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A Critical Legal Studies Perspective

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A CRITICAL LEGAL STUDIES PERSPECTIVE

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In this comment I want to address two points suggested by Professor Finnis's essay "Natural Law and Legal Reasoning." I say "suggested by" deliberately, for I do not want to attribute the points in their full force to him, although I believe that his essay lends itself to a reading in which those points would be given their full force. The points deal with the question of "easy questions" and what Professor Finnis calls the "sufficient and necessarily artificial clarity and definiteness" that yields answers to such questions, and with the way in which legal professionals are likely to understand the "theory of practical reasoning" to which Professor Finnis is committed. In discussing these points I will move back and forth between what I have elsewhere called the sociological and the philosophical strands in critical legal studies.[1] At the conclusion of the comment I will note briefly some of my disquiets about the enterprise of the comment itself.

I. EASY QUESTIONS

A typical response to the CLS claim of indeterminacy is to point out that lawyers certainly, and lay people in some cases, have the experience of confronting and resolving easy cases.[2] In discussing easy questions, Professor Finnis uses the term "algorithm," which I believe is symptomatic of the images that the "easy questions" response trades upon. That is, we know that there are easy questions because we know that there are legal rules that use mathematical terms which are, at least for all practical purposes,[3] completely determinate—the periods identified in statutes of limitations, for example, or the various mathematical provisions in the United States Constitution. Further, though this point is less

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[1] Tushnet, *Some Current Controversies in Critical Legal Studies*, in CRITICAL LEGAL THOUGHT: A GERMAN-AMERICAN DEBATE (C.Joerges & D.Trubek eds. 1989). I should note that I no longer think it correct, and am inclined to think it unhelpful, to distinguish between these two strands except for purposes of a certain kind of exposition (fortunately, the kind exemplified by this comment). My concern is that the distinction may, to use a favorite CLS term, reify the disciplines of sociology and philosophy rather than, as most people associated with CLS would prefer, dissolve the disciplinary distinction altogether.

[2] In addition to Finnis's comments, which are of course not directed, at least explicitly, at the CLS claims about indeterminacy, *see* Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985), which has become probably the standard citation for the point.

[3] I mean by this to put aside Wittgensteinian—or Kripkean—worries about the understandability of mathematical terms.

often made, it is trivially easy to posit a legal rule that is also completely determinate: "Plaintiffs always win" or "Litigants named Tushnet always lose."[4]

If the existence of *this sort* of easy question refuted the CLS claim of indeterminacy, one might wonder how people with law degrees from respectable universities could ever have offered the indeterminacy claim. And, because it is generally conceded that at least some CLS adherents, if perhaps deeply wrong-headed, are at least not incredibly stupid, there has to be something wrong with the use of this sort of example to refute the CLS indeterminacy claim. I will suggest several candidates for what is wrong.

First, the examples provide what we might call "existence proofs" of the possibility of determinacy, or simple counterexamples. If, however, the CLS indeterminacy claim was not that there was never and never could be a determinate legal rule, an existence proof or a counterexample does not refute the claim. When I have stated the indeterminacy claim, I have used terms like "interesting" to qualify the claim, as in, "No interesting legal propositions are determinate."[5] I have recognized, of course, that that and cognate formulations must place a lot of weight on the term "interesting" or substitutes therefore, and I will discuss the kinds of weight later in this section. For now, however, the point is simply that identifying some linguistically determinate rule[6] need not refute the indeterminacy claim properly understood.

This point may be put somewhat differently. Imagine that we had a metric by which the determinacy of words or legal rules could be measured; call each unit a "determinile," and assume that a completely indeterminate rule measures zero on the scale, while a fully determinate one measures 100 determiniles. I suggest that most legal academics in the United States would say that the general measure of determinacy is around 40 to 60 determiniles; that is, overall, legal rules are not completely determinate but they are not completely indeterminate either. The CLS claim, I suggest, is that the measure of indeterminacy is about 15 to 5 determiniles. There is a gap between the CLS understanding of the degree of indeterminacy and the mainstream understanding, but no one on either side claims that the positions are at the polar extremes. On this view, an existence proof or counterexample might show only that we have identified a rule that falls into the 5-15 determiniles range that, even CLS people agree, includes determinate rules.

Second, it seems to me significant that the core examples of determinate legal rules invoke mathematical terms. This can show, at most, that the domains of law and of mathematics—or other equivalently determinate ways of speaking—sometimes come into contact, or, to adopt another mathematical metaphor, that the two domains overlap to some degree as

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[4] For additional discussion, *see infra* text accompanying notes 13-15.

