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THE AUTHORITY OF LAW IN THE PREDICAMENT OF CONTEMPORARY SOCIAL THEORY

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Legal theory is only a part of social theory. The shape of a methodologically critical social theory is determined by moral and political theory.[1] The effort of moral and political theory is to discern principles for solving practical problems of behavior and distribution in human community — principles that are reasonable (fair, efficiently beneficial. . .), and preferable or even best. The effort of legal theory, when specifically focused, is different. It is to explain why, and on what conditions, principles and solutions once settled upon are to be given effect even when there is no consensus that the settlement was or is still correct, or that correct principles for arriving at such solutions were followed or are even available.

Because legal theory must assume that those subject to the law disagree about what the content of particular laws should be, it must walk a narrow path, from which many legal theorists stray. On the one side, legal theory must not ignore the lack of consensus about solutions to practical problems. On the other side, it must not assume that there really are no correct principles for solving practical problems; or that one can do legal theory well without having a correct moral and political theory; or that the correct principles conform to the model of techniques in themselves amoral and sub-political, such as cooking, bridge-building, or competitive games.

This article explores one of the central enterprises of legal theory: the explanation and justification, in principle, of the law's moral authority. Part I shows how one influential contemporary rejection of that authority rests on an unwarranted assumption of social consensus. Part II has much wider horizons. It surveys, partly historically and partly sys-

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1. For the dependence of even purely descriptive social theory on an implicit or explicit ethics and political theory, see J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 3-22 (1980).

tematically (though not, of course, exhaustively), some main aspects of the predicament of contemporary social theories as they struggle to make do with *emaciated conceptions of practical reasonableness*. The critique of these struggles hints at richer conceptions which I have recently expounded and defended more fully.[2] Finally, Part III resumes the problem of legal authority, to show how legal theory can and should appeal to a full conception of fairness to explain why a law can be judged morally binding even by those who reasonably regard it as unwise.

I

In the seventies, legal theorists began to argue that law, even good law, creates no moral reason to obey it just because it is law.[3] There is, they have argued, no generic moral obligation, not even *prima facie* or presumptive or defeasible, to obey the law. And this contention about obligation is equally a contention about authority. For to show that subjects have some moral obligation to obey the law is, by entailment, to show that the law has moral authority.[4]

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2. *See* J. FINNIS, *supra* note 1, at 59-197; J. FINNIS, FUNDAMENTALS OF ETHICS (1983). These works argue that being practically reasonable is one of the basic opportunities or basic human goods or basic aspects of human flourishing, along with other basic goods such as bodily life, knowledge, play, aesthetic experience, friendship . . . . They further argue that practical reasonableness involves a number of basic requirements, structuring the pursuit of all the basic human goods; requirements such as call for a coherent plan of life, detachment, commitment, no arbitrary preferences amongst basic goods, no arbitrary discrimination amongst persons, attention to consequences and efficiency, no attack on any basic human good in any act . . . . This footnote, of course, gives only hints of that account; the text below, without attempting to repeat or even summarize the books, introduces some of these conceptions in a way that is, I hope, sufficiently self-explanatory.

3. *See*, Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950 (1973); J. RAZ, THE AUTHORITY OF LAW 233-49 (1979); Sartorius, *Political Authority and Political Obligation*, 67 VA. L. REV. 3 (1982).

4. It is possible to conceive of a form of moral authority of rulers which does not entail any moral obligation of their subjects to comply with the rules; Rolf Sartorius contends that this form of moral authority is not merely conceivable but is actually worth considering: Sartorius, *supra* note 3. But he does not deny that any generic moral obligation to obey the law entails that the law and its authors have moral authority. He fails to show that arguments capable of justifying a claim to moral authority to make and enforce the law would not equally (or by addition of only uncontroversial premises) justify the claim that there is a generic moral obligation to obey that law. Since this is not disputed by Joseph Raz, I will treat the questions of authority and obligation without further differentiation. On

I offer here no point-by-point refutation of the arguments of these theorists.[5] Instead, I identify one structural weakness in their case. Reflection on this weakness will bring to light the materials needed to construct a positive case affirming the moral obligation to obey the law.

The weakness comes to light when we observe how Joseph Raz's influential denial of the law's moral authority[6] goes along with two ungrudging admissions: that everyone has moral reason to cooperate in securing certain social goals, and that law is instrumental in securing those goals. These admissions expose Raz's case to an obvious objection: what is instrumental in securing a morally obligatory goal must itself be morally obligatory, unless there is some other instrumentality, equally or more serviceable. Raz responds unsuccessfully to that objection, and the failure of his response clarifies the way in which law serves the goods attainable by cooperation.

Raz begins by granting that law indeed has, as one of its two principal functions, the role of securing morally desirable cooperation. As he points out, schemes of social cooperation are of various kinds. One of the most typical and pervasive schemes concerns acts which are useful if a sufficiently large number of people behave in appropriate ways but are without any value if nobody does or if only few people do. Polluting the rivers is an example. If a sufficiently large number of people refrain from polluting the rivers, they will be clean, and each person has a moral reason to contribute to keeping them clean.[7] The law, continues Raz, is indeed

> instrumental in setting up and maintaining schemes of social cooperation, and this not only by providing sanctions to motivate those who would not otherwise contribute their shares. . . but also through designating in an open and public way what the scheme is and what each has to do as his contribution to it. . ., thus enabling those who are motivated by the appropriate reasons to take part in the cooper-

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the tight interrelationship between the concepts of authority and obligation, see J. FINNIS, *supra* note 1, at 233-34, 255, 314-20, 335-37, 345; H.L.A. HART, ESSAYS ON BENTHAM 253-59 (1982).

5. For a brief refutation of M.B.E. Smith's central argument (*supra* note 3) see J. FINNIS, *supra* note 1, at 345.

6. J. RAZ, *supra* note 3, at 233: "there is no [moral] obligation to obey the law even in a good society whose legal system is just."

