Legal Naturalism Is a Disjunctivism

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Abstract: Legal naturalism is the doctrine that a rule's status as law depends on its moral content; or, in its strongest form, that "an unjust law is not a law." By drawing an analogy between legal naturalism and perceptual disjunctivism, I argue that this doctrine is more defensible than is generally thought, and in particular that it entails no conflict with ordinary usage.

Legal positivists hold that a rule's status as law never depends on its moral content. In Austin's famous formulation: "The *existence* of law is one thing; its *merit* or *demerit* is another. Whether a law *be* is one enquiry; whether it *ought* to be, or whether it agree with a given or assumed test, is another and different inquiry."[1]

There seems to be no generally accepted term for the opposed view, that a rule's status as law *does* (sometimes or always) depend on its moral content. *Legal moralism* would be the natural choice, but that name is already taken to mean the view that the law should impose social standards of morality on private conduct. *Legal normativisim*, another natural choice, is, somewhat perversely, already in use to denote a species of legal positivism.[2] The position in question is sometimes referred to as "the natural law view," but this is not really accurate; although the view has been held by many natural law theorists, it has not been held by all of them, and is not strictly implied by the natural law position. All natural law theorists believe in a non-conventional moral standard to which human rules must conform in order to be *just*; but this by itself does not entail believing in a non-conventional moral standard to which human rules must conform in order to be *laws*. The term I shall use for the latter position, then, is *legal naturalism*. Although this term is itself often used as a synonym of "natural law

[1] John Austin, *The Province of Jurisprudence Determined* (1832) p. 278.

[2] Alessandro Passerin d'Entrèves, *Natural Law*, 2nd rev. ed. (London: Hutchins, 1970), p. 175.

theory," it seems to me to convey the idea of being a theory *about law in general* in a way that the latter does not.[3]

As I shall be using the term, legal naturalism is consistent with either the view that legal status depends on moral standards external to the law (the more familiar "natural law" version of the doctrine), or the view that the moral standards that define legal status are to be found within the nature of law itself (as seems to be the position of Lon Fuller).[4] Legal naturalism also appears to come in both a strong version, according to which *any* deviation from morality is a bar to a rule's being a law, and a weak version, according to which only *some* deviations from morality are so. (My reasons for saying "appears" will become plain in due course.)

Strong legal naturalists sometimes argue that what distinguishes a genuine law from the mere command of a "gunman writ large" (in Hart's phrase)[5] is that a law must possess *authority*, and the only available source of its authority is the authority of morality, which law inherits by decreeing as morality authorises. Or again, law may be viewed as a functional concept: "Legal Naturalism," Barnett writes, "views law as an enterprise, an activity with a purpose."[6] If the just resolution of disputes and protection of legitimate rights are part of that function, then unjust rules will not be living up to the defining function of law. (Of course a cynic might grant that law has a function, but maintain that this function is the oppression and exploitation of the

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[3] I borrow the phrase, in this connection, principally from Randy Barnett, who means by it not quite what I mean here, but at least something in the very near vicinity: Randy E. Barnett, "Toward a Theory of Legal Naturalism," *Journal of Libertarian Studies* 2.2 (1978), pp. 97-107 (online: **http://mises.org/journals/jls/2_2/2_2_1.pdf**). To be sure, the term has had other uses, from naming an application of naturalising projects to law (**http://plato.stanford.edu/entries/lawphil-naturalism**) to identifying a strand within Marxism (Olufemi Taiwo, *Legal Naturalism: A Marxist Theory of Law* (Cornell, 1996); but none seems to be dominating the field as yet.

[4] Lon Fuller, *The Morality of Law* (Yale University Press, 1969).

[5] H. L. A. Hart, *The Concept of Law*, 3rd ed. (Oxford, 2012), p. 7.

[6] Barnett, *op. cit.*, p. 100.

populace by a ruling elite – in which case unjust laws would be living up to their function perfectly. Addressing this objection lies beyond my present purpose; but I do wish to note, at least, that a thing's function need not always be determined solely by the purposes of its originators.)

Alternatively, though compatibly, other naturalists argue that certain principles of justice are universal across all legal systems, because they are necessary to any workable social order, and every legal system aims at a workable social order whatever else it aims at; these principles, then, are essential to any legal system, and their *consistent* application is consequently essential to a *properly functioning* legal system. Thus any edicts that conflict with the consistent application of these core legal principles are obstructions to rather than instances of legality.

