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ORIGINAL ARTICLE

Law, Practical Reason, and Future Generations

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Abstract
Complex moral and political problems like climate change have the capacity to make wrongful (in)actions appear reasonable. This has significance for the central questions of jurisprudence. If we cannot plan rationally for the future, or acts now thought to be rational and blameless become progressively more blameworthy, central elements in our understanding of law – planning, reasonableness, and authority – may diminish in their ability to explain the function and normativity of law. If this is the case, legal positivism and legal non-positivism appear to be confronted with significant, but different, challenges depending on the extent that they conceive of law as future-orientated planning or as a form of practical reasonableness.

Keywords Climate Change · Future Generations · General Jurisprudence · Legal Positivism · Legal non-positivism · Practical Reason

1 Introduction

The problems created by climate justice and future generations do not appear to have any significant points of interaction with general jurisprudence. In what follows I explore three constructed scenarios which reveal jurisprudential insights. The scenarios – models exploring our relationship with dangerous climate change – deliberately produce dilemmas for practical reason. That is, they produce contradictory intuitions or obligations which may stultify decision-making or may make harmful (in)actions rationally acceptable. Discussing these scenarios provides a foreground for my central concern, the relationship between the future and both legal positivism and legal non-positivism. My conclusion is that both are problematised by the interaction of certain possible futures and practical reason. Shapiro's 'planning theory'

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(2002; 2011) cannot explain how law has claim to authority where law cannot guarantee coherent reason-giving. Finnis's Thomist theory (2011) roots practical reason in the temporal horizon of the individual and thereby lacks resources to specify our relationship with future generations. This also allows us to draw some general conclusions about jurisprudence, practical reason, and the future. In particular, prevailing theories of law lack sufficient resources to integrate our accounts of legal authority with the problems associated with 'demandingness', problems inescapable in theorising climate justice and future generations.

1.1 Practical Reason

Practical reason concerns the logical relationship of means to ends in action. It concerns the reasonableness of action given our likely goals as humans and our coexistence with other agents. And it concerns the justification of action given our limited knowledge and capacity for reflection on our choices. Before connecting these ideas with law, we have to consider the contested role of reason and knowledge in this acting and choosing.

Can reason guide what we must do? That is, can reason completely determine what we should do in specific circumstances? On the one hand, reason might be dramatically limited in its contribution to generating moral guidance. It might make us prudent, allowing us to choose the right means to our ends, avoiding errors and hazards in the process. But reason might not be able tell us what our ends should be, and nor could it establish a class of actions that are necessarily required or forbidden. On the other hand, reason might well reveal to us the class of actions that are always (un)desirable, or allow us to recognise the ends or goals that any similarly situated person should choose. It would determine action in a strong, moral, sense of giving us a categorical reason to act, or give us stringent reasons that over-ride our immediate interests and motives. Between these poles intermediate positions are possible. But in essence the meaning and scope of practical reason is contested such that we could mean by it (simply) 'finding ways to get what we want'. Or (concerning outcomes) 'guiding our actions by rules that will ensure the best state of affairs for everyone'. Or (concerning the quality of our actions) 'acting only on principles that are rationally defensible and treat others' ends as having equal value to one's own'.

We have no need to adjudicate between these conceptions of practical reason. The nature of future generations entails severe problems for whatever philosophy of practical reason we have. From the outset we need to be aware of the paradoxes of identity and harm occasioned by any reflection on future generations. Whoever *will* live in the future cannot have their welfare compared with that of another comparative group who *might* have existed. At the same time, we always benefit that group of people who do come to live in the future because we have given them life. This makes comparative harm choices between different groups of future people with different welfare impossible. No comparative group exists. And those who do exist have benefited from our actions, however selfish or neglectful our actions were (Parfit 1984, Chap. 16). We should note that deontological appeal to the rights of future people, or the absolute wrongness of certain acts with certain consequences, partially ameliorates these problems (Mulgan 2006, p. 28f). However, they are not wholly

avoidable. We need to make policy decisions about the future. Comparing outcomes and states of affairs is an inescapable part of practical reason. Nevertheless, this problem has distinctive contours, and may be partially ameliorated, in the legal context. After all, when governing through law it is possible to shift normative focus, and ultimate responsibility, from the individual to the collective. This is especially significant with a global problem where no single state, alone, is capable of solving the problem. Simon Caney's analysis is helpful here:

> The collectivist perspective adds a different dimension to this for [...] the identities of nations are less changeable over time than those of individuals. [Consequently] it is inaccurate to say that currently alive individuals have a higher standard of living than those same individuals would have had if industrialisation had never taken place. However, the acts of industrialisation did not [...] bring different countries into existence than would otherwise have existed. (Caney 2005, p. 759)

Caney's arguments are in fact directed at distributive aspects of global climate change mitigation, denying that this must be purely a backwards-looking question of past pollution (the 'polluter pays') stressing, rather, whether and how 'ability to pay' can be morally significant. But, of wider significance is the argument that evaluating harmful or wrongful actions vis-à-vis future people is not, for Caney, stultified by the non-identity problem. He offers a range of arguments in favour of collectivising responsibility in all discourses of futures and future generations (see also Brännmark 2016). This is partly because we are dealing with problems *produced* by collective agency, but partly because of the *agentic continuity* achieved by constitutionalism. Constitutions entail the continuity and the stability of identity of certain agents – states and nations – into the future in a way that is denied to individual humans (see also Riley 2016). As such, the connection of intergenerational justice and legal justice may be confounded by the types of problems of practical reason addressed in the following scenarios. The non-identity problem, in contrast, is less problematic for considering the especial claims, and problems, of *legality* and future generations.