[5] *See, e.g.*, M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 52 (1988).

[6] Again subject to Kripkean worries.

in some Venn diagrams. It does not show that the entire domain of law is just like the domain of mathematics. Again, if the CLS claim of indeterminacy is limited to some sub-set of possible legal propositions, such as "interesting ones," the existence of points of contact between law and determinate domains, or the existence of some degree of overlap, does not refute the CLS claim, at least if the points of contact are not so numerous or the amount of overlap is not so great as to make the CLS claim uninteresting. But, precisely because the examples of determinacy tend to be mathematical or otherwise tangential to what really happens in law, I doubt that the points of contact are numerous enough to weigh heavily against the CLS claim.[7]

Third, we should consider what actually happens in law when statutes of limitations are involved.[8] There are disputes over whether to count Sundays for purposes of statutes of limitations, which actually are disputes over what a number used in a legal rule really means. I do not want to make too much of these disputes, though, because there are more important examples for my purposes. There are two typical disputes over statutes of limitations: (1) From what date does the statute run,[9] and (2) Which of several possible statutes of limitations should apply in the circumstances.[10] That is, the existence of a fully determinate provision arguably applicable to the situation at hand does not mean that the actual resolution of the problem is determinate.

I would like to identify the reason for that as a fourth response to the "easy questions" claim, though it probably is not an independent reason. In the dispute between H.L.A. Hart and Lon Fuller over the problems of the core and penumbra of legal propositions, Fuller pointed out that legal propositions typically do not turn on the interpretation of single words, but on "a sentence, a paragraph, or a whole page or more of text."[11] For present purposes, I want to take this as pointing out, correctly, that individual legal propositions—that the statute of limitations is four years—are embedded in a complex domain including many other relevant legal propositions, and that the resolution of any particular legal problem turns not on the meaning of any individual proposition but on the mean-

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[7] For an interesting though I believe almost completely wrong-headed extended discussion claiming—in the terms used here—that the points of contact are indeed quite substantial, *see* Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989).

[8] In working through the example of the constitutional requirement that the President be over 35 and a native-born citizen, I have suggested that were there sufficient political pressure to elect a 32-year-old President or to elect Henry Kissinger President, lawyers would start to make arguments, which would start to sound credible, about these rules. My view is that it is only because no one has a present interest in making those arguments that they sound implausible when they are devised to meet the purported counterexamples the constitutional provisions are taken to provide. For additional discussion of this point, see *infra* note 15 accompanying text.

[9] *See, e.g.*, Lorance v. American Tel. & Tel., 109 S.Ct. 2261 (1989).

[10] *See, e.g.*, Owens v. Okure, 109 S.Ct. 573 (1989).

[11] Fuller, *Positivism and Fidelity to Law—A Response to Professor Hart*, 71 HARV. L. REV. 630, 663 (1958).

ing of all the propositions, all at once.[12] If that is so, an "existence proof" that includes a single legal proposition establishes nothing at all.[13]

Consider again the determinate rule that plaintiffs always win. I know of no legal system that incorporates such a rule, and there is a reason for that, I suspect. Such a rule would be felt to be intolerable in any system that held itself out to be a legal system. Similarly with the rule about plaintiffs named Tushnet. In the legal system of the United States, such a rule would almost certainly be unconstitutional as a violation of notions of equal protection,[14] and I suspect that similar notions can be found in any system that holds itself out as a legal system.

There are some points at which the preceding discussion is vulnerable, though I believe that the weaknesses are not serious. I have assumed that the legal domain includes many other relevant legal propositions. It could be that, with respect to some interesting purportedly determinate rule, the domain includes only a few relevant legal propositions. If so, the domain itself may be sufficiently determinate to defeat the CLS claim; the determinile measure may get up to 40 or 50. What is crucial here, of course, is the specification of criteria of relevancy to restrict the domain of relevant propositions. Yet, it seems to me the mark of a talented lawyer to devise arguments that demonstrate the arguable relevance of rules that a less talented lawyer would think irrelevant at the outset. Coming up with creative analogies is, after all, an important part of what lawyers do. If one incorporates this notion of lawyering into the definition of the legal system, it is unlikely that the legal system taken as a whole would be sufficiently determinate to defeat the CLS claim of indeterminacy.

