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FINNIS ON VIEWPOINT AND FOCAL MEANING

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In *Natural Law and Natural Rights,* John Finnis proposes a version of natural law theory that will "assist the practical reflections of those concerned to act, whether as judges or as statesmen or as citizens."[1] Such an undertaking cannot proceed securely, according to Finnis, "without a knowledge of the whole range of human possibilities and opportunities, inclinations and capacities, a knowledge that requires the assitance of descriptive and analytical social science."[2] In the opening paragraph, Finnis succinctly states the basic thesis of his book:

> There are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy. It is the object of this book to identify those goods, and those requirements of practical reasonableness, and thus to show how and on what conditions such institutions are justified and the ways in which they can be (and often are) defective.[3]

Finnis' version of natural law therefore attempts to combine a theory of practical reasonableness that yields the principles of natural law, with a theory of the basic forms of human good grasped by practical reasonableness.

The attempt to combine the principles of practical reasonableness with the basic forms of human good has its antecedents more in the Thomistic tradition than in the work of some recent natural law theories, such as Lon Fuller's.[4] Fuller distinguished between his own procedural version of natural law and Aquinas' substantive natural law, which Fuller characterized as beings primarily concerned "with the proper ends to be sought through legal rules."[5] Fuller of course

[1] John Finnis, *Natural Law and Natural Rights* (Oxford:Clarendon Press, 1980), p. 18. Hereinafter referred to as Finnis.

[2] *Ibid.,* pp. 18-19.

[3] *Ibid.,* p. 3.

[4] Lon L. Fuller, *The orality of Law* (New Haven: Yale University Press, 1969), pp. 96-106.

[5] *Ibid.,* p. 93.

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argued that abuse of certain procedural requirements contained in his internal morality of law would lead to substantive immorality,[6] nonetheless, he drew a clear distinction between procedural means and substantive ends. In contrast, Finnis argues that a natural law theory must be capable of grasping substantive human goods through the operation of practical reasonableness, apparently, therefore, Finnis reject Fuller's attempt to distinguish between two kinds of natural law, one procedural, the other substantive.

As indicated at the outset of this paper, Finnis is not merely proposing a theory of natural law linking practical reasonableness to forms of human good, but is also (and primarily) offering a theory to assist the practical reflections of those concerned to act. Why this is significant for the legal theorist is that it is a central thesis of Finnis' version of natural law that unless the legal theorist actually *engages in* the truly practical reasonableness of those truly concerned to act from the legal point of view, the legal theorist will fail to describe law at all. It is this methodological thesis that rests at the foundation of Finnis' version of natural law and that distinguishes his theory of natural law from all other natural law theories, and it is part of the concern of this paper to indicate why this is so. My primary concern here, however, is with Finnis' critique, on methodological grounds, of H.L.A. Hart's attempt to elucidate the legal point of view through "the internal point of view."[7] Basically, Finnis adopts Hart's technique of distinguishing between central and peripheral cases of the meaning of a concept, but maintains that the viewpoint from which the legal theorist distinguishes between the central and peripheral cases is not Hart's internal point of view, but rather the moral point of view of practical reasonableness.

My strategy is to begin by presenting a synopsis of the issue and of Finnis' critique of Hart. Then I shall examine several criticisms of Finnis' arguments; I shall argue that these arguments do not succeed against Finnis. I shall also contend, however, that Finnis' case against Hart is not as clearly developed as it might have been, and I shall provide a supporting argument that I believe establishes Finnis' position against Hart. In the conclusion, I shall suggest several difficulties with Finnis' conclusion that the legal theorist must adopt the viewpoint of the person who is practically reasonable, and these comments will be designed to cast some light on the debate between natural law and legal positivism.

[6] *Ibid.*, pp. 152-86.
[7] H.L.A. Hart, *The Concept of Law* (Oxfornd: Clarendon Press, 1961), p. 86.

