



THE OBLIGATION TO OBEY THE LAW IN THE LIGHT OF THE DEBATE BETWEEN FINNIS AND RAZ *

A obrigação de obedecer à Lei à luz do debate entre Finnis e Raz

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Abstract: The recent debate between John Finnis and Joseph Raz on the existence of a general *prima facie* moral obligation to obey positive laws is a major contribution to a classical topic in legal and political philosophy. In this paper, I argue that Raz's normal justification thesis and Finnis's doctrine of "*determinatio*," inherited from Aquinas, complement each other, shedding light on how norms grounded in social facts can give rise to *particular* moral obligations independently of their content. However, I argue that this on its own does not explain the possibility of a *general* moral obligation to obey the law, that is, the notion that *everyone* has a *prima facie* moral obligation to obey *every* law that applies to them.¹

Keywords: Obligation. Law. John Finnis. Joseph Raz.

Resumo: O debate recente entre John Finnis e Joseph Raz sobre a existência de uma obrigação moral geral *prima facie* de obedecer a leis positivas é uma contribuição importante a um tópico clássico em filosofia política e jurídica. Neste

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¹ This paper deals with obedience to positive law in the light of the debate between Finnis and Raz, not directly with the debate between the two philosophers of law, which is why the positions of national and foreign authors on this debate are not discussed.

artigo, eu argumento que a tese da justificação normal de Raz e a doutrina da “*determinatio*” de Finnis, herdada de Tomás de Aquino, se complementam, esclarecendo o modo como normas fundadas em fatos sociais pode dar origem a obrigações morais *particulares* independentemente de seu conteúdo. Contudo, eu argumento que isso por si só não explica a possibilidade de uma obrigação moral *geral* de obedecer à lei, isto é, a noção que *todos* têm uma obrigação moral *prima facie* de obedecer a toda lei que se aplique a eles.

Palavras-chave: Obrigação. Direito. John Finnis. Joseph Raz.

Introduction

How can social institutions create moral obligations for people? Is this possible? In this paper, I examine the conceptual possibility of a *prima facie* general moral obligation to obey positive law, drawing on works by John Finnis and Joseph Raz. In their published works, the debate between Finnis and Raz started with Finnis’s paper “The Authority of Law in the Predicament of Contemporary Social Theory,”² which consisted mainly in an attack on Raz’s book *The Authority of Law*.³ Raz replied to Finnis in the paper “The Obligation to Obey: Revision and Tradition.”⁴ Finally, we can find Finnis’s rejoinder in the paper “Law as Co-ordination.”⁵ My main aim in this paper is not to reconstruct this debate historically but to draw on it to investigate how to make sense of a moral obligation to obey the law.

In the first part, I formulate the problem and sketch some of the main attempts to solve it in order to emphasize the distinctiveness of Finnis’s and Raz’s contributions. In the second part, I outline the classical doctrine of “*determinatio*,” which Finnis inherited from Aquinas as part of his own attempt to solve the problem, and I examine a Razian objection to such a doctrine’s ability to explain certain central cases of law. In the last part, I focus on Raz’s “piece-meal approach” to the problem of the moral obligation to obey the law in order to consider whether the doctrine of “*determinatio*” can account for a *general* moral obligation to obey the law or only for particular moral obligations to obey *certain* laws. My claim is

² FINNIS, John. The Authority of Law in the Predicament of Contemporary Social Theory. *Notre Dame Journal of Law, Ethics & Public Policy*, v. 1, n. 1, p. 115-137, 1984; republished in FINNIS, John. *Law’s Authority and Social Theory’s Predicament*. In: FINNIS, John. *Philosophy of Law*. Oxford: Oxford University Press, 2011. p. 46-65, from where I quote.

³ RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon Press, 1979.

⁴ RAZ, Joseph. The Obligation to Obey: Revision and Tradition. *Notre Dame Journal of Law, Ethics & Public Policy*, v. 1, n. 1, p. 139-155, 1985.

⁵ FINNIS, John. Law as Co-ordination. *Ratio Juris*, v. 2, n. 1, p. 97-104, mar. 1989; republished in FINNIS, John. *Law as Coordination*. In: FINNIS, John. *Philosophy of Law*. Oxford: Oxford University Press, 2011. p. 66-73, from where I quote.

that, taken together, Raz's normal justification thesis and Finnis's doctrine of "*determinatio*" are capable of explaining how particular moral obligations to obey the law are possible, even though they do not explain the possibility of a *general* moral obligation to obey the law.

1. Understanding the Problem

1.1. Conceptual clarifications

The obligation examined here is usually called a "*prima facie*" obligation because, from the norm-addressee's point of view, it is not reasonable to view the obligation to obey positive laws as absolutely indefeasible. To the best of my knowledge, nobody considers this obligation indefeasible in the recent debates on the subject. Moreover, such a *prima facie* obligation is *general* when it applies to all subjects in a legal system's jurisdiction, and it holds for any norm that is legally valid according to that system. So we ask how it could be possible for every person subject to a legal system to be *prima facie* morally obliged to obey every law of that system *because* it is a law of that system.⁶

The scope of this paper is restricted to mandatory norms. Mandatory norms are understood here as practical rules or principles that demand or forbid a kind of action of a type of subject in certain circumstances. Our problem presupposes that legally valid mandatory norms are not morally valid norms *by definition*; that is, the answer to our question is not trivial if and only if legal validity does not need to be conceived as a mere species of the genus "moral validity." In other words, our presupposition is that tests of legal validity are underdetermined by moral arguments. I do not argue for that presupposition here.

Another important clarification is that mandatory norms are here considered protected reasons in Raz's sense. For Raz, mandatory norms are exclusionary reasons because they are second-order reasons not to act for certain first-order reasons.⁷ An exclusionary reason is not the weightiest reason in a balance of reasons. It is a reason not to act for the balance of reasons. It defeats other reasons based on its kind, not based on its

⁶ See PERRY, John. Associative Obligations and the Obligation to Obey the Law. In: HER-SHOVITZ, Scott (org.). *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin*. Oxford: Oxford University Press, 2006. p. 183-205, p. 184; and SMITH, M. B. E. Is There a Prima Facie Obligation to Obey the Law? *The Yale Law Journal*, v. 82, n. 5, p. 950-976, abr. 1973, p. 952.

⁷ RAZ, Joseph. **Practical Reason and Norms**. 2. ed. Oxford: Oxford University Press, 1999, p. 39.

weight. According to Raz, a reason is a protected reason when, besides being an exclusionary reason, it is also a first-order reason to perform or avoid an act.⁸

The last clarification allows us to understand one essential feature of mandatory norms in general: peremptoriness. H.L.A. Hart accounts for this feature when he analyses the concept of a “command.” A peremptory reason is an exclusionary reason because it precludes independent deliberation of the merits of doing the act. More precisely, the norm-addressee can still deliberate, but she cannot act on her own deliberation. To sum up, a peremptory reason does not function within the norm-addressee’s deliberation because it *replaces* that deliberation with the norm.⁹

There is another essential feature that we shall import from Hart’s analysis of the concept of a command. This is the Hobbesian notion of *content-independence*. Unlike at least some morally valid mandatory norms, legally valid mandatory norms are not considered reasons for action because of their content. In general, as Hart said, there is a connection between an action and a reason for that action based on the content of the action. For example, the action may be a means to a desired consequence, which is my reason to perform it.¹⁰ But things are not so with legally valid mandatory norms.