In parallel, but more concretely, dangerous anthropogenic climate change puts the well-being of all humans at risk. If we ignore the warnings of climate science (IPCC 2022) fulfilling basic needs or interests will become progressively more difficult for generations of future people, requiring adaption of their lives and their horizons to hostile, straightened, 'unfavourable' conditions (Rawls 1993, p. 270, 297). The eroding of the 'circumstances of justice'[1] might then mean future people not being able to maintain just institutions. Similarly, climate change might cause us to re-evaluate political and economic rights that we now take to be universalisable.

How we speculate about these people and their circumstances without merely indulging in catastrophic thinking forms the methodological and normative backdrop of this paper. We have to admit multiple possible futures and relationships with the future. Nonetheless, our practical concern with them has recognisable tendencies and

[1] Coined by Hume but developed by Rawls (1999) the circumstances of justice are further discussed below.

produces a set of distinctive dilemmas and quandaries. These are the problems isolated and explicated in the scenarios that follow. The scenarios or vignettes assume that ‘problems for practical reason produced by the future’ will always encompass both logical puzzles about identity *and* practical problems about how we maintain the conditions of the possibility of justice for future generations. And, even without appeal to the non-identity problem, we know that sustainability and intergenerational justice produce apparently reasonable arguments pulling in different directions: for and against democracy, for and against sustainable development, for and against geo-engineering etc.[2]

What unites the scenarios is the presupposition that we face genuine quandaries for our reasoning. Whether we call these ‘perfect moral storms’, ‘wicked problems’, or ‘dilemmas’, these problems are irresolvable without moral failure or irrationality. Resolutions to some problems will produce further injustice (Gardiner 2011); inaction rationalised as ‘allowing solutions to emerge’ may well be an immoral response to existential jeopardy (Shue 2014, 2022). Indeed, the problems of practical reason here are manifold. Reason may not be able to guide us as to what is morally necessary regarding future generations because any chosen course of action will entail harmful costs.

These scenarios do not exhaust the multifarious challenges presented by the future, practical reason, and legality. They are intended to encompass *general and urgent* areas of practical and normative speculation. That is, they have been created to capture the problems produced by (on the one hand) future generations in general rather than specific regulatory challenges. And (on the other hand) they are tailored to capture the broad set of challenges posed by ‘problem’ futures, futures that are likely to be less good than our own, rather than an open future that may be as good or better. Other theories and speculation focus on new regulatory regimes for certain kinds of emerging or future problems (for example AI or nanotechnology). These future trends and regulatory regimes pose their own imaginative and regulatory problems. But they are not *general* problems for intergenerational justice, and nor are they (we can assume) *stultifying* for practical reason in the way that consideration of future generations as a whole can be. It should be added that the scenarios presented are also general in the sense that they do not specify types of *political* future (see Wainwright and Mann 2018). Rather, by assuming certain, general, kinds of ‘brokenness’ in the future (political and social, as well as environmental) we are better able to elicit intuitions about challenges faced by *law*-makers and *legal* decision-makers.

Two final, more specific, points flow from these substantive and methodological considerations. The first, concerns practical *reasonableness*. The people inhabiting a ‘broken future’ (Mulgan 2011) may not be able to rely on the rational principles and moral boundaries that we (in more stable and affluent times) can count on as reasonable. Indeed the problems faced by practical reason in relation to the future lie in significant measure in distinguishing the reasonable and unreasonable. Reasonable people come to different judgements about the best means to secure their well-being now and in the future. Equally, but more dangerously, reasonable polities do not agree on how to secure human well-being in the future because what is reasonable depends

[2] See variously Gardiner (2011), Jamieson (2014), and Shue (2014).

upon the actual or possible acts of other states. This might be thought of as a dilemma or tragic quandary whereby unilateral leadership is vital but, simultaneously, no state could be reasonably asked to sacrifice a generation for the sake of other generations. And one reason why the non-identity problem presents problems for deontologists as well as consequentialists is that reasonable principles – calibrated to judge the permissibility of our ends and act as side-constraints on our actions – might well produce unreasonable courses of action when adopted by states (Brooks 2020). States are called upon to make all-things-considered judgments about the distribution of rights and resources with no agreement on how they determine, or limit, what they can be held responsible for. These logical and moral limits on *reasonableness* and what is *reasonably demandable* are addressed throughout what follows but will receive more sustained attention at the end.

Second, my ultimate concern is to show that there are questions here for general jurisprudence. Most obviously *if* law has a link with practical reason it then potentially engages or incorporates any contradictions and paradoxes produced by intergenerational justice. There is no doubt that practical reason does have some link with legality. The question then is how we construe this connection. Some would pinpoint practical reason's centrality to any conception of law (Finnis 2011). Some would highlight practical reason's role in judicial decision-making (Dworkin 1986). Others would focus narrowly on the logic of norms and the distinctive functioning of legal norms in the weighing and defeating of reasons (Raz 1999). As will be discussed, core propositions associated with both the positivist and non-positivist models of law – that 'law can have any content', that law 'is a form of practical reason', or that law 'contributes to the common good' – will be problematised or impugned by the practical quandaries that orientation to the future produces.

