IS FINNIS WRONG?

Understanding Normative Jurisprudence

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Judges and lawyers believe that international law, customary law, and legal systems such as the Third Reich or apartheid law in South Africa are law. But how do we explain the fact that there is one concept of law when there are different conceptions of law with a variety of different features? Finnis, inspired by the Aristotelian notion of central case, adumbrates the idea that the concept of law might be unified by a primary concept which is the concept of "law as practical reason"; that is, law conceived from an ethical perspective. He advances two arguments to defend his methodology: the conceptual and the functional. *Contra* Finnis, the paper shows that neither the conceptual nor the functional argument can successfully support the view that "law as practical reason" is the central case of the concept of law. The study clarifies the Aristotelian notion of central case and illustrates the mistaken application of this notion to the concept of law. However, we also argue that Finnis's insight—the idea that all the different conceptions of law might be unified for the purposes of theoretical research—is fundamental and appealing. This paper aims to reconstruct Finnis's insight through the model of core resemblance. The result is that the different conceptions of law can be unified by resemblance to the concept of "law as practical reason," though there is no identity among the different conceptions of law.

I. INTRODUCTION

Research on the methodology of legal theory aims to elucidate the *ways or paths* both to identify and to determine the subject matter of jurisprudence, that is, to find out the most appropriate method to know, explain, and understand what law is.[1] The idea adumbrated by methodological legal theorists is that finding an appropriate method helps us to find an answer to the question of what law is. However, some legal theorists proceed the

    1. *Cf.* A. Halpin, *The Methodology of Jurisprudence: Thirty Years Off the Point.* 19 CAN. J.L. & JURIS. (2006): 67–105 for a skeptical view on methodology.

other way round and think that prior to finding the appropriate method is the question of what law is. In this paper we deal with the first strategy. The methodological task seems fundamental because is has the potential to enable legal theorists to reach both agreement and meaningful disagreement and to advance our understanding of substantive jurisprudential views.

Controversies have arisen over whether the subject matter of jurisprudence is either a social or a normative fact or a combination of the two. Other controversies center on whether there is continuity between scientific, social, and normative facts and whether, therefore, the way to understand law is through a naturalized methodology,[2] and on whether there is a gap between social facts and normative facts (if so, it is argued, the most appropriate methodology might be conceptual analysis).[3] Other views assume a skeptical approach, denying normative facts and instead advocating an interpretive methodology.[4] Legal theorists who believe in either normative or social facts are committed to the view that there is *something* to describe and that the main task of the legal theorist is descriptive-explanatory. By contrast, legal theorists such as Dworkin believe that there are no normative facts and therefore that there is *nothing* to describe and explain. According to Dworkin, there is only a moral internal or substantive point of view for both legal theorist and legal participants, and therefore jurisprudence is normative all the way down. The belief in an Archimedean or external point of view, Dworkin tells us, produces the illusion of a descriptive-explanatory task for the legal theorist, but the legal theorist is *really* only advancing his or her own substantive moral point of view. Dworkin's methodology will be called the *strong* version of normative jurisprudence.

Finnis, in opposition to the legal theorists above, begins with an answer to the question on method and then searches for an answer on what law is. Finnis (and also to a certain extent Dworkin) advances a methodology in which the practical point of view enables us to identify and determine the subject matter of jurisprudence. Unlike Dworkin, however, Finnis acknowledges that there are both social and normative facts that play an important role in answering the question of what law is. Therefore Finnis believes that

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2. This view is advocated in B. Leiter, *Legal Realism and Legal Positivism Reconsidered,* ETHICS 278–301 (2001); Leiter, *Rethinking Legal Realism: Towards a Naturalized Jurisprudence,* TEXAS L. REV. 267–315 (1997); and M. MOORE, EDUCATING ONESELF IN PUBLIC (2000). J. COLEMAN, THE PRACTICE OF PRINCIPLES (2001), like Leiter, believes that there is a continuity between social and normative facts but does not advocate a naturalized epistemology; he aims to reconcile conceptual analysis with a pragmatic approach.

3. Kelsen believes that there is a gap between normative and social facts but does not explicitly advocate conceptual analysis. *See* H. KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY (2002).

4. *See* R. Dworkin, *Truth and Objectivity: You'd Better Believe It*, PHIL. & PUB. AFF. 87–139 (1996). Dworkin criticizes external skepticism, but embraces internal skepticism: Dworkin's anti-Archimedeanism aims to show that we cannot explain or describe morality from a detached or external perspective and that there is only room for a substantive or internal view on both morality and evaluation. Paradoxically, some followers of Dworkin such as Greenberg aim to show that there are normative facts that make the law. *See* M. Greenberg, *How Facts Make Law.* LEGAL THEORY 157–158 (2004).

the descriptive-explanatory approach is sound but advocates the view that any description and explanation of what law is should be done from the point of view of the man who possesses practical reasonableness.[5] In other words, practical reasonableness allows us to understand the unique qualities of law and the ways in which it can assist in fulfilling the basic goods in our lives. How does Finnis reconcile a descriptive-explanatory method and the view that there is a privileged point of view which is the point of view of practical reasonableness without falling prey to the *strong* version of normative jurisprudence?

Finnis resorts to the Aristotelian idea, later well developed by Aquinas and medieval scholars,[6] of "focal" meaning or "central" case, which is the view that the central case of law is the conception of law advocated by the man who possesses practical reasonableness.[7] This methodological device enables legal theorists, Finnis argues, to differentiate the defective or marginal legal systems from the ones that approximate the ideals of justice. In other words, multiplicity and unification can be reconciled because both the common belief and the legal-positivist approach that wicked legal systems are law, together with the view that law serves ideals of justice, can be coherently unified. Finnis is following Aristotle's insight: for Aristotle, a successful criticism of Plato's theory of the forms needed to show that there is multiplicity, but also unity, in key concepts such as "being," "good," "democracy," and so on. The point of view of the man who possesses practical reasonableness, Finnis tells us, will explain why we consider to be law legal systems that do not possess desirable features such as pursuing the common good. Moreover, the legal theorist will simultaneously be able to explain why we consider law legal systems that do embrace the ideals of justice. If Finnis's argument succeeds, then Finnis's *weak* normative jurisprudence, as opposed to Dworkin's *strong* normative jurisprudence, might be a fruitful *way or path* to answer the main question of substantive jurisprudence, namely, what law is.

The point of this paper is to show that Finnis's methodological view of the practical viewpoint as the "central" case of the concept of law is unsatisfactory and to advance a solution to the question posed by Finnis, namely, to give a unifying concept of law that enjoys multiplicity. Finnis supports his methodological view with two arguments: a conceptual and a functional one. Section III of this paper criticizes the conceptual argument, which adumbrates the idea of law as "central" case. The article proposes that the Wittgensteinian-style approach of law as core resemblance

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5. "Practical reasonableness" is the technical term introduced by Finnis.

6. *See* E.J. Ashworth, *Suarez on the Analogy of Being: Some Historical Background*. Vivarium 50–75 (1995).

7. For the use of Finnis's methodology in legal interpretation *see* T. Endicott, *How to Speak the Truth*, 46 Am. J. Juris. 229–248 (2001).

is more successful than the "central case" method in two ways.[8] First, it circumvents the difficulties of the analysis in terms of the "central" case or focal meaning, and second, it fulfills the roles attributed to the concept of law. The idea of law as core resemblance enables us to show that there is "mediation" of the point of view of practical reasonableness but not "priority" and that, therefore, there are different concepts whose features are connected in an interesting and relevant way through practical reasonableness.