We are not considering legally valid mandatory norms to be morally valid mandatory norms by definition because we are assuming that legally valid mandatory norms may be approved by morally neutral tests. Hence, we are compelled to claim that legally valid mandatory norms owe their possible character as reasons for action to the fact that they originate from certain social sources as enactments and precedents.¹¹ This is why they are content-independent. This amounts to saying that a legally valid mandatory norm might obligate one to perform an action or to refrain from performing it, as this makes no difference to its legal validity. Certainly, this is not the same as claiming that a legal norm can have any content at all. But it leads to the question of whether the content of that kind of norm is the only possible reason for the action in conformity with the norm, sanctions aside.

⁸ RAZ, Joseph. Legitimate Authority. In: RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*. 2. ed. Oxford: Oxford University Press, 2009. p. 3-27, p. 18.

⁹ HART, H.L.A. Commands and Authoritative Legal Reasons. In: HART, H.L.A. *Essays on Bentham: Essays in Jurisprudence and Political Theory*. Oxford: Oxford University Press, 1982. p. 243-268, p. 253.

¹⁰ HART, H.L.A. Commands and Authoritative Legal Reasons. In: HART, H.L.A. *Essays on Bentham: Essays in Jurisprudence and Political Theory*. Oxford: Oxford University Press, 1982. p. 243-268, p. 254.

¹¹ RAZ, Joseph. Hart on Moral Rights and Legal Duties. *Oxford Journal of Legal Studies*, v. 4, n. 1, p. 123-131, 1984, p. 129.

Finally, we must distinguish between a mandatory norm as a possible content-independent reason for action and the sanction for breaking that mandatory norm, which is another type of reason for action. Paraphrasing Hart, sanctions are secondary reasons: provisions just in case the protected reason is not accepted as such.¹² To put it another way, when the norm-addressee does not exclude the balance of reasons as she would do if the norm were an exclusionary reason for her, then the sanction is intended as a weighty reason to tip the norm-addressee's balance of reasons in favor of the norm-act. Thus, returning to the matter at hand, we can reformulate our problem as a search for the intelligibility conditions of a general moral obligation to accept legally valid mandatory norms as protected reasons. How is it possible to have a *prima facie* moral obligation to replace our own deliberation on the merits of an action with a legally valid mandatory norm independently of its content?

1.2. Traditional justifications of a moral obligation to obey the law

In order to understand the best-known answers to the problem of a moral obligation to obey the law, we should keep in mind that legally valid mandatory norms are not the only candidates for *peremptory* and *content-independent* reasons for action. Acts of promising and consenting, for instance, give rise to that kind of reason for action. If I promise to visit you in the hospital, it makes sense only if I have to exclude at least certain conflicting reasons not to go. If I still intend to deliberate on every pro and con of going and to act based on that deliberation, I will be acting as if I had never promised to go. The act of promising is in itself a reason to go that does not simply add to the reasons that ground my decision. Instead of adding to those reasons, the promise replaces those reasons and functions independently of them.¹³ Things are similar in the case of consent; consenting makes no sense if it leaves me free to balance the reasons on which I based my consent against other reasons and to act on that balance of reasons.¹⁴

This is why there have been so many attempts to ground a moral obligation to comply with legally valid mandatory norms on acts of promising and consent. For instance, a mandatory norm may be legally valid because it was properly enacted by a certain government. Since I consent to that

¹² HART, H.L.A. Commands and Authoritative Legal Reasons. In: HART, H.L.A. *Essays on Bentham: Essays in Jurisprudence and Political Theory*. Oxford: Oxford University Press, 1982. p. 243-268, p. 254.

¹³ RAZ, Joseph. *The Morality of Freedom*. Oxford: Oxford University Press, 1986, p. 57-58.

¹⁴ For an examination of similarities and differences between promises and acts of consenting, see SIMMONS, John A. *Moral Principles and Moral Obligations*. Princeton: Princeton University Press, 1979, p. 76.

government's rule, the argument follows, I have a moral obligation to comply with its enactments. Nevertheless, most people have never actually consented to their governments or promised to obey their norms. So why should they accept the relevant enacted mandatory norms as peremptory and content-independent reasons rather than simply weighing the merits of their content against the disadvantage of being sanctioned for violating them? To deal with this problem, political philosophers have attempted to prove that people should consent to their governments or promise to obey them. Their reasoning usually takes the form of a theory of a hypothetical, rational, or tacit form of consent or promising that takes the place of a real, empirical, explicit act of consent or promising.

These different forms of contractualism are set aside in this paper, since I shall assume that consenting and promising are capable of creating obligations only via to the performance of real actions in an appropriate way, including, for instance, a belief by the subject that obligations are thereby acquired.¹⁵ In addition, I will leave to the side two other groups of arguments: 1) arguments based on the principle of "fair play" or fairness, according to which, roughly speaking, members of a just society have an obligation to each other to obey the law because they all accept the benefits made possible by the acceptance of such an obligation by fellow members of their society;¹⁶ and 2) conventionalist arguments based on the function of law in solving problems of coordination.¹⁷ These types of argument face different but closely related problems.

¹⁵ See RAZ, Joseph. *The Morality of Freedom*. Oxford: Oxford University Press, 1986, p. 97. Simmons offers a very helpful critical examination of the argument from tacit consent as the last refuge of consent theorists, showing that it is often confused with another type of argument: the argument from fairness that I mention below; see SIMMONS, John A. *Moral Principles and Moral Obligations*. Princeton: Princeton University Press, 1979, p. 75-100. I also accept Smith's arguments against attempts to ground the obligation to obey on promise and consent; see SMITH, M. B. E. Is There a Prima Facie Obligation to Obey the Law? *The Yale Law Journal*, v. 82, n. 5, p. 950-976, abr. 1973, p. 960-964.

¹⁶ As far as I know, the argument from fairness was first explicitly introduced by Hart; see HART, H.L.A. Are There Any Natural Rights? *The Philosophical Review*, v. 64, n. 2, p. 175-191, abr. 1955, p. 185. John Rawls seems to have been its main proponent, however, even though he abandoned the claim that the principle of fairness binds all citizens, even in just societies; see RAWLS, John. Legal Obligation and the Duty of Fair Play. In: HOOK, Sidney (org.). *Law and Philosophy*. New York: New York University Press, 1964. p. 3-18; and RAWLS, John. *A Theory of Justice*. 2. ed. Cambridge, USA: The Belknap Press of Harvard University Press, 1999, p. 301-8. Finnis also presents his own version of that argument, which we will examine in section 3.3; see FINNIS, John. Law's Authority and Social Theory's Predicament. In: FINNIS, John. *Philosophy of Law*. Oxford: Oxford University Press, 2011. p. 46-65, p. 47-51. I agree with the objections against the argument from fairness raised by Smith and Robert Nozick; see SMITH, M. B. E. Is There a Prima Facie Obligation to Obey the Law? *The Yale Law Journal*, v. 82, n. 5, p. 950-976, abr. 1973, p. 954-960; and NOZICK, Robert. *Anarchy, State, and Utopia*. Oxford, UK, Cambridge, USA: Blackwell, 1974, p. 90-95.