I believe it will be helpful now to return to the other examples of determinate rules, like "Plaintiffs always lose," which will allow us to consider what makes a legal proposition "interesting."[15] Let us suppose, though, that for some reason or other, the relevant law-makers happen to declare such a rule as law. What would happen? At first, of course, the rule being obviously determinate would be applied across the board, producing results that people would generally agree were unjust. At that point, the rule might be repealed, which would give us no interesting analytical insights. Alternatively, though, the rule might be "interpreted" to avoid manifest injustice. I would think that the techniques for such a reinterpretation would be apparent to well-trained lawyers. It would be-

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[12] I put it in this strong form, which I believe correct, but my basic point would hold were the statement in the text to be modified to say "all relevant—or nearby—propositions."

[13] For an example, using one of the mathematical propositions of the Constitution, see M. TUSHNET, *supra* note 5, at 61-62.

[14] I put it in this way to elide the differences, if any, between the equal protection clause of the fourteenth amendment and the ideas of equal protection that the Supreme Court has held are present in the due process clause of the fifth amendment.

[15] For a discussion of why such rules do not appear in real legal systems, see *supra* note 14 and accompanying text.

gin to happen that people who filed certain kinds of claims would be described, not as "plaintiffs" subject to the determinate rule, but as, for example, "claimants" or "victims." And because the rule does not say that claimants always lose, injustice could be avoided.

(I do not think that this example is entirely fanciful, though because the postulated determinate rule is fanciful, I suppose I am entitled to some fancy in my response. The implausibility of the response is generated by the implausibility of the initial hypothetical, not by a weakness in the underlying argument about indeterminacy. Further, I suggest that something like it characterizes the development of legal rules in systems where there are competing legal jurisdictions. If a person is excluded from one, or is likely to lose in one, because of a determinate rule applied in that jurisdiction, he or she will go to the other and argue that the preferred system has jurisdiction.)

This discussion suggests that we might think of "interesting legal questions," that is, those to which the CLS indeterminacy claim applies, as those that are likely to generate real disputes. In an important way, this definition of the scope of the CLS indeterminacy claim converges with Finnis's concern with practical reason, but in doing so it shows why the existence of easy questions is basically irrelevant to the more important matters bound up with the idea of practical reason. As Finnis says, "practical reasoning moves from reasons for action to choices (and actions) guided by those reasons."[16] This suggests, as Alisdair Macintyre has said specifically, that practical reason comes into play only where there is a choice to be made,[17] that is, where one wonders about the possible reasons for competing choices or courses of action. Easy questions are, precisely, those as to which there appear to be no competing choices. Yet, if, as Finnis also says, "legal reasoning is, broadly speaking, practical reasoning," it would appear that the existence of easy questions has nothing to do with legal reasoning.[18]

This conclusion, though, may be too abrupt. For one thing, it is reasonably clear that what one group of people regard at one point as an easy question, another group, or the same group at some other time, might see as not so easy after all.[19] If what are easy questions change over time or across groups, it is reasonably clear that "easiness" is not a property of words alone, but is a property of words in particular communities under particular circumstances. It is reasonably clear as well that questions once easy become more difficult when some social group with sufficient political power finds that its interests would be promoted were the question to become controverted, that is, to become an occasion for demanding reasons for choices and courses of action—in the usual instance, I believe,

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[16] Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1 (1990).

[17] A. MACINTYRE, WHOSE JUSTICE, WHAT RATIONALITY 54 (1988).

[18] It should be noted, too, that in this version there is nothing about legal reasoning that sets it apart from other forms of practical reasoning.

[19] I have elsewhere used the example of the question, once hotly contested, of whether West Virginia was legally created and therefore entitled to two Senators. M. TUSHNET, *supra* note 5, at 69 n.153.

an occasion for demanding reasons for the maintenance of the existing social order. To put the point in a somewhat different way, selecting among competing alternatives, which is what practical reasoning consists in, involves selecting a course of action that will bring us acceptably close to our goal. Yet, the criteria for determining what will count as acceptably close are socially constructed.

This is not to say, of course, that once the questions become the occasions for contention that new answers will be given, or rather, that new arrangements will be devised. In one sense, there cannot be "new" answers at all, for the easiness of easy questions is precisely that no one thinks that they have to be answered, or indeed that they are questions. My hypothesis, though, is that the fact that people ask for answers where once they needed none is a signal of a shift in underlying political forces.

If that hypothesis is correct, however, it has implications for our understanding of practical reasoning as well. I have been arguing, in essence, that the CLS claim of indeterminacy stands up to the "easy questions" challenge because that challenge does not address the problems of practical reasoning that characterize, or define, legal reasoning. Yet, if the category of "easy questions" is itself defined with reference to underlying political forces, there would seem to be some overlap between politics and the concept of practical reasoning as well.[20] Even if there is no such conceptual overlap, however, I am reasonably sure that there is a practical overlap, to which I now turn.