This article also argues that although Finnis's functional argument might seem promising, it entails two difficulties. First, the functional argument is uninformative. It does not establish that law as a coordinating activity for the common good is the *central case* of law. The argument only shows that practical reasonableness is relevant to understanding the point of law, but does not establish that it is the *central case* of the different conceptions of law. The functional argument needs the conceptual argument inasmuch as it is necessary to show that the different conceptions of law either refer to or have as a primary source the idea of law as a coordinating activity for the common good. Furthermore, the argument that law pursues the common good and that therefore the man who possess practical reasonableness is the primary source of other conceptions of law is not a compelling argument for either legal positivists or interpretivists, since they do not accept the basic premise about the object or point of law. The latter believe that the object of law is to provide a justification of the state's coercion, whereas legal positivists believe that the object of law is to coordinate the activities of the participants of a community.

The second difficulty arising from the functional argument is that advancing the functional argument *without* the conceptual one might entail that Finnis's *weak* normativism will collapse into Dworkin's *strong* normative jurisprudence. The *strong* normativist might argue that Finnis's idea of the function of law as a coordinating activity pursuing the common good is a plausible interpretation of what the point of legal practice is that competes with other interpretations on the point or function of legal practice. Finnis might need, the strong normativist could argue, constructive interpretation to solve the disagreement among competing interpretations.

If our proposal of the concept of law as core resemblance to the point of view of practical reasonableness is sound, then we can advance a conceptual argument that might be a fruitful path to explore the possibility of a *weak* normative jurisprudence as conceived by Finnis, but without the difficulties of Finnis's account.

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8. Cf. id. at 234. Endicott interprets the Aristotelian notion of "focal meaning" analysis as an analysis of resemblance to a paradigm. *See* section III of this paper for a different view on this matter.

II. FINNIS'S METHODOLOGICAL CLAIMS

Finnis's methodological claims are intriguing and complex because one can identify two aspects in his methodology: an explanatory aspect and a practical one. The first aspect involves a descriptive-explanatory methodology; this means that he aims to describe legal concepts but believes that description cannot take place without considering the central case of jurisprudence, the point of view of the man who possesses practical reasonableness. According to this view, the legal theorist needs to explain and describe both the marginal cases of law and the core case of law as conceived by the practical point of view. This task cannot be done, however, without taking the insider's point of view; that is, the point of view of the man who has habits, social practices, intentions, and beliefs in a given community. Finnis emphasizes the role of anthropology, statistical analysis, and so on to expand the understanding of the insider's point of view. However, he tells us that such data only help us to understand the degrees of perfection or defectiveness of the practical point of view and the principles of practical reasonableness in different cultures and social practice and that it is the task of the intellect to grasp what is practically reasonable.[9] In other words, what is practically reasonable cannot be derived from the empirical data of human nature.

On the other hand, Finnis rejects Dworkin's view that our starting point should be our own moral and political beliefs, since according to Finnis these beliefs can be false or affected by our prejudices. We need to stand outside these beliefs and revise them in order to reach the "right" reasons.[10] For Dworkin, by contrast, the practical question needs to be answered in terms of a theoretical question: what I ought to do requires an answer to

9. Finnis puts this as follows:

> Descriptive knowledge thus can occasion a modification of the judgments of importance and significance with which the theorist first approached his data, and can suggest a reconceptualization. But the knowledge will not have been attained without a preliminary conceptualization and thus a preliminary set of principles of selection and relevance drawn from some practical viewpoint. . . . The methodological problems of concept-formation as we have traced it in this chapter compel us to recognise that the point of reflective equilibrium in descriptive social science is attainable only by one in whom wide knowledge of the data, and penetrating understanding of other men's practical viewpoints and concerns, are allied to a sound methodology about all aspects of genuine human flourishing and authentic practical reasonableness.

JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980), at 17–18.

10. Finnis asserts:

> Just as there is no question of deriving one's basic judgments about human values and the requirements of practical reasonableness by some inference from the facts of the human situation, so there is no question of reducing descriptive social science to an apologia for one's ethical or political judgments, or to a project for apportioning praise or blame among the actors on the human scene: in this sense descriptive social science is "value-free."

Id. at 17.

the question of what I ought to believe about the grounds of law. The practitioner, judge, legislator, and lawyer need to engage in an inquiry into the grounds of law that make legal propositions true, and this search is a constructive task that requires us to take into account the practitioner's and the theorist's moral convictions.[11] True, it is integrity that will guide the practitioner in constructing the best possible interpretation of what the law is, and the requirement of fit with the bulk of the legal material will enable the practitioner to reach a balance between moral soundness and legal precedent. But it is a theoretically justificatory enterprise, characterized by determining the grounds of law.

The second aspect of Finnis's methodology is the practical one. At the core of Finnis's inquiry is the practical question of what one ought to do according to the principles of practical reasonableness. For Finnis, the theorist needs to explain the practical viewpoint, but once the practical viewpoint has been identified, it impinges on all of us: the theorist and the participant. It is because the practical viewpoint impinges on all of us that we must act according to the principles of practical reasonableness, and the law needs to be shaped according both to such principles and also to the basic values. From the viewpoint of the theorist, according to Finnis, the explanatory task precedes the justificatory task. There is, however, a mutual interdependence between the explanatory and justificatory enterprises. Practical deliberation requires knowledge of the human situation, but at the same time evaluation from the point of view of the man who possess practical reasonableness determines which descriptions are *illuminating* and *significant*.[12] This interpretation of Finnis's methodology as a two-tiered structure

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11. RONALD DWORKIN, LAW'S EMPIRE (1986), asserts in several passages that the interpretive task requires the substantive convictions of the theorist and the judge in order to determine which interpretation best fits the past legal materials and is morally sound: "Each judge's interpretive theories are grounded in his own convictions about the 'point'–the justifying purpose or goal or principle- of legal practice as whole, and these convictions will inevitably be different, at least in detail, from those of other judges." Id. at 87–88. Dworkin explains the role of convictions as follows:

> We can now look back through our analytical account to compose an inventory of the kind of convictions or beliefs or assumptions someone needs to interpret something. He needs assumptions and convictions about what counts as part of the practice in order to define the raw data of his interpretation at the pre-interpretive stage; the interpretive attitude cannot survive unless members of the same interpretive community share at least roughly the same assumptions about this. . . . Finally, he will need more substantive convictions about which kinds of justification really would show the practice in the best light.

Id. at 67.

12. Finnis points out:

> There is thus a mutual though not quite symmetrical interdependence between the project of describing human affairs by way of theory and the project of evaluating human options with a view, at least remotely, to acting reasonably and well. The evaluations are in no way deduced from the descriptions; but one whose knowledge of the facts of the human situation is very limited is very unlikely to judge well in discerning the practical implications of the basic values. Equally, the descriptions are not deduced from the evaluations; but

is the most reasonable and charitable in terms of Finnis's own assertion that he is carrying out a descriptive project. He is eager to distinguish his view from the ideas advocated by normativists such as Dworkin and tells us that he is following the descriptive methodological line traced by Hart. For Dworkin, unlike for Finnis, the justificatory and the explanatory tasks cannot be separated. Having this interpretation in mind, I divide Finnis's defense of the practical viewpoint as the core or primary point of view of the concept of law into two arguments: the conceptual and the functional.

A. The Conceptual Argument

The first argument in favor of the view that the practical viewpoint is the "central" case or "focal meaning" of the concept law is called a conceptual argument, because it first identifies the two *roles* that the concept of law possess in our ordinary usage, namely, unification and differentiation. Then it proceeds to show that the analysis within the framework of "focal meaning" or "central case" best fulfills the roles attributed to the concept of law. The concept of law, Finnis tells us, is used in different ways and in different contexts; in spite of this multiplicity, however, "law" refers to a single concept, and consequently the different conceptions of law refer to a primary source, which is the point of view of the man who possesses practical reasonableness. Hence Finnis's argument shows that multiplicity can be unified by a central case of law. Let us scrutinize the argument.