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The methodology of the legal theorist

It is widely believed that there is a sharp distinction between description and evaluation, and that the basis of this distinction is the obvious distinction between factual statements that are either true or false and normative judgments concerning value, obligation, responsibility, etc.; in the standard jargon, this distinction is abbreviated into the "is-ought" distinction. These distinctions provide the basis for Austin's quips, "The existence of law is one thing; its merit or demerit is another,"[8] and "A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation."[9] Thus, a standard legal positivist criticism of natural law is that the latter confuses the distinction between "what a law is" and "what a law morally ought to be" when it asserts that "an unjust law is no law at all."[10] Finnis marshalls an impressive array of arguments against this "standard" method of disposing of natural law,[11] but he does not deny that there is a valid distinction between two kinds of *propositions* divided into descriptive statements and normative judgements; rather, he denies that the social theorist can characterize law without ensagins in evaluation.[12]

The development of modern jurisprudence and of social science suggests, Finnis says, "that a theorist cannot give a theoretical description and analysis of social facts, unless he participates in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness."[13] This is the case, Finnis continues, because the human actions, practices, habits, dispositions and human discourse that form the subject matter of a social science "can be fully understood only by understanding their point, that is to say their objective, their value, their significance or importance, as conceived by the people who performed them, engaged in them, etc."[14] However, the variability of these actions, practices, habits, dispositions, and conceptions of the point, value, and significance of these actions, etc., creates the problem of formulating a general descriptive theory covering all these varying particulars. In

[8] John Austin, *The Province of Jurisprudence Determined*, ed. by H.L.A. Hart (London: Weidenfeld & Nicolson, 1968), p. 184.

[9] *Ibid.*, p. 184.

[10] St. Augustine, *De Libero Arbitrio*, I, y, 11: "lex esse non videtur quae justa non fuerit."

[11] See Finnis, pp. 363-366, 23-36.

[12] *Ibid.*, p. 3.

[13] *Ibid.*, p. 3.

[14] *Ibid.*, p. 3.

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other words, as Finnis puts it, "How does the theorist decide what is to count as law for the purposes of his description?"[15]

One obvious and ancient approach to the problem created by varying particulars is to simply search for the common element within the particulars. In regard to the term "law", Kelsen takes just such an approach: What could the social order of a negro tribe under the leadership of a despotic chieftain —an order likewise called "law"— have in common with the Constitution of the Swiss Republic?[16]

Kelsen argues that there is an univocal meaning to the term "law", a common element referring to a "specific social technique". Finnis argues that Kelsen's methodology, as well as Austin's and Bentham's, is "naive," and has been superceded by the descriptive analyses of law developed by Hart and Joseph Raz.[17]

Finnis descusses three principal features of Hart's methodology, and these features reveal the naivete of Kelsen's approach. First, Hart criticizes Kelsen for failing to understand the different social functions performed by legal rules. In Finnis' words, "Law is to be described in terms of rules *for* the guidance of officials and citizens alike, not merely as a set of predictions of what officials will do."[18] Thus, Hart's method constantly appeals to the practical point of the components of the concept of law, and therefore Hart fully recognizes the variability of conceptions of the point of the components of a concept of law. Second, Hart's method abandons the search for a univocal meaning of "law" because it distinguishes between focal and secondary meanings of a term, and it proceeds on the assumption that "the extension of the general terms of any serious discipline is never without its principle or rationale".[19] Hart therefore does not attempt to provide a definition of "law" in terms of a set of individually necessary and jointly sufficient conditions, but rather distinguishes between "law" and "legal system" and characterizes the latter as a "union" of primary and secondary rules.[20] Third, Hart proposes the internal point of view as the viewpoint from which to differentiate

15 *Ibid.*, p. 4.

16 Hans Kelsen, *General Theory of Law and State* (Cabridge, Mass.: Harvard University Press, 1945), p. 19.

17 Joseph Raz, *Practical Reason and Norms* (London: 1975), Finnis directs his arguments against both Hart and Raz. For purposes of simplicity and exposition, my paper examines only Finnis' critique of Hart, though I believe the main arguments I present apply equally against Raz.

18 Finnis, p. 7.

19 Hart, p. 78.

20 Hart maintains that law is a mere *set* of rules, while a legal system is a *system* unified by a secondary rule of recognition. *Ibid.*, pp. 229-30.