¹⁷ David Lewis developed a theory of conventions, the source of which is the theory of games of pure coordination; see LEWIS, David. *Convention: A Philosophical Study*. 2. ed. Oxford: Blackwell, 2002. Based on this book, which was first published in 1969, philosophers

The problem of coordination in the technical sense of game theory occurs in situations where parties need to choose one action from among the alternatives and the outcome of this choice depends on the choices made by the other parties. Thus, each choice is based on mutual expectations. In addition, and this is crucial, the parties share a preference that outweighs their other preferences. For instance, I prefer to meet you at the library; you prefer to meet me at the gym. But I prefer meeting you to going to the library, and you prefer meeting me to going to the gym. We need to coordinate our actions in order to accomplish our common goal. This is a problem if there is more than one possible route toward equilibrium: more than one way to coordinate actions in order to satisfy shared preferences (we can meet at the library or at the gym). However, if equilibrium is reached, there is no incentive for unilateral divergent behavior. After all, every agent prefers equilibrium to a situation in which she satisfies a preference that is not the common one. Therefore, it makes no sense to speak of an “obligation” to obey a convention¹⁸ that solves a problem of coordination by establishing an equilibrium.¹⁹

In turn, an argument from fair play assumes that there are recalcitrants in social coordination: free riders. According to the argument, agents have

have accounted for at least some aspects of law as conventions that solve problems of coordination. However, Leslie Green has developed a very persuasive and influential argument against such conventionalist theories of law; see GREEN, Leslie. Positivism and Conventionalism. *Canadian Journal of Law and Jurisprudence*, v. 12, n. 1, p. 35-52, jan. 1999. For a defense of conventionalist theses, see, for example, BOARDMAN, William S. Coordination and the Moral Obligation to Obey the Law. *Ethics*, v. 97, n. 3, p. 546-557, abr. 1987; and LAGERSPETZ, Eerik. *The Opposite Mirrors: An Essay on the Conventionalist Theory of Institutions*. Dordrecht: Springer Science, Business Media, 1995. Boardman admits that there is an important difference between law and conventions in the strict sense of game theory, whereas for Lagerspetz the nature of coordination problems can explain how laws can be exclusionary reasons only if morality requires coordination and that coordination requires law as its rational solution. Chaim Gans defends an even weaker conventionalist thesis, according to which the obligation to obey the law is normative but not moral and does not cover those ordinary citizens who do not share the purposes of a particular organization or do not (have to) respect such an organization; see GANS, Chaim. The Normativity of Law and its Co-ordinative Function. *Israel Law Review*, v. 16, n. 3, p. 333-349, jul. 1981. Gerald Postema, in turn, restricts his conventionalist thesis to *judicial* obligation; see POSTEMA, Gerald. Coordination and Convention at the Foundations of Law. *The Journal of Legal Studies*, v. 11, n. 1, p. 165-203, jan. 1982. Be that as it may, I do not think the weakness of these claims makes them immune to Green’s objections.

¹⁸ For a technical definition of convention, see LEWIS, David. **Convention: A Philosophical Study**. 2. ed. Oxford: Blackwell, 2002, p. 78.

¹⁹ Another game theory problem often considered in the debate on whether there is an obligation to obey the law is the “prisoner’s dilemma.” Whereas pure coordination problems are informational problems in which players have no incentive to diverge from each other, prisoner’s dilemmas are motivational problems in which players have no incentive to cooperate with each other. This being so, the introduction of a new obligation—the obligation to obey the law—is incapable of solving a prisoner’s dilemma: the lack of incentive to comply with moral obligations persists in relation to that new obligation. This is why it is the introduction of coercion, and not of an obligation to obey itself, that can solve a prisoner’s dilemma.

enforceable obligations to accept their role in coordination, provided they benefit from them. Keeping in mind what we noted above about the technical sense of problems of coordination, the problem is that if recalcitrants have to be forced to take part in coordination, this may be because they have other preferences that outweigh the shared preference. In short, an agent can have a conflicting preference that outweighs the benefit provided to her by the coordination she is being forced into. From this agent's point of view, the benefit of cooperation does not compensate for what it causes her to miss out on. As such, establishing a general obligation to shoulder the costs of a given case of coordination involves more than proving that every agent benefits from that coordination. What must be shown is that there is a general obligation to fulfil the value at stake in that coordination in the first place, which goes beyond the scope of the argument from fairness.²⁰

This very rough reconstruction of the best-known attempts to demonstrate the possibility of a moral obligation to obey the law is helpful for emphasizing the relevance of the debate between Finnis and Raz to the problem. With this background established, let us now turn to the major points they advance on the issue.

2. Assessing the Doctrine of “*Determinatio*”: Finnis vs Raz

According to Finnis, the “master thesis of classical legal theory” is the thesis that “in positive law we can find a mode of derivation of specific norms of action, that is, of practical reasonableness, by an intellectual process which is not deductive and does involve free choice (human will) and yet is intelligent and directed by reason.”²¹ This process is called “*determinatio*” by Aquinas:

By *determinatio* there can be a particularisation of general ideals, commitments, and principles by architects, musicians, legislators, and jurists, by steps none of which are themselves necessary, and all of which could reasonably have been in some respect different—so that there is, in these myriads of instances, no uniquely correct solution—but all of which are reasonable and none of which could without risk of *error* have been taken randomly or without regard to coherence with the larger whole constituted

²⁰ For a more recent defense of the argument from fairness, see KLOSKO, George. *Political Obligations*. Oxford: Oxford University Press, 2005; and KLOSKO, George. *The Principle of Fairness and Political Obligation*. Lanham: Rowman and Littlefield, 1992.

²¹ FINNIS, John. Critical Legal Studies. In: FINNIS, John. *Philosophy of Law*. Oxford: Oxford University Press, 2011. p. 299-319, p. 301.

both by the initial general idea or ideas of value, commitment, or principle and by the steps already taken.²²

Examples from practical arts such as architecture are especially helpful for clarifying the meaning of “*determinatio*”:

[A] general idea or “form” (say, “house”, “door”, “door-knob”) has to be made determinate as this particular house, door, doorknob, with specifications which are certainly derived from and shaped by the general idea but which could have been more or less different in many (even in every!) particular dimension and aspect, and which therefore require of the artificer a multitude of choices. The (making of the) artefact is controlled but not fully determined by the basic idea (say, the client’s order), and until it is fully determinate the artefact is non-existent or incomplete.²³

To sum up, a “*determinatio*” is called for when practical reason is incapable of determining a unique reasonable outcome of practical reasoning, leaving room for choice²⁴ within certain parameters. To critically assess the potential of the doctrine of “*determinatio*” to account for the possibility of a general moral obligation to obey positive law, in this section I shall consider Raz’s arguments against the doctrine’s ability to explain certain indisputable, central cases of law, along with Finnis’s possible replies.