Legal positivists are united in rejecting legal naturalism, whether strong or weak, and insisting that what makes an edict a law and what makes it just or legitimate are two different questions. But the distance from legal naturalism varies from positivist to positivist. Austin's position is farthest, inasmuch as he claims that all that is necessary for an edict to be a law is that it be issued by someone having legal authority *in a purely descriptive sense* of "authority" – essentially, the power to exact compliance. In effect, Austin sees no real difference between a legal regime and a gunman writ large.

Contra Austin, Hart insists on a difference between a legal regime and a gunman writ large, but he does not draw on the justice or injustice of the respective edicts to draw the distinction. Instead – to simplify somewhat – he insists that in order to be genuine laws, such edicts must be accepted by government officials as rules binding their decisions on new cases, not simply as a series of particular orders they are in the habit of giving. But for Hart, accepting the edicts as binding rules does not necessarily mean accepting them as *morally* binding.

Here Raz disagrees; for Raz, laws (and thus legislators, through their laws) make claims of obedience on those subject to them, and to make such a claim is implicitly to regard oneself as *morally entitled* to make it, and likewise to regard those subject to it as *morally obligated* to obey it. Raz is still taken to count as a legal positivist, however, because on his view what is crucial for an edict's being a law is not that it *possess* moral authority, but only that it *claim* it.[7] Laws that falsely claim moral authority thus remain laws for all that. Yet while this position thus deviates from the (strong) legal naturalist position that only those edicts that *possess* moral authority are genuine laws, Raz's position nevertheless serves as a potential halfway house between legal positivism and legal naturalism, or perhaps a gateway drug for the latter, and at the same time serves as a potential reply to the aforementioned cynic; for to claim moral authority for one's edicts is to put those edicts forward as *attempts at justice*. And if the practice of lawmaking is defined as an attempt to produce a certain sort of product, then in cases where that attempt fails, we *might* wish to say that the product is no law at all.

Consider the difference between an *ugly* knife and a *dull* knife. Both are in some sense defective, but a dull knife is defective *as* a knife; dullness impedes a knife's performance of its defining function. Ugliness, by contrast, is merely an accidental defect in a knife; an ugly knife may be perfectly serviceable taken just as a knife. By analogy, then, an unjust law, from the legal positivist's standpoint, is like an ugly knife; its injustice is a mark against it, to be sure, but considered just as a law it may be perfectly in order. For the legal naturalist, on the other hand, if laws, like knives, have a *function*, and if that function is one with an appropriate link to justice, then an unjust law will be more like a dull knife; it is defective as a law, because injustice impedes law's performance of its function.

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[7] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, rev. ed. (Oxford, 1995), p. 214.

Yet this point might seem insufficient to support legal naturalism. After all, a dull knife is still a knife – just as a cook who produces a scorched or otherwise defective cake will still be said to have produced a cake (albeit a bad one). For strong legal naturalists, an unjust law is supposed to be a *failed* attempt at a just law; but a dull knife is only a flawed, not a failed, attempt at a knife, as a scorched cake is likewise only a flawed, not a failed, attempt at a cake. A critic may say "that's no knife" (or, *mutatis mutandis*, "that's no cake"), but this is merely metaphorical – a way of saying that the item meets the criteria of knifehood (or cakehood) only minimally rather than superlatively. So it might seem as though the legal naturalist, though perhaps still able to say that an unjust statute is defective as a law, is nevertheless in no position to deny that the unjust statute is a law for all that. The claim that an unjust law is not a law will then be licit only if taken metaphorically, a critic's dismissive "that's no law!"; indeed, some interpreters have taken *lex injusta non est lex* to mean no more than this.[8]

But of course if the knifemaker (or the cook) messes up *badly enough*, the result – a "knife" with only a handle and no blade, perhaps, or a "cake" that is merely a mass of charred cinders – may not even rise to the level of being a knife (or cake) at all; in such a case, "that's no knife" (or "that's no cake") need not be taken as metaphorical. So even if *some* unjust laws still count as laws, so long as justice is part of the criteria of successful law it is likely that there will be laws whose deviation from justice is great enough to deny them the status of law entirely. So the knife and cake analogies do support at least *weak* legal naturalism.

As for the strong legal naturalist, she may urge us to think of lawmaking as closer to mathematics than to knifemaking or cookery. If I try to construct a mathematical proof, but what I end up constructing does not end up successfully proving what it purports to prove, then although we might still grant the name "mathematical proof"

[8] cf. "*Lex Iniusta Non Est Lex* – Laws on Trial in Aquinas' Court of Conscience," Norman Kretzmann, *American Journal of Jurisprudence* 33.1 (1988), pp. 99-122.

to the *activity* I'm engaged in, we would probably deny that name to the *product* of my activity. A bad knife may still be a knife, and a bad cake a cake, but a bad proof is no proof at all.