II. Practical Reasoning in Lawyers' Discourse

The terms "practical reason" and phronesis have come into the vocabulary of constitutional lawyers in the United States in recent years.[21] I do not want to saddle Finnis directly with the misuses of those terms in that vocabulary, but I do want to suggest some sociological dimensions that deserve some attention.

At least in the United States, legal theory is parasitic upon developments in other domains of normative and descriptive social theory. "Practical reason" is in some ways just another essentially ignorant appropriation by lawyers of concepts from other domains, where they have a well-developed background and literature, to be imported to solve problems the lawyers have discovered in their own domain. As used by academic lawyers in the United States, practical reason seems to mean the good common sense of the well-socialized lawyer. To the extent that the general concept of practical reason draws upon the idea that people engaged in some practical activity on a regular basis become adept at

[20] I take it to be uncontroversial that there are overlaps between practical reasoning and the substance of political decisions.

[21] For a discussion, convergent with mine, that cites sources, *see* Feinman, *Practical Legal Studies and Critical Legal Studies*, 87 Mich. L. Rev. 724 (1988).

determining the right way to conduct that activity, the American usage is at least in the ballpark of ideas that might circle around the proper concept of practical reason.[22]

Once we think about how lawyers are socialized, though, we might have some misgivings about placing much normative weight upon the conclusions they draw—or, if that suggests too rationalistic a process, the solutions they arrive at—in the course of their practical activity. I would begin my analysis by identifying one fact and one myth. The fact is that the social composition of the lawyering class, including lawyers presently in practice and those developing the practical skills that will enable them to become lawyers, is markedly skewed. The myth is that the practical reasoning abilities of lawyers are deployed in helping people resolve their problems of daily life, whereas those abilities are in fact deployed, at least in the reaches of the United States legal profession that define what good legal practice is, on behalf of large organizations attempting to navigate through the shoals of the modern regulatory state.[23]

The social origins of the lawyering class are likely to affect what the profession regards as sound common sense in an obvious way. On ordinary assumptions about human motivation, cynically overstated as "who pays the piper calls the tune," we are likely to find it extraordinarily difficult to distinguish between the socialized sound common sense of the profession and the interests of the lawyering class and those for whom it labors. Sound common sense is likely, therefore, to be shaped by the interests of those holding power, either because they are like the lawyers or because they employ the lawyers.

Perhaps, we might think, the process of socialization into the lawyering class would moderate the class origins and affiliations of lawyers. I suspect that that is true, but would emphasize the word "moderate." The sound common sense of the profession might be somewhat more restrained than the unbridled desires of the powerful clientele. In its organized expressions, the legal profession in the United States is today probably somewhat more reasonable than its clientele, though the notion of corporate responsibility has penetrated the corporate elite as well.[24] Yet, it is worth pointing out that the organized expressions of the bar in the United States have almost since the beginning been replete with high-sounding language that is substantially at odds with what the very people uttering the words were doing in their capacity as lawyers acting on behalf of

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[22] For the kind of use of the concept to which I refer, *see* Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747 (1989). Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 849-55 (1990), offers a more sophisticated treatment, and a reference to the United States literature at 850 n.79, but her treatment is, in my view, subject to weaker versions of the criticisms I offer in the text.

[23] I limit my observations to the United States profession because I am not familiar enough with the profession elsewhere to be nearly as confident about my judgments with respect to the bar elsewhere as I am with respect to the United States bar.

[24] I suppose, though, that defenders of the notion of practical reason would see that as the penetration of practical reason with respect to corporate activities into the corporate elite.

clients.[25] And, there is a structural reason to believe that lawyers will not find it to be an important component of common sense to stand against the interests of the powerful. One of the practical skills that lawyers develop is deferring to—or catering to—those in power, in order to get them to use their power on behalf of the lawyer's clients. The very structure of the profession, without regard to its class composition, thus places limits on what the profession is likely to regard as sound common sense.[26]

The myth of service to individuals enhances limitations on the profession's sense of what is sound common sense. The myth is an ideology in Mannheim's classic sense, a story about how people live their lives that allows them to engage in behavior that, in the absence of such a story, they might find normatively troubling. If lawyers are socialized into believing that they are members of a "helping profession," they are likely to think that the judgments they arrive at are compassionate in the aggregate, even if individual judgments, when viewed by outsiders to the profession, might seem unfeeling. Of course, many individual lawyers, perhaps most of them, actually do help real people get on with their lives. Yet, those who define the profession's aspirations—by becoming leaders of the bar or by instructing budding lawyers at leading law schools—do most of their work on behalf of large organizations rather than on behalf of individuals.[27] No doubt the myth of service is comforting, but to the extent that it underpins the profession's sense that its common sense embodies norms that are in an important way independent of the interests of the powerful, it provides another of the supports for a notion of sound common sense that almost certainly cannot bear much normative weight.