7. J. RAZ, *supra* note 3, at 247-48. Note that by "a moral reason to. . .", Raz means a moral obligation. *See id.* at 12, 235-36, 248.

ative enterprise.[8]

But, he concludes, the fact that law thus "enables" us to do what we have moral reason to do does not create for us a moral reason to comply with the law. For, he says,

> the moral reasons affecting such cases derive *entirely* from the factual existence of the social practice of cooperation and *not at all* from the fact that the law is instrumental in its institution or maintenance. Consider the example of river pollution mentioned above. It matters *not at all* to one's moral reasoning whether the practice of keeping the rivers clean is sanctioned by law, is maintained by exhortations and propaganda undertaken by enthusiastic individuals, or whether it grew up entirely spontaneously.[9]

In short, the moral authority of the scheme of cooperation derives entirely from the practice of cooperation and not at all from the fact that the practice is legally stipulated. The goal, cooperation, is morally obligatory, but the law is not necessary for attaining it; other available means will do.

In affirming that law has moral authority, one is contradicting Raz's claim that it "matters not at all to one's moral reasoning" whether a scheme of social cooperation is sanctioned by law, or maintained merely by the alternative means of exhortations and propaganda or spontaneous social practices. And the ground for contradicting Raz's claim is essentially that human good is complex, and conceptions of human goods are even more so. To speak to the case discussed by Raz: the benefit of having clean rivers neither is, nor is universally regarded as, the only relevant good.

It is perfectly possible for farmers or manufacturers on the banks of the river to judge that there is no sufficient reason for a national policy of eliminating river pollution. Such a view may equally be held by persons with no special personal interest, concerned only for the well-being of the national economy. They may rest their view on the heavy economic costs of the anti-pollution policy: the cost of compensating riparian owners, and the cost of providing alternative means of waste disposal, at a time of economic stringency in export industries competing with foreigners unhampered by anti-pollution laws. And so forth.

Confronted with an anti-pollution propaganda campaign,

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8. *Id.* at 248-49.
9. *Id.* at 249 (emphases added).

whether by pressure groups or even by Government, the farmer or manufacturer has, therefore, no sufficient reason to comply. He may well think the policy misguided; and it will damage him personally while yielding him nothing which he counts a significant benefit. Similarly, with a practice of not polluting rivers, the farmer has no reason to treat the incipient or prevailing trend as morally compelling. For, once again, he may well think the practice misguided; and, again his own immediate interests also suggest that he have no part in it.

But if and when a *law* is passed, things are changed for the farmer's practical reasoning. Now he can reason thus: "I should comply with this law, even though this law is neither in the national interest nor in my own. I should comply because I get many benefits from 'the law', from the legal system within which I live. My farm is protected from damage; my sales of farm produce are enforceable against the purchaser for the purchase price; those prices are supported by a government policy based on the laws of taxation and of market regulation; and so forth. Getting these benefits from the law, I should accept its burdens. Even though I might be able to 'benefit' even more by my secret non-compliance, I want to be a fair and upright citizen, just as I want others to be fair and upright in their dealings with me, whether they be my employees, fellow tradesmen, bankers and insurers, or the local police and courts. Moreover, I think the votes of elected representatives a useful and fair method of resolving national issues; in this instance my view has not prevailed in that political process; but sometimes the favor is in the majority, and when that happens I expect the law to be obeyed; so I should go along with it when I'm on the losing side in the vote."

Still, it may be asked, why does the law, and not the propaganda campaign or the spontaneous social practice, get the benefit of these considerations of fairness? An answer must begin by pointing to the *wide range* of benefits which the subject derives from others' compliance with law. This particular law, just because it is the law, lays on him the burden of avoiding river-polluting methods of farming or manufacturing. But the law (not this particular law, but the same "law of the land"), just as law, enforces against his neighbors the obligation not to burn down his buildings, and not to build new premises in defiance of zoning regulations, and the obligation to pay the purchase price of goods bought from him. Equally, the law, just as law, imposes on countless other people the obligation to pay the taxes which make possible a farm price

support policy rather beneficial to the farmer.

The law presents itself as a seamless web. Its subjects are not permitted to pick and choose among the law's prescriptions and stipulations. It links together, in a privileged way, all the persons, and all the transactions, bearing on the farmer's present and immediate future situation. It also links all the people and transactions which have borne on the farmer's well-being or interests in the past. And finally, it links too all the people and transactions that may bear on his future interests and well-being as he moves into other occupations, into retirement, old-age, illness and death. The metaphors, "web" and "links", here stand for the fact that in all these differing times and situations, a common reason for action — the law — was available and peremptory.[10]

Not all aspects of the common good are identified and protected or advanced, even purportedly, by the law. Not all the requirements of fairness or of appropriate community-mindedness are brought into play by the law's requirements. But to trace out the seamless web of the law is to gain a singularly adequate view of the breadth and *complexity* of the common good, of fairness, and of what may be involved in an appropriate *philia politike* ("friendship within the polity", good neighborliness towards the whole of society).[11]

The law has a further significance. Apart from the law, the farmer could reasonably be relatively indifferent to the concerns and interests of persons whose activities, apart from the law, do not affect him or at least do not benefit him. To take only the most obvious example, the farmer could, apart from the law, be indifferent to the concerns and interests of all the environment-conscious enthusiasts who campaign for anti-pollution laws. But when the law forbids pollution, he cannot but recognize that those who pressed on him this burden are themselves subject to burdens which, while they have no intrinsic relation to his burden, do share with him the quality of being peremptory and imposed for the supposed common good of this same community.

These, then, are some reasons for denying Raz's claim that "it matters not at all to one's moral reasoning whether the practice of keeping rivers clean is sanctioned by law [or]

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10. On the notion of peremptory reasons for action, see J. RAZ, *supra* note 3, at 235; H.L.A. HART, *supra* note 4, at 261; *cf.* J. FINNIS, *supra* note 1, at 234.