2.1. “*Determinatio*” in Raz’s political thought

At first, it is essential to note that Raz accepts the doctrine of “*determinatio*”²⁵ since he is an advocate of the incommensurability of values,²⁶ a thesis according to which it is impossible for every practical problem to have a

²² FINNIS, John. Critical Legal Studies. In: FINNIS, John. *Philosophy of Law*. Oxford: Oxford University Press, 2011. p. 299-319, p. 314.

²³ FINNIS, John. *Natural Law and Natural Rights*. 2. ed. Oxford: Oxford University Press, 2011, p. 285.

²⁴ Although it is appropriate to talk of the doctrine of “*determinatio*” in terms of “decisions” or “choices,” we should point out that it is normal for customs to emerge when there is a need to determine the answer to a moral problem but it is not possible for every agent to be left free to do as she pleases. Since a law can be a customary law, it seems to be important to adapt the doctrine of “*determinatio*” to include the possibility that the needed determination will be made spontaneously, not necessarily via deliberation. Thus, there would be a moral obligation to obey the authority of a custom in every society where a necessary “*determinatio*” is made by custom, not by deliberation. What matters for Finnis is that “the selection, whether it was by a process of custom-formation or by enactment, judgment, or other authoritative decree, must be treated as authoritative” (FINNIS, John. *Law’s Authority and Social Theory’s Predicament*. In: FINNIS, John. *Philosophy of Law*. Oxford: Oxford University Press, 2011. p. 46-65, p. 63).

²⁵ Addressing a legal right to political activity, Raz offers an excellent illustration of the doctrine at issue here; see RAZ, Joseph. A Right to Dissent? I. Civil Disobedience. In: RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*. 2. ed. Oxford: Oxford University Press, 2009. p. 262-275, p. 272.

²⁶ See especially RAZ, Joseph. *The Morality of Freedom*. Oxford: Oxford University Press, 1986, p. 388-399; RAZ, Joseph. Incommensurability and Agency. In: RAZ, Joseph. *Engaging Reason: On the Theory of Value and Action*. Oxford: Oxford University Press, 1999. p. 46-66; and RAZ,

uniquely right answer.²⁷ If values are incommensurable, there is a plurality of values but no metric to commensurate the weight of those values in a balance of reasons, and thus neither is it the case that different values are equal nor is it the case that one is objectively weightier than the other.²⁸

In *The Morality of Freedom*, “*determinatio*,” or the need for an authoritative choice in certain situations, appears as one of three ways in which an authority can make a difference to its subjects’ reasons for action.²⁹ The other ways mentioned by Raz are the delivery of solutions for coordination problems and prisoner’s dilemmas. However, we saw above (section 1.2) that the introduction of an obligation to obey the law cannot provide a solution to either problem. Hence, it seems that “*determinatio*” is actually the only way left open for Raz to make sense of the ability of authorities to create moral obligations.

Furthermore, the doctrine of “*determinatio*” has a close relation with the very conception of an obligation to obey as a protective reason (see section 1.1). If authoritative choices were conceived as mere first-order reasons to be balanced with other first-order reasons, incommensurability would make it impossible to consider authoritative reasons weightier or weaker than competing reasons. So rather than solving the practical problem, authoritative reason would become part of it. This is why, given incommensurability, it is best to conceive of an authoritative reason to act as a first-order reason to act and, at the same time, as a second-order reason not to act on certain first-order reasons.³⁰

If it can be claimed that moral rights and duties are in need of an act of “*determinatio*” and, additionally, that the choice involved in the doctrine of “*determinatio*” must be a public one, perhaps we can make the case for the central meaning of positive law as the result of a process of “*determinatio*.” Nonetheless, Raz claims that the process of “*determinatio*” does not cover the whole area of the central meaning of positive law because there are moral rights and duties—equally demanded by positive law—that are not a matter of “*determinatio*.” Therefore, according to Raz, we cannot use the doctrine of “*determinatio*” to justify a *general* moral obligation to obey the law. At most, it can justify particular moral obligations to obey some laws.

Joseph. The Relevance of Coherence. In: RAZ, Joseph. *Ethics in the Public Domain: Essays in the Morality of Law and Politics*. 2. ed. Oxford: Clarendon Press, 1995. p. 277-325, p. 317-318.

²⁷ Certainly, incommensurability is not the only source of indeterminacy that affects practical reasoning. There is (at least) also the vagueness of practical norms; see, for example, KRAMER, Matthew. *H.L.A. Hart: The Nature of Law*. Cambridge: Polity Press, 2018, p. 137-139; and GREEN, Leslie. The Forces of Law: Duty, Coercion, and Power. *Ratio Juris*, v. 29, n. 2, p. 164-181, jun. 2016, p. 166.

²⁸ See FINNIS, John. Law’s Authority and Social Theory’s Predicament. In: FINNIS, John. *Philosophy of Law*. Oxford: Oxford University Press, 2011. p. 46-65, p. 60.

²⁹ RAZ, Joseph. *The Morality of Freedom*. Oxford: Oxford University Press, 1986, p. 48-49.

³⁰ See GREEN, Leslie. The Forces of Law: Duty, Coercion, and Power. *Ratio Juris*, v. 29, n. 2, p. 164-181, jun. 2016, p. 166.

2.2. The limits of the doctrine of “*determinatio*” according to Raz

The doctrine of “*determinatio*” is supposed to account for central cases of law.³¹ Raz argues, however, that there are indubitable central cases of law that are not a matter of “*determinatio*” and that therefore do not represent moral obligations to obey the law *qua* law. Raz’s point is that, in such cases, the positivity of the norm—the fact that it is a legally valid norm according to relevant social sources—is completely indifferent to the moral obligation to conform with the norm. For Raz, it is even morally wrong for a subject to conform to such positive norms **because** they are positive norms.³² This is the case with positive laws that forbid murder and rape, for instance. Nobody has doubts regarding the central meaning of such laws as laws. These cannot reasonably be classified as borderline cases of law. Hence, Raz concludes:

If a legal prohibition of murder neither imposes an independent moral obligation nor makes the duty not to murder stricter or weightier than it was without the law, then the case is made. The prohibitions of murder, rape, enslavement, imprisonment and similar legal prohibitions are central to the laws of all just legal systems. Their existence cannot be dismissed as marginal or controversial. If these laws do not make a difference to our moral obligations, then there is no general obligation to obey the law. There may be a moral obligation to obey some laws, but this was never in contention.³³

If Raz’s analysis is correct, the doctrine of “*determinatio*” is not incorrect. On the contrary, this doctrine is essential for clarifying why Raz concedes that there may be a moral obligation to obey some laws (“this was never in contention”). The claim is only that the doctrine is not sufficient to vindicate a *general* obligation for all subjects to obey all the central cases of law in a certain jurisdiction.

At this point, it is necessary to examine whether it is actually the case that a process of “*determinatio*” is not required where the law prohibits what is morally wrong anyway. In other words, do Raz’s examples successfully make the point that a legal prohibition is morally indifferent (or redundant), provided I already have a moral obligation to refrain from performing certain acts?

³¹ For an account of the methodology of central cases and focal meaning, see FINNIS, John. *Natural Law and Natural Rights*. 2. ed. Oxford: Oxford University Press, 2011, p. 9-11.