1.2 Dilemmas

The following scenarios, derived and adapted from the work of other theorists, are intended to put pressure on practical reason and our relationship with the future. They generate problematic judgments that are not a problem for law alone. Nonetheless, as is considered in subsequent sections, they have greater connection with key debates in jurisprudence than we might anticipate.

1.3 'Suicide Club'

Most people in a given generation (and certainly the majority of people with power) know that the future will be disastrous for the lives of their grandchildren.[3] They have no wish to pay the cost of preventing this. They are, in effect, resigned to being the penultimate 'normal' generation. Although they may have children, they *assume* that it is possible for these lives to go well (given the power and wealth they will bequeath them) but think it too costly to *ensure* that the lives of their children's children goes well. They may be acting reasonably. It might be that the lives of their children are

[3] This builds on passing comments by Hart (2012) at 192, 199. What Hart himself meant by 'suicide club' is considered below.

not significantly affected by climate change and they can feel secure in the knowledge that they are unlikely to directly harm their own children through their inaction. Nonetheless, it is much more certain that the lives of their grandchildren will be less happy and prosperous than their own. They are also (more or less dimly) aware that their inactions are suicidal for humanity in the long-term.

The 'circumstances of justice' hold in Suicide Club, albeit not in any strict or uniform sense. That is, there is 'moderate', not extreme, scarcity in many countries. This means that the conventional institutions of legal and political justice have a meaning and function, namely to remedy and to distribute. But there are hidden human and environmental costs making this moderation and this justice possible. Resources, rights and opportunities are unequally distributed. The 'circumstances of justice' disguise vast inequalities in life opportunities.

Suicide Club are not actively ending normal human life. They are (perhaps culpably) fatalistic about its endurance. They have no wish to try to change the future which they know to be, ultimately, dreadful. They plan for their own affairs and have their own rights but see little sense in protecting future rights. These commitments are – they admit – unattractive but not, they maintain, patently unreasonable.

How is practical reason engaged here? First, and importantly, the political situation of humanity in Suicide Club is such that two poles of thought present themselves as reasonable: sustainability and non-sustainability. On the one hand, the survival and flourishing of future generations appears to be morally pressing. On the other hand, it is reasonable to discount[4] these future generations and not make oneself worse off. Given that the non-identity problem means no particular person will be worse off by misuse of resources – and that what they do will always have some value in the future, the future lives they produce will *be* human lives and therefore be of *some* value – inaction regarding sustainability is not morally unreasonable.

Second, the people of Suicide Club have no reason to preserve the material circumstances of justice, but they have every reason to favour the fruits of the circumstances of justice, namely protection of their persons, property and promises (Hart 2012, p. 197). In other words, societies exist so that we can have coordination, industry, and prosperity. The very existence of laws and legal remedies reflects the fact that we have societies based on relationships of trust going beyond the confines of family. With society comes the typical forms and contents of justice – protection of persons, private property, and contracts – rights and powers that reflect our complex societies and our complex interactions. However, while Suicide Club treats these entitlements as justly held fruits of society, they are not prepared to ensure the *material* conditions that make these rights and remedies possible. They are not committed to the idea that the circumstances of justice must be preserved for future generations. In particular, preventing extreme scarcity in the future is not perceived as a morally necessary requirement. It is at best supererogatory.

[4] 'Discounting' has different possible meanings. General discounting would simply insist that the interests of those in the future matters less, both because we are permitted to be self-interested and because the costs of resources are expected to fall over time. Narrower versions would insist either that the costs of fulfilling various interests is likely to fall in the future (just as they have fallen in the past) *or* that we cannot know precisely what it is that the people of the future will need and they may be able to substitute what are expensive resources for us for other inexpensive resources.

1.4 'Perfect Storm'

A majority of people in a generation like our own know that the future is disastrous for the next generation. They wish to prevent this. But they will not.[5] This is because of the sheer complexity of the epistemic and practical problems they face. Their conjectures about the future cannot amount to absolutely certainty. Their norms and institutions are imperfect, meaning burdens are impossible to distribute on any uncontestably just basis: there are simply too many competing claims, historical complexities, and potential injustices. Their ability to act is stultified by the complexity, magnitude, and partial indeterminacy of the problem they face. Sustainability is so global, and so complex, a problem that no solution could possibly be plausible to everyone in a state, let alone universally. All of this is 'morally corrupting' in the sense that the moral problem is real and yet *indifference* to the problem seems both attractive and rational. The Perfect Storm arises from this concatenation of elements: the 'wicked' complexity of the problem, the corrupting force it exercises on reasoning, and the inescapability of inadequate compromises.

The principal component of practical reason at work here is *judgment*. Much hope is invested in democracy to make decisions for the people of Perfect Storm. Democratic decision-making, it is hoped, will provide a way forward that has at least some claim to realising a common good. The outcome of democratic deliberation may not be 'future-proof', but democracy sometimes produces mitigating policies in concert with other states. To that extent, democracy has instrumental value. By the same token, no intrinsic value attaches to democracy and 'the people' are as distrusted as politicians for their capacity for delusion and rationalisation. Indeed, the short-termism of representative democracy is also, clearly, part of the problem of sustainability. Thus democratic processes are valuable only to the extent that they are the least bad processes for generating policy judgments. But it is also assumed that democratic judgment is susceptible to (or is reflective of) the general corruption of moral and political reasoning in Perfect Storm. In essence, the products of democratic deliberation are useful although they may well be practically inadequate *and* morally flawed.