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between focal and between central and borderline cases. To summarize Hart's critique of Kelsen's methodology, then, Kelsen, in appealing to a pre-theoretical sense of "law," adopts this pre-theoretical viewpoint as the viewpoint to be taken by the descriptive theorist of law; such a viewpoint, according to Hart, ignores the key characteristic of a social rule, namely that the latter has an internal aspect under which legal officials and citizens "*use* the rules as standards for the appraisal of their own and others' behavior".[21] In the internal point of view, Hart says, "there should be a critical reflective attitude to certain patterns of behaviour as a common standard".[22]

Finnis does not dispute the three general features of Hart's methodology, but he does object that the selection of the internal point of view as the viewpoint of the descriptive legal theorist is "unstable and unsatisfactory".[23] What is particularly objectionable to Finnis is Hart's statement that "allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting or traditional attitude; on the were wish to do as others do".[24] Hart is here referring to those who voluntarily accept (in his technical sense of "adopt the internal point of view of the rules") the *authority* of the legal system, and his point is that those who do voluntarily accept the system need not conceive of themselves as morally bound to accept the system.[25] Thus, Hart argues that those who accept the system may nevertheless consult conscience and "decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so".[26] Finnis' objection is that it is unstable and unsatisfactory to take self-interest or an unreflecting, traditional attitude as the central case of the legal point of view, because they are "manifestly deviant, diluted or watered-down instances of the practical viewpoint that brings law into being as a significantly differentiated type of social order and maintains it as such. Indeed, they are parasitic upon that viewpoint".[27] Finnis concludes that: "If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation. . . then such a viewpoint will constitute the central case of the legal viewpoint."[28]

21 *Ibid.*, p. 96.
22 *Ibid.*, p. 56.
23 Finnis, p. 13.
24 Hart, p. 198.
25 *Ibid.*, pp. 198-99.
26 *Ibid.*, p. 199.
27 Finnis, p. 14.
28 *Ibid.*, pp. 14-15.

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Such a viewpoint, Finnis proposes, is that of the person who is practically reasonable, "that is to say: consistent: attentive to all aspects of human opportunity and flourishing, and aware of their limited commensurability; concerned to remedy deficiencies and breakdowns, and aware of their roots in the various aspects of human personality and in the economic and other material conditions of social interaction".[29] Finnis hesitates to call this the moral viewpoint, for "the term 'moral' is of uncertain connotation".[30]

Examination of Finnis' critique of Hart

Thus far, I have merely synopsized Finnis' critique of Hart. In this section, I shall go more deeply into Finnis' argument, or what I take to be his argument, and for this purpose I shall use two criticisms of Finnis presented recently by Peter Danielson.[31] First, Danielson argues that even if we grant for the sake of argument that the proper viewpoint of the descriptive theorist of law is "the moral man", nevertheless it does not follow that the moral man is the follower of Finnis' particular natural law morality:

> Surely there is a large variety of moralities that will support allegiance to law. Thus there is no reason for Finnis to specify the moral man as the follower of a natural law morality. So even if valid, this argument supports one natural law thesis (some morality or other is necessary for the identification of the legal), not Finnis' particular natural law morality.[32]

In response to this argument, it must first be noted that there is no theoretical reason why Finnis would deny the statement that several moralities will support allegiance to law. Finnis' man of practical reasonableness is not required to adopt a particular morality, though he must *be* practically reasonable and employ the principles of practical reasonableness, and such a man is presupposed, in Finnis' view, by any natural law theory. Consequently, "the moral man", as Danielson misleadingly calls him, is the follower of any natural law
view, by any natural law theory. Consequently, "the moral man", as
of course, that the man of practical reasonableness will necessarily reach the same conclusions regarding substantive morality favored by Finnis, for Finnis' theory is not an attempt to demonstrate that a

[29] *Ibid.*, p. 15.
[30] *Ibid.*, p. 15.
[31] Peter Danielson, *University of Toronto Law Journal* (1980), pp. 441-447.
[32] *Ibid.*, p. 443.

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particular morality is the correct morality, but it is an attempt to establish that there are principles of practical reasoning.