11. On *philia politike*, see 3 E. VOEGELIN, ORDER AND HISTORY, (PLATO AND ARISTOTLE) 320-21 (1957).

is maintained by enthusiastic pressure groups."[12] These reasons do not yet adequately express the case for affirming that such a law is morally authoritative. I return to that case in Part III. But first I explore some of the main reasons why contemporary legal theories lack, or distort, the conceptual materials needed for making out that case.

II

Legal theory gets off to a shaky start with the Platonic discussion in the *Minos*.[13] Socrates is shown making two moves. The right move is the explanation of legal authority and obligation in terms of what is needed for securing human good. The wrong move (presented by the author as right) is to treat the hoped-for human good, the end, as if it were a producible, that can be *made* and *completed* like the omelet that can be made by following a recipe, or the bridge that can be built by following a blue-print. In this conception, the end is external to the process required to produce it; the processes have only instrumental value. Practical reasonableness, individual or political, is conceived in emaciated fashion as a craft, only more extensive in its ambition and perhaps more demanding in its skills than other crafts.[14]

Western social theory has frequently reverted to some such emaciated conception of practical reasonableness. Aristotle teetered on the brink of instrumentalizing all human practical reasonableness and virtue to the attaining of opportunity for contemplation.[15] Aquinas often spoke in similar fashion,[16] but in fact makes the essential corrective move. There is, he says,[17] not one first principle of practical reasoning, rather there are many, all equally fundamental and equally substantive. Thus, there is no determinate one natu-

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12. J. RAZ, *supra*, note 3, at 249. I should make it clear that Raz's own social theory is scarcely open to the charge of employing an emaciated concept of practical reason.

13. PLATO (OR PSEUDO-PLATO), MINOS 316e-317a (R. Hathaway, trans. in 14 AM.J. JURIS. 116, 120).

14. On the craft analogy in the early works of Plato, see T. IRWIN, PLATO'S MORAL THEORY: THE EARLY AND MIDDLE DIALOGUES 71-86, 90-101, 109, 127-31, 174-81, 196-97 (1977).

15. ARISTOTLE, NICOMACHEAN ETHICS, Book X.7: 1177a12-1178a9.

16. AQUINAS, SUMMA THEOLOGIAE, *Prima Secundae*, q.3, a.6c; q.57, a.1 ad 2; q.66, a.4 ad 1.

17. *Id.*, *Prima Secundae*, q.58, a.4c; q.63, a.1c; q.94, aa.2c, 3c, 4c; *Secunda Secundae*, q.47, a.6c & ad 1 & ad 3. For a brief exposition of these texts, see J. FINNIS, *supra* note 2, at 68-69.

ral last end or determinate unifying purpose of individual or social life. But Aquinas's texts were sufficiently Aristotelian to be widely misread; many, thinking to follow him, treated contemplation of theoretical truth as a determinate natural last end, and avoided instrumentalizing moral life only by declaring that the first principles of which Aquinas spoke are not human goods to be done and pursued, but negative moral principles in the same logical form as the Ten Commandments.[18] Others instrumentalized the human virtues to the pursuit of a supernatural end conceived *simply* as a vision of God.[19] This simplified account had two unfortunate consequences. The point of the virtues, and even of ordinary good actions, was made obscure (for *how* do they tend to fit one for a future contemplative vision?). And the lives of those who did indeed stand in the way of the divine project were liable to be treated instrumentally in the fashion of mere obstacles.

The theological inadequacy of such conceptions of human good was recently explained by the Second Vatican Council, which identifies the ultimate end of mankind, not simply as a vision of truth, nor even as a participation in holiness and grace, but as a participation by a multiplicity of persons in a manifold of goods. The goods are specified, in outline, as: human dignity, brotherhood and freedom and thus "all the good fruits of our nature and of our effort." The envisaged participation in these goods is called "a kingdom of truth and life, holiness and grace, justice, love and peace." On this account, ordinary good deeds and virtues of every kind can go to building up here and now that supernatural kingdom. And when that kingdom is hereafter completed, there "will be found again", as intrinsic to its heavenly constitution and life, those good works and virtues themselves (which thus are revealed to faith to have more than merely instrumental value).[20]

While Aquinas affirmed the plurality of basic and intrin-

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18. *See, e.g.*, V. BOURKE, ETHICS (3d ed. 1966). For the historical background in Cajetan, Medina, Suarez and other theologians of the sixteenth and seventeenth centuries, see H. DE LUBAC, THE MYSTERY OF THE SUPERNATURAL, 25-67, 181-201 (1977). A brief and penetrating survey is Grisez, *Man, the Natural End of*, 9 NEW CATHOLIC ENCYCLOPEDIA 134-7 (1967).

19. See almost any neo-scholastic manual of moral theology; for a brief survey and critique, see G. GRISEZ, CHRISTIAN MORAL PRINCIPLES 12-13, 103-06, 112 (1983).

20. Second Vatican Council, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD (*Gaudium et Spes*), no. 39, *reprinted in* THE DOCUMENTS OF VATICAN II 199, 237 (W. Abbott ed. 1965).

sic human goods and first principles of practical reasoning, modern legal theory has followed another path. It is the inheritor of the Enlightenment, which repudiated both the (ill-conceived) heavenly last end, and the crystallized negative moral principles prematurely declared by theologians and rationalist philosophers to be truly first principles of practical reason. While Kant tried to resurrect the moral principles by giving them the rational force of the principle of non-contradiction,[21] Bentham wanted to instrumentalize all principles, virtues and social arrangements to the pursuit of an attainable worldly end: the maximum net pleasure, or minimum net pain, of the maximum number of human beings.[22] Contemporary social theory rightly treats as absurd each of Bentham's key notions: (i) that pleasure is the maximand, (ii) that pain and pleasure are simply higher and lower points on a single scale, and (iii) that sense can be made of an injunction conjoining two superlatives, whether "the most words in the shortest time" or "the greatest good of the greatest number".[23] Nothing of Bentham's project for guiding social choice remains for serious consideration; it was not merely impracticable, but radically incoherent and senseless, in many different respects. Bentham himself was uneasily aware of one further incoherence that I have not mentioned. He could not decide whether his injunctions were offered to each individual as guides to maximizing his own happiness, or rather to an entire society (and thus to each of its members) as guides to maximizing the happiness of "the greatest number".[24] He could not make up his mind in fifty years what his recipe was a recipe for, a boiled egg or an omelet.