This could produce a more specific practical and political tension. Parliaments might try to pass some laws that accord with sustainability and long-term global interests. But these plans are likely to fail to become law or would be passed in such a compromised form as to be useless. In response, more fundamental constitutional constraints related to sustainability could become attractive. However, the contradictions that they produce would themselves be deeply problematic (Gosseries 2014). On the one hand, it makes sense for parliaments to entrench strict self-denying ordinances concerning resources and sustainable practices and thereby limit further democracy for the sake of future generations. On the other, it is both absurd and repugnant to try to limit the democratic freedom of future peoples: if we can justify

[5] This draws extensively on Gardiner's idea of a 'Perfect Moral Storm' (op. cit.). For present purposes I have distilled and compressed several problems he raises concerning reasoning. I have neglected many important points Gardiner makes about international responses to climate change, the prisoner's dilemma, and the limits of cost-benefit analysis. For this, and other reasons, my analysis is more pessimistic than Gardiner's.

having democracy then so can future generations. The outcomes produced by political institutions are likely to be accepted whether or not they are consistent with the direst warnings about sustainability. But this is not because of their claim to practical (or public) reason. It is because moral judgment in the society of Perfect Storm is simply too corrupted to offer a coherent practical alternative.

This problem of judgment is connected to a second problem, that of knowledge and obligation. In particular, the maxim 'ought implies can' is both crucial and meaningless. The class of impossibilities that will 'defeat' ought is irretrievably confused and indeterminate. The modalities here – what is possible or impossible, be it metaphysically, physically, psychologically, or politically – is hopelessly unclear to the people of Perfect Storm. Whether they 'can' respond to climate change is a question stultified by various competing claims about what is politically feasible, scientifically possible, and morally necessary. It is reasonable for people to *not act* or *not decide* under these circumstances. Or (put slightly differently) it is reasonable for the people of Perfect Storm to assume that the complexity of sustainability renders a good response *impossible* (in a strict sense of rationally and empirically impossible). Accordingly inaction is reasonable because they simply have no consistent reasons for action (see Jamieson 2014, p. 102).

1.5 'Tragic Inertia'

A majority of people in a generation know that the future is disastrous for the next generation.[6] They wish to prevent dangerous climate change, but they want to do this without disruption to settled rights and entitlements. They are committed to the strong normative force of individual choice and autonomy especially as this is realised through the use of free markets. It is likely that unfettered preference-fulfilling behaviour will leave everyone worse off. But acquisition and affluence (and other benefits produced by a free market) do reflect and foster other valuable phenomena like choice and innovation. So, it is rational and morally justified to allow free markets to progressively lead them to ruination. The individual preferences revealed by markets are valuable. But they will never yield sustainability.

First, Tragic Inertia highlights a contradictory relationship between our form of life and the moral demands made by intergenerational justice. It is rational both to celebrate and distrust markets; the acquisition and affluence that comes with them is, under any lens, morally ambiguous. Many people in Tragic Inertia insist that there is a burden of proof against any political project that would negate the rights and choices which are produced under free markets. Conversely, it is feasible to many others that there are circumstances where that burden could be discharged. Either way, even *if* limits on market freedoms could reliably ensure the protection of future generations, there may be no morally defensible way to achieve this without simply 'sacrificing' one's own generation. Indeed the radical frustration of expectations that this would

[6] Based on Hardin (1968). My scenario inverts the basic assumptions of Hardin's position. There, *public* ownership without collective (legal / authoritative) governance produces tragedy. Here, *private* ownership with collective (legal / authoritative) governance generates the tragedy. In some ways Hardin's original version would be equivalent to 'Suicide Club' where rational self-interest leads to tragedy. The many unsatisfactory elements of Hardin's position are discussed by Gardiner (*supra* and below).

produce is both over-demanding and unjust: it asks too much of people and interferes with settled expectations. At the same time it is, also, a morally defensible response to the situation *of our generation in particular* given that they (the inhabitants of Tragic Inertia) have an especial responsibility to prevent climate change (Shue 2022). If we do not make a considerable sacrifice now future generations will be irretrievably harmed. The burden of proof has almost certainly been discharged requiring substantial disruption to their social and economic structures. Many nonetheless deny this is the case or, faced with such evidence, deny that the burden of proof against markets could ever be discharged given that its implications are so morally demanding.

Second, note that Tragic Inertia yields contradictory impulses based in *justice* itself. We should look backwards to settled entitlements but also feel the moral force of forward-looking redistributive responsibilities whether this is the distribution of material goods or rights to future generations. The main debates around global justice are no doubt relevant here: whether we should focus on individual or collective responsibility; how far past injustice governs future distribution especially where, properly calculated, the debts accumulated by the affluent world are by now ruinously large. But Tragic Inertia engages a tension particularly significant for justice and law. Existing 'business as usual', including the typical entitlements found in private law, help to fuel disaster; at the same time they have self-standing moral justifications and cannot (without considerable additional moral and political justification) be defeated wholesale by the claims of distributive justice. So, has the burden against legal business-as-usual been discharged? Justice-talk cannot answer this question, only restate it: is our moral priority respect for settled entitlements, or is it justice through distribution?