Danielson's second objection cuts deeper into the natural law position taken by Finnis by inquiring why the legal point of view must include *only* "moral men". Indeed, this is the very question that Hart would raise at this point, for as a legal positivist he maintains that the legal point of view is not necessarily the moral point of view; thus, Hart denies that the internal point of view must include the moral viewpoint. Alluding to Hart's position regarding the internal point of view, Danielson presses the argument against Finnis:

> Can't self-interested men or traditionals respect the law? Against the first Finnis argues that self-interest "waters down" one's respect for the law. But he fails to notice that this type of argument applies to moral man as well, since any morality may require illegal conscientious actions. Against the traditionalist (who is exempt from the previous criticism), Finnis charges that he will not be able "to bring law into being". But it is difficult to see why this is relevant; someone may be an excellent rule-follower in spite (perhaps even because!) of his incapacity to innovate.[33]

Furthermore, Danielson argues, Finnis is incorrect to maintain that the self-interested man and the traditionalist are "parasitic on the man who could bring law into being", for "Even if law was created by moral men (which is questionable) why should its present study be determined by principles different from those adequate for institutions that were not so created: markets and languages".[34]

Unfortunately, even if persuasive, Danielson's criticisms here do not directly address Finnis' main argument against Hart's selection of the internal point of view as the legal point of view. Finnis' main argument is that the considerations and attitudes associated with self-interest and unreflecting habit are not *central cases* of the legal point of view, but "are manifestly deviant, diluted or watered-down instances of the practical viewpoint that brings law into being *as a significantly differentiated* type of social order and maintains it as such".[35] Hence, in response to Danielson's contention that Finnis' objections to the self-interested man apply to the moral man as well concerning respect for the law, Finnis could reply that his argument against Hart is not that the internal point of point might lead to "disrespect" of the law in the sense that self-interested men might not

[33] *Ibid.*, p. 443.
[34] *Ibid.*, p. 443.
[35] Finnis, p. 14.

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obey the law, but rather that the attitude of self-interested is not the central case of the legal viewpoint because self-interest may be inconsistent with "respect" for the law *as* a certain kind of social institution. Thus, objecting to Raz's anarchistic judge, Finnis claims that such a judge "dilutes his allegiance to law and his pursuit of legal methods of thought with doses of that very self-interest which it is an elementary function of law (on everybody's view) to subordinate to social needs".[36]

The legal point of view, according to Finnis, brings about and maintains a significantly differentiated type of social order, and the central case of such a viewpoint cannot be characterized in terms of mere self-interest or unreflecting habit. Hart, for example, maintains that with the arrival of a modern legal system, the three main defects of law within a society consisting of primary rules alone are *remedied* by supplementing the primary rules with secondary rules.[37] Finnis argues that self-interest and unreflecting habit "will not bring about the transition from the pre-legal (or post-legal!) social order of custom or discretion to a legal order, for they do not share the concern, which Hart himself recognizes as the explanatory source of legal order, to remedy the defects of pre-legal social order".[38] Finnis' argument concerning the traditionalist is therefore not, as Danielson characterizes it, that the traditionalist cannot "bring law into being" in the sense that the traditionalist might not follow the rules, but that the traditionalist does not represent the central case of the viewpoint that accounts for the introduction and maintainance of a certain kind of social institution.

At this point, it will be beneficial to examine what makes law a certain kind of social institution, and we may begin by sketching the relevant aspects of Hart's concept of law. Hart conceives of law as providing a distinctive form of social order that has the *authority* to fashion, apply, and enforce legal rules; such an order is therefore to be sharply distinguished from a system based on power alone.[39] In Hart's words, there is a distinction between "oblige" and "obligate",[40] and the obligatory force of law rests not on power but on the authority of the system.[41] The key to this insight that law rests on authority is to be found in the notion of a normative social rule. An accepted so-

36 *Ibid.*, p. 14.
37 Hart, pp. 90-96.
38 Finnis, p. 14.
39 Hart, p. 198.
40 *Ibid.*, pp. 80-81.
41 *Ibid.*, pp. 196-98.