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21. I. KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN 424 (1785; Prussian Academy ed. vol. IV (1911)), trans. L.W. Beck (R. Wolff ed.), FOUNDATIONS OF THE METAPHYSICS OF MORALS 47-48 (1969). For a balanced account of the place of non-contradiction in Kant's ethics, see K. WARD, THE DEVELOPMENT OF KANT'S VIEW OF ETHICS 99-130 (1972).

22. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11 n. d (1789; note added in 1822; Burns and Hart eds., 1970).

23. On the implausibility of pleasure as the point of everything, see R. NOZICK, ANARCHY, STATE AND UTOPIA 42-45 (1974); J. FINNIS, *supra* note 1, at 95-96. For reasons why pain and pleasure are not to be treated as points on a scale, see Grover, *The Ranking Assumption*, 4 THEORY AND DECISION 277-99 (1974). For the logical problems caused by conjoined superlatives, see P. GEACH, THE VIRTUES 91-94 (1977).

24. *See, e.g.*, 9 J. BENTHAM, WORKS (J. Bowring ed. 1843). For a brief account of the modern exegesis of Bentham on this problem, see H.L.A. Hart's Introduction to J. BENTHAM, *supra* note 22, at xlix-lii.

Perhaps the only successor to Bentham in contemporary legal theory goes by the name of Economic Analysis of Law.[25] For this school proposes as the criterion of just social choice the aggregative maximization of the wealth of society. The wealth of a society is in turn defined as the sum of all goods and services in the society, weighted by their values, while what one values is defined as what he is willing and able to pay for, and the measure of that value is defined as how much he is willing and able to pay. But this maximand, wealth as thus defined, is quite implausible. It incompletely represents the basic forms of human well-being and lacks any account of the intrinsic relations between resources and those basic goods. Moreover, the injunction to maximize wealth without regard to either prior or resulting patterns of distribution is even less plausible. Economic Analysis of Law, as a normative theory, grotesquely lacks any account of the limits on what is up for distribution (hearts of live donors? children for torture? anybody for slavery?. . .). Equally lacking is a coherent account of why what counts as payment should be distinguished from duress, fraud or theft.

There remains a substantial body of theory seeking with pertinacity and some success to explore the resources and limits of instrumental rationality in the context of social life. *Game theory* concerns individual decision-making in a social context. *Social choice theory* focuses instead on decisions to be made on behalf of a society, decisions to be chosen on the basis of an aggregation of individual preferences. These two branches of the theory of instrumental rationality are analogous to the two projects between which Bentham could not make up his mind.

The principal result of the vast and rigorous effort of social choice theory over the last forty years has become rather well known under the label "Arrow's theorem":[26] under any non-arbitrary, fair, or non-perverse method of amalgamating the preferences of individuals, instances of *intransitive* or cyclical outcomes occur. Outcomes are intransitive or cyclical when outcome A beats outcome B, and outcome B beats out-

25. *See* R. POSNER, THE ECONOMICS OF JUSTICE 48-115 (1981). In his Preface to the 1983 edition, Judge Posner seems virtually to abandon any claim that his normative theory is justified or correct, and points to the "rather bizarre results that its unflinching application could produce."

26. K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 51-9 (2d ed. 1963). For a simple exposition of the General Possibility Theorem in a context of political theory, see W. RIKER, LIBERALISM AGAINST POPULISM 115-36 (1982).

come C, but outcome C beats outcome A. In such a situation, the amalgamation of individual preferences fails to provide a rational, consistent or meaningful identification of the preferred "social choice." To Arrow's inconvenient theorem we can add other assured results of social theory. There is, for example, Elizabeth Anscombe's demonstration that even when all issues are decided by majority vote, the majority of voters can be in the minority on the majority of issues and the person or persons directly affected by the vote can always be in the minority.[27] Indeed, as William Riker has shown, for *any* method of amalgamation which involves the summation of revealed preferences (i.e. a system of voting), the possibility of strategic voting *guarantees* that, where more than two possible outcomes were available for choice, we cannot know whether the result of the amalgamation is meaningful or is rather the result of manipulation of the voting process by the strategic voting of perhaps a small minority.[28]

The upshot of social choice theorizing is to this extent clear. Legal theory must make its way in a world in which we know that fair procedures cannot guarantee outcomes which are fair in the sense of accurately representing, say, majority preferences.

The problems of intransitivity which undermine the project of aggregating individual preferences into a "social choice" are, in fact, not restricted to *social* choice. In arriving at his or her own determinate preferences, an individual must choose, and in this choosing will encounter the same paradoxes of intransitivity as have been demonstrated in the context of social choice. Whenever one has several interests or desires or standards of evaluation or criteria of choice, and is choosing between more than two alternatives, one can find that alternative A is preferable to B and C in respect of value v1 (say, having unpolluted river water), while alternative B is preferable to C and A in respect of value v2 (say, minimization of transaction costs), and alternative C is preferable to A and B in respect of value v3 (say, likelihood of fair and uncorrupt administration).[29]

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27. Anscombe, *On Frustration of the Majority by Fulfilment of the Majority's Will* in G.E.M. ANSCOMBE, 3 COLLECTED PHILOSOPHICAL PAPERS 123-29 (1981). Anscombe is not, of course, a professed "social choice theorist."

28. W. RIKER, *supra* note 26. Note Arrow's remark that "in a generalized sense all methods of social choice are of the type of voting." K. ARROW, *supra* note 26, at 27-28.

29. *See* Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 21, 37-38 (1978).