At this point it seems to me appropriate to engage in a modest ad hominem discussion of another of Finnis's works, his treatment of the strategy of nuclear deterrence.[28] That discussion has a number of targets,

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[25] The basic work on this topic is Robert Gordon's ongoing study of the elite New York bar in the nineteenth century. For some soundings of his findings, see Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1910*, at 51, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA (G. Gawalt ed. 1984).

[26] The phenomenon is not confined to lawyers for the corporate elite. It is part of the strategy of civil rights claimants, for example, to explain to a person in power that that person's interest would be served by something that initially appears to be contrary to that person's interest. For one version of this point, see Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

[27] I rely here on the analysis of J. HEINZ & E. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982), who describe the structure of the Chicago bar with reference to whether lawyers graduated from local or national law schools. Local law schools, which probably are most of them, educate lawyers who will indeed provide services to individual clients, including divorces, will writing, small business counselling, and the like. The national law schools, in contrast, educate lawyers who will provide services to larger organizations, be they corporations or the national government. It is the latter group that primarily influences the development of the ideology of the profession.

[28] J. FINNIS, J. BOYLE, & G. GRISEZ, NUCLEAR DETERRENCE, MORALITY AND REALISM (1987). I am reasonably confident that most of the specific matters I cite were not initially drafted by Finnis, but he of course would properly take responsibility for them.

but its primary focus is on the immorality, according to what Finnis and his co-authors call the tradition of common morality, of the strategy of nuclear deterrence because it takes as one of its defining aims the deliberate killing of innocents. In setting up their discussion, Finnis and his co-authors include a chapter on the duty to deter Soviet advances. That chapter counterposes "Western culture and political life" to "the Leninist political order," to the obvious advantage of the former:

"Soviet rulers vary in the scale and intensity of their crimes, but their ideology has an inherent disrespect for the dignity of individual persons, who can be sacrificed whenever expedient to promote the Marxist utopia."[29] Further, were the Soviets "not opposed," the consequence would probably be the loss of the independence of the West and therefore "great damage to the goods which are protected by Western political and constitutional order."[30] This is because

> there is in Soviet ideology and politics a dynamic towards unsettling the world order and expanding the influence, the hegemony, or even the direct rule of the Soviets. The domination and absorption of the Baltic nations, the fraudulent and forcible repression of the nations of Eastern Europe, and the continual efforts to support Marxist revolution around the world, belong to a pattern of foreign policy. . . .[31]

In addition, "nations whose military power is great and is not seriously opposed are likely to use their power to get their way whenever confronted by other nations."[32] Further, the Soviet Union cannot be understood as having simply reacted to "perceived threats by the West,"[33] because that "can hardly account for the whole policy—for the extensive Soviet activities in the Third World, the build up of the Soviet navy, or, in general, the continued emphasis on developing capacities for long-distance projection of offensive military power."[34] Similarly, the actual "cautious expediency" of Soviet foreign policy results from Marxist ideology, and in any event, "Soviet support for Third World 'progressive' forces goes beyond the counsels of caution and opportunism."[35] Finnis and his co-authors conclude that "it would be quite premature to think that Soviet officials are at heart decent pragmatists and patriots cast in the image, or self-image, of Western leaders and elites."[36] They think it unlikely that "the Western nations would long maintain their constitutional and social values if they were to renounce nuclear deterrence unilaterally."[37]

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[29] *Id.* at 69.
[30] *Id.* at 70.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 71.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 72.
[37] *Id.* at 73-74.