1. *The Differentiation Role*
The differentiation role is the first role identified by the conceptual argument. Finnis begins with the idea that a descriptive-explanatory method needs to be aware of the different conceptions[13] and self-interpretations of the people whose conduct and dispositions shape the concept to be investigated. The complete understanding of the actions and practices entails an understanding of the point of the action or practice. The agent who executes the action or the participant who participates in the practice gives the action or practice its point or value. Therefore only through understanding the self-interpretations of participants does the theorist understand the attributed value or point.[14] The theorist is confronted, however, by the problem of a variety of conceptions about the value or point of the practice and action. The point of a practice changes from person to person and

> without the evaluations one cannot determine what descriptions are really illuminating and significant.

Finnis, *supra* note 9, at 19.

13. I have chosen the term "conception" for the subjective views that participants or agents give to the point or value of a practice. The term concept is reserved only for the abstract mental entity that aims to grasp and refer to fundamental features of the phenomena, i.e., actions, practices, and so on.

14. Id. at 3.

from society to society.[15] How can the theorist organize these conflicting and different self-interpretations and conceptions? Theorists in the human sciences resort to the identification of a common factor that will unify the variety of conceptions about the point or value of a practice and action. This strategy is criticized by Finnis, and we now turn to this point.

2. *The Unifying Role*

The unifying role constitutes the second role identified by the conceptual argument. Finding an answer to the multiplicity of conceptions and self-interpretations about the point of actions and practices means searching for a common factor that covers all these different self-interpretations and con-ceptions.[16] Kelsen, according to Finnis, is aware that the point or function of an activity is fundamental to the success of the descriptive-explanatory task of the subject matter. Kelsen, Finnis tells us, advances the view that the theorist needs to find *one thing in common* or the *one feature* that characterizes and explain the subject matter.[17] This view presupposes that the concept "law" is connected to one single feature. Raz and Hart, Finnis tells us, break the "naïve" methodology of Austin and Kelsen and argue that Austin and Kelsen are mistaken on the function attributed to law. Hart explains the concept of law by appealing to the practical point of the components of the concept.[18] Both Raz and Hart emphasize that law provides reasons for actions and aims to guide the conduct of the legal participants. They also believe, according to Finnis, in the idea that these different conceptions have a principle or rationale that unifies them.[19]

Finnis criticizes Kelsen because he presupposes that there is a common factor or one thing in common to all the different conceptions of law. But he also criticizes Raz and Hart: although they abandon the idea that there is one thing in common to all instances of the concept law, they adopt an unstable or unsatisfactory "practical point of view."[20] Finnis uses the term "practical point of view" to refer to a point of view that addresses decision

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15. Id. at 4.
16. There is a parallel motivation in Aristotle's introduction of the idea of "focal meaning." Aristotle aims to show, contra Plato, that the concepts of "being," "goodness," or "friendship" do not stand for one single essence but for different essences and properties. However, they can be unified and therefore they can be the subject of investigation by one discipline, i.e., metaphysics in the case of the concept "being." *See* Terence Irwin, *Homonym in Aristotle,* 34 REV. METAPHYSICS 52–544 (1981), at 540. Irwin highlights the difference between Aristotle and Wittgenstein's enterprises. The latter aims to show that there are only resemblances between the different entities and it indirectly criticizes the idea of essences, whereas the former aims to forestall skepticism that might result from a criticism of Plato's theory of the forms. Aristotle aims to show that there are different essences. The argument is in favor of a multiplicity of essences. *See* P. Grice, *Aristotle on the Multiplicity of Being,* 69 PACIFIC PHIL. Q. 175–200 (1988).
17. FINNIS, *supra* note 9, at 6.
18. Id. at 7.
19. Id. at 10.
20. Id. at 13.

and action.[21] Thus Raz[22] adopts the "ordinary man's point of view" and in a later work Raz refers to the "legal point of view"[23] whereas Hart adopts the "internal point of view," namely, the point of view of the man who *uses* the rules as a standard for evaluating his own and others' actions. Raz's and Hart's practical points of view, Finnis tells us, represent steps forward from Austin and Kelsen, who presuppose the man who merely acquiesces in the law because of fear of punishment.

However, Finnis finds both Raz's and Hart's internal points of view unsatisfactory because *they cannot explain the distinction* between different points of view such as that between the anarchist and the ideal law-abiding citizen.[24] Legal theorists need a principle or rationale that will enable them to discriminate between points of view and to identify what is significant or relevant when organizing the different self-interpretations and conceptions of law. Finnis tells us that descriptions cannot do without the concepts found appropriate by the man who possesses practical reasonableness and argues that the Aristotelian notion of *focal meaning* or *central case* illuminates the idea that the point of view of the man who possesses practical reasonableness is the focal meaning of the concept of law.[25]

B. The Functional Argument

Finnis's functional argument is closely connected to the conceptual one. The functional argument advances the view that law is a cooperative activity and that the participants of a political community share a conception of the point or objective of continuing cooperation.[26] This point or objective is called by Finnis "the common good." The common good is a set of factors (a value, an objective, or the conditions for attaining either a value or an objective) that provide reasons to the participants of a political community for collaborating with others, and vice versa.[27] There are, according to Finnis, three different senses of values that enable us to identify the three senses of the common good. The first sense refers to a set of human values, that is, knowledge, life, play, aesthetic experience, friendship, practical reasonableness, and religion, in which we all participate but which we do not exhaust. For example, we participate in the value of knowledge, which opens different horizons and possibilities of realization; this is why some of us become police inspectors, academics, scientists, journalists, and so on. The second sense refers to an *objective* that is either wholly or partially completed; for

21. Id. at 12.
22. For a discussion on the differences between Raz's and Finnis's methodologies, *see* J. DICKSON, EVALUATION AND LEGAL THEORY (2001).
23. J. RAZ, PRACTICAL REASON AND NORMS (1999) (1975).
24. FINNIS, *supra* note 9, at 13.
25. Id. at 10–11.
26. Id. at 153.
27. Id. at 154.

example, when a person has the objective of writing a report, a book, or a journal paper or carrying out an experiment. The third sense is the set of conditions that enables the members of a community to attain reasonable objectives or to realize for themselves values.[28] For example, in the case of the value of knowledge, the conditions for the realization of this value might be access to books, information, lectures, intellectual conversations, adequate laboratories, and so on.

The common good within a political and legal community is related to the third sense. However, the third sense of the common good is possible because the participants of a community have an idea about the common good in the first sense. For example, the conditions of realization of the objective of writing a book, such as access to other books, lectures, and so on, is possible only because the participants in a community have a set of values that includes the value of knowledge. Finnis gives us the following definition of law:

> Throughout this chapter, the term "law" has been used with a focal meaning so as to refer primarily to rules made, in accordance to regulative rules, by a determinate and effective authority (itself identified and, standardly, constituted as an institution by legal rules) for a "complete" community, and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the community's co-ordination problems (and to ratifying, tolerating, regulating, or overriding co-ordination solutions from any other institutions or sources of norms) *for the common good of that community*, according to a manner and form itself adapted to that common good by features of specificity, minimization of arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities.[29]

Finnis tells us that this concept is the *focal meaning* of the concept of law. The construction is within the boundaries of the common use of the term "law" and therefore corresponds closely to the different existing social phenomena.[30]

However, Finnis advances the "differentiation argument" in chapter I of *Natural Law and Natural Rights* and tells us that we need to assess the different self-interpretations and conceptions of the concept of law, which vary from person to person and from culture to culture. He proposes to advance a concept of law in which the *focal meaning* or the *central case* is the point of view of the man who possesses the practical point of view. Law as practical reasonableness, therefore, will be the primary or source concept of the different conceptions and self-interpretations of law. In other

28. Id. at 155.
29. Id. at 276.
30. Id. at 277.

words, the point of view of the man who possesses practical reasonableness determines what law is. The question that has to be answered is why practical reasonableness *should* determine what law is. According to the functional argument, the answer is as follows:

Premise 1: The point or goal of law determines what law is.