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cial rule, as distinguished from a mere habit, has an external aspect of observable, regular behavior (an aspect which exemplifies a group habit), as well as an internal aspect which escapes the view of the extreme external observer, who "does not give any account of the manner in which members of the group who accept the rules view their own regular behavioun".[42] A member of a group who accepts and uses the rules as guides to conduct takes the internal point of view. What is especially characteristic of the internal point of view is that there must be "a critical reflective attitude to certain patterns of behaviour as a common standard".[43] It is such a critical reflective attitude that is at the foundation of law, simply because such an attitude is constitutive of the practice of acceptance that itself constitutes a social rule, and for Hart law is a social order of accepted rules, not a mere set of habits.[44] In turn, Hart argues that "the coercive power of law presupposes its accepted authority",[45] though he denies that "those who do accept the system voluntarily. . . must conceive of themselves as morally bound to do so".[46] In Hart's view, therefore, law is a distinctive social order whose authority rests on acceptance and whose rules impose legal, though not necessarily moral, obligations. Such a social order is clearly distinguishable from an order based on power alone which fails to impose obligations and does not rest on authority, and of course such an order may likewise be distinguished from institutions such as language and markets, which also fail to impose obligations.

When Hart's conception of law as a distinctive social order is developed along these lines it appears quite doubtful that an unreflecting, traditional attitude is a central case of the internal point of view, which requires a critical reflective attitude to certain patterns of behavior as a common standard. Finnis' argument against self-interest is, however, noticeably less convincing than his argument against the attitude of unreflecting habit. It may well be that it is a matter of long-term, rational self-interest to forego one's immediate wants, desires, or needs for the sake of bringing about or maintaining a social order characterized as a union of primary and secondary rules. However, I shall not here attempt to construct or defend such an argument based on long-term rational self-interest; my point is rather that it is likely that

42 *Ibid.*, p. 87.
43 *Ibid.*, p. 56.
44 *Ibid.*, pp. 54-56.
45 *Ibid.*, p. 198.
46 *Ibid.*, p. 198.

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defenders of self-interest arguments may well develop a plausible counter-argument to Finnis' criticism of Hart.

Rather the further examine Finnis' arguments against the self-interested man and the traditionalist. I shall now present an argument that attempts to show that Hart's internal point of view cannot, within Hart's own concept of law, be the legal point of view.[47] This argument commences by noting that Hart draws a distinction between two kinds of social rules: those that impose obligations, and those that do not. Hart says that "The statement that someone has or is under an obligation does indeed imply the existence of a rule; yet it is not always the case that where rules exist the standard of behaviour required by them is conceived of in terms of obligation."[48] As examples of social rules that do not impose obligations, Hart cites the rules of etiquette and of correct speech. An obligatory social rule, according to Hart, implies three characteristics: 1) there is an insistent general demand for conformity to them and great social pressure is brought to bear against deviators;[49] 2) obligatory rules "are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it";[50] 3) obligatory rules may require conduct which "may, while benefiting others, conflict with what the person who owers the duty may wish to do. Hence obligations and duties are thought of as characteristically involving sacrifice or renunciation".[51] It is these three characteristics of obligatory social rules that appear to be clearly at odds with the attitudes of self-interest and unreflecting habit: it is quite difficult to see how such attitudes could represent the *central case* of the legal point of view, if the latter includes, as it does for Hart, the imposition of obligatory social rules. But my main point in recognizing Hart's distinction between two kinds of social rules is that Hart the existence of the internal point of view is a necessary, but not a sufficient, condition for the existence of obligatory social rules. There is no guarantee that adoption of the internal point of view by itself will yield a rule that imposes legal *obligations;* consequently, Finnis' conclusion is correct that the internal point of view is not the central case of the legal point of view.[52]

[47] The basis for this argument is elucidated in my "Hart's Concept of a Legal System," *William & Mary Law Review,* Vol. 18, No. 2 (Winter, 1976), pp. 287-319.

[48] Hart, p. 83.

[49] *Ibid.,* p. 84.

[50] *Ibid.,* p. 85.

[51] *Ibid.,* p. 85.

[52] Finnis' conclusion is correct *assuming* Hart is right that law does impose *obligations.* The possibility remains that law might not impose obligations. See my "The Basis of Law in Hart's *The Concept of Law.*" *The Southwestern Journal of Philosophy,* Vol. IX, No. 1 (1978), pp. 11-17, especially p. 16.