This problem of intransitivity has serious consequences for every form of utilitarianism, consequentialism or proportionalism[30] in ethics. But intransitivity also generates logically necessary and severe limitations on the usefulness of social choice theory's partner in the theory of instrumental rationality: game theory.

Game theory offers to guide the choices of players, each of whom knows his own interests or preferences, and the interests or preferences of the other participants, and each of whom seeks to maximize the satisfaction of his own interests and preferences by choices made in circumstances where the outcome for him will or may be affected by the choices of the other participants but where the choices must be made in ignorance of the other participants' actual choices. Since the theory predicts the outcomes for all players, its results are considered guides to social decision-making, too. Some theorists, like Hobbes, have thought to explain the point of legal regulation in terms of one of the paradigm games in game theory: the Prisoners' Dilemma.

This paradigm, like Hobbes's state of nature, posits a situation with two significant features: (i) the effort by each player to maximize his gains, or to minimize his possible losses, yields an equilibrium in which for each player the outcome is much inferior to what each could have attained by cooperation; (ii) all cooperative arrangements are radically unstable because each has the incentive to renege on the arrangement, both for the sake of further gain and for the avoidance of very serious loss in the event of the other player's reneging.[31] Many discussions of the Prisoners' Dilemma focus on the "paradoxical" character of the first feature. But legal theory has a special interest in the second. For

30. For the meaning of these three terms, see J. FINNIS, *supra* note 2, at 80-86; *see also* note 44 *infra*, and text between note 44 and note 45.

31. The eponymous Prisoners' Dilemma concerns the pre-trial interrogation of two (guilty) prisoners. Each is interrogated separately, and knows the following: (a) if neither confesses they will each get a short sentence; (b) if one confesses but the other doesn't, the one will be released and the other will get a heavy sentence; and (c) if both confess each gets a moderate sentence. On game-theoretical postulates, (a) would be higher "equilibrium" but is unstable, and the actual outcome will be the lower but stable equilibrium, (c). A standard exposition is D.H. LUCE AND H. RAIFFA, GAMES AND DECISIONS 94-102 (1957). For an accessible presentation of many problems sharing the generalized structure of the Prisoners' Dilemma, with particular reference to the relevance of norms in attaining the higher equilibrium, see E. ULLMANN-MARGALIT, THE EMERGENCE OF NORMS 18-73, especially 18-29 (1977).

the introduction of enforceable norms requiring cooperation could enable the players to reach the higher and, for each, more desirable of the two equilibria, the one attained by stable cooperation. Yet on the postulates of game theory, each player has only the following incentive: to support the introduction of enforceable norms but then to break the equilibrium by deviating secretly from those norms.

The postulates of game theory in fact render unintelligible any judgement *by the players* that the higher level equilibrium is *preferable* to any alternative outcome *just because* it is an outcome in which each is doing equally well and no one is suffering very serious loss. Such a judgement is unreasonable on the postulates of game theory because on those postulates there is another outcome which is more in each player's interests: the outcome in which he gains the highest possible individual payoff by secretly deviating from the collaboration equilibrium.

Expositions of game theory often skate over this problem by labelling the units in the calculus "preferences" rather than "units of self-interest."[32] But, as authoritative exponents such as Arrow[33] and Sen[34] have indicated, in the real world no one's preferences and choices need be determined by the emaciated rationality of self-interest. Participants in the real world may prefer fairness to a marginal or even to a substantial increment in the advancement of their own interests; and if each participant is willing to guide his choice by considerations of fairness, the dilemma can be resolved and the higher equilibrium attained. Players with a preference for a fair outcome to the game do have the incentive to introduce laws or other norms, not as a mere ruse for secret personal advancement, but as a path to an equilibrium whose fundamental attractiveness is a good uncountable in the calculus of game theory: fairness in the playing and outcome of the game itself.

Notice that the resolution of the dilemma is attained not by substituting altruism for egoistic self-interest, but by two factors in conjunction. First, the concern (fundamental to game theory) to maximize one's own pre-established preferences is to be replaced by a concern for a fair and desirable

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32. *See, e.g.*, Green, *Law, Co-ordination and the Common Good*, 3 OXFORD J. LEGAL STUDIES 299 (1983).

33. ARROW, *supra* note 26, at 114-15.

34. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317-44 (1977).

outcome to the game. Second, there must be a procedure (in game theory usually given with the structure of the problem) for coordinating the individual choices so as to attain the desirable fair outcome. An altruistic desire to advance the interests of other persons is not generally an adequate substitute for either of the two factors just mentioned. For there is a game-theoretical Altruists' Dilemma, analogous to the Prisoners'. That is to say, there are situations in which the shared preferences for increasing the other player's pay-off yields (on game-theoretical postulates) an outcome worse for both than the outcome yielded by selfish choices.[35]

John Rawls has pointed out how the Prisoners' Dilemma is resolvable by mutual adherence to principles of fairness.[36] But his *A Theory of Justice* is the great monument to game theory's emaciated conception of reasonableness. For the book's absolutely fundamental strategy is to explain and justify fairness by reference to what would be chosen by persons on postulates which are, in fact, the postulates of game theory: that each of the choosers is out to maximize his own interests, selfish or altruistic, and has no concern for the fate of the other participants *as such*. Those postulates and certain conditions of ignorance together constitute the model that Rawls calls the Original Position. The central claim of his theory is that the principles of "justice as fairness" are those that would, in the Original Position, be unanimously chosen as principles to regulate social life in the real world outside the Original Position. The rational attraction of this argument is that the conditions of ignorance in the Original Position do indeed guarantee that the principles there selected would be free from any taint of bias, and would thus be fair.

