifiable non-compliance that would otherwise have been expected. Thus the discretion granted to administrative agencies, if properly exercised, assists in tailoring regulations so that they do not constrict the legitimate life plans of individuals.<sup>68</sup>

Similarly, adjudicative bodies at the national and local level hear requests for variances on the grounds that the application of a particular regulation will cause a "hardship," usually defined as inhibiting or prohibiting the reasonable use of the property being regulated. Discretion to grant such variances is wide. Discretion is also evident in the practice of consent orders, where either past violations are excused for the promise of future compliance, or where the kind of compliance required is actually modified in order to meet some of the needs of the regulated entity. For

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moral culpability may be mitigated because the law itself helped formulate the habit in the people. It is in this context that critics of the applicability of certain laws (e.g. prohibition) have their point: the passage of the law will abet disrespect for the law because the moral force of the law as law does not overcome a large segment of the population's non-legal moral values.

<sup>67</sup> Hamilton, *Federalist* 25, *supra* note 42.

<sup>68</sup> In contrast, F.A. Hayek believed that such discretion was the hallmark of an abuse of the Rule of Law. F. HAYEK, *THE CONSTITUTION OF LIBERTY* 212-17 (1960). Theodore Lowi argues that the most modern forms of administrative agencies have undermined the formal structure of the classic liberal notion of the Rule of Law. T. Lowi, *The Welfare State, The New Regulation, and The Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY*, 17, 56-57 (A. Hutchinson & P. Monahan, ed. 1987)

example, consent orders granting extensions or only partial compliance with environmental regulations is commonplace.

If the legal system has had to contend with a large number of exceptions or variances in one of its proposed policies, it soon becomes evident to the lawmakers that a revision of the general rule may be necessary. Thus, the recognition and attempt to deal with what would be occasions of justifiable non-compliance feeds back into the law-making role, making it more responsive to the needs of regulated entities. The legal system can also recognize that the law has simply died from desuetude: a widespread lack of compliance and enforcement. Permitting justifiable non-compliance can be a method of allowing a law to lapse after it has outlived its usefulness for the common good.

Finnis looks upon such devices as the legal system's method to channel moral feedback into the rule-making mechanism itself, leaving the law's seamless garment without a rent. But he seems to view the roles of those institutions primarily as limiting rather than recognizing the moral feedback of those who would justifiably object to complying with a law.<sup>69</sup> I think it more plausible to see it as a healthy legal system's recognition of the morally acceptable grounds for non-compliance. It is, indeed, the modern legal system's more sophisticated accomplishment of what Aristotle so presciently addressed as the needs of equity.<sup>70</sup>

A final mechanism that deals with occasions for justifiable non-compliance is one that is most vital, but one that does not necessarily legally validate the non-compliant act. It is prosecutorial discretion. Prosecutorial discretion does not occur when there is insufficient evidence to support an indictment or a civil citation. In that case, there is simply nothing to prosecute. Prosecutorial discretion occurs when there is sufficient evidence to charge a person with a legal violation, but "for reasons of justice" it is inappropriate to do so. Here the act of accepting non-compliance is not a validating act. The law has not been modified to accommodate the recalcitrant. The legal system simply accepts the act of non-compliance.

There are many grounds on which a prosecutor may justifiably, within his discretion, eschew prosecution for a crime. One of the most common is the practical problem that the docket is too crowded, and a speedy trial not possible, or there is not enough manpower even to try the offender. Nor is any police force in a free society large enough to arrest all offenders. In such cases, the prosecutor will try the "serious" cases, try to plead out the less serious, and ignore those that do not constitute a major danger to the larger scheme of the common good. The justifiably non-compliant are likely to be those in the last category. Recall here that justifiable non-compliance is not designed to call into question the appropriateness of the particular law in the generality of cases, nor would the morally non-compliant person seek to undermine the efficacy of the enforcement arm of the law.

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<sup>69</sup> NATURAL LAW, *supra* note 2, at 313.

<sup>70</sup> ETHICS, V.x.1-8

Since the decision not to comply has to be based upon good and sufficient moral reasons, a merely subjective preference by the actor is insufficient. The test of reasonable non-compliance is objective. Here, the possibility of mistake on the part of the non-compliant actor takes on significant practical significance. If the non-compliant person is, in fact, scandalizing the efficacy of the enforcement mechanisms of the law, or if his act will, in fact, undermine the effective co-ordination necessary to the success of a particular policy, the prosecutor would have reason to enforce the law. Absent mistake, however, the prosecutor would have no morally justifiable reason to enforce the law against one who is objectively justified in his non-compliance save for the duties imposed on the prosecutor by his office. But we have just seen that the duties imposed on him include the obligation to withhold prosecution for the good of the community. Consequently, only a pharisaical kind of attitude would induce a prosecutor to enforce a law against one who objectively was justifiably non-compliant.<sup>71</sup>