Premise 2: The point or goal of law is to coordinate the participants' activities for the common good of that community, i.e., law establishes the conditions for the realization of a plurality of values such as practical reasonableness.[31]

Premise 3: The central case of law determines the concept of law and therefore what law is.

Premise 4: Law as practical reasonableness[32] determines the central case of law.

Premise 5: Law as practical reasonableness determines what law is.

Conclusion : "Law as practical reasonableness determines that law is a coordinating activity for the common good of that community, i.e., law establishes the conditions for the realization of a plurality of values such as practical reasonableness. This is the central case of law."

Premise 3 establishes that the *central case* of law determines what law is, but Premise 2 has already told us what law is. So the methodology advanced by the idea of the *central case* becomes redundant. The conclusion is uninformative and circular. Finnis tells us that law is a coordinating activity for the common good of that community and that this definition is the *central case* of law; it therefore determines and unifies the different conceptions of law because it reflects the point of view of practical reasonableness. The answer advanced by the functional argument to the question why the point of view of practical reasonableness *should* determine the *central case* is that law should be defined by its goal or point. The implicit premise is that only the point of view of practical reasonableness can reveal the true goal or point of law. The argument operates backwards: we already know what the point or goal of law is and hence what law is. We subsequently reach the conclusion that only because we have practical reasonableness can we formulate the goal or point of law.

Consequently, the argument does not explain *why* law as practical reasonableness *should be* the *central case* of the different conceptions and

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31. *Cf.* L. Green, *Law, Co-ordination and the Common Good,* 3 Oxford J. Legal Stud. 299–324 (1983). Green criticizes Finnis's attempt to reconcile natural law theory and legal positivism. Green argues that there is a tension between Finnis's idea of the common good, which involves a deep structure of values, and his view that the point of law is to coordinate the activities of the participants in a community, which involves a structure of preferences. Preferences are *appearances*, whereas values pertain to the domain of *reality*. Therefore they are bound to conflict.

32. The statement of "the man who possesses practical reasonableness" has been formulated as "law as practical reasonableness." *See* section III for a clarification on this point. This formulation does not affect the argument.

self-interpretations of law. It demonstrates only that we need practical reasonableness to reveal the point or goal of law.

The functional argument depends on the conceptual one: it needs to demonstrate that the different conceptions of law *are unified by* law as practical reasonableness as the *central case.*

Finnis's insight that law as practical reasonableness plays an important role in determining the concept of law and unifying the different conceptions and self-interpretations of the concept of law is important and sound. However, we have shown that the functional argument is flawed since it is uninformative. In addition, consider the argument of legal positivists and interpretivists. They do not accept the view that law is a coordinating activity for the common good of a community, and for them, therefore, the functional argument is not compelling. Furthermore, legal interpretivists such as Dworkin could argue that the concept of law as given by Finnis is a competing conception of the point or value of legal practices, and consequently we need to provide the best possible interpretation of the different competing views on the point or value of law. Finnis's legal theory, according to this view, would collapse into Dworkin's constructivist jurisprudential approach.[33] What, then, is the way out of this argumentative route? How can we incorporate Finnis's insight on the importance of the point of view of practical reasonableness to advance a concept of law that gives justice to the different conceptions and self-interpretations but that also unifies these different conceptions? I provide an answer to this question in section III.

III. A RECONSTRUCTION OF FINNIS'S CONCEPTUAL ARGUMENT

We scrutinize above the two roles attributed by common usage to the concept of law. However, we find a difficulty with the argument that says that the core or source of all conceptions of law is the point of view of the man who possesses practical reasonableness. The Aristotelian notion of *focal meaning* or *central case* refers not to points of view but rather to concepts, and in order to ensure terminological clarity without a radical change in the argument, I propose the following formulation: the point of view of the man who possesses practical reasonableness determines the core concept or "central" case of the concept of law. We can then talk of "law as determined by practical reasonableness."

In the following section I elucidate and criticize Finnis's application of the Aristotelian notion of "focal meaning" or "central case" to law.

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33. *Cf.* B. Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence,* 48 AM. J. JURIS., 17–52 (2003), who argues that Dworkin needs a Finnis-style argument to ground a normative jurisprudential methodology.

A. Criticism of Law as "Central Case"

Finnis resorts to Aristotle's ideal of focal meaning (*pros hen* or associated homonym),[34] which involves the view that some words, such as "health," "friendship," "being," or "good," are non-univocal; however, their different meanings can be associated with a core concept, and this association can be realized in different ways. Thus there are degrees within concepts. Finnis tells us that there are central cases of constitutional government and there are peripheral cases (Hitler's Germany, Stalin's Russia, and so on).[35] Similarly, there is a central case of friendship as a relationship of love and loyalty and peripheral cases such as peers, business partners, and so on. The term "health" is a good illustration of the difference between focal meaning and peripheral cases. An athlete, a complexion, and a diet might all be called healthy. Milo the wrestler is healthy and wrestling is also healthy. They are, however, not healthy in the same way. Nevertheless the two ways of being healthy are connected. The way in which wrestling is healthy is parasitical upon the way in which Milo is healthy. Wrestling is healthy in the sense that it tends to produce health in its practitioners.[36]

The explanatory task, in correspondence to the two roles of unification and differentiation attributed to the concept of law, should not be confined only to the central case but should also incorporate peripheral cases, since understanding the concept involves understanding the dissimilarities and analogies between the central and the peripheral cases.[37]

If "law as determined by practical reasonableness" is the central case or focal meaning of any description or explanation of law, then "law as determined by practical reasonableness," in the Aristotelian sense, is the

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34. Shields distinguishes between discrete and associated homonym. In the former, the same term refers to different entities that are not connected. For example, the term "bank" refers simultaneously to "river bank" and "bank" as a financial institution. In the latter case, the term refers to different entities that are associated in virtue of a common source or principle. This association might also be called "focal" meaning (G.E.L. Owen, *Logic and Metaphysics in Some Early Works of Aristotle, in* LOGIC, SCIENCE AND DIALECTIC [M. Nussbaum ed., 1986]), "focal connection" (Irwin, *supra* note 16), "central case" (FINNIS, *supra* note 9), or "core-dependence homonym" (C. SHIELDS, ORDER IN MULTIPLICITY (1999). *See* SHIELDS, ORDER, at 11. It is important to distinguish between associated homonym and Wittgenstein's idea of "family resemblance," in which the different entities have overlapping features but are not connected by a common principle or source to which they all refer.

35. FINNIS, *supra* note 9, at 11.

36. Aristotle uses the term "health" as an example of "focal meaning":

Now that which is indeed spoken of in many ways. But it is spoken of with regard to one thing and a single kind of nature. Its position is similar to that with health. Everything that is healthy is spoken of *with regard* to health. So, one thing is said to be healthy by dint of preserving health, another by dint of producing it, another by being a sign of it, another by being capable of having it. It is in just this way that which, although spoken of in many ways, is nevertheless always spoken of with regard to a single principle.

ARISTOTLE, METAPHYSICS 1003 a34–b6.

37. FINNIS, *supra* note 9, at 11.

core concept of positive law. According to Aristotle, this is a logical and semantic claim.[38]

In this section, I discuss Finnis's main example of "focal meaning," that is, "friendship," and argue that Aristotelian scholarship is not clear on the point of whether "friendship" is a clear example of focal meaning. Indeed, some Aristotelian scholars argue that it is a case of analogy or resemblance but not of focal meaning. I subsequently take a less controversial example of focal meaning, the concept "life," and endeavor to show that the concept "law" cannot be analyzed in terms of "focal meaning" or central case. Law, rather, is like the concept "friendship" and instead should be analyzed as resemblance or analogy. In section III.B I advance a notion of resemblance that, I believe, is necessary for the concept of law to play the desirable roles attributed to it. The criticism of "focal meaning" aims to refute the view that "law as determined by practical reasonableness"[39] has the priority of *central case* attributed by Finnis. The paper advances "law as core resemblance" as a more fruitful strategy to examine the concept of law.