But this strategy has an irremediable weakness. It assumes that a principle which would go unchosen in the Original Position cannot be a fair principle. The assumption is gratuitous; Rawls offers no defense of it (though he defends the conclusions it entails). But a defense of the assumption is required. For there are many principles for ordering social life that would not be selected by the self-interested persons in

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35. *See* E. ULLMANN-MARGALIT, *supra* note 31, at 48n, citing Schelling, *Some Thoughts on the Relevance of Game Theory to the Analysis of Ethical Systems* in GAME THEORY IN THE BEHAVIORAL SCIENCES (I. Buchler & H. Nutini ed. 1969). On the important difference between friendship in the classical sense (*amicitia, philia*) and altruism (a concept invented in the nineteenth century, by Auguste Comte, with intent to supercede friendship), see J. FINNIS, *supra* note 1, at 142-44, 158.

36. J. RAWLS, A THEORY OF JUSTICE 269 n. 9 (1971).

the Original Position. Principles which give priority, for example, to truth and beauty over error and trash, or which give support to interpersonal fidelity over the whims of self-interest, would go unchosen, as Rawls explains, because each of those choosers, not knowing what beliefs and values they will have in the world outside the Original Position, would be afraid to disadvantage error or infidelity in case he might turn out to be a person with beliefs deemed erroneous, or one who prefers "liberation" to fidelity.[37] The Rawlsian theory of fairness thus rests on nothing more adequate than an appeal to individual "prudence", in the sense of cautious self-interest. Once this has been identified as its basis, its very claim to be a theory of *fairness* is seen to be unfounded.

Indeed, the entire construction of Rawlsian justice proceeds on the emaciated conception of practical reason, in which there is no acknowledgement of the intelligible good, the attractive beauty or worth for its own sake, of truth and knowledge, friendship and authenticity, beauty, devotion, skill and even fairness itself. The whole construction is a device for guaranteeing that each shall get what he wants whatever that may be, so far as is consistent with every other getting what he wants consistent with. . . and so on. Here we have the characteristic modern modelling of practical life and reason on techniques of making or getting what happens to be wanted, rather than on the doing of, or participation in, substantive human goods. The goods and the virtues are carefully reconstructed or reinterpreted as in themselves neutral instruments of self-protection and the advancement of self-interest. To repeat: the concept of self-interest in these emaciated theories of practical reason is not necessarily one of selfishness. But it is a concept in which friendship or fairness are not intrinsic intelligible goods to be cherished and advanced for their own sake. Rather they have the status of something which someone happens to want, but which others perhaps just don't want, and which therefore have no *structural* role.

One might suppose that the other well-known game-theoretical paradigm, the Coordination Problem,[38] could help

37. *Id.* at 207-09, 327-28.

38. *See* E. ULLMANN-MARGALIT, *supra* note 31, at 74-133. Confusion has arisen because there is a game-theoretical model of "coordination problem" and there is a conception going under the same name but unconstrained by the emaciated and instrumental rationality of game-theoretical postulates. For the latter, see, e.g., J. RAZ, PRACTICAL REASON AND NORMS 64, 159 (1975); Ganz, *The Normativity of Law and Its Coordinative Function,*

explain the human good of coordination and cooperation. Several recent social theorists have tried to use this paradigm as an explanatory model of law and legal system.[39] But it will not provide what we are seeking.

In the game-theoretical Coordination Problem, the players have a shared interest in some objective attainable only by cooperation, but there are more than one incompatible alternative ways of coordinating their actions. The players wish, for example, to meet, and they could meet at places P1, P2 or P3. In the purest version of the Coordination Problem, the players are entirely indifferent as between the possible meeting places (equilibria). In less pure instances of the paradigm, player A most prefers P1, player B most prefers P2, but each player regards all three places as acceptable and any of them as preferable to not meeting at all. Clearly, some rule of thumb, or legal rule like the rule of the road, or a system of traffic lights, will enable the players to identify a salient[40] solution, say P2. The salient solution, once chosen, is stable because preferred by all to the absence of a solution, for all the players prefer meeting to missing (while in the traffic situation all prefer missing to meeting).

Obviously, the game-theoretical Coordination Problem is no adequate model for explaining the emergence and the feature of law. In the game-theoretical Coordination Problems, once a solution is identified, there is no possibility of deviation from it. The sole point of the game is that the players shall "meet", and no player has any rational motive, whether selfish or altruistic, for choosing an action which will disrupt the equilibrium.[41] For the postulate of the game-theoretical

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16 ISRAEL L. REV. 333 (1981); J. FINNIS, *supra* note 1, at 232-33, 244-49, 306. The note, *id.* at 255, implicitly distinguishes between the two conceptions, but ought to have done so much more explicitly. Failure to notice the distinction renders irrelevant the critique in Green, *supra* note 32.

39. *See* Ganz, *supra* note 38; and the reply by Ullmann-Margalit, *Is Law a Co-ordinative Authority?* 16 ISRAEL L. REV. 350 (1981).

40. "As Schelling and Lewis have shown, co-ordination problems are, very generally, solved through *salience*: one of the co-ordination equilibria might appear conspicuous to the people involved, owing to some specific feature it possesses, and might hence serve as a focal point for the convergence of their choice of actions. The salience of the co-ordination equilibrium need not be, and in general is not, a result of its being in any obvious sense better than the other co-ordination equilibria . . . . Precedent and agreement also solve recurrent co-ordination problems. They can, however, be viewed as special cases — albeit important ones — of salience." E. ULLMANN-MARGALIT, *supra* note 31, at 83-84 (original emphasis).

41. *See* Green, *supra* note 32, at 317, 319.

Coordination Problem, as of other game-theoretical models, is that each player can and does rank the possible outcomes in a preference ranking which is complete and transitive[42] (and then seeks to do the best he can in terms to secure those outcomes, as ranked). In the Coordination Problem, the alternative to the chosen salient equilibrium rank higher on no one's preference ranking, and since that ranking is presupposed to be complete and transitive, deviance would be not so much wrong as irrational. Indeed, it would be so irrational that deviation is not an intelligible choice.[43]

In the real life of practical reasonableness, alternatives do not present themselves for choice in transitive orderings. Choice A will be better than choice B in respect of its friendliness or fairness or of its increasing my long-run security, but choice B will be better than choice A in respect of its increasing my here-and-now satisfactions or short-run security. These different types of goods are not commensurable apart from particular scales of assessment which one *chooses* to employ. And the reasons for one's most fundamental choices of scales of assessment cannot be that they identify *quantities* of

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42. As is implied in my use of "intransitivity", in the text after note 28, a relationship R between choices or outcomes x, y, z . . . is transitive if for all x, y, z . . ., xRy and yRz implies xRz.