1.6 The Concept of Law and Practical Reason

Some initial, general, analysis is in order. How does law *exist* in these situations? And how is legality, as we typically understand it, *justified* and *justifying* in these situations? On my construction of Suicide Club we have a society, with working and developed legal institutions, which is *careless* about its own future endurance. This carelessness need not impugn the quality of its law nor does it impugn its claim to possess law. But caution is needed. The proposition that 'no state with a working legal system can be actively pursuing its own dissolution' might be true. The proposition that 'no state with a legal system is accidentally or inadvertently pursuing its own dissolution' is presumptively false. A state could be (politically or materially) pursing policies that are accidentally undermining its own integrity, independence, or durability. That is, a legal system might assist in creating conditions that undermine that very legal system or in some way undermine legality itself. In actual fact, all the scenarios depict such broadly self-undermining societies: Suicide Club, but also Perfect Storm where it is unclear what would produce a good sustainability policy, and Tragic Inertia where we rely on morally justified mechanisms to produce outcomes that – vis-à-vis future generations – are also morally unjustified and will harm well-being.

How should we approach questions of self-undermining legal systems and societies? Does this question (as Hart would suggest) turn only on 'truisms' about the func-

tion of social institutions (Hart 2012, p. 199), or are there substantial implications here related to the circumstances of justice and the existence conditions of law? In order to understand the problem of self-undermining law we should separate *instrumental* conceptions of law from *functionalist* explanations of law, and their roles in general jurisprudence (see Bennett 2011; Smith 2000 respectively). The background to Hart's original 'suicide club' assertion is that possession of a legal system is for a society to possess a morally neutral instrument, albeit one that will *typically* serve to ensure that society's continuation and will do so by providing certain kinds of protections and remedies. A society is not a suicide club in the sense that both the society and the legal system it creates can be presumed to be seeking their endurance or not working actively against its endurance. This is meant as a broad postulate in the explanation of social institutions – we create institutions that work for us, not against us – and Hart is not saying that legal systems have a conscious *telos* of social or political survival. That a legal system might nonetheless assist in the undermining of that society is perfectly consistent, for Hart, with possessing law. So (conversely) Hart's claim is not the specially functionalist one that elements of a legal system *can always be explained* by their serving to maintain the continuity of the society of which law is a part. Hart endorses something closer to the more modest, instrumentalist, claim that societies strive to create social instruments that work for them not against them. And yet, Hart has to rely on broadly functionalist assumptions about the contribution of law to the endurance of societies to insulate his positivism from being associated with the claim that 'law can have any content' (2012, p. 199). Legal systems enforcing norms contrary to basic human survival will not survive as legal systems, as Hart readily concedes (2012, p. 191). Conversely, then, law is *not* merely an instrument able to serve all and any ends, but nor is it fully explicable in terms of its functions.

This leaves the explanatory significance of 'endurance' or 'survival' undeveloped. It is still unclear what we should make of those norms that will – in the long term – undermine the viability of a society. They therefore invite an analytic question: is the status of the 'minimum content of natural law' (and other basic legal contributions to the endurance of that same legal system) that of mere background condition to law's existence, or a reflection of law's function to ensure survival? And they invite a normative question: at what point do self-undermining norms cease to reflect the permissible self-interest of a generation and start to resemble a 'suicide club'?

This points to a second main connection with the jurisprudential tradition, namely debates about 'wicked' legal systems (Dyzenhaus 2010). In Suicide Club, as outlined here, there is not only something blameworthy in the indifference of the populace, but also in the failure of legal institutions and legal officials to identify and prevent (in) actions undermining the legal system's own continuity. If a legal system really were the vehicle of the dissolution of the society it serves (or culpably failed to challenge that dissolution) we might indict its legal institutions and not just the political actors creating law (see Alexy 2002). Suffice to say that there are counter-veiling claims to reasonableness on precisely this point: it is both reasonable and unreasonable for judges to 'interfere' in politics, it is both reasonable and unreasonable to have a vision of legality where moral criteria circumscribe the limits of permissible positive law. We are not, in other words, on unique jurisprudential territory. Arguably some

debates about sustainability, law and responsibility are equivalent to the question of whether egregious laws can still be law.[7]

Indeed, the question of law's moral failings provokes descriptive and evaluative questions about legal values, legal judgment, and the inclusion of moral consideration into law. In the context of intergenerational justice and future generations this has translated into the challenge of reorientating law to a wider set of values beyond those that law currently recognises (see especially Stokes 2021). This could, in fact, imply one of two things. On the one hand, asking law-makers to anticipate a *greater range of problems or sources of value*, giving value to objects and phenomena previously unvalued. Or, on the other, accepting more *conditionality in our judgments* such that we produce more epistemic and normative humility in law, such that 'mastery of nature' is no longer valorised and that the world itself is treated as more dynamic, fleeting or processual than our legal categories traditionally imply. These positions produce significant challenges of their own. The former ('new sources of value') faces the problem of simply collapsing into the question of legal standing. Rather than create new categories of protection, harm, wrong, or interest, it is more likely that legal systems will identify new victims (nature itself, ecosystems, animals) for *existing* norms and normative categories. This may be valuable, but it is far from a radical response to intergenerational injustice. The latter ('a new conditionality and humility in law') faces a radical mismatch between its epistemic dynamism and the categorical claims made by law. Law's categories and typical forms are such that normative precision, and legal justice, become possible; call for their disruption appears to abandon claim to be addressing law at all. Either way, there are continuities here with the debate about 'wicked' legal systems and, we might note, the inconclusive outcomes of those debates. Law seems to be instrumental in gross injustices. But this does not necessarily represent a good guide to what understanding what law *is*. Put another way, law's failure to prevent systematic injustice or catastrophe is by no means a reason to choose legal non-positivism over positivism as an explanation of the nature of law.