Let us start with Aristotle's motivation for introducing the notion of focal meaning. Aristotle's criticism of Plato's theory of the forms has its basis in the idea of non-univocity, which involves the view that terms such as "being," "good," and so on actually refer to different entities and properties, and therefore we cannot say that there is unity on what is "good" or "being." However, Aristotle's belief in the possibility of the unity of science and his commitment to non-univocity mean that there cannot be one science for the different ways of "being." Aristotle nevertheless conceives that within the multiplicity of non-univocal terms there is some order, and this subsequently gives rise to the idea of associated homonymy or "focal" meaning. Homonymy plays a twofold role: a critical and constructive one. On the former task Aristotle uses homonymy to criticize his predecessors, on the latter he aims to show that different entities subsumed under the same term are actually connected by a core concept. Shields calls this "core dependence" *homonym*, and its most sophisticated formulation is as follows:

> CDH_3: *a* and *b* are homonymously F in a core-dependent way iff: (i) they have their name in common, (ii) their definitions do not completely overlap, and (iii) necessarily, if *a* is a core instance of F-ness, then *b*'s being F stands in one of the four causal relations to *a*'s being F.[40]

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38. *See* Owen, *supra* note 34; *cf.* Irwin, *Homonym in Aristotle*, 3 REV. METAPHYSICS 523–544 (1981). Hamlyn claims that Owen's use of "focal meaning" is misleading, since Aristotle's purpose is to refer to concepts rather than "senses" of a term. Then the term "focal connection" is more accurate. Finnis uses the term "focal meaning," and therefore to avoid confusion we follow Finnis's terminology.

39. For simplicity, I interpret the term the "moral viewpoint" as "moral law." The term should be understood in terms of Finnis's requirements of practical reasonableness.

40. SHIELDS, *supra* note 34, at 119.

Aristotle defines the four causal relations as follows: formal, final, material, and efficient. Thus, the propositions "Socrates is healthy," "vitamins are healthy," "Socrates' complexion is healthy," and "Socrates' regimen is healthy" stand in an *efficient causal* relation. Vitamins are the efficient cause of Socrates' health, as is Socrates' regimen. Finally, Socrates' complexion is caused by a healthy organism such as Socrates' body. But entities may also stand in a relation of *final causation,* such as in the propositions "scalpel is medical" and "medical doctors," since a scalpel is not a mere knife but is a scalpel because its function is medical and doctors are doctors because their function is also medical. But the relationship between the core and the entities might also be in terms of *material causation:* muscle is called healthy by being the material cause of a healthy organism. Even though we may assert that none of Aristotle's example uses formal causation, there are plausible relationships between core cases and other cases that might be established in terms of *formal causation.* The reason to resist the introduction of formal causation as a possible relationship among entities is, in principle, justifiable. The relationship between the core concept or terms and the entities should be understood as something short of formal identity. If there is a formal causal relationship between two entities that refer to the same term, then one might say that it is a case of synonymy and not homonymy.

Shields has argued that it is possible to conceive the formal causation between two entities in terms of extrinsic rather intrinsic denomination, that is, one in which a subject is called F not because it realizes F-ness in an intrinsic way but because it stands in some suitable relation to F-ness.[41] Thus it is arguable that nonexperts with some skills to heal are called medical appropriately: even though they lack the appropriate training and knowledge in science, they might realize the form in question (i.e., medical) incompletely or inchoately.[42] Therefore a folk healer counts as medical because the nature of his practice has a formal relationship to medicine.[43]

We should emphasize that the core cases should be prior to the related cases. Shields defines this as follows:

> Hence, we see that some F is derived from core-dependent homonym only if: (i) there is some core instance of being F; (ii) its account makes essential reference to that core instance; and (iii) an account of the core instance makes no essential reference to it.[44]

Thus, in order for a term to be the "focal meaning, "central case," or "associated homonymy," it is necessary that (1) the entities or properties

that the term refer to are different and their definitions do not completely overlap; (2) the different entities or properties are connected in virtue of a common source or principle; (3) the entities are connected to the common source, but the source does not need to refer to the entities or properties (asymmetry); (4) the connection to the common source is in virtue of one or more of the four causal relations: formal, final, material, and causal.

Now that we have a clear concept of "central case" or "focal meaning," let us proceed to examine two terms scrutinized closely by Aristotle: "life" and "friendship."

In *De anima* Aristotle acknowledges that there are different capacities in living beings: lower-order capacities and higher-order capacities. Consequently, some living beings exercise their capacities for reproduction; other living beings do not need to, since they are everlasting. Thus the appearance of nonbiological beings such as God indicates the possibility that the term "life" is a non-univocal term. Can we establish a core association among the different entities that the term refers to? Shields provides the following exemplary propositions:

  (I)   Socrates is alive.
 (II)   Pavlov the dog is alive.
(III)   My florabunda rosebush is alive.
(IV)   God is alive.[45]

Aristotle believes in the non-univocity of "life": for a living thing to "be," it has to be alive, and in the case of living things, essence is identical with life; consequently dog, God, florabunda rosebush, and Socrates have different essences, and life is not the same for dog, God, florabunda rosebush, and Socrates. But in what sense are these different entities associated? According to Shields, the core-homonymous definition of life is in terms of an intentional system and Aristotle's God is the supreme and complete intentional system.[46] For Aristotle, life is the actuality of mind (M1072 b26–27); however, not everything that is alive has a mind. Nevertheless if we understand that the actuality of mind is the actualization of the highest and best objects of thought, then we can assert that the core of life is a form of enriched intentional activity. The question that arises concerns the way that plants, animals, and other intentional systems are related to God as an intentional system. Shields argues that the relationship is one of formal causation:

> For though God's life is a formal cause of the lives of other creatures, the forms thus realized are already distinct. The result will be that living things bear formal causal relations to a pure and complete enriched intentional system without themselves being pure, complete or enriched.[47]

45. Id. at 185.
46. Id. at 189.
47. Id. at 190.

The term "friendship" is much more controversial than the term "life." Aristotle's *Eudemian Ethics* introduces "focal meaning" and analyzes the term "friendship" as focal meaning. However, in the later writing, *Nichomachean Ethics,* friendship is not used as an example of "focal meaning."[48] Fortenbaugh argues that "friendship" is not a case of "focal" meaning but rather of resemblance and that therefore the *Eudemian Ethics* errs in suggesting "focal meaning" for "friendship."[49,50] He says there are two possible ways to analyze "friendship": analogical relationship and resemblance, but not "focal meaning" or "associated homonymy."

First, let us scrutinize the analogical relationship between different kinds of friendship. Friendships are purposeful, and one can identify three different kinds of friendship according to their purpose: utility, pleasure, and good. (*NE* 1156 a7–8). The latter is friendship among moral men, whereas the preceding two are friendships for some advantage. They can be called "friendships" without equivocation. According to Aristotle, one may say that there is an analogical relationship between the three kinds of friendship (*NE* 1157 a33): as the good is related to friends of goodness, so the pleasant is related to friends of pleasure. The associations are analogous and therefore they enjoy a quasi-common nature.[51] The second kind of relationship is resemblance. Aristotle believed that the non-univocity of friendship can be analyzed as a resemblance, presupposing a direct relationship based on similarity or a common feature among the different types. Unlike the Wittgensteinian "family resemblance," in which different entities have overlapping features but do not require necessary common features for each entity to be associated, Aristotelian resemblance requires a common feature across the different entities in order for those entities to be associated. For the different kinds of friendship the common features are reciprocal affection, wishing well, and awareness (*NE* 1155 b27–1156 a5). This association, consequently, is not a definitional association of the type "focal" meaning or "associated homonym" as described above. Thus, Fortenbaugh argues, though friendship for pleasure or utility might resemble the perfect friendship, the other friendships are not focally dependent upon perfect friendship.[52] Fortenbaugh explains this as follows:

48. *Cf.* R. GAUTHIER & J. JOLIF, L'ETHIQUE A NICOMAQUE (1959); and Owen, *supra* note 34. They agree that there is focal meaning in the Nichomachean analysis.