43. This impossibility of deviance is the counter-part of the impossibility of morally significant choice in the utilitarian, consequentialist or proportionalist model of rational choice:

> One can choose only what appears to one to be good; but if, as proportionalists claim, (i) 'wrong' entails 'yielding (or promising) less good', and (ii) [one is in a situation in which some] choices can be identified as yielding (or promising) less good than some alternative choice(s), then it becomes inconceivable that a *morally* wrong (as distinct from a merely mistaken) choice could ever be made [in that situation]. How could anyone *choose* an act which he can see yields less good than some alternative open to him? Morally wrong choices are, of course, unreasonable. But unreasonable choices are possible precisely because the goods apparently realizable by choices are *not* commensurable as yielding (or promising) greater or lesser good; they retain their attractiveness as yielding (or promising) some real good, an attractiveness which would be destroyed if that could be seen to embody less good, all things considered, than some available alternative. The unreasonableness of morally wrong choices is not the incomprehensibility of choosing a lesser good [i.e. a good that is simply lower on the (supposed) one rational measure]. Rather it is the unreasonableness of pursuing good arbitrarily, or unfairly, or fanatically, or inconstantly, or by means of a direct attack on some basic good, or in some other way contrary to a principle of practical reasonableness.

J. FINNIS, *supra* note 2, at 89-90.

the good to be assessed or even transitive *ordinal relations* between outcomes in terms only of that assessable good.[44]

In short, the Coordination Problem model, as understood in game theory, takes things too easily to be of assistance in legal theory. By assuming that the players have complete and transitive preference rankings, and that these coincide to support the choice of a salient solution preferred by each to no solution, the model shares the weakness I identified in Raz's denial that law is needed to secure morally desirable schemes of cooperation. Within the confines of the river pollution game, many players prefer no solution to any of the salient solutions. The game of coordination in society can only be played if it is extended to a field of choice which is, in terms of time and subject matter, a *wide* field, so that burdens in one part of the field can be envisaged as related to benefits in others. But widening the field of choice has a further result: all individual and social decision procedures will yield conspicuous intransitivities. The resulting dilemmas can be overcome, as they in practice are overcome, by acknowledging a certain sort of good or "benefit", the good of fairness and the related good of social or political friendship or good neighborliness. These are goods which certainly multiply the intransitivities. But they enable the individual to acknowledge the moral authority of decision-procedures which cannot pretend to *maximize* the satisfaction of his own or others' preferences. There is, in short, an intelligent concern for the structure and outcome of whole systems of personal interactions which is not a concern either for maximized ag-

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44. Thus Duncan Luce and Howard Raiffa, in their standard work on game and decision theory, make the appropriate caveat about the axiom of transitivity, the first and decisive axiom the theory:

> No matter how intransitivities arise, we must recognize that they exist, and we can take only little comfort in the thought that they are an anathema to most of what constitutes theory in the behavioral sciences today. We may say that we are only concerned with behavior which is transitive, adding hopefully that we believe this need not always be a vacuous study.

H.D. LUCE AND H. RAIFFA, *supra* note 31, at 25. The authors are aware, too, that intransitivities often emerge because a subject (i.e. a topic or situation) "forces choices between inherently incomparable alternatives. The idea is that each alternative invokes "responses" on several different 'attribute' scales and that, although each scale may itself be transitive, their amalgamation need not be." *Id.* at 25. On the reasonable choice of the basic commitments in terms of which we can subsequently rank, transitively, a good many alternatives, see J. FINNIS, *supra* note 2, at 87-88, 90-92; J. FINNIS, *supra* note 1, at 115-18.

gregations of preferences or for maximizing one's own individual payoffs (whether selfish or altruistic).

III

Law is one of the paradigms of political authority. Political authority has its most thorough explanation as the source of solutions to coordination problems. But now "coordination problems" must be understood without the restrictions of game theory's postulates. The term now extends to any situation where, if there were a coordination of action, significantly beneficial payoffs otherwise practically unattainable would be attained by significant numbers of persons, where there is sufficient shared interest to make some such coordination attractive, and where the problem is to select some appropriate pattern of coordination in such a way that coordination will actually occur.

In a general theory of law, the principal object of concern is the last-mentioned aspect of the problem. The focal question is not: What is the right decision in such circumstances? (There is good reason, as we have seen, to think that most often no uniquely correct solution could be found). The focal question for legal theory is rather: How is action to be coordinated? How, first, is a solution to be selected? Why, once selected, is it to count as *the* solution? And then, what is involved in maintaining it as the solution all through its implementation?

In the final analysis, there are only two ways of coordinating action in a group. There must be either unanimity or authority. Whichever method is employed, it must handle two distinguishable problems: (i) the selection of a pattern of coordination, and (ii) the implementing of that pattern in actual cooperation to the degree required to attain desired benefits. The selection may, for example, be by exchange of promises, which requires unanimity between the promising parties at the time of the promise. Or it may be by some legislative body which in the extreme but possible case might comprise every member of the community and make decisions only by unanimity. But in either case, if the desired result is to be attained by cooperation, the unanimity about the selected pattern must either continue all the way through the period of implementation or must, during that period and for its duration, be replaced by authority. Such authority may take one or other of the following forms: either the authoritativeness of the selection process (promise or enactment)

must be quasi-unanimously acknowledged, or some authoritative person or body of persons must hold the parties to the selected pattern.