There are no statistical studies that I know of on the subject of prosecutorial discretion. But most of those who have worked with United States attorneys, or city prosecutors, or agency regulators, or building inspectors have similar experiences. The prosecuting authority will frequently not press charges against individuals who have opted for a justifiable limited exception of the law because it realizes the moral limitations under which this act of justifiable non-compliance has taken place. Enforcing authorities (i.e., police, or building inspectors) go even further. They will affirmatively ignore or not report such limited acts of non-compliance. Phrases like "the man is not a danger to the community" come forth to describe what has actually taken place. It is true that many self-seeking non-compliant persons slip through in addition to those justifiably non-compliant. However, like a mature society's tolerance for a range of self-seeking behavior that is excused through the devices of due process, a mature legal system likewise tolerates and affirmatively makes room for justifiable acts of non-compliance even though some free riders get by as well. If the society insisted on a literal enforcement of every regulation, there would necessarily result a "rule of laws" and the destruction of the Rule of Law as well as of the good of individuals throughout the community.

To the extent, therefore, that a legal system is not lean, for appropriate reasons having to do with a large population in a complexly related post-industrial economy, it must provide for a wide range of legitimate opportunities for non-compliance. Again, each act of non-compliance should be reasonable, taking into account the needs of the common good in the particular situation, the risk of being caught defeating the legitimate reason for non-compliance, the scandal to the legal order by such revelation, and the genuine temporariness of the exception. Such non-compliance can be made legitimate by legal mechanisms, primarily adjudicatory and regulatory bodies, or by prosecutorial discretion. But

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<sup>71</sup> Unless, of course, the prosecutor himself was making a good faith error in evaluation.

the social/legal system should tolerate such deviations when properly justified, and socially/morally condemn such deviations when not.

#### VI. JUSTIFIED NON-COMPLIANCE: RAZ OR FINNIS?

I come now to the final consideration. Does the necessity for the recognition of non-compliance run counter to Professor Finnis's structure, or can it be accommodated within it?

Since the publication of *NATURAL LAW AND NATURAL RIGHTS* in 1980, much of the critique of that work has centered on Finnis's continuing argument that there is a moral obligation to obey the law. Indeed, as the years have passed, in answer to his critics, particularly to his colleague Joseph Raz, Finnis's insistence on that point has become even more pronounced. Raz has contended that "there is no *general* obligation to obey the law" even "in a reasonably just state."<sup>72</sup> Thus, even where the law was just, the moral obligation to obey came not from the fact that the action required was framed as law, but from the fact that the action required was itself just, irrespective of whether it was a part of positive law or not.<sup>73</sup> Since the moral obligation to obey the law in fundamental cases such as murder is either irrelevant or perverse,<sup>74</sup> the law possesses no authority to compel obedience in these same areas. All law does in formulating sanctions against murder is to curb those whose moral principles do not restrain them from killing and assure those guided by the proper moral principles that they will not be taken advantage of.<sup>75</sup> In contrast, Finnis replies that there is a moral obligation to obey the law *qua* law, even if the law be unwise or impractical. Only if the law is unjust does it lose its authority as law, and, even then, the reasons for moral obedience to a positive law would still hold in the case of an unjust law, if the common good would be furthered by a loyal act of obedience.<sup>76</sup>

Raz does allow that law can be morally obligatory in certain kinds of cases. One is where the government knows better: it has greater knowledge and expertise. Industrial safety is the example he gives. The citizen properly obeys the law because the government has authority, i.e., more expertise than the subject for co-ordinating human actions effectively in this particular area. A second case is where co-ordination is to the good of all, and the government's call for me to obey induces me to pitch in with the others. Prohibiting private barbecues in order to preserve the countryside is the example given. Raz's third case is similar to Finnis's central case: the subject regards the policy (e.g., licensing nuclear power plants) as wrongheaded. For Raz, the law has no authority here because its expertise is mistaken. However, in order that one does not "undermine the government's ability to do good" by affirmative acts of non-compliance or disobedience, the subject is morally constrained to obey the law.<sup>77</sup>

<sup>72</sup> Raz, *The Obligation to Obey: Revision and Tradition*, 1 *NOTRE DAME J. OF LAW, ETHICS & PUBLIC POLICY* 139, 142 (1984) (hereinafter *Obligation to Obey*). *THE AUTHORITY OF LAW*, *supra* note 7, at 233.

<sup>73</sup> *Obligation to Obey* at 140-42.

<sup>74</sup> *Id.* at 141.

<sup>75</sup> *Id.* at 143.

<sup>76</sup> See discussion, *supra*, at text accompanying notes 41-46.

<sup>77</sup> *Obligation to Obey*, *supra* note 72, at 146.