So, canonical debates in jurisprudence are potentially in play here. On the one hand, Hart's 'suicide club' and the 'minimum content of natural law'. On the other, the implications of moral impermissibility on validity and demarcation. Accordingly, and as a general methodological point, the duty to prepare for the future does raise questions about legality as such. We need legal systems to be instruments of planning for the future. And we need legal institutions and legal regulations to be sensitive to the potentialities and limits of human lives and human agency of people in the future. Exploring the positions of Finnis and Shapiro will allow us to concretise these connections.

1.7 Positivism and Non-Positivism

For Shapiro law should be characterised as a form of planning, with planning understood as a joint activity composed of shared expectations. Law is often like, and

[7] *Mutatis mutandis*: (first) the wrong takes place in the future, and (second) the wrongfulness often stems from omission not commission.

often *is*, the facilitation of planning. An adequate account of law, for Shapiro, would capture the ideas of an institution that facilitates our planning, through harmonisation of our willing with expectations of others, under authority (2011, p. 137f).

Planning in Shapiro's work resonates with law's familiar potential for 'coordinating' our actions. However coordination does not fully capture the plurality of plans we create as individuals nor the planned diffusion of responsibilities that we find amongst legal officials. Indeed as a 'joint intentional activity' we, in concert with legal officials, are engaged in a shared practice, a practice of harmonising our wills and intending under plans of various degrees of specificity (Shapiro 2002, p. 394). Planning is also normative – it requires adherence and fidelity to a cooperative and mutually advantageous endeavour – but it is not morality. Rather, law itself must claim the obligatory force and exclusive authority claimed by moral judgments. Law has to claim an exclusionary authority over our practical reasoning and planning. This postulate of legal authority, shared with Raz (1986), makes sense of the internal point of view necessary to explain the distinctive normativity of law while also clarifying how that normativity relates to both individual reasons for action and the capacity of authorities to create reasons. That is, law's authority gives us a reason to act. It is not simply a set of standards we may, or may not, choose to apply to others' actions.

These elements produce the *prima facie* attraction, and central puzzle, of Shapiro's use of 'planning'. Law might be said to help prepare us for the future. It allows us to enter into predictable relationships. But does it amount to *planning for the future*? Legal judgments are there precisely to displace all-things-considered practical or moral judgments about what future states of affairs we individual and collectively should pursue. Tellingly, law for Shapiro is characteristically found in the 'sub-plans' characteristic of private law (contracts, wills) not in grand collective judgments about how we as a society are to live. But even these private sub-plans, if they are to be *plans*, need to be connected with planning for end-states. *Planning* (perhaps in distinction to both 'preparedness' and 'co-ordination') always concerns a desired outcome or end-state. So, to keep within a model of planning, Shapiro has to switch focus to legal officials as part of a planning *system*, a system facilitating but not dictating collective social planning (2011, p. 146). That shift to legal officials within a legal system takes us back to an orthodox positivist conception of the internal point of view: law being used as a standard of judgment rather than being used to further the common good. And this, in turn, engages familiar questions about legal authority.[8]

There are questions raised across the dilemmas about how we reconcile authority as superiority and authority as knowledge. As both Perfect Storm and Tragic Inertia imply, having an authoritative decision-maker is not thereby to ensure that we are doing the right thing (Perfect Storm), and outsourcing decisions about the common good to the market or other manifestations of preferences is no guarantee of moral success (Tragic Inertia). Many of these problems about the future require us to be clear about how we reconcile knowledge expertise, uncertainty and ignorance, and

[8] This problem is apparent not only in positivism's reluctance to see public law as serving the common good, but also in Shapiro's characterisation of private law as the creation of private 'sub-plans'. It may involve individuals 'planning their affairs' and doing so in concert with others. But planning does not capture the remedial and corrective character of private law rules.

the political need for decision-making in a way that works to the common good. We should not expect legal institutions to have coherent, all-things-considered, answers to such far-reaching policy questions. Nonetheless, legal institutions must address such questions where they arise in disputes (Setzer and Vanhala 2019). And, given that legal decisions can and will disrupt our individual 'plans' in name of the common good, we are owed an account of how legal authority legitimately displaces individual entitlements in favour of collective interests. Shapiro's planning theory has few resources to explain or conceptualise law's authoritative assertions of the common good. Law has to aid planning, but it also changes, modifies and adjudicates between plans: what is the 'plan' uniting these legal powers? And courts make authoritative judgments on major social policy issues without certainty about the future. Whose future should they be planning for? The nation's, this generations, or all generations? Shapiro, ultimately, ends up close to Hart vis-à-vis the function of law, survival, and the future, but on slightly shakier ground. We are invited to see law as having a function (and not merely as an instrument) in order to make its typical form and content intelligible. But we cannot make claim to any function beyond individual and collective coordination. Appeal to planning to explicate this idea of co-ordination fails in the absence of a goal or teleology for those authoritatively administering coordination. Legality is, then, entirely compatible with legal systems having elements undermining its own, and society's, existence. Law, as such, implies nothing about the continuation of the circumstances of justice or of any particular legal system.