³² RAZ, Joseph. The Obligation to Obey: Revision and Tradition. *Notre Dame Journal of Law, Ethics & Public Policy*, v. 1, n. 1, p. 139-155, 1985, p. 141-142.

³³ RAZ, Joseph. The Obligation to Obey: Revision and Tradition. *Notre Dame Journal of Law, Ethics & Public Policy*, v. 1, n. 1, p. 139-155, 1985, p. 142.

2.3. A Finnisian reply

In order to avoid drawing a hasty conclusion about the issue, Finnis meditates on how Aquinas and Hooker deal with positive laws such as those forbidding murder and rape. Looking at this in detail will be helpful:

Aquinas says that this sort of law is derived from natural law by a process analogous to deduction of demonstrative conclusions from general principles; and that such laws are not positive law only, but also have part of their 'force' from the natural law (i.e. from the basic principles of practical reasonableness). Hooker calls such laws 'mixedly human', arguing that their matter or normative content is the same as reason necessarily requires, and that they simply ratify the law of reason, adding to it only the additional constraining or binding force of the threat of punishment.³⁴

The approach described by Finnis favors Raz's thesis because the positivity of law does not add to the practical reasoning of a moral agent; that is, her normative situation does not change by the enactment of a law forbidding murder, for example. Only the recalcitrant gains a new reason not to murder: the threat of punishment. This is why Finnis does not accept Aquinas's and Hooker's accounts as they are.

Finnis does not deny, of course, that a category of positive law is composed of norms that are directly derived from requirements of practical reasonableness and conceptions of the moral good. This kind of norm is morally mandatory. Moreover, a prohibition against murder or rape seems to be quite determinate by itself. It does not appear to be impossible to comply with it until lawgivers specify what amounts to that kind of act by their choice among equally reasonable alternatives. Thus it seems that there is no "*determinatio*" when lawgivers forbid murder, but only practical reasoning; what is more, the same type of practical reasoning is available to every moral agent. Finnis warns us, however, that "the process of receiving even such straightforward moral precepts into the legal system deserves closer attention."³⁵

Finnis notes that a formulation such as "no one may kill" is legally defective. In order to understand why this formulation is defective, one needs to understand that it is a mistake to think, like Hooker, that the threat of punishment is the only addition that a positive law makes to the law of reason:

As part of the law of the land concerning offences, it adds also, and more interestingly, (i) a precise elaboration of many other legal (and therefore

³⁴ FINNIS, John. *Natural Law and Natural Rights*. 2. ed. Oxford: Oxford University Press, 2011, p. 281-282.

³⁵ FINNIS, John. *Natural Law and Natural Rights*. 2. ed. Oxford: Oxford University Press, 2011, p. 282.

social) consequences of the act and (ii) a distinct new motive for the law-abiding citizen, who acts on the principle of avoiding legal offences as such, to abstain from the stipulated class of action.³⁶

Finnis claims that the development of these legal implications and consequences does not amount to deductive arguments from principles of practical reasonableness. This process requires authorities' rational freedom of choice: "*determinatio*."

2.4. A Razian rejoinder

Even if we agree with Finnis that the reception of moral norms in a legal system is much more complex than the mere addition of a threat of punishment for recalcitrants, it is not clear that Finnis has a good answer to Raz's objection. At first, we should ask whether the principle of avoiding legal offences on its own is a reason that is capable of making a difference to a moral agent's decision to refrain from killing an innocent. The answer to this question must be no.

To start with, even if we think that it is possible for a morally conscious agent to actually consider killing an innocent person—perhaps in order to prevent a greater evil—it is not plausible to believe that committing a legal offence on its own could qualify as such a greater evil in a possible situation. Indeed, it seems to be much more reasonable to think of the principle of avoiding legal offences as the type of reason that would always be excluded by the moral obligation not to kill innocents to the extent that such a principle conflicts with that obligation. But if the principle of avoiding legal offences because they are legal offences is always defeated by the moral obligation not to kill innocents—either because that moral obligation is an exclusionary reason or because it is always a stronger reason compared to that principle—then such a principle is never a necessary reason for a morally conscious agent to refrain from killing innocents.

As for the other element in Finnis's analysis of the legal reception of determinate moral prescriptions—precise elaboration of legal and social consequences of violations of these prescriptions—it will help us to examine Raz's suggestion that "much of the good that the law can do does not presuppose any obligation to obey."³⁷ Raz means that, although the kind of law at issue here is not for the morally conscious person, there must be a reception of those moral norms by law enforcement such that

³⁶ FINNIS, John. *Natural Law and Natural Rights*. 2. ed. Oxford: Oxford University Press, 2011, p. 283.

³⁷ RAZ, Joseph. The Obligation to Obey: Revision and Tradition. *Notre Dame Journal of Law, Ethics & Public Policy*, v. 1, n. 1, p. 139-155, 1985, p. 143.

the morally conscious person is not abused by the morally recalcitrant. Nevertheless, for Raz, the law enforcement apparatus does not need a claim to obedience to accomplish that aim:

One can threaten and penalize people without having authority over them. [...] Their actions are morally permissible for reasons independent of the law. Even when they encroach on the personal liberty of the offender, they need not invoke the law in justification. They treat offenders in *ways morally appropriate* for those who renege on their moral duties.³⁸

Raz's inspiration here comes from anarcho-capitalist protective agencies, a private model of rights enforcement that Robert Nozick, for example, developed as a thought experiment in the first part of his *Anarchy, State, and Utopia*. However, taking a closer look at the idea of *morally appropriate ways of treating offenders*, we can find good reason to object against this model of law enforcement without authority.

As seen above, the legal prohibition of morally prohibited actions does not change the normative situation of morally conscious persons after all. Nonetheless, it does take away their right to threaten and penalize moral offenders. This being so, the point at issue is whether the morally conscious person has a moral obligation to refrain from threatening and penalizing the moral offender, leaving that to the political authority. The answer to this issue depends on another question: how to determine what counts as morally appropriate treatment of offenders. Is it possible to derive a uniquely right answer to this question from moral principles? Or is it necessary to make a rational choice among reasonable alternative answers to this question? According to Finnis, it is a rational *decision*, and not *simply reasoning*, that settles this question. In other words, it is necessarily a "*determinatio*."

I believe that this is correct; even the simplest sanction imposed on a confessed murderer is not a clear matter of demonstration. Practical reasoning can discard many competing punishment options, but I cannot see how it could show that only one option is the right one. Thus, different anarcho-capitalist protective agencies would disagree on this and many other issues regarding the type of rights a murderer would still retain, or the type of legal relations she could still maintain. Without claiming authority, as Nozick has shown, different agencies can negotiate a peaceful solution in matters of disagreement in order to avoid a costly war. But if I do not have an obligation to obey, if the agency is not even claiming authority when it prohibits murder, I am morally permitted to decide whether it is better to fight to impose my solution (my own "*determinatio*"), which I consider more sensible according to the scale of assessment which I *choose* to employ.

³⁸ RAZ, Joseph. The Obligation to Obey: Revision and Tradition. *Notre Dame Journal of Law, Ethics & Public Policy*, v. 1, n. 1, p. 139-155, 1985, p. 143-144 (my emphasis).