Or at least a *logically* bad proof is no proof. A perfectly valid mathematical proof may still be in a sense a *bad* proof if, for example, it is cumbersome, taking many steps to prove what could be proven in fewer. Analogously, the strong naturalist is not committed to holding that *every* defect in a law – repetitive wording, for example – makes it no longer a law. A strong legal naturalist thinks defects in *justice* are a bar to status as law, but that is consistent with a variety of attitudes to other sorts of defects.

So for both knives and cakes on the one hand, and proofs on the other, among those defects that impede the item's function, there are some that impede it only enough to make it a bad or poor instance of its kind, and others that impede it so greatly as to eject it from the kind altogether. The weak naturalist thinks injustice ordinarily belongs to the former class, and only *extreme* injustice to the latter; the strong naturalist, by contrast, assigns *all* injustice to the latter.

In contemporary philosophy of law, legal naturalism, particularly in its strong form, is often regarded as a non-starter – a mere rhetorical device, or an enormous no-true-Scotsman fallacy.[9] David Lyons, for example, dismisses the strong legal naturalist position as "plainly false," on the grounds that "law can be, and much too often is, bad or unjust."[10] Now pointing to examples of unjust decrees, rulings, and statutes in order to refute strong legal naturalism might seem question-begging, given that strong legal naturalists do not regard such decrees, rulings, and unjust statutes as

[9] Philosophers sometimes write as though any moralised definition of an ordinarily descriptive term counts as an instance of the no-true-Scotsman fallacy. This is a mistake. Rather, a no-true-Scotsman fallacy occurs when a claim using the moralised sense is illicitly used, via equivocation, to defend a claim using the non-moralised sense; see my "No True Fallacy," *Austro-Athenian Empire*, 27 October 2013; online: **http://aaeblog.com/2013/10/27/no-true-fallacy**

[10] David Lyons, "The Internal Morality of Law," p. 1; in *Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility* (Cambridge, 1993), pp. 1-12.

laws. But the point of the objection is presumably that denying the status of law to unjust rules flies too much in the face of ordinary usage to be taken seriously.

Yet the doctrine that *lex injusta non est lex* – "an unjust law is not a law" – is not a marginal view historically; indeed, it was the dominant position during roughly the first two millennia of western jurisprudence. Plato defends it in both the *Greater Hippias* and the *Laws*:

> Do you call law a harm to the state, Hippias, or a benefit? ... I think it is enacted for the sake of benefit; but it sometimes does harm too, if it is enacted badly. ... But don't those who enact the law enact it as the greatest good for the state? and without this it is impossible to have good governance? ... So whenever those who attempt to make laws miss the good, they have missed the lawful and the law. ... But then those who are knowledgeable hold that in reality, for all human beings, what is more beneficial is more lawful than what is less beneficial. (*Greater Hippias* 284c-e)

> We deny to be true laws all those that are not laid down in the common interest of the whole city. (*Laws* 715b)

A similar argument to the one in *Greater Hippias* is offered by Diogenes.[11]

The strong legal naturalist position is developed more fully in the *Minos*, a dialogue whose Platonic authorship is debated,[12] but which is in any case an early and influential work in the Platonic tradition:

> Since it is *by* law that what is legislated is legislated, in virtue of *law's being what* is this legislated? Is it in virtue of its being some awareness, or some

[11] R. F. Stalley and Roderick T. Long, "Socrates and Early Socratic Philosophers of Law," pp. 54-55; in Fred D. Miller Jr. and Carrie-Ann Biondi, eds., *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics, Vol. 6: A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, pp. 35-56.

[12] As the arguments against Platonic authorship are primarily philosophical rather than philological in nature, I think I can come down on the side of authenticity without stepping outside my realm of competence.