49. W.W. Fortenbaugh, *Aristotle's Analysis of Friendship: Function and Analogy, Resemblance, and Focal Meaning*, PHRONESIS 51–62 (1975); *Cf.* A.D.M. Walker, *Aristotle's Account of Friendship in the Nichomachean Ethics*, PHRONESIS 180–196 (1979). Fortenbaugh is one of the authors cited by Finnis to support his claim on "central" case or "focal" meaning.

50. Fortenbaugh, *supra* note 49, at 51–52.

51. Id. at 54.

52. *Cf.* J. Cooper, J., *Aristotle on the Form of Friendship*. 30 REV. METAPHYSICS 619–648 (1977). Cooper highlights the tension between Aristotle's *Rhetoric* and the *Nichomachean Ethics*. In the former, Aristotle endorses the idea that friendship is mutual well-wishing out of concern of one another, and this is a characteristic of friendship of whatever type. By contrast, in the latter, Aristotle seems to belief that friendship by utility and friendship by pleasure are wholly self-centered. Cooper rejects this interpretation and argues that the three types of friendship have

> Though they resemble perfect friendship, the other friendships are not focally dependent upon perfect friendship. First we may consider the friendship of pleasure seekers. This kind of friendship is essentially an association for the sake of pleasure. It can be defined as an association based upon pleasure and involving reciprocal affection and mutual awareness. The definition mentions neither perfect friendship nor something which implies perfect friendship. The definition does mention pleasure which is a point of similarity between the friendship of pleasure seekers and the friendship of morally good men. But pleasure is not conceptually dependent upon perfect friendship, so that the friendship of pleasure seekers is not conceptually dependent upon perfect friendship and its definition need neither mention perfect friendship nor include the definition of perfect friendship.[53]

We can understand and engage in friendships for pleasure or utility without having an understanding of perfect friendship.

Finnis proposes that "law" is like "friendship," but if he is right, then "law as determined by practical reasonableness" is not the central case of law. Positive law might have the following features: "goal-orientated towards co-ordination of activities," "claiming authority," "posited by human beings," whereas the concept of "law as determined by practical reasonableness" has features such as "goal-orientated towards coordinating activities for *the common good*," "claiming authority," "*having* authority," and "posited by human beings." These latter features overlap with the features of positive law, but the concept of positive law will not be core-dependent on the concept of "law as determined by practical reasonableness." As in the case of friendship, in which understanding of mere pleasurable friendship does not require the understanding of friendship among moral men, we can understand and engage with the concept of law as coordinating activities without needing to have an understanding of the perfect concept of coordinating activities toward the common good.

Can we find a better exemplary case to show that positive law is core-dependent on "law as practical reasonableness" and therefore that the latter is conceptually prior to the former? One possible strategy is to resort to the concept "life," which Aristotle has identified as a clear example of "focal meaning." Can we say, consequently, that the concept "law" is more like the concept "life" than "friendship"? The answer is negative. In the case of the concept "life," all different concepts of "life," such as the life of a dog or that of a florabunda bush, have a formal relationship with the core concept of the perfect intentional system, which is God. They are all core-dependant of

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a common feature: the friend will wish his friend whatever is good for his own sake (id. at 630–631). If Cooper is right, then there is neither resemblance nor core-dependence to a central case among the three kinds of friendship. In other words, friendship by utility, friendship by pleasure, and friendship among moral men are synonymous rather than homonymous. This seems to contradict the *Rhetoric,* the *Eudemian Ethics,* and the *Nichomachean Ethics.* I am grateful to Amanda Perreau-Saussine for making me aware of Cooper's interpretation.

53. Fortenbaugh, *supra* note 49, at 58.

God as intentional system, though they are an incomplete or inchoate form of the perfect form of intentional systems. By contrast, "law as determined by practical reasonableness" and "positive law" have different goals.[54] The goal of "law as determined by practical reasonableness" is the " pursuit of the common good," and the goal of "positive law" is the coordination of activities of the legal participants. Therefore one might say that they are different concepts since they have different goals. However, one might raise the question of whether they can be associated in terms of "focal" meaning.

Let us explore this possibility. One might say that there is a common feature to the effect that both "law as determined by practical reasonableness" and positive law aim to coordinate actions, but one cannot say that in order to understand or define positive law as a coordinating activity, one needs to understand "law as determined by practical reasonableness" as a coordinating activity *toward the common good*. One might say that one *ought* to find the common feature of coordination toward the common good in the different kinds of law : "law as determined by practical reasonableness" and positive law; but this is not a case of conceptual or definitional "focal" meaning or central case. In the case of "life," one can find a perfect intentional system, that is, God, and other intentional systems, such as plants, dogs, human beings, which have a *formal* causal relationship with the perfect intentional system. The other intentional systems are imperfect in relation to the perfect one, like the man who has learned the crafts of healing but who does not have the training of a medical doctor; however, one may apply to both the term "medical" without equivocation.

Can one establish a *formal causation* between "law as determined by practical reasonableness" and "positive law"? If so, positive law is conceptually core-dependent on "law as determined by practical reasonableness," since the perfect case of the coordination of actions is coordination of actions *toward the common good*. Other kinds of coordination of actions, such as coordination by positive law, are incomplete or inchoate. Let us revise the idea of God as the perfect intentional system. For Aristotle, an intentional system has an end-directed behavior and each kind of intentional system has a different goal or end; that is, God's end is contemplation, human beings' end is to be rational and so on. Something counts as good of its kind to the degree it realizes its end. Formal causation is seen as a threat to core-dependence homonym or "central case" methodology because it establishes identity between different concepts; that is, God's life and human beings' life are synonymous. Thus synonym and homonym are exclusive; then if the relationship between two things is *formal causation,* there cannot be homonym between such concepts. For example, "*If Socrates causes me to be healthy by his good example, then perhaps his being healthy is a formal cause of my being healthy; but then we are synonymously healthy.*"[55]

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54. This is also acknowledged by Finnis.
55. SHIELDS, *supra* note 34, at 115.

In the legal context, the perfect law is law as a coordination of activities for the common good, and it is arguable that this core concept is the *formal cause* of other concepts of law such as positive law.[56] An objector might argue, however, that if "law as practical reasonableness" is the *formal cause* of other concepts of law, then there is identity and therefore synonym between them. Finnis has failed, the objector might continue, to show that the concept of law can be non-univocal, and therefore his aim at showing that the concept of law as practical reasonableness can be the central case of different conceptions of law is also doomed to fail. Finnis, however, might resort to the example of God as a perfect intentional system and human beings, plants, and animals as inchoate forms of the perfect intentional system, and might argue that law as practical reasonableness and positive law have different goals or ends. As it is God's end to contemplate, it is the end of law as practical reasonableness to *coordinate the activities of the legal participants toward the common good.*

In a similar fashion, Finnis could argue, the end of positive law is to coordinate activities of the legal participants *simpliciter*. But positive law is an inchoate or incomplete form of law as practical reasonableness. However, the weakness of this defense is apparent. The goodness of something within its kind is determined by the realization of its end. In other words, the end provides the normative standard for its being a good instance of its kind. In the example of intentional systems, it is good for Socrates to contemplate and for a dog to be rational, *but neither Socrates ought to contemplate nor a dog ought to be rational.* Similarly the end of positive law is to coordinate the activities of the legal participants, even though some laws are unjust or against practical reasonableness. It is good, however, for positive law to coordinate the activities of the legal participants toward the common good as it is good for Socrates to contemplate, but the latter kind of coordination is not the end of positive law as it is not the end of Socrates to contemplate. It is therefore not true that positive law ought to coordinate the activities of the legal participants toward the common good. If there is a *formal causal* relationship between the core concept of law as practical reasonableness and the core-dependent concept of positive law, then the consequence is that law as practical reasonableness and positive law have different ends and different *ways* of being "good," as Socrates and a dog have different ends and different *ways* of being "good."