This theme unsurprisingly recurs throughout the book. The authors refer to "subsequent Soviet domination of other nations," and "the enslavement of many millions of persons [which] refers to no mere abstraction; those subjected to totalitarian oppression are inhibited from living good lives, pressed to do wicked things, and very often deprived of life, liberty, and many other important goods," and they say that "one should bear in mind the grave risks created by movements which, while advocating nuclear disarmament, fail to acknowledge, steadily and clearly, what would be the probable side-effect of doing what they advocate: Soviet domination."[38] These are, to my mind, extraordinary words read in 1990, and striking words to have written in 1987. For about twenty years, the Soviet economy has been staggering along, and there is surely little reason to think that the rulers of the Soviet Union, no matter what their Leninist ideology, such as it is, would say, would be enthusiastic about taking on the burdens of governing—"enslaving"—a recalcitrant population of the United States. Nor does there seem to me much evidence of Soviet foreign policy adventurism in the past twenty years on the questions of nuclear strategy that most concern Finnis and his co-authors; the citations of support for Third World revolutions seem to me almost completely irrelevant to the question of the expansionist desires vis-a-vis Western democracies of the Soviet leadership. And, finally, there is the point that negotiations over nuclear disarmament, again over the past twenty years, have repeatedly consisted of the United States refusing to take "yes" for an answer, saying that technological developments make it inappropriate now to adopt proposals that the United States had made in the recent past.[39]

What can account for the myopia reflected in Finnis's discussion of the likelihood of Soviet world domination? I am willing to put some weight on the authors' understandable lack of prescience about developments in the Soviet Union, though I again have to stress that the book was published in 1987 and describes ordinary life under Soviet rule as if Stalin was still in charge. Another aspect of the explanation seems to me to lie in the authors' larger conceptual program, which involves using the question of nuclear strategy to challenge both consequentialist and standard deontological arguments about the foundations of morality with an alternative drawn from what Finnis calls "the tradition of the common morality." Particularly with respect to consequentialism, the case for unilateral disarmament based on "the common morality" might well be uninteresting unless the consequences were presented as extremely severe. If the consequences are not that severe, ordinary consequentialist calculations might lead to adoption of a unilaterist policy, which would accord with Finnis's preferences but for reasons quite inconsistent with his deepest commitments.

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[38] *Id.* at 158, 241, 353-54.

[39] I should also mention the use in domestic United States politics of the specter of a "missile gap" and a "window of vulnerability" (the former by a Democratic candidate for the Presidency, the latter by a Republican one), neither of which turned out to exist once the candidate took office.

But, there seems to be more to it than that sort of intellectual strategy. The language Finnis and his co-authors use conveys, both in the kinds of key statements I have quoted and in their more passing comments, real belief in the picture of the likelihood of Soviet domination. A recent book on the way in which nuclear strategists think about their enterprise illuminates, in my view, that belief. According to Steven Kull, nuclear strategists carry around in their heads two completely incompatible understandings of nuclear arms. On one understanding, nuclear arms are just a development of conventional weaponry and nuclear strategy is an extension of conventional strategy. On the other understanding, nuclear arms are quite different from conventional weapons, particularly in that they make possible a strategy of "sufficiency"—enough weapons to destroy the enemy even after being subjected to a first strike—rather than equivalency—the same numbers and types of weapons as the enemy has, because each weapon can "take out" only its equivalent. Kull bases his analysis on interviews with nuclear strategists. He reports one of them as follows:

> He [said] that it is also important to have a countersilo response to a Soviet countersilo attack. If the Soviets think that the United States could not respond in kind, they might think the United States would not respond. He agreed that even without hard-target kill capability, the United States would have many options for striking military targets—just not hardened ones. I then asked why the Soviets would think we might not respond. He answered that they "might" think this way and we must guard against this possibility. When asked if he would see things this way if he were in Soviet shoes, he equivocated but then basically said no. When I probed into why he attributed such reasoning to the Soviets, he did not offer any supportive evidence but shrugged and said that "we might as well" guard against this possibility and "there's no reason not to."[40]

To an outsider, this looks completely irrational, and indeed that sense comes across throughout Kull's work. Policymakers say incompatible things, and when confronted with the incompatibility adopt a variety of rhetorical strategies that shift the ground to yet another unsatisfactory position, only to end up saying the equivalent of "we might as well." Kull attributes this irrationality, as it seems to me, to psychological processes. That is not my concern here. Rather, I want to link my discussion of Finnis on nuclear strategy to my discussion of the embeddedness of lawyers' practical reason. The link occurs, I suggest, in the fact that, in some sense, Finnis and his co-authors *have to* talk in the way they do about Soviet intentions and the like if they are to be taken seriously by the group concerned with the issue, that is, by nuclear policymakers. They are, in short, embedded in a social group with a distinctive outlook on the world, and to get off the ground in a discussion with that group one

[40] S. KULL, MINDS AT WAR: NUCLEAR REALITY AND THE INNER CONFLICTS OF DEFENSE POLICYMAKERS 180-81 (1989).

has to at least act as if the group's assumptions are obviously correct, and probably has to truly believe that they are. In just the same way are lawyers embedded in an array of social relations that defines the limits of what they can regard as results compatible with practical reason.