> showing, as what is learned is learned through the science that shows it? ... Aren't right, and law, most fine? ... And wrong, and lawlessness, most shameful? ... And the former preserves states and all other things, while the latter destroys and overturns? ... So one ought to think of law as something fine, and seek it as good? ... So it wouldn't be appropriate for the wicked official judgment to be law. ... And yet even to me law seems to be some sort of judgment; but since it's not the wicked judgment, isn't it clear that law, if indeed it is judgment, is the worthy? ... And what is worthy judgment? Is it not true judgment? ... Isn't the true, the discovery of what is so? ... Law, then, wishes to be the discovery of what is so .... but men, who (so it seems to us) do not at all times use the same laws are not at all times capable of discovering what the law wishes: what is so. ... What's right is right and what's wrong is wrong. And isn't this believed by everyone ... even among the Persians, and always? ... What is fine, no doubt, is everywhere legislated as fine, and what is shameful as shameful; but not the shameful as fine or the fine as shameful. ... And in general, what is so, rather than what is not so, is legislated as being so, both by us and by everyone else. ... So he who errs about what is so, errs about the legal. ... So in the writings about right and wrong, and in general about ordering a state and about how a state ought to be organized, what is correct is royal law, while what is not correct, what seems to be law to those who lack knowledge, is not, for it is lawless. (*Minos* 314a-371c)

A moral test for legal status shows up in Xenophon as well:

> But what is violence and lawlessness, Pericles? Isn't it when the stronger party compels the weaker to do what he wants by using force instead of persuasion? ... Then anything a despot enacts and compels the citizens to do instead of persuading them is an example of lawlessness? ... And if the minority enacts something not by persuading the majority but by dominating it, should we call this violence or not? It seems to me that if one party, instead of persuading another, compels him to do something, whether by enactment or not, this is always violence rather than law. Then if the people as a whole uses not persuasion but its superior power to enact measures against the propertied classes, will that be violence rather than law? (*Recollections of Socrates* I.2)

Since Xenophon puts this argument in the mouth of Alcibiades rather than Socrates, there may be doubt as to whether the author means to endorse it; but Xenophon has

Socrates enunciate an equally moralised conception of rulers, similar to one in the *Minos*: "Kings and rulers ... are not those who hold the sceptre, nor those who are elected by just anyone, nor those chosen by lot, nor those who practice force or fraud, but rather those who know how to rule."[13] (*Recollections* III.9)

Aristotle does not endorse the doctrine quite as explicitly, but he does remark: "For how can that be ... appropriate to a lawgiver, which at any rate is not even lawful? Now to rule not only rightly but wrongly is unlawful." (*Politics* 1234b24) Here we have, if not a moralised conception of *law*, at least a moralised conception of *lawfulness*.

Cicero, presumably following widespread Stoic doctrine, offers a particularly clear statement of strong legal naturalism:

> I find that it has been the opinion of the wisest men that Law is not a product of human thought, nor is it any enactment of peoples, but something eternal which rules the whole universe by its wisdom in command and prohibition. ... What of the many deadly, the many pestilential statutes which nations put in force? These no more deserve to be called laws than the rules a band of robbers might pass in their assembly. For if ignorant and unskillful men have prescribed deadly poisons instead of healing drugs, these cannot possibly be called physicians' prescriptions; neither in a nation can a statute of any sort be called a law, even though the nation, in spite of its being a ruinous regulation, has accepted it. Therefore Law is the distinction between things just and unjust, made in agreement with that primal and most ancient of all things, Nature; and in conformity to Nature's standard are framed those human laws which inflict punishment upon the wicked but defend and protect the good. (*On Laws*)[14]

[13] A moralised conception of rulers is found in the Confucian tradition also: "Is it acceptable for subjects to assassinate their rulers? ... One who mutilates benevolence should be called a 'mutilator.' One who mutilates righteousness should be called a 'crippler.' A crippler and mutilator is called a mere 'fellow.' I have indeed heard of the execution of this one fellow Zhou, but I have not heard of it as the assassination of one's ruler." (*Mengzi* 1B8; in Bryan W. Van Norden, trans., *Mengzi: With Selections from Traditional Commentaries* (Hackett, 2008), p. 26.)

[14] C. W. Keyes, trans. (Cambridge, 1961).

> True law is right reason conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil. Whether it enjoins or forbids, the good respect its injunctions, and the wicked treat them with indifference. This law cannot be contradicted by any other law, and is not liable either to derogation or abrogation. Neither the senate nor the people can give us any dispensation for not obeying this universal law of justice. It needs no other expositor and interpreter than our own conscience. It is not one thing at Rome, and another at Athens; one thing to-day, and another to-morrow; but in all times and nations this universal law must forever reign, eternal and imperishable. (*On the Republic*)[15]

In the Christian period, one of the most frequently cited statements of strong legal naturalism is Augustine's remark "That seems to me to be no law, that is not just" (*On Free Choice* I.5); the same author's question "If justice be removed, what are kingdoms but great bands of robbers?" (*City of God* IV.4) seems to be in the same spirit. The *Institutes of Justinian* also strike a legal naturalist note with their opening declaration: "Jurisprudence is acquaintance with things human and divine, the knowledge of what is right and what is wrong. ... These are the precepts of the law: to live rightly, not to wrong another, and to render to each his own."