Nozick himself is aware of the insoluble divergence, for example, among individuals considering a balance between a penal system that is harsher, and therefore more likely to punish criminals, and one that is less harsh, and therefore less likely to punish innocents:

*It is, to say the least, very doubtful that any provision of the law of nature will (and will be known to) settle the question of how much weight is to be given to such considerations, or will reconcile people's different assessments of the seriousness of being punished when innocent as compared to being victimised by a crime.*³⁹

Since by hypothesis there is no authority being claimed over me here and no uniquely right answer, *it is not morally wrong* to fight to defend my solution to the practical problem of punishment against others, or at least *to refuse to cooperate* with others' decisions.⁴⁰ The core of the issue is that, even if, for whatever reason, I decide not to fight, the practical question is still open. In short, this is the type of problem situation in which, without an authoritative decision, there is no answer that one is morally *bound* to accept. Moreover, this is not the type of matter that can be settled privately by each individual judgement. (Imagine each person trying to enforce her own penalty for the murder.) Therefore, it appears that we do not have a central case of positive law that dispenses with the need for an authoritative "*determinatio*" after all. But is that enough to vindicate the claim that there is a general moral obligation to obey legally valid norms? Not yet.

3. Raz and the Piece-meal Approach

Raz argued that the extent of the moral obligation to obey legally valid norms varies from person to person and from situation to situation.⁴¹ This is a "piece-meal approach" that Raz himself considered "puzzling."⁴² What

³⁹ NOZICK, Robert. *Anarchy, State, and Utopia*. Oxford, UK, Cambridge, USA: Blackwell, 1974, p. 97 (my emphasis).

⁴⁰ G. E. M. Anscombe makes similar remarks when she denies the possibility of a right to punish in the state of nature; see ANSCOMBE, G.E.M. On the Source of the Authority of the State. In: ANSCOMBE, G.E.M. *Ethics, Religion and Politics*. Oxford: Basil Blackwell, 1981. P. 130-155, p. 148-149. In turn, Green claims that we can conceive of a public order of mutual coercion without authority. For him, a public debate about which sanctions should be imposed is not a debate about duties; see GREEN, Leslie. *The Authority of the State*. Oxford: Clarendon Press, 1999, p. 200. I disagree with Green: what counts as a sanction according to some values and conceptions of common good is just another crime according to other views, such that a debate about sanctions is always a debate about our duties regarding appropriate ways to treat others.

⁴¹ RAZ, Joseph. The Obligation to Obey: Revision and Tradition. *Notre Dame Journal of Law, Ethics & Public Policy*, v. 1, n. 1, p. 139-155, 1985, p. 146.

⁴² RAZ, Joseph. *The Morality of Freedom*. Oxford: Oxford University Press, 1986, p. 80.

matters for us here is assessing whether the doctrine of “*determinatio*” is enough to explain the presumption of a *general* moral obligation to obey the law, or whether all it can clarify is a “piece-meal approach” of this sort. This is why we shall examine the main theses in Raz’s theory of legal legitimacy in this section.

3.1. The main theses of Raz’s theory of authority

Let us start with a thesis that is not properly part of Raz’s conception of authority but that needs to be rejected if there is *any* moral obligation to obey the law. This is the no difference thesis: “*the exercise of authority should make no difference to what its subjects ought to do, for it ought to direct them to do what they ought to do in any event.*”⁴³ Clearly, if the no difference thesis were true, there would be no need for an authoritative “*determinatio*.” Moral principles would always fully determine what is morally required of an agent. A legally valid norm that one has an obligation to obey would be the mere social acknowledgement of an independent obligation. The positivity of the norm itself would not amount to a change to the agent’s normative situation.

The second⁴⁴ thesis to be considered is already accepted in this paper as part of the formulation of our problem. It is the pre-emptive thesis: the fact that an authority requires the performance of an action is a reason for its performance that is not to be added to all other relevant reasons when assessing what to do but rather excludes and takes the place of some of them.⁴⁵ It amounts to treating legally valid norms as protected reasons. If there is a moral obligation to obey a legally valid norm, then there is a moral obligation to accept that norm as a protected reason. It should be noted that this goes beyond the claim that there is a moral obligation to peaceful conformity with positive laws.

The third thesis is the dependence thesis: “all authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive.”⁴⁶ This general requirement for a moral obligation to obey a law is not to be confused with the no difference thesis. Dependent reasons are reasons that reflect the outcome of a balance of reasons. This being so, the concept of a “dependent reason” is connected to the concept of a “pre-emptive reason.” A pre-emptive reason replaces

⁴³ RAZ, Joseph. *The Morality of Freedom*. Oxford: Oxford University Press, 1986, p. 48.

⁴⁴ This numeration is mine, not Raz’s.

⁴⁵ RAZ, Joseph. *The Morality of Freedom*. Oxford: Oxford University Press, 1986, p. 46.

⁴⁶ RAZ, Joseph. *The Morality of Freedom*. Oxford: Oxford University Press, 1986, p. 47.

the subject's balance of reasons. This being so, the dependence thesis is a moral thesis that asserts that it is legitimate to replace a subject's balance of reasons if and only if such a pre-emptive reason reflects a reasonable outcome of that balance of reasons.

Certainly, given the plurality of incommensurable values accepted by Raz and Finnis, the outcome of a balance of reasons might be different if another person were to weigh the same reasons. Satisfying the dependence thesis, however, the pre-emptive reason would still be a reasonable result of such a process of balancing. Therefore, it would properly take into account reasons that appeal to every addressee of the legal norm. This is consistent with the doctrine of "*determinatio*." After all, according to this doctrine, an authoritative choice is not random but is to be made among *reasonable* options—that is, among reasons that are reasons for the norm-addressee.

But why would the norm-addressee have a moral obligation to accept a replacement for her own balance of reasons? Here comes the last and most important of Raz's thesis: the normal justification thesis:

[T]he normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.⁴⁷

This thesis is not intended as a sufficient justification of a moral obligation to obey the law. As the title says, it is intended merely as a *normal* condition.⁴⁸ Responding to his critics in the second edition of *Practical Reason and Norms*, Raz also appeals to the idea of an indirect strategy according to which conformity with first-order reasons that apply to the norm-addressee is what matters after all, and according to which this is sometimes better secured not by direct compliance with such reasons but by compliance with a second-order (exclusionary) reason.⁴⁹

We can clarify this indirect strategy with an example. There is a legally valid norm that states that you should stop when the traffic light is red and go when it is green. If you accept such a norm as authoritative, you do not act on your own balance of reasons to stop or go when you reach an intersection with a traffic light. The reasons in that balance would be, for instance, your interests in being safe on the one hand and in arriving at your destination as soon as possible on the other. The rationale behind

⁴⁷ RAZ, Joseph. *The Morality of Freedom*. Oxford: Oxford University Press, 1986, p. 53.

⁴⁸ RAZ, Joseph. On Respect, Authority, and Neutrality: A Response. *Ethics*, v. 120, n. 2, p. 279-301, jan. 2010, p. 298.