The invocation of political authority to settle coordination problems can be illustrated by returning to the problem of river pollution, the case used by Raz in denying the moral authority of law. The problem arises because people, even people of purest good will, can discern a variety of practical possibilities. We can have:

S1: a river of really pure running water. The benefits will be that it looks and smells good and so is apt for human aesthetic enjoyment and play, that it sustains natural plants and fish for conservation, science, or sport, that its waters are drinkable without expensive processing and cause no infections or injuries . . . and many other potential payoffs. Alternatively, we can have:

S2: a river that is freely available as a sewer. The benefits of such a regime will be that it allows producers to dispose of their waste far more cheaply than by any available alternative means, and saves the community the costs of policing the river. Or we can have:

S3: a river that is available for unlimited waste disposal by those willing to pay a waste-disposal fee to defray the costs of alternative drinking water supplies and additional health services, and perhaps to finance other public services whether or not made necessary by the policy of permissive disposal. The benefits of this will be some, but not all, of those available under scheme S2, supplemented by additional payoffs to taxpayers because the scheme provides an additional source of public revenue. Or, finally (in a list that could in fact be extended), we can have:

S4: a river that is available for limited waste disposal, the quantity and quality of pollutants being policed so as to be compatible with some plant and fish life, some aesthetic enjoyment, a low level of infection, and other benefits like those in scheme S1, but at a level lower than in S1 though at a much higher level than in S2 or S3.

Obviously, each of these schemes (even, to a limited extent, the practice of unlimited waste disposal, S2), involves coordination if it is to attain the payoffs envisaged. Each potential solution involves a pattern of actions and abstentions by a (large) number of agents and potential agents, such that the benefits of any individual action or abstention depend on the actions and abstentions of the other parties. Moreover, selecting and moving to one scheme in preference to its pred-

ecessor involves a more or less distinct "framework" coordination problem: How shall *such* questions of selection of schemes be decided? For this river is only one of many, and pollution of rivers is only one form of pollution, and pollution is only one of countless forms of socially relevant phenomena involving costs and benefits, human goods and harms.

There is a sense in which this "framework" coordination problem is only ephemeral in character, at least by comparison with the day-in day-out character of coordinating the operation of the selected scheme. Once the appropriate persons have coordinated the processes of selection and the polity has adopted the scheme, the framework problem seems to be solved. But there is also a sense in which the framework problem and its procedural solution subsist as standing features of the polity. 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. In other words, the selection, whether it was by a process of custom-formation or by enactment, judgment or other authoritative decree, must be treated as *authoritative.*

The necessity ("must") just mentioned is to be understood as follows. Schemes S1, S3 and S4 do not yield their payoffs unless the relevant population displays a high level of conformity with the selected scheme. It may well be that 25 percent of the population favor S1, while 25 percent favor S2, 25 percent S3, and 25 percent S4. What is certain is that none of the schemes will yield any significant benefits if there is only 25 percent compliance. The required level of compliance is quasi-uniformity, a kind of unanimity in action. But since there is no unanimity at all about the intrinsic desirability of the respective schemes, such unanimity in action must result from quasi-unanimity about the desirability of conforming to the authoritatively selected scheme. The uniformity of action must result from quasi-unanimous acknowledgement of the authority of that selection, of the process which settled upon one scheme rather than the others.

The farmer confronting the anti-pollution policy confronts concretely the essential questions about political and legal authority. Why should he treat a law against river pollution as authoritative, while treating propaganda, appeals to community spirit, and developed or developing practice as of no consequence? And what is his "shared interest" in a scheme which he thinks is mistaken, and which he knows may

be damaging to him?

The answer to the first question lies in the *quality* of the legal system as a device for solving coordination problems. The quality of a legal system that makes it authoritative is its general salience. By holding itself out as a public and privileged identification of a solution for the case of every coordination problem, and by offering grounds for acknowledging that privileged status, the law achieves the salience it seeks in particular coordination problems. The grounds for acknowledging that privileged status are several. The law, if accorded that status, offers the prospect of combining speed with clarity in generating practical solutions to constantly emerging and changing coordination problems, and in suggesting devices by which such solutions can be generated. Its institutions for devising and maintaining solutions secure fairness by the stability, the practicability and the generality or non-discriminatory character of the solutions, and by the imposition of those solutions on free-riders and other deviants by processes which minimize arbitrariness and self-interested or partisan deviance in the very processes themselves. In short, it is the values of the Rule of Law [45] that give the legal system its distinctive entitlement to be treated as the source of authoritative solutions.

These valuable features of a legal system are important precisely because, in the real world, recalcitrance is always possible, even on the part of one for whom cooperation would bring benefits. The variety and complexity of basic human goods, and of reasonable ways of pursuing and realizing human good, make actual "preferences" radically unstable. For "payoffs" are ambivalent and "orderings" always remain incomplete and actually or potentially intransitive. Friendship, and fairness, are amongst the causes of that ambivalence, intransitivity and instability; they are interests and goods that unsettle any individual preference-ranking by demanding, attractively, the sacrifice of some of one's "own" goods and interests for the sake of a shared interest.

There remains the question whether and how the farmer has a shared interest in complying with the anti-pollution law. There is a shared interest, or sharing of aim, which makes a community possible and lasting despite lack of consensus on almost every practical problem. This sharing of aim has as its

45. On the Rule of Law, see J. RAZ, *supra* note 3, at 210-29; J. FINNIS, *supra* note 1, at 270-76, 292-93. Both these treatments profited greatly from L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

most directly significant component the shared willingness to treat friendship and fairness for what they are: aspects of human flourishing which provide a counter-attraction to, and *critique* of, many alternative, vividly attractive, but diminished conceptions of that well-being. Concretely, then, the farmer can judge that the regular, impartial maintenance of the legal order itself is a good which gives him sufficient shared interest in, and reason for, cooperation by compliance with the anti-pollution law. The good he thus discerns and seeks to realize is a good indiscernible in the emaciated models of practical reasonableness: the good of a fair method of relating burdens to benefits, and persons to persons, over an immensely complex and lasting but shifting set of persons and their aspirations and transactions. Nothing other than legal order can promise such a method.