By the 13th century, we find Thomas Aquinas elaborating the same doctrine:

> Human law has the nature of law in so far as it partakes of right reason; and it is clear that, in this respect, it is derived from the eternal law. But in so far as it deviates from reason, it is called an unjust law, and has the nature, not of law but of violence. ... Laws framed by man are either just or unjust. If they be just, they have the power of binding in conscience, from the eternal law whence they are derived .... On the other hand laws may be unjust .... The like are acts of violence rather than laws; because, as Augustine says (De Lib. Arb. i, 5), "a law that is not just, seems to be no law at all." Wherefore such laws do not bind in conscience .... (*Summa Theologiæ* IaIIæ 93.3, 96.4)[16]

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[15] C. D. Yonge, trans. (New York, 1877).

[16] Fathers of the English Dominican Province, trans. (Benziger Brothers, 1947).

Four centuries later, one of the last great Scholastics, Francisco Suárez, defends this position also:

> [I]t is inherent in the nature and essence of law that it shall prescribe just things. This assertion is not only indubitably true by the light of faith, but is also manifest by the light of natural reason. ... [A] human legislator does not have a perfect will, as God has; and therefore ... such a legislator may sometimes prescribe unjust things, a fact which is manifestly true; but he has not the power to bind through unjust laws, and consequently, even though he may indeed prescribe that which is unjust, such a precept is not law, inasmuch as it lacks the force or validity to impose a binding obligation. ... (*On Laws and God the Legislator*, ch. 9.)[17]

With the decline of the classical tradition and the rise of the modernity, the legal naturalist position begins to wane in popularity, but it is never entirely eclipsed. In a 1646 pamphlet, the English Leveller Richard Overton declares that "nothing which is against reason is lawful," adding that this is "a sure maxim in law, for reason is the life of law." (*A Defiance Against All Arbitrary Usurpations or Encroachments*) In the following century, American revolutionary James Otis argues in a 1764 pamphlet:

> The supreme power in a state, is *jus dicere* [to state the right] only: – *jus dare* [to give the right] strictly speaking, belongs alone to God. Parliaments are in all cases to *declare* what is for the good of the whole; but it is not the *declaration* of parliament that makes it so: There must be in every instance, a higher authority, *viz.* GOD. Should an act of parliament be against any of *his* natural laws, which are *immutably* true, *their* declaration would be contrary to eternal truth, equity and justice, and consequently void: and so it would be adjudged by the parliament itself, when convinced of their mistake. Upon this great principle, parliaments repeal such acts, as soon as they find they have been

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[17] Excerpted in J. B. Schneewind, ed., *Moral Philosophy from Montaigne to Kant* (Cambridge, 2002), pp. 73-74.

> mistaken, in having declared them to be for the public good, when in fact they were not so. (*The Rights of the British Colonies Asserted and Proved*)

Around the same time, the English jurist William Blackstone throws his considerable influence on the side of strong legal naturalism:

> This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times; no human laws are of any validity, if contrary to this: and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original. ...
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> Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. ...
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> [A judge is] sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. .... Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined. (*Commentaries on the Laws of England*, Introduction)

In the 19th century, the strong legal naturalist position is revived in an extreme form by the American abolitionist Lysander Spooner:[18]

[18] See my "Inside and Outside Spooner's Natural Law Jurisprudence": **http://praxeology.net/Spooner-OB.doc**

> If, then, law be a natural principle – one necessarily resulting from the very nature of man, and capable of being destroyed or changed only by destroying or changing the nature of man – it necessarily follows that it must be of higher and more inflexible obligation than any other rule of conduct, which the arbitrary will of any man, or combination of men, may attempt to establish. Certainly no rule can be of such high, universal and inflexible obligation, as that, which, if observed, secures the rights, the safety and liberty of all.
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> Natural law, then, is the paramount law. And, being the paramount law, it is necessarily the only law: for, being applicable to every possible case that can arise touching the rights of men, any other principle or rule, that should arbitrarily be applied to those rights, would necessarily conflict with it. And, as a merely arbitrary, partial and temporary rule must, of necessity, be of less obligation than a natural, permanent, equal and universal one, the arbitrary one becomes, in reality, of no obligation at all, when the two come in collision. Consequently there is, and can be, correctly speaking, *no law but natural law*. (*The Unconstitutionality of Slavery*)