This is an undesirable consequence for natural lawyers such as Finnis, since it means that "law as determined by practical reasonableness" and positive law refer to different concepts and therefore they belong to different disciplines. Consequently, "law as determined by practical reasonableness," it is arguable, is to be studied by moral psychology or moral

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56. For a defense of law as an archetype where different conceptions of law "participate" in the idea of law *see* N. Simmonds, *Law as a Moral Idea*, U. TORONTO L.J. 61–92 (2005).

philosophy, and positive law is the exclusive subject matter of legal theory or jurisprudence. For legal positivists such as Kelsen, this is precisely their point: law is non-univocal, and the different kinds of law, that is, "law determined by practical reasonableness" and positive law, pertain to different disciplines.

The legal positivist might accept the quasi-formal causal relationship between law as practical reasonableness and positive law; as in the case of different types of friendship, there is some analogy between "law as determined by practical reasonableness" and positive law, and consequently they share a quasi-nature; that is, they both guide behavior (though in different *ways*).

In summary, if Finnis resorts to the example of "life" to establish the case for core dependence between "law as determined by practical reasonableness" and "positive law," the causal relationship that is established seems problematic since it might entail either a relationship of identity or a core-dependence homonym that recognizes different ends and *ways* of being good among the associated concepts.

But can we argue that there are other kinds of causal relationship between "law as determined by practical reasonableness" and positive law such as *efficient, final, or material* causation? Let us take the case of material causation. We cannot reasonably say that "law as determined by practical reasonableness" is the material cause of positive law, since there have been legal systems that possess all the features of positive law but lack the features that characterize "law as determined by practical reasonableness" such as coordinating the activities of the legal participants to pursue the common good. Let us examine the case of *final causation*. Is it arguable that the finality of positive law *is caused* by the finality of "law as determined by practical reasonableness"? In the former, the law will pursue coordination without pursuing the common good. Finnis would need to explain the ways in which the end of positive law is *necessarily caused* by the end of "law as practical reasonableness." However, a number of examples of legal systems show that coordination of activities among the participants of a community has been achieved without coordination of activities among participants pursuing the common good. Finally, let us consider the case of efficient causation. How can "law as determined by practical reasonableness" be the efficient cause of positive law in the same way that "vitamins are the efficient cause of Socrates' health"? It is clear that we can have a positive system of law that has not been efficiently caused by "law as determined by practical reasonableness," as wicked legal systems of the twentieth-century legal systems have shown.

We have shown the difficulties involved in the idea that "law as determined by practical reasonableness" should be understood as *conceptually or logically prior* to positive law, because law should be analyzed as *focal meaning*. Can we defend the view that law should be analyzed as a case of resemblance? This is the point that we now turn to.

B. Law as Core Resemblance

In this section of the paper it is claimed that the idea of core resemblance provides a special kind of priority[57] that is significantly different from the priority of focal meaning or central case as advanced by Finnis. The fruitfulness of core resemblance for the analysis of the concept of law is apparent: it enables the concept of law to fulfill the differentiation and unifying roles and to circumvent the difficulties of the *central case* analysis.

What is core resemblance? How might the concept of law be analyzed in terms of core resemblance? In his book *Philosophical Investigations,* Wittgenstein adumbrated the view that different entities can be related to each other in a relevant way and be subsumed under the same concept without having to have a *single common feature.* To the question of how it is that we are able to use a single concept—for example, "good," "democracy," "number," "games"—to mean a variety of particulars, authors such as Locke respond that we can refer to these different particulars as the same concept because they do in fact possess a *common quality.*[58] In other words, the different entities have a single quality that authorizes the use of a single concept. We talk of good knives, good walks, and good friends, and they all have the quality of goodness. However, one might object, good knives and good friends are "good" in different ways. Similarly, we refer to the United States, Germany, the United Kingdom, and Mexico as democratic countries, but the concept "democracy" refers to different characteristics in each particular case.

In paragraphs 66 and 67 of *Philosophical Investigations,* Wittgenstein introduces the notion of family resemblance with the following analogy:

> 66. Consider for example the proceedings that we call "games." I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to all of them?—Don't say: There *must* be something common, or they would not be called "games"—but *look* and *see* whether there is anything common at all.—For if you look at them you will not see something that is common to *all,* but similarities, relationships, and a whole series of them at that. To repeat: don't think but look!—look for example at board-games, with their multifarious relationships. Now pass to card-games; here you find many correspondences with the first group, but many common features drop out, and other appear. When we pass next to ball-games, much that is common is retained, but much is lost.—Are they all "amusing"? Compare chess with noughts and crosses. Or is there always winning and losing; or competition between players? Think of patience. In ball games there is a winning and losing; but when a child throws his ball at the wall and catches it again, this feature has disappeared.

57. This is probably the kind of priority of the "central case" that Hart had in mind in his book THE CONCEPT OF LAW: "For it is clear that the diverse range of cases of which the word "law" is used are not linked by any such simple uniformity, but by less direct relations–often of analogy of either form and content- to a central case"; H.L.A. HART, THE CONCEPT OF LAW (1994), at 79.

58. JOHN LOCKE, II AN ESSAY CONCERNING HUMAN UNDERSTANDING xi.9 (1979); id. III at iii.6.

And the result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.

67. I can think of no better expression to characterise these similarities than "family resemblance," for the various resemblances between the members of a family: build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way.—And I shall say: "games" form a family.[59]

Bambrough advances the following interpretation of the overlapping of different features among different entities that are subsumed under the same concept:

e	d	c	b	a
ABCD	ABCE	ABDE	ACDE	BCDE

Thus instances "e," "d," "c," and "a" have the feature B in common; however, "b" has only overlapping characteristics with the other instances. It lacks the common feature B.[60]

A number of objections have been raised against the idea that different particulars or entities can be subsumed under the same concept because there is a family resemblance among their features.[61] The main argument is that we can always find resemblances between different entities and find new entities *ad infinitum*. The notion of family resemblance leaves the boundaries of any concept open to an infinite potential number of entities, and therefore, we might say, everything resembles everything else. The problem is called "the underdetermination of the extension" of family resemblance concepts. One possible solution is the idea that there is a basic predicate that determines the extension of a family resemblance concept. In other words, there is a subclass of members, and all the members that are subsumed under a certain concept ought to resemble the other members of the subclass. The members ought to have at least one feature in common with other members of the subclass, and this is a sufficient but not a necessary condition for an entity to be subsumed under a particular concept. However, some members of the general class *might* not share common characteristics or features. A number of authors in a variation of the paradigm case have advanced the idea of a list of the total characteristics that belong

59. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Ascombe trans., 3rd ed. 2001) (1953).

60. R. Bambrough, *Universals and Family Resemblances,* PROC. ARISTOTELIAN SOC'Y 207–222 (1961). *Cf.* T. Tessin, *Family Resemblance and the Unity of a Concept,* 19 PHIL. INVESTIGATIONS 62–71 (1961).

61. M. Mandelbaum, *Family Resemblances and Generalisation Concerning the Arts,* 2 AM. PHIL. Q. 219–228 (1965); H. Wennerberg, *The Concept of Family Resemblance in Wittgenstein's Later Philosophy,* 33 THEORIA 107–132 (1967); L. Pompa, *Family Resemblance,* 17 PHIL. Q. 63–67 (1967).

to a subclass.[62] There ought to be a minimum number of characteristics that the members of a subclass have. This idea might be formulated as follows:

Subclass P (Paradigm)
ABCDE

e	d	c		b	a
ABCD	ABCE	ABDE		ACDE	BCDE

Particulars "e," "d," "c," "b," and "a" can be subsumed under the same concept because they have features in common with subclass P, and these features are sufficient but not necessary to determine whether e, d, c, b, or a can be subsumed under P.