In contradistinction, Finnis makes the practically reasonable person central to understanding law (2011, p.15f). Just as we cannot understand morality without thinking how the virtuous person is likely to act in various situations, we need to place the acting and reflecting person at the heart of legal theorising. The inclusion of the practically reasonable person in the central case of law by Finnis is intended to provide the internal point of view on law (2011, p. 12). That is, capturing the meaning of legal practices implies appealing to the person trying to pursue various – rational and justifiable – human ends in concert with others also pursuing similar ends or 'basic goods' (2011, p. 81f). The rational person can assume that judges and law-makers acknowledge these rational and justifiable ends and make laws and judgments that are consistent with those ends. Law is morally forceful because legal normativity synchronises with moral normativity *for the practically reasonable person*. This need not mean law is always morally correct. There is no necessary relationship between 'legal' and 'just'. But law will always form part of the obligations of that practically rational person.

Whether or not this is the best approach to the internal point of view necessary for an account of obligation and authority in law, it forces us to contemplate the limitations and boundaries at work in our general practical thinking. We not only have limited time to realise or reconcile our basic goods, but we face the legitimate *limitation* of pursuing those goods by a state, and the difficulty of participating in some of those goods because of the material limits that the world places on our choices. All things being equal, it is never blameworthy in itself to pursue normal human ends. But it might be blameworthy if this is at the expense of others. And it is blameworthy not to limit the means of their pursuit such that others can also pursue them. Whether

those others automatically includes future people should be our first point of critical intervention.

It is never blameworthy to pursue the continuation of one's own life or protect the lives of our loved ones. Nor is it ever permissible to directly attack the basic goods of another (2011, p. 118f). But how we reconcile our pursuit of ends with the actions and lives of others inevitably involves compromises and trade-offs, compromises that will be realised differently in different states. Whether and how we give meaning to, or discount, the lives of those in the future seems to fall within these concerns. The subsidiarity element of Finnis's thought allows these questions to be allocated to different states to decide differently. However, more pressingly, Finnis's philosophical anthropology provides little principled guidance on how intergenerational justice should be conceived. Finnis's opposition to consequentialism means that certain kinds of problems (including the full force of the non-identity problem) may be bypassed by a practically reasonable person. However, this leaves the question of what *rights* future people have and what political responsibilities there are regarding these rights. For instance, if we are not 'attacking' future people directly then the maxim of practical reason prohibiting direct attacks does not apply. Subsuming future generations under *my* concern with sociability would be consistent with other elements of Finnis's account (2011, p. 88) but is similarly problematic. We perhaps must posit some basic concern with those who come after us, and (by virtue of a 'zipper argument' (Mulgan 2006, p. 28) might be thought to care about all those generations that our own generation overlaps with. But this is moving far beyond the intended function of Finnis's Thomist account of self-understanding and self-evidence in practical reason. There are certain ends we cannot deny to ourselves, and we should have reasonable concern for others. Nevertheless, these principles are not intended to capture anything beyond 'this generation' here and now as it moves into the future.

1.8 Demandingness

These discussions of Shapiro and Finnis imply different kinds of challenges for positivism and non-positivism. Responsibilities to the future, for legal positivism, stand in an uneasy relationship with legality. The future is just another regulatory concern that law may or may not tackle. At the same time a legal contribution to social self-destruction, eroding the very circumstances of justice that make legality possible, undermines even the most minimal functional explanations of law's content. At the same time, it is tempting to suggest that very existence of law – as planning – automatically benefits the future. However 'planning' sits awkwardly with law's predominantly deontological features. Responsibilities to the future, for legal non-positivism, stand in an uneasy relationship with practical reason: we share common goods with future people, but this need not mean altering our society's conception of our common good.

One important cross-cutting theme here is demandingness and the limits of our potential agency and therefore our potential obligations. What can be demanded, of individuals and states, as *sacrifices* for the common good? We noted in Perfect Storm (though it might feasibly feature in other scenarios) that the maxim 'ought implies

can' engages questions of possibility and obligation. The maxim usually serves as a block or side constraint on obligation, insisting that the impossible cannot be morally required. More loosely, demandingness can be treated as marking a line between the mandatory and the supererogatory (i.e. praiseworthy but exceptional actions that cannot form perfect duties). By extension, we could construe key elements of our scenarios as boundary disputes between the obligatory and the supererogatory. Antithetical ideas of 'reasonable demands' might flow directly from different conceptions of what we must do, what we are capable of doing, and what it is merely desirable to do. More accurately, we can construe these uncertainties as the intersection of modalities: deontic modalities (what must be, may be, or must not be, done) and alethic modalities (what is physically or metaphysically necessary, possible or impossible). Underneath many debates around climate change and the future both of these modalities are in play. What is politically reasonable or merely desirable? What is actually possible given our resources and capabilities as a state? Or – and this is crucial for connecting practical reason and modern natural law – what are our (agentic and moral) limits given the irrevocably human tendencies, bonds, dispositions or goods that are at the base of human practical reasoning? This question is crucial to connecting Finnis's model of natural law with demandingness and problem futures.