> [J]ustice is an immutable, natural principle; and not anything that can be made, unmade, or altered by human power. ... It does not derive its authority from the commands, will, pleasure, or discretion of any possible combination of men, whether calling themselves a government, or by any other name.
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> It is also, at all times, and in all places, the supreme law. And being everywhere and always the supreme law, it is necessarily everywhere and always the only law. Lawmakers, as they call themselves, can add nothing to it, nor take anything from it. Therefore all their laws, as they call them, – that is, all the laws of their own making, – have no color of authority or obligation. It is a falsehood to call them laws; for there is nothing in them that either creates men's duties or rights, or enlightens them as to their duties or rights. There is consequently nothing binding or obligatory about them. ... It is intrinsically just as false, absurd, ludicrous, and ridiculous to say that lawmakers, so-called, can invent and make any laws, *of their own* ... as it would be to say that they can invent and make such mathematics, chemistry, physiology, or other sciences, as they see fit .... (*Letter to Grover Cleveland*)

In 1961, Rose Wilder Lane, one of the founders of the American libertarian movement, writes: "I deny that legislators make *law*. They create legal Acts, statutes,

which may or may not coincide with real Law, and in fact seldom do."[19] And in his "Letter from Birmingham Jail" two years later, Martin Luther King Jr. (1929-1968) reiterates the strong legal naturalist position:

> One may want to ask: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all."

My point in citing these various authors is not to bolster the case for the *truth* of legal naturalism (strong or otherwise). After all, an equally impressive list of witnesses (in some cases the same witnesses) could be invoked on behalf of natural slavery, male supremacy, and other likewise dubious propositions. Rather my point is that when a position was the reigning orthodoxy for 2000 years and continues to attract a respectable minority following for the next 500 years after that, then while it certainly may be mistaken, it's difficult to believe that its mistakenness is something that can simply be read off of prevailing usage with no need for further argument. Can the consensus of the most brilliant legal minds in a 2000-year-old tradition be wrong? Hell yes, many times over. But can it be shown to be wrong by an argument as simple as "LOL read the dictionary moron"? This I'm inclined to doubt. If the strong legal naturalists are wrong, it's not merely because they don't understand what the words mean.

My goal in this paper is not to offer a full-fledged defense of legal naturalism, in either its strong or its weak variety. But I do wish to argue that legal naturalism, including strong legal naturalism, is more defensible than is generally thought, and in particular that it entails no conflict with ordinary usage.

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[19] Letter to Jasper Crane, 14 February 1961), in Roger Lea MacBride, ed., *The Lady and the Tycoon: Letters of Rose Wilder Lane and Jasper Crane* (Caldwell, Idaho: Caxton Printers, 1973), pp. 266-69.

Let's consider an analogy with disjunctivism about perception. Disjunctivists often make a claim structurally similar to the strong legal naturalist claim that an unjust law is not a law – namely that illusory perceptual experiences such as hallucinations are not genuine perceptions. Claire Michaels and Claudia Carello, for example, argue that hallucinations, dreams, etc., "while perhaps falling under the headings of 'experiences', or 'things that animals do,' do not fall under the headings of perception," and indeed are no more central to an understanding of perception than "an upset stomach is intrinsic to the understanding of digestion."[20] David Kelley concurs that since "in hallucinations, there is no object present at all, or objects that are present are embellished in ways that do not correspond to any of their attributes," it follows that such experiences "are not perceptions, and there is no apparent reason to think they will tell us anything about perception."[21] And John McDowell explains that "lack of the appropriate relation between the fact and the experience" means that "the apparent perception is not a genuine perception."[22]

It's important to see that the perceptual disjunctivist's point is not merely a terminological one – an eccentric preference for using "perception" as a factive or success-term. After all, factive and non-factive uses of "perceive" are both perfectly acceptable in ordinary language; "When I was on acid I saw a flying rhinoceros" and "When I was on acid it seemed to me that I saw a flying rhinoceros, though of course I didn't" are equally licit and equally comprehensible, and no one supposes that one contradicts the other. Terms like "perceive" and "see" have a dual sense; a broad sense that includes both veridical and non-veridical perceptual experiences, and a

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[20] Claire F Michaels and Claudia Carello, *Direct Perception* (Englewood Cliffs NJ: Prentice-Hall, 1981), p. 91n.

[21] David Kelley, *The Evidence of the Senses: A Realist Theory of Perception* (Louisiana State, 1986), p. 133.