⁴⁹ RAZ, Joseph. *Practical Reason and Norms*. 2. ed. Oxford: Oxford University Press, 1999, p. 194.

the authority of the norm in the traffic light example is that you better promote your interests (your reasons) if you follow the norm rather than directly complying with your own reasons by considering whether it is safe to go now or better to wait for the next opportunity to cross.

To be certain, you will sometimes have reason not to exclude your own deliberation about the right moment to cross the road. You might be taking someone to a hospital urgently. After all, an exclusionary reason need not be an absolute reason, excluding every kind of conflicting reason. But it could be justified whenever it excludes at least some conflicting reasons, replacing deliberation and thereby optimizing conformity with the reasons that apply to the subject.

3.2. The normal justification thesis and the piece-meal approach

It is important to note that although the normal justification thesis explains how it is possible for us to have a reason to obey laws, it is applicable only on a case-by-case basis. Even if we accept that the normal justification thesis can make intelligible a moral obligation to sometimes obey some laws, we have not yet justified a general obligation to obey. In other words, the normal justification thesis does not assert that it is necessary for everyone in every circumstance to comply with a certain second-order reason in order to optimize conformity with first-order reasons. Sometimes, the norm-addressee will be justified in acting on her own balance of reasons even if the normal justification thesis is true. At this point, Raz seems to triumph with his “piece-meal approach”:

The government may have only some of the authority it claims, it may have more authority over one person than over another. The test is as explained before: does following the authority's instructions improve conformity with reason? For every person the question has to be asked afresh, and for every one it has to be asked in a manner which admits of various qualifications. An expert pharmacologist may not be subject to the authority of the government in matters of the safety of drugs, an inhabitant of a little village by a river may not be subject to its authority in matters of navigation and conservation of the river by the banks of which he has spent all his life.⁵⁰

As we see in this passage, not only considerations about circumstances but also the degree of a citizen's expertise in the norm's subject matter may determine her moral obligation to obey. For instance, a traffic engineer may be able to see that a certain traffic norm is pointless since she knows that it is more convenient and equally safe to disregard it. That engineer would not be under an obligation (even a *prima facie* one) to obey that traffic norm.

⁵⁰ RAZ, Joseph. *The Morality of Freedom*. Oxford: Oxford University Press, 1986, p. 74.

It is true that since Raz concedes that, in certain circumstances, a just government may be preferable to any other social organization,⁵¹ he also concedes that there may be an obligation to conform with the law even for citizens like the engineer in our example, provided that law-breaking would threaten the effectiveness of that kind of government. Nonetheless, since the matter is empirical, Raz emphatically refuses to accept that every case of law-breaking necessarily has such an effect.⁵² Indeed, Raz emphasizes that there may be situations in which the best way to preserve a just government is to defy certain unjust, pointless, and oppressive laws.⁵³

I believe that Raz is correct to view the claim that every instance of law-breaking is a threat to the effectiveness of just and necessary governments as exaggerated. But we still have to consider his arguments for a “piece-meal approach” to the problem of obedience more closely. His examples of an alleged lack of moral obligation to obey the law based on citizens’ expertise will lead us back to the thesis of value incommensurability.

3.3. A second condition for a moral obligation to obey the law

If some norm-addressees do not have to comply with a specific legally valid norm because they know *better* than the authority what they ought to do in the circumstances, must there not be a way to rank answers to the specific problem that that norm intends to solve? In other words, the argument at issue against the presumption of a general moral obligation to obey the law depends on the assumption that there are objectively, uniquely better answers to practical problems and that at least some people can know those answers. So is Raz abandoning the thesis of incommensurability?

The answer is no; what the thesis of incommensurability shows is that there are practical problems the answers to which cannot be uniquely right, and they are not rare. But Raz can agree with this while insisting that such a result only supports the thesis that it is possible that some people sometimes ought to obey the law. For even if the thesis of incommensurability is true, it is possible that some answers in practical reasoning are uniquely correct, demonstratively right, and knowable by certain people,

⁵¹ RAZ, Joseph. *The Morality of Freedom*. Oxford: Oxford University Press, 1986, p. 70.

⁵² RAZ, Joseph. The Obligation to Obey: Revision and Tradition. *Notre Dame Journal of Law, Ethics & Public Policy*, v. 1, n. 1, p. 139-155, 1985, p. 149.

⁵³ RAZ, Joseph. About Morality and the Nature of Law. In: RAZ, Joseph. *Between Authority and Interpretation: On the Theory of Law and Practical Reason*. Oxford: Oxford University Press, 2009. p. 166-181, p. 175.

while positive law recommends a different course of action.⁵⁴ In these cases, there is no plausible *general* obligation to obey.

But is it not possible for a law to recommend a sub-optimal or even wrong course of action that we nonetheless have an obligation to obey? Certainly, there may be situations in which what matters above all is that we are able to make a collective decision. In such a case, the alternative course of action, which would be identified as a worse option or a plain mistake by an expert, is nonetheless worth choosing, for no cooperation would be worse than misguided cooperation. This is not a sound objection against Raz, however; the normal justification thesis should lead the agent also to consider the reasons that count in favor of cooperating with others. This is why it is about time that we focus on an aspect of our question that is constantly mentioned in this paper: the requirement of collective decision-making—that is, social coordination.

Following Green's criticism,⁵⁵ Finnis was emphatic about the differences between the sense of coordination that is relevant to legal theory and the sense of coordination in game theory.⁵⁶ For Finnis, there is a general *prima facie* moral obligation to obey the law because law is a "seamless web" designed to bring about the common good by coordinating our choices given 1) the irreducible plurality of human goods and human persons and 2) the related intrinsic limitations of human reason.

The idea of law as a seamless web is used to reveal the alleged moral impermissibility in a Razian piece-meal approach, for this idea would make it impossible to pick and choose what laws we want to comply with. By picking and choosing, we would be collecting benefits from the legal web while rejecting its harms. In other words, this is Finnis's version of an argument from fairness for legal obedience.

Finnis admits that, circumstantially, fairness and the overall common good can be better served by breaching the law than by conforming to it. But he insists that it is "extravagant" to consider that there is not even a *prima*

⁵⁴ See ENDICOTT, Timothy. The Subsidiarity of Law and the Obligation to Obey. *The American Journal of Jurisprudence*, v. 50, n. 1, p. 233-248, jun. 2005, p. 244-245. Endicott's "wise electrician" is an example tailored to show that even a just and good law does not imply a general obligation to comply with it.

⁵⁵ See GREEN, Leslie. Law, Coordination and the Common Good. *Oxford Journal of Legal Studies*, v. 3, n. 3, p. 299-324, jan. 1983.