Legal non-positivism should have no problem accommodating demandingness, its value is precisely in placing moral limits on what can have the status of law. It does this by commencing reflection on law with the practically reasonable person, their reflection, and their need for law. As such, problems about demandingness that typically arise for consequentialist theories should not arise. Rather than make calculations about states of affairs, we begin with one's own agency, the ends that one might blamelessly pursue, and the limitations on how we allow our actions to impinge on the lives of others. In other words, natural law, via basic goods, builds in 'natural' limits to what can be demanded and these limits arise from coexistence, not from the dubious normativity of bringing about the best possible state of affairs. But this harmony with a philosophical anthropology does not translate well to generations. My temporal horizon is not that of my state or generation and it is the function of law to prepare for a range of possible, collective, futures. To reduce 'the future' to the sum of possible futures for all individuals living here and now and problematically presentist (Mulgan 2011, p. 18f). While for some theorists this could be overcome through appeal to the human rights of future people, this is not an option for Finnis despite his putative centralising of natural rights in his theory of natural law. (Human rights, for Finnis, track the typical frustrations encountered in pursuing basic goods. Such rights simply do not exist for those agents without the requisite rational agency implied by 'pursuing basic goods' and so, *a fortiori*, do not exist for those who do not yet exist.) In essence, legal non-positivism, or certainly Finnis's conception of natural law, appear to have an automatic harmony with human potentiality and therefore automatically defeat any challenges on the basis of demandingness. We should see this as an inadequate response to the challenge of future generations.

Positivism faces a somewhat different problem because of its ambiguous relationship with consequentialism. In many respects consequentialism provides the best possible moral resources for dealing with future generations: only consequentialism automatically includes future generations, as our moral equals, in moral reflection.

This might prove demanding as a theory of individual obligation. But in the form of rule utilitarianism we seem to be able to reconcile the creation of a set of rules suitable for well-being for future generations and a set of demands that are not excessively onerous for present generations. The theory of authority shared by Shapiro and Raz comes close to this in conceptualising law as the product of rules, and reasons, which together provide us with good, content-independent, reasons for action. Thus law can, though need not, be justified as reason-giving on the basis of rule utilitarian. Of course, Shapiro has no wish to help himself to this argument given the sources thesis, and given his vision of law displacing moral deliberation. However, we have to ask, in the final analysis, whether this is a defensible position for legal positivism in the light of the moral demands of future generations. The ersatz moral force of law, and its coordinating capacity ('planning'), may capture salient features of legal institutions. However, it is precisely these features that look deeply problematic in the relation to future generations. We want law to have concern with the future, even if this is simply to ensure that the conditions of legality remain intact into the future. Legal institutions and officials that are reckless about this are engaged in something like the 'suicide club'. And to have 'planning without a vision of future' is precisely the right characterisation of our parlous political and legal relationship with the future. This is to accept both the Perfect Storm, and Tragic Inertia, as necessary correlates of legality.

2 Conclusion

These scenarios were intended to provoke reflection on practical reason. They produced what looked like different contradictions, or forms of impasse, in our ability to think about or act regarding the future. We expect law to be an important tool for overcoming complex problems in ways that allow individual choice and individual rights to be reconciled with the common good. Alas, rational individual choices can lead to tragedy. And the common good may be a genuinely undecidable, and not just contested, ideal.

Established problems like the non-identity problem sit here alongside various different challenges to typical consequentialist and deontological reasoning. Because they did not allow us to simply appeal to 'justice' or to 'legality' as fundamental principles or fundamental solutions they also reflect our own predicament in complex, plural, and internally conflicted societies lacking single unifying commitments. There is no stable or uncontested common good that would overcome contradictions in our practical reasoning and give an end or objective to our legal systems. It is not (and perhaps cannot be) established that legal systems necessarily tend to produce or support sustainability, not even the sustainability of legal systems themselves. 'Planning' is not a useful candidate for explicating how law involves preparedness for the future. And the 'practically reasonable person' is not a suitable mechanism for dissolving antinomies produced by expansive timescales.

To return again to the question of whether law must 'include' human survival, neither law as such, nor even our regulations on sustainability and environment, are any guarantee that we will have a desirable future as a species. This is consistent with

Shapiro's positivism and Finnis's non-positivism. Neither are committed to the idea that practical reason must lead us to a desirable future. Neither are committed to the idea that societies with law are likely to choose desirable futures. Certainly, as the final arbiter (in both cases) of legitimate and authoritative decision-making, we can expect legal systems to produce judgments about basic social objectives (like survival) and do this in ways which, while not perfect, avoid excessive or unnecessary sacrifices. But law does not on either model guarantee coherence: there is no reason why law has to be internally coherent (it can pull in different directions like practical reason) and it need not be 'globally' coherent such that all of our principles and the material presuppositions of our institutions and rights are protected (it can face genuine antinomies of practical reason). The existence of law does not guarantee survival and, indeed, it cannot even guarantee coherence in thinking about survival.

This discussion has treated problems regarding future generations as contradictions. And, further, those contradictions are treated as significant for law as such. They are not merely regulatory problems requiring better regulatory architecture. They are not technocratic problems requiring a better mixture of knowledge, technology, and policy. Rather, they are tragic choices where the chooser can be taken as a moral failure, or morally tainted, whatever course of action they end-up pursuing. Possession of law is no bulwark against tragedy, not least because possession of law today is no guarantee that we will have law tomorrow.

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