[22] John Henry McDowell, *Meaning, Knowledge, and Reality* (Harvard, 1998), pp. 431-432.

narrow sense that is limited to the veridical ones. While disjunctivists may tend to prefer the narrow sense, since it enables them to express their position somewhat more clearly, the point of disjunctivism is not to legislate about a particular form of words. There is nothing *inherently* contrary to disjunctivism in describing hallucinations and the like as perceptions, understanding the latter term in the broader sense.

So what is the substantive claim that perceptual disjunctivism makes, for which the terminological preference is merely a proxy? Sometimes the claim is described this way: there is no "common kind" or "common factor" between veridical and non-veridical perceptions. This formulation can easily make the disjunctivist thesis sound absurd; *of course* there is a kind to which both veridical and non-veridical perceptions belong – namely, *apparent* or *putative* perceptions. So what is the disjunctivist getting at?

To understand the disjunctivist thesis aright, imagine a forgery expert breaking bad news to a museum curator with the following statement: "Three of your Rembrandts are fakes." This statement, viewed a certain way, seems odd; it appears to be treating a fake Rembrandt as a kind of Rembrandt. And surely *a fake Rembrandt is not a Rembrandt*. But in another sense the statement is perfectly in order; it's a natural enough way of putting the expert's judgment, and we all understand it easily. This shows that in ordinary language, a term like "Rembrandt" has both a narrow usage, in which only paintings produced by the historical Rembrandt count as Rembrandts, and a broad usage, in which anything that *purports* to be a Rembrandt counts as a Rembrandt. There is, *in a sense*, a common kind to which genuine Rembrandts and fake Rembrandts both belong, namely the class of *putative* Rembrandts. The forgery expert's claim is obviously using "Rembrandt" in the latter sense; the claim is not the incoherent one that three of the *genuine* Rembrandts are fake, but rather the intelligible if unwelcome claim that three of the *putative* Rembrandts are fake.

But while *in one sense* "putative Rembrandt" counts as a genus of which "fake Rembrandt" and "genuine Rembrandt" are species, the genus-species relationship here is very different from the ordinary case. After all, a *putative* Rembrandt is simply a *putatively genuine* Rembrandt; thus the genus *has to be defined in terms of one of its species*. Likewise a *fake* Rembrandt is a *putatively but not actually genuine* Rembrandt; so *one of the species has to be defined in terms of the other species*. By contrast, think of "triangle" and "quadrilateral" as species of the genus "polygon." We might define "triangle" as "three-sided polygon," and "quadrilateral" as "four-sided polygon." Notice that we do not appeal to the concept of "triangle" to define either the genus "polygon" or the coordinate species "quadrilateral." Neither species presupposes the other; and each species presupposes the genus but not vice versa.

With our case of the Rembrandts, however, it is different. Neither putative Rembrandts nor fake Rembrandts can be defined except in terms of genuine Rembrandts – while the concept "genuine Rembrandt" does *not* presuppose the concept "putative Rembrandt." In the case of triangles and quadrilaterals, the fundamental concept is the *genus* "polygon"; but in the case of genuine and fake Rembrandts, the fundamental concept, the one on which both the genus and the other species depend, is the *species* "genuine Rembrandt." And this is so regardless of whether we treat "genuine Rembrandt" or "putative Rembrandt" as the default meaning of "Rembrandt." The way we word the point may be affected by the terminology we choose, but the point itself will not be.

For the disjunctivist, a non-veridical perception is like a fake Rembrandt. Where a sense-data theorist may think of putative perception as a neutral experiential state conceptually prior to veridical perception – with the latter being defined as "putative perception caused, in the right way, by an object 'matching' the putative perception's content," or something of the sort – the disjunctivist denies the possibility of identifying the putative perception except in terms of the veridical one. Sellars

famously notes that "*being red* is logically prior, is a logically simpler notion, than *looking red*."[23] Analogously, for the disjunctivist, seeing something red is logically prior to, and a logically simpler notion than, seeming to see something red. And this point is independent of whether our default use of "perception" is as a success-term or not.

Although I'm sympathetic to perceptual disjunctivism, I'm not here invoking it as true. I'm simply invoking it as a familiar, coherent, intelligible position, and thus as a model to help us see legal naturalism as likewise coherent and intelligible.

The strong legal naturalist, I suggest, thinks of unjust laws as being like fake Rembrandts. While preferring to use the term "law" narrowly to mean the just species, the naturalist is perfectly free to recognise a broader use of the term as proper. Indeed, the very phrase "an unjust law is not a law" seems to use the term broadly in the first instance and narrowly in the second. (Analogously, the forgery expert could have told the curator: "Three of your Rembrandts are not really Rembrandts." Properly understood, this statement is in no way contradictory.) Hence the point of strong legal naturalism is not really that the *word* "law" should not be applied to unjust statutes. We may use the term "law" in a more generic sense if we like, but for the naturalist it will still be true that a law (in the generic sense – what the naturalist might prefer to call a *putative* law) can only be understood as an *attempt* at *just* law, and an unjust law can only be understood as an *failed* attempt at just law.