There are striking similarities between the basic-predicate or core-resemblance solution explained above and the idea of analysis of friendship by the method of mere resemblance adumbrated by Aristotle. Aristotle distinguishes between *mere* resemblance and resemblance by analogy. Aquinas,[63] Suarez,[64] and other medieval philosophers have called the latter "analogy of proportionality." For the analysis of resemblance by analogy or the analogy of proportionality, it is necessary to have four terms arranged in a self-evident scheme of proportion. By contrast, mere resemblance involves two terms related directly on the basis of some common feature. Aristotle's solution differs from Wittgenstein's family resemblance concept,[65] because Aristotle in his analysis of the notion of friendship recognizes common features that are logically *necessary and sufficient* for the occurrence of friendship: reciprocal affection, wishing well, and awareness (NE 1155 b27–1156 a5). Aristotle argues that friends wish each other well in the way in which they are friends (*NE* 1156 a3). Thus, if the friendship is based on utility or pleasure, wishing well is self-interested.

In addition, according to Aristotle, friendship between perfectly good men is considered the perfect case of friendship, and this has consequences for the *mere* resemblance analysis.[66] Friendships based upon pleasure and

62. A. Manse, *Games and Family Resemblance*, 42 Philosophy 210–225 (1967); J. Bellaimey, *Family Resemblances and the Problem of the Under-Determination of Extension,* 13 Philosophical Investigations 31–43 (1990).

63. There is a dispute over whether Aquinas made such a distinction between "analogy of proportionality" and "analogy of attribution." The latter is the analysis by central case or focal meaning. It is argued that the distinction is introduced by Cajetan, who asserts that such a distinction is implicit in Aquinas. *See* Thomas Cardinal Cajetan, On the Analogy of Names [*De Nominum Analogia*] (E. Bushinski trans., 1953); E.J. Ashworth, *Signification and Modes of Signifying in 13th Century Logic: A Preface to Aquinas on Analogy,* Medieval Phil. & Theology 39–67 (1991); R. McInerny, *Aquinas and Analogy: Where Cajetan Went Wrong*, Phil. Topics 103–124 (1992); B. Montagnes, La Doctrine de L'Analogie de L'Etre D'Apres Saint Thomas D'Aquin (Philosophes Medievaux 6, 1963).

64. F. Suarez, Disputationes Metaphysicae, 25 and 26 Opera Omnia (Hildensheim 1965) (1866).

65. Fortenbaugh, *supra* note 49, at 55.

66. In the seventh book of the *Eudemian Ethics,* Aristotle points out that resemblance is not an adequate basis for focal analysis. Owen, *supra* note 38, has emphasized that Aristotle refuses

friendships based upon utility do not resemble one another. Thus friend-
ships based on utility among old men are lacking the feature of pleasure,
whereas friendships based on mere pleasure might lack utility and can be
harmful. Both kinds of friendship are nevertheless related *indirectly* because
they both resemble the perfect case: the friendship among perfectly good
men.[67]

Can the notion of core resemblance be applied to the analysis of the
concept of law? First, let us consider the paradigmatic or core case of the
concept of law as advanced by Finnis. According to Finnis, law is a set of
rules, buttressed by sanctions and created by a determinate and effective
authority for a complete community, to solve coordination problems for the
common good. The following features can be demarcated:

B = Rules made by a determinate and effective authority.
C = Rules buttressed by sanctions.
D = Rules that solve coordination problems.
E = Rules that solve coordination problems for the common good.

Second, let us consider the different conceptions or self-interpretations
respecting common beliefs of the concept of law:[68]

Paradigmatic or core case = L1
Customary law = L2
Positive law = L3
International law = L4

	L1	
	BCDE	
L2	L3	L4
E	BCD	D
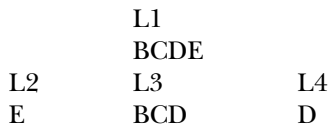
to use resemblance as the basis of focal analysis or focal meaning. Thus a painted eye resembles
a living eye but cannot share the function of a living eye. It therefore cannot be said that it is
an eye. Focal meaning is not used by Aristotle to connect different entities, each of which has
its own goal.
67. Aristotle points out:

But since people do apply the term "friends" to persons whose regard for each other is
based on utility, just as states can be friends, or on pleasure, as children make friends,
perhaps we two must call such relationships friendships; but then we must say that there
are several sorts of friendship, that between good men, as good, being friendship in the
primary and proper meaning of the term, while the other kinds are friendships by way
of resemblance to true friendship, since such friends are friends in virtue of a sort of
goodness and likeness in them.

ARISTOTLE, NICHOMACHEAN ETHICS 1157 a26–a33.
68. Aristotle, like legal positivists and Finnis, also highlighted the importance of respecting
genuine common beliefs in both analyzing and advancing concepts.

We might take L2 as a particular example or type of customary law which is a system of rules for the common good of the community. However, the rules of our particular example of customary law might have emerged not with the purpose of solving coordination problems but merely to reinforce a set of moral rules and principles. L3 might be a legal system such as that of the Third Reich, which was a system of rules buttressed by sanctions made by a determinate and effective authority to solve coordination problems. L4 might be a set of rules of international law, which aims to solve coordination problems, but the rules are neither made by a determinate and effective authority because the rules are rules of custom, nor are they buttressed by sanctions. The examples of customary law, positive law, and international law are related to the paradigmatic case because they have some features in common with the paradigmatic case, but there is no *direct* relationship between our particular examples of customary law on the one hand and positive law and international law on the other. The relationship is *indirect* and mediated through the paradigmatic case.

What, then, is the distinction between the core-resemblance and the central-case analyses? Does the distinction matter for the purposes of theorizing about law? For the central-case analysis, there ought to be a causal connection; that is, efficient, final, material, or formal, between the different conceptions and self-interpretations and the central case. We have shown the implausibility of such causal connections in the analysis of the concept of law. By contrast, for the core-resemblance analysis, the relationship between the core and the different self-interpretations and conceptions is short of identity. The relationship is of mere resemblance, but there is still a unifying view on the concept of law. For the reasons already discussed, I believe that the latter is the correct kind of analysis for the concept of law. Consequently, law as practical reasonableness mediates between the different conceptions of law, but they do not constitute *one* concept in any strong sense.

IV. CONCLUSION

As pointed out in a previous section, Finnis has criticized both Hart's internal point of view and Raz's ordinary man's or legal point of view.[69] He argues that both are unstable and cannot provide the desired and required unification of the different conceptions and self-interpretations of the concept of law. The idea of law as practical reasonableness as the focal meaning or central case of law, Finnis tells us, explains the ordinary concept of law but also transcends it, and therefore a different concept of law from the "ordinary" one emerges. Finnis advocates the view that although the "ordinary concept of law" is quite unfocused, it is helpful because it enables us to understand lawyers, anthropologists, bandits, and tyrants when they

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69. Raz, *supra* note 23, at 76–77.

talk about law.[70,71] But we need, he argues, a concept that can be used in theoretical explanation.

We have shown, however, that the conceptual argument and the functional arguments as conceived by Finnis are unsatisfactory and we have instead advanced a reconstruction of the conceptual argument in terms of core resemblance. Law as practical reasonableness within the core-resemblance approach ensures mediation between the different conceptions and self-interpretations of law and establishes a unifying concept of law not in terms of identity but in terms of resemblance. Consequently, the role of mediation attributed to law as practical reasonableness within the core-resemblance account enables us to organize the data and the heap of different "common" views and self-interpretations of the concept of law without presupposing a "primary" source that establishes the identity between the different conceptions and self-interpretations. The idea of law as practical reasonableness as core resemblance is a much more successful approach to the problem of unification and differentiation identified by Finnis and can be used in a fruitful and informative manner for theoretical and methodological purposes in legal theory.

70. Finnis, *supra* note 9, at 278.
71. Id. at 278.