Since Raz concedes that the government's authority comes from effective co-ordination in society, Finnis holds that this principle of authority is true for all law, even law that merely reconfirms what would have been one's moral obligation even without the law.<sup>78</sup> If one adds to this the nature of the law, i.e., its universality and seamless character, then the law (when just) always provides an exclusionary reason for obedience.<sup>79</sup>

It would seem that the argument for a legitimate place for non-compliance in a legal society is easily allied to Raz's view of the independent force of moral judgment in relation to the law. Raz asserts that even in those areas where the fact of the law makes a difference to one's moral obligations, "the obligation is limited and varies according to the circumstances" and "from one person to another."<sup>80</sup> Indeed, Raz specifically gives an example of one who knows more than the regulator as being morally free from the law's command, for it literally has no authority for him. The subject's own knowledge and moral obligation will control the decision.<sup>81</sup> Thus, the legitimate act of non-compliance that I outlined above would seem to be accounted for by Raz without contradiction to his (more limited) notion of authority.

Raz similarly accounts for the rational calculation by the non-compliant person as to whether he will be caught. If no one knows of the offense, then the effectiveness of government is not diminished.<sup>82</sup> Of course, even if not caught, the non-compliant person must still be concerned where others have relied upon his compliance for the entire co-ordination to be effective (in Raz's example, foregoing the use of one barbecue knowing that others are doing so as well). That is why Raz believes that room for legitimate non-compliance in cases of co-ordination is narrow.<sup>83</sup> Finally, Raz's views would also easily allow and, likely, morally commit the government to forego prosecution of the legitimately non-compliant act if no bad example or co-ordination problems are present.<sup>84</sup>

If there is a cost to Raz's acceptance of legitimate non-compliance, it is that by leaving out the exclusionary reason for obedience to the law in so much of his theory, he leaves open the possibility of a habit of non-conformity becoming accepted and thereby inevitably weakening the entire legal structure. A system that is based upon so many individual case-by-case decisions, according to each person's moral calculations, may be radically unstable.<sup>85</sup>

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<sup>78</sup> Raz denies that effective co-ordination need always come from governmental authority, and gives the example of the government's using economic incentives or contracting for certain social results. The obligation to obey in those cases comes not from authority but from a voluntarist communitarian and quasi-contractarian basis. *Id.* at 144, 153-55.

<sup>79</sup> *Authority of Law*, *supra* note 31, at 117, 120.

<sup>80</sup> *Obligation to Obey*, *supra* note 72, at 148.

<sup>81</sup> *Id.* at 148-49.

<sup>82</sup> *Id.* at 149.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Raz's answer is that respect for the law is still possible even when law is not generally of a moral obligation. *AUTHORITY OF LAW*, *supra* note 7, at 250. He argues that, like friendship, respect for law may be an aspect of loyalty to one's community. *Id.* at 253-61.

There is room, therefore, for justified non-compliance in Raz's theory, even with the danger of instability. Does Finnis's system provide any better framework, or does the notion of justified non-compliance at bottom stand as a contradiction to John Finnis's schema, or, at best, an uncomfortable and risky exception? There certainly seem to be elements in the theory of justified non-compliance that run counter to Finnis's conception. A justification for non-compliance seems to allow for one's picking and choosing what laws to obey on the basis of the moral reasonableness of each specific law and whether one can do better "on one's own" in any particular case. Even if accepted, it may leave "gaps" in the legal system, gaps that undermine the generic moral obligation to obey the law.

Upon reflection, however, I think that the necessity for a legal system to recognize the legitimacy of non-compliance is harmonious with the system of Finnis, and indeed, gives a flexibility and a dynamism to the system that might otherwise be perceived as static.<sup>86</sup> To begin with, let us recall Finnis's acceptance of the rulers' suspending the Constitution to act *ultra vires* for the common good in an emergency situation. So long as the need was manifest, the exception temporary, and the objective in harmony with the common good, Finnis would have the citizen, on moral grounds, acquiesce in the act. Professor Finnis does not think the legal system has been shattered by a temporary hiatus at the highest level. The "gap" in the law of the most fundamental second order type does not destroy the coherence of the legal structure. Similarly, if the act of non-compliance by the citizen is temporary, not destructive of the common good, and objectively in tune with his participation in the field of fundamental good, then the legal system should similarly "acquiesce" in the non-compliance.<sup>87</sup> Even when the non-compliant act cannot be ratified by mechanisms in the legal system,<sup>88</sup> those persons in the legal system entrusted with enforcing the law, such as prosecutors, would be morally justified in acquiescing if the character of the non-compliant act was as I have described. Indeed, in view of the common good, which seeks to

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<sup>86</sup> It was my colleague, Professor David Barnhizer, who suggested that the contribution of the notion of justifiable non-compliance to the dynamic of Finnis's structure was a more attractive alternative than a mere formal harmony with his scheme.