⁵⁶ See FINNIS, John. Law's Authority and Social Theory's Predicament. In: FINNIS, John. *Philosophy of Law*. Oxford: Oxford University Press, 2011. p. 46-65. and FINNIS, John. Law as Coordination. In: FINNIS, John. *Philosophy of Law*. Oxford: Oxford University Press, 2011. p. 66-73. Raz gave the same kind of warning; see RAZ, Joseph. Facing Up: A Reply. *Southern California Law Review*, v. 62, p. 1153-1235, 1989, p. 1189; and RAZ, Joseph. The Problem of Authority: Revisiting the Service Conception. In: RAZ, Joseph. *Between Authority and Interpretation: On the Theory of Law and Practical Reason*. Oxford: Oxford University Press, 2009. p. 126-165, p. 153-154.

facie obligation to obey in such cases.⁵⁷ Only laws that “do grave damage to the common good” are considered by Finnis to be “morally ultra vires and devoid of law’s generic moral authority.”⁵⁸

Replying to this argument, we should first remark that Finnis draws too much from the ideal of law’s being morally serviceable. That may be correct as an ideal, but it does not follow that actual law is equally serviceable unless it does grave damage to the common good. As Raz notes, against this Thomist line of reasoning:

While we can affirm that the law, as an abstract institution, as a kind of complex social practice, can be put to moral use, and that, where it exists, it has moral tasks to discharge [...] we cannot say that in its historical manifestations through the ages it has always, or generally, been a morally valuable institution, and we can certainly not say that it has necessarily been so. To say that is to claim that by its very nature the law cannot be realized except in a morally valuable way. And that is not so.⁵⁹

So if a given law is simply pointless regarding the common good, why would it be extravagant to think that there is no obligation to obey it? This seems to be a *non sequitur*. An obligation stemming from the ideal of law would be due to actual law without being a *non sequitur* if and only if it were impossible for law *qua* law to be as morally serviceable as its ideal. But if Finnis were to make such a submission to avoid the *non sequitur*, he would end up with an overly restrictive conception of law’s central cases. That this is not his claim is shown by his appeal to the conception of law as a seamless web, a conception designed to spread moral obligation across legal systems that are not blatantly heinous.

Secondly, the very idea of a *seamless* web is to be doubted. All legal systems contain laws that vary in terms of their degree of importance. A pedestrian who decides to ignore the rule according to which she must cross only at the crosswalk because she cannot see the point of obeying the rule at least in a particular situation is not, because of that, more likely to punish moral offenders on her own. It is common sense that we are able to roughly discriminate among different laws and their importance. Since a law such as that which demands that one cross the street at a specific place can at least sometimes be breached without harm, it is hard to see why it would be unfair for one to disobey that law sometimes while complying with others all the time.

⁵⁷ FINNIS, John. Law as Coordination. In: FINNIS, John. *Philosophy of Law*. Oxford: Oxford University Press, 2011. p. 66-73, p. 72.

⁵⁸ FINNIS, John. Law as Coordination. In: FINNIS, John. *Philosophy of Law*. Oxford: Oxford University Press, 2011. p. 66-73, p. 72.

⁵⁹ RAZ, Joseph. About Morality and the Nature of Law. In: RAZ, Joseph. *Between Authority and Interpretation: On the Theory of Law and Practical Reason*. Oxford: Oxford University Press, 2009. p. 166-181, p. 179.

Finally, the possibility of sometimes breaking the crosswalk rule without causing harm suggests that social coordination is plainly unnecessary in certain situations. Besides actually being able to decide what to do without an authority's help, an ordinary citizen may be in a situation where deciding by herself matters more than optimizing her conformity to reasons. This is why Raz adds a *second condition* to a moral obligation to obey the law (a condition to be added to his normal justification thesis), according to which "governments can have legitimate authority only over matters regarding which acting according to right reason is more important than deciding for oneself how to act."⁶⁰ This is the autonomy condition.⁶¹

Applying this condition to the doctrine of authoritative "*determinatio*," we can say that such a doctrine is to be confined to matters in which it is unreasonable for every private agent to decide for herself how to decide what is undetermined by practical reason. Briefly, it is possible for practical reason to underdetermine decisions without there being a need for an *authoritative* choice.

Now that we have rejected Finnis's "seamless web" argument and have accepted a Razian autonomy condition for the doctrine of "*determinatio*" that prevents every issue from being treated as a matter of collective decision, we must reject the possibility of a general obligation to obey the law. For, as our arguments show, the obligation to obey is to be assessed on a case-by-case basis, and the test for that—the autonomy condition added to the doctrine of "*determinatio*," understood as the best specification of the normal justification thesis—makes contingent (and indeed thoroughly unrealistic) the matter of whether every authority's decision is to be approved. This being so, if it is correct to claim that the issuing of positive

⁶⁰ RAZ, Joseph. Government by Consent. In: *Ethics in the Public Domain: Essays in the Morality of Law and Politics*. 2. ed. Oxford: Clarendon Press, 1995. p. 355-369, p. 365-366.

⁶¹ Raz sometimes also calls this the "independence condition"; RAZ, Joseph. The Problem of Authority: Revisiting the Service Conception. In: RAZ, Joseph. *Between Authority and Interpretation: On the Theory of Law and Practical Reason*. Oxford: Oxford University Press, 2009. p. 126-165, p. 137. Andrei Marmor perhaps does not pay enough attention to this condition when he writes: "My own view is that Raz's theory makes more sense if the normal justification thesis is confined to facilitating the obligations that apply to the authority's putative subjects; the only way to get the conclusion that there is an obligation to follow the directive of a legitimate authority is to assume that the role of a practical authority is to make it more likely that its subjects would comply better with the obligations that apply to them by following the authority's directive than by trying to figure it out for themselves"; MARMOR, Andrei. *Philosophy of Law*. Princeton and Oxford: Princeton University Press, 2011, p. 65. Raz's second condition does confine the normal justification thesis to certain situations that are usually described as involving obligations. However, firstly, there can be situations in which the subject's deciding for herself is more important than conforming to obligations (such as cases of obligations toward friends), and secondly, there can arguably be situations in which obligations are actually outweighed by other reasons (such as certain moral ideals or even personal safety). Therefore, the addition of Raz's second condition seems to do a better job than a simple replacement of "reasons" for "obligations" in the normal justification thesis, as Marmor seems to suggest.

law is capable of creating moral obligations (since where positive law exists, it can provide a moral service by determining practical reason's requirements for social life), it is equally necessary to acknowledge that this service has been poorly provided or provided when undue, such that there is no general obligation to obey the law.⁶²

Conclusion

The debate between Finnis and Raz shows us that the moral obligation to obey certain laws can follow from the existence of competing incommensurable practical reasons to which human beings cannot conform without the help of an authority. Thus law as a reason for action is to be understood against the backdrop of a service conception of authority, according to which law helps the morally conscious person to abide by her reasons for social cooperation.

However, this debate also shows us that this service conception of authority is unable to account for a *general* moral obligation to obey the law, since in the real world this service is not necessarily adequately provided by existent law. In addition, there are occasions where the service should not be delivered at all, for it is up to the private agent to determine what she ought to do even if an authority would do a better job of balancing her reasons. This being so, the conclusion of this paper is in line with liberal theories that advocate limits to state interference in private life, even where governments are democratic and generally fair.

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⁶² Obviously, this is Raz's own conclusion, even though we did not follow his precise route to it. See RAZ, Joseph. About Morality and the Nature of Law. In: RAZ, Joseph. *Between Authority and Interpretation: On the Theory of Law and Practical Reason*. Oxford: Oxford University Press, 2009. p. 166-181, p. 179.