Although I am not deeply familiar with the tradition in which the concept of practical reason plays a central part, I can imagine a response to these cynical sociological observations about the legal profession (and nuclear policymaking) in the United States. The observations might be correct, the response I imagine would go, but they are irrelevant to a proper understanding of practical reason. Such a concept, it might be thought, can be developed only by considering what a "purified" practical activity would be, that is, one that lacked the distortions of judgment that the sociological observations have identified.[41] This response, I take it, links Finnis's analysis to the tradition in which he is working, where practical reason is theoretical reasoning about the connection between means and ends.

Within that tradition, the objections I have raised may be irrelevant. Yet, as the notion of "practical reason" has been assimilated into United States legal theory, a difficulty remains. In the process of assimilation "practical reason" has come to be opposed to "abstract reasoning," and has come to be connected to the idea of "pragmatic reasoning." With the tradition assimilated in that way, the difficulty remains. Relying on a purified profession effectively abandons the idea of "practical reason," in the sense in which the concept has been assimilated into United States legal theory, as something embodied in, though of course going beyond, real practices. If we must imagine a purified profession in order to understand what that sort of practical reason is, we are, or so it seems to me, engaged in the kinds of abstract reasoning to which United States legal theorists think the tradition of practical reason is opposed, at least with respect to the kinds of activity to which practical rather than theoretical reason was appropriate.

My ignorance of the relevant tradition means, of course, that I may be completely off the mark. Before considering the significance of that ignorance in a somewhat different way, however, I would still insist on the accuracy of my sociological observation that the idea of practical reason is likely to be assimilated into the United States legal profession in the form of a complacent acceptance of things pretty much as they are, modified, of course, in a sensibly moderate way. Because moderate reform in the United States seems to resemble the programs of the non-Thatcherite Conservative "wets" in Great Britain, I do not take much comfort in the recent interest in practical reason among United States legal academics.[42]

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[41] I am comforted in conjuring up this response by the fact that Jurgen Habermas, who does rely on some idea of practical reason, has offered a response of the sort I am imagining. And, Finnis's treatment of emotion as distorting practical judgment seems to me also relevant here.

[42] Habermas has noted, as well, the importance of developing an idea of practical reason that avoids becoming "just a reflection of the prejudices of the adult, white, well-educated, western male of today." Habermas, *Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?*, 83 NW. U.L. REV. 38, 40 (1989).

In concluding this section, I would like to revert to Finnis's discussion of nuclear deterrence. For me, even though I come from a different tradition, clearly the most powerful portion of the book is its final section, "Concluding Christian Thoughts." That section more credibly presents the unilateralist argument than the remainder of the book. It is suggestive of the way in which social relations limit what counts as an exercise of practical reason that Finnis and his co-authors tell readers in their Preface that they can skip this section if they want to.[43]

III. TRADITIONS AND LEGAL REASONING

As one who finds the critical legal studies approach to law congenial, I have been struck, amused almost, by the kinds of criticisms levelled against the works of Roberto Unger by certain British scholars, among them Finnis.[44] These scholars apply the standard techniques of philosophical analysis in the central Anglo-American tradition to Unger's work, and find it wanting. Yet, one might think that they have committed what they might describe as a category mistake. When I read Unger, I am struck by the distance between his work and most contemporary political philosophy in the United States. I have found it easiest to think of Unger as jurisprudence's Gabriel Garcia Marquez. The analogy is helpful in this context because Marquez is a magical realist, which means that, because he is a realist, there is some connection between the world he writes about and the world we live in. Similarly, Unger writes something that has some connection with mainstream political philosophy. Yet, using the standard techniques I have referred to as the basis for criticizing Unger's work seems to me like criticizing Marquez's magic realism on the ground that no one really lives for hundreds of years.

One might respond that it is not Unger's critics but Unger himself who has committed the category mistake. Marquez, after all, calls his works novels. Unger, in contrast, appears to be talking to practitioners of philosophy in the United States. He makes general claims about language, truth, and reason that look much like philosophy as they conceive it. Further, one might wonder what sort of response Unger wishes to elicit from his readers. If he wants them to give rational assent to the propositions he offers, surely, his critics would say, his arguments must be subjected to the kinds of rational analysis they have deployed. I agree with that point, and confess that I would be much more comfortable were I able to say that, having read the critics, I continue to give my rational assent to Unger's arguments. Perhaps because of my limitations as an analyst, however, I find myself largely persuaded by Finnis's criticism of Unger.[45] Yet, Unger still seems *right* to me in an important way. This

[43] J. FINNIS, J. BOYLE, & G. GRISEZ, *supra* note 27, at vi ("A reader concerned simply with common morality's implications for deterrence need read only Parts One, Two, and Five, which stand independently of . . . the concluding reflections in Part Six").