<sup>87</sup> Admittedly the analogy is not exact. The rulers' permissible exception is done for the most extreme reasons: survival of the system. That degree of necessity is not required in what I have suggested would be justifiable non-compliance. Nonetheless, the range of harm possible by more casual violations of the Constitution is far greater than the harm done by an occasional act of non-compliance. In addition, the range of goods is so variable and differentiated for each individual that there is a stronger reason for allowing a wider discretion in justifying a non-compliant act at the individual level.

<sup>88</sup> It should be recalled that a legal system may have a range of ratifying actions available at the Constitutional level. Congress, for example, ratified most of Abraham Lincoln's unilateral actions done without legislative sanction during the Civil War. If Finnis would allow a citizen to acquiesce in *ultra vires* acts that were not so ratified, it seems appropriate that the legal system could, for morally appropriate reasons, acquiesce in similar actions by the citizen that were also unratified.

assist each individual in the development of a life plan, the prosecutor should be under the same moral constraints to acquiesce as would a citizen in obeying a just but *ultra vires* act by the government.

It is true that at times, Finnis's argument seems to open the door to justifiable non-compliance a crack only to close it again. And there is no doubt that in my argument a modern technological society must accept and deal with a wide range of non-compliant acts in order to retain the saliency of the Rule of Law that is indicated in his limited possibilities of morally permissible disobedience. Nonetheless, there is much in the structure of Finnis's system to accord with an explicit acceptance of a practical range of justifiable non-compliance.

We should recall that Finnis asserts that the moral obligation to obey the law is "relatively weighty,"<sup>89</sup> not conclusive, and that it is defeasible.<sup>90</sup> It is true that the defeating conditions he lists are rather narrow, and that most can be overcome by a concern for the continued prospering of a relatively just legal order. On the other hand, Finnis emphasizes that the law's purpose to maintain real fairness between persons

is unaffected by the detection or covertness of breaches of law. The institution of law gains much of its value, as a contribution to the common good, precisely from the fact that the obligations it imposes hold good even when breach seems likely to be undetectable.<sup>91</sup>

When a person commits an act of justifiable non-compliance within the limits I have adduced, he in no way undermines law's contribution to the common good. In fact, Finnis continues, "it would be foolish to deny that in some circumstances an individual can serve fairness or other aspects of the common good better by breach than by conformity."<sup>92</sup> All Finnis wishes to emphasize in confronting Raz is that, even in these circumstances, there is still a reason to obey the law. That is true. But in those particular circumstances, there would also be a reason not to obey the law, and my point is that the legal system needs affirmatively to recognize and to tolerate such acts of non-compliance for its own well-being and development.

Looked at from another angle, if, in fact, the justifiability of non-compliance is based on danger of Pharisaism to the Rule of Law, then the exclusionary reason for obeying the law may be absent. As Finnis declares:

Someone [our Pharisee, for example] who uses his empirical opportunity, or even his legally recognized authority, to promote schemes thoroughly opposed to practical reasonableness cannot then reasonably claim to have discharged his own re-

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<sup>89</sup> NATURAL LAW, *supra* note 2, at 319.

<sup>90</sup> *Id.*

<sup>91</sup> *Law as Co-ordination*, *supra* note 34, at 102.

<sup>92</sup> *Id.* at 102-03.

sponsibilities in reason, and may be unable to justify his claim to have created a good and sufficient exclusionary reason affecting the responsibilities of those whose compliance he is seeking or demanding.<sup>93</sup>

I would only (but significantly) modify the statement to read:

if someone uses his recognized authority to promote schemes *clearly* opposed to practical reasonableness *in some cases*, he may be unable to justify his claim to have created a good and sufficient exclusionary reason affecting the responsibilities of *some of those* whose compliance he is seeking or demanding.

If that be the case, then the legal system ruled in part by the rule of laws necessarily exempts affected persons from the moral obligation to obey certain particular laws.

We can conclude our investigation in this fashion. The Rule of Law can be negated in part by the rule of laws, i.e., by a Pharisaical concern with the letter of the law in disregard of the persons the law should be designed to assist. A modern technological society naturally runs the risk of incorporating some aspects of the rule of laws. To prevent a disintegration of the Rule of Law, such a society should, first of all, affirmatively justify any regulatory scheme that significantly intrudes upon the life plans of individuals. Second, that society must also affirmatively ratify or tolerate limited and justifiable acts of non-compliance. A system that accepts the necessity of acts of justifiable non-compliance can be easily in accord with Joseph Raz's views, although the problem of radical instability remains. On the other hand, John Finnis's system could also incorporate such a notion, if it wished to emphasize not only the moral justification for such acts, but the manner in which recognition of justifiable non-compliant acts can assist the dynamic development of the system toward instantiating the common good more effectively.

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<sup>93</sup> NATURAL LAW, *supra* note 2, at 246.