This distinction is open to positivists too. Henry Sumner Maine both pokes fun at, and twists himself into a pretzel to explain, the Irish legal doctrine that there are two kinds of contract: valid contracts and invalid contracts.[24] Clearly Maine assumes that an invalid contract is no contract at all, so that speaking of valid contracts and

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[23] Wilfrid Sellars, *Empiricism and the Philosophy of Mind* (Harvard, 1997), p. 36.

[24] Henry Sumner Maine, *Lectures on the Early History of Institutions* (H. Holt, 1875), p. 57; cf. John G. W. Sykes, "On Contract: An Essay Towards a Popular Introduction to the Indian Contract Act of 1872," p. 270, in *The Calcutta Review* 61 (1875), pp. 245-280.

invalid contracts as two kinds of contracts is like speaking of genuine Rembrandts and fake Rembrandts as two kinds of Rembrandts. (This not a naturalist moment on his part, as Maine's conception of legal validity is purely a positive one.) But of course "contract" can be used either broadly, to include both valid and invalid contracts, or narrowly, in a sense restricted to the valid ones; in that sense there's nothing inappropriate about the Irish doctrine. Still, Maine is right to sense that valid and invalid contracts are not properly coordinate species of a common genus, since neither the genus nor the invalid species can be identified except in terms of the valid species.

In any case, my point is this: even though the strong legal naturalist thesis is put forward as a terminological one about which things should be called *laws*, it is not essentially terminological, and can still be stated even if we use "law" to refer to a genus including both just and unjust instances. Whatever *words* we use for the genus and its two species, the disjunctivist insists, it will still be true that both the genus and the unjust species can be identified only in terms of the just species. And that means that *an appeal to ordinary usage is no objection to strong legal naturalism.*

Of course, the fact that legal naturalism can be reconciled with ordinary usage is not enough to establish its truth or even its plausibility. Some genus-species relationships are like the fake-Rembrandt case; some are like the three-sided-polygon case; and it still remains an open question whether the unjust-law case is more akin to the former than to the latter. In this paper I have not offered a positive argument for the claim that the concept of "unjust law" depends on the concept of "just law"; I have simply traced the consequences of assuming it. The more ambitious project I shall return to in the future (though my comments about Raz above indicate the line I would wish to follow). All the same, as the ordinary-usage objection is one of the points most often raised against strong legal naturalism, showing that it fails is not a trivial result.

At this point, however, the distinction between strong and weak legal naturalism turns out to be less fundamental than it originally seemed. Both the strong and the weak naturalist agree on the substantive, non-terminological point: that the things ordinarily called unjust laws cannot be understood or identified except as failed attempts at, or as deceptive instances of, the things ordinarily called just laws. The two kinds of naturalist part company only on the terminological question of how great a deviation from justice licenses withholding the generic term "law," and this question is arguably secondary and to some extent a matter of rhetorical strategy. This is why, in introducing the distinction at the outset, I qualified it by saying that there "appears" to be such a distinction.

Ordinary language offers resources to both the strong and weak naturalist terminology; on the one hand, it treats unjust laws as genuine possibilities, as the weak naturalist prefers; on the other hand, words like "law" and "lawful" have in general usage an air of authority to them, while phrases like "lawless" are pejorative, and these facts favour the strong naturalist. Which strands in ordinary usage to stress and which to leave aside is a question whose answer cannot be neatly read off of ordinary usage itself, but must depend on other factors. I think that for those of us who are involved in radical political projects such as agorism[25] that involve promoting mass disobedience to and bypassing of governmental edicts, the language of strong legal naturalism is useful in depriving unjust statutes and decrees of the aforementioned aura of authority that attaches to the word "law." But those whose political projects are more moderate and reformist may reasonably prefer the weaker naturalist terminology.[26]

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[25] Samuel Edward Konkin III, *The New Libertarian Manifesto* (Koman Publishing, 2006); online: **http://www.anarchism.net/newlibertarianmanifesto.htm**; also Charles Johnson, "In Which I Fail to Be Reassured," *Rad Geek People's Daily*, 26 January 2008; online: **http://radgeek.com/gt/2008/01/26/in_which**

[26] Well, reasonably *given* the unreasonably moderate and reformist nature of their political projects.