[44] *See* Finnis, *The Critical Legal Studies Movement*, 30 AM. J. JURIS. 21 (1985); Ewald, *Unger's Legal Philosophy: A Critical Legal Study*, 97 YALE L.J. 665 (1988).

[45] Though not by Ewald's.

suggests that, at least insofar as I am unable to counter Unger's critics, I must believe that Unger seeks something other than rational assent—perhaps, as the analogy to Marquez suggests, esthetic appreciation of his having captured something about the world in which we live.

I mention the possibility of a category mistake because I think it has some bearing on Finnis's natural law enterprise. At first glance, Finnis seems to draw extraordinarily strong and obviously controversial conclusions from extremely weak premises.[46] Further, again at first glance there seems to be some tension between Finnis's invocation of practical reason, which would appear to call upon judgments socialized professionals make in the course of dealing with particular problems that present themselves in enormous detail in their professional lives, and his acceptance of rather quick abstract arguments from those weak premises to his strong conclusions.

These difficulties, though, disappear when we understand that Finnis operates from within a particular philosophical tradition, whose aspiration is, in part, to demonstrate that relatively abstract arguments are rationally grounded in understandings we gain from practical reason. Those of us outside that tradition might raise our eyebrows at the tradition's continued adherence to that project, which has been offering itself for rational agreement for almost a thousand years and which appears, at best, to have run up against impenetrable barriers in the past two hundred years. Yet, of course, two hundred years is a relatively short period of time, as these things go, as indeed is a thousand years. Outsiders' skepticism therefore need not cast any rational doubt on the insiders' project.

Nonetheless, there are reasons to be, if not skeptical in the sense I have just suggested, somewhat distanced from Finnis's project. These reasons are suggested by the category mistake committed in the criticisms of Unger's work. The mistake there is to assess work within a particular tradition according to the criteria used in another tradition. So too with Finnis's project: Precisely because it is located within a particular tradition, outsiders to that tradition really cannot get a proper handle on it for purposes of criticizing or even evaluating it. For those outside the tradition, his work can be edifying, illuminating some aspects of what we see in the world without, however, commanding our rational agreement—just as Marquez's magical realism can illuminate the real world without being realistic according to the criteria most of us use in our daily lives, and just as Unger's jurisprudence can be illuminating without satisfying the demands of the central tradition of recent Anglo-American political philosophy.[47]

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[46] *See* Shearmur, *Natural Law Without Metaphysics?: The Case of John Finnis*, 38 CLEV. ST. L. REV. 123 (1990).

[47] A. MACINTYRE, *supra* note 16, concludes with an argument that discussions across traditions can be more than merely edifying but can, in some circumstances at least, result in the rational replacement of one tradition by another. His analysis deserves much more extended treatment than this footnote, but in the present context I should note that I find his argument fundamentally inconsistent with the entire structure of his argument elsewhere in the book.

In that spirit, I would like to conclude with one observation about Finnis's presentation in this Symposium. As Finnis presents his natural law theory, immorality, at least in its "paradigmatic form," involves the emotional distortion of judgment. Evil, that is, is, or is at least connected to, "bad emotion." There are other traditions, though, in which evil and bad emotion play rather different roles. For those who find Freud's insights into human personality illuminating, bad emotion is an ineradicable part of personality, which can be brought under control, if at all, only to a degree. In that tradition, Finnis's hopeful assumption that bad emotion can be placed under the full control of rationality, which appears to be an essentially unalloyed good,[48] is mere romanticism.[49]

Alternatively, of course, we might see evil as ineradicable. That appears to have been Dostoyevsky's view, for example, to invoke a figure who is, in the broadest sense, within the same tradition as Finnis. If, as in my tradition, one does not believe in God's redemptive grace, one is likely to be even more cautious about accepting the view offered by Finnis that practical reason, refined through rationality purged of bad emotion, will justify fairly precise conclusions about controversial moral issues. We will, of course, have to do the best we can, but, alas, the best we can do may be quite limited.

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[48] For my skepticism about the assumption that rationality is necessarily good, see Tushnet, *Flourishing and the Problem of Evil*, 63 TUL. L. REV. 1631, 1647 (1989).

[49] *See, e.g.*, H. MARCUSE, EROS AND CIVILIZATION (1956).