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Conclusion

I have argued that Hart's conception of the internal point of view cannot be taken as the legal point of view, at least as long as the latter is presumed to include reference to the imposition of obligation. Does it follow, however, that simply because Hart's internal point of view is inadequate as the central case of the legal point of view, therefore Finnis' man of practical reasonableness is the central case? Of course the bare disjunction, either Hart's internal point of view or Finnis' practical reasoner, begs the question, so we must turn to the text to see whether Finnis offers a stronger argument.

Finnis argues that with the elimination of the self-interested man and the traditionalist, there remains the person with "disinterested interest in others" and the person who acts from the moral point of view. In regard to the former, Finnis claims that: "If disinterested concern for others is detached from moral concern, as it is by Hart, then what it involves is quite unclear, and, in the absence of clarification, it must be considered to have a relationship to law and legal concerns as uncertain and floatiag as its relationship (on this view) to moral concern."[53] Here, one must agree with Finnis that "disinterested concern for others" appears to be connected to moral concern, for it seems to be an essential element in Hart's characterization of both obligatory social rules that do not impose moral obligations and those that do: both refer to sacrificing self-interest.[54] Finnis says that the conclusion we should draw is clear:

> If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation (and thus of "great importance", to be maintained "against the drive of strong passions" and "at the cost of sacrificing considerable personal interest"), a viewpoint in which the establishment and maintenance of legal as distinct from discretionary or statically customary order is regarded as a moral ideal if not a compelling demand of justice, then such a viewpoint will constitute the central case of the legal viewpoint. For only in such a viewpoint is it a matter of overriding importance that law as distinct from other forms of social order should come into being, and thus become an object of the theorist's description.[55]

At first glance, this argument appears to simply assume that law rests on moral grounds; thus, it may be objected that the legal viewpoint, *if* it is granted that legal obligation is presumptively a moral

53 Finnis, p. 14.
54 Hart, pp. 85, 169.
55 Finnis, pp. 14-15.

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obligation, and *if* the establishment and maintenance of law is regarded as a moral idea. But a closer examination of the text reveals that it is Finnis' view that the presumption of a moral basis for law derives from the position that it is a matter of *overriding importance* that law, as a distinctive social order, should come into being. The argument rests, therefore, on the nature of law as a significantly distinct social order, and the question Finnis poses for us is, "Is law such a significantly distinctive social order that it is a matter of overriding importance that it be established and maintained as such?"

A full examination of this question cannot be initiated here, but in closing I should like to make one final point that concerns the debate between legal positivism and natural law. For the sake of argument, let us suppose that Finnis is correct that the legal point of view is that of the man of practical reasonableness; does it therefore follow that the natural law position is right? It seems likely that the legal positivist might include the man of practical reasonableness within the internal point of view, and even allow him to be the central case of the legal point of view, yet deny that this constitutes a significant argument against legal positivism. That is to say, a positivist might argue along Hart's lines that the application of the principles of practical reasonableness is "unfortunately compatible with very great iniquity" and is no more substantively moral than Hart's "minimum content of natural law".[56] This possible response to Finnis raises the important issue of whether adoption of a viewpoint has any direct bearing on the debats between legal positivism and natural law; or, in different terms, whether the methodological issue of viewpoint and focal meaning is an issue of contention between legal positivism and natural law.

As mentioned at the outset of this paper, Finnis' approach in *Natural Law and Natural Rights* is to propose a version of natural law that links the principles of practical reasonableness with the basic forms of human good. Thus, in Finnis' view, the methodological issue should not be sharply disconnected from the question whether it is a matter of overriding importance to establish and maintain law. According to Finnis, if the legal theorist must adopt the viewpoint of the man of practical reasonableness as the legal point of view, he must also participate "in the work of evaluation, of understanding what is really good for human persons".[57] If Finnis is cor-

[56] Hart, pp. 202, 198.
[57] Finnis, p. 3.

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rect, then the question of overriding importance must be answered by the man of practical reasonableness. A fuller examination of Finnis' treatise is required to assess this contention and to appraise Finnis' contribution to the natural law-legal positivism debate.

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