PROFESSOR MURPHY ON LEGAL DEFECTIVENESS

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By

JORGE L. FABRA-ZAMORA, LL.B.

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Author: Jorge Luis Fabra-Zamora, LL.B. (University of Cartagena)

Supervisor: Professor Dr. Wilfrid J. Waluchow

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For Jorgito And Laurita.

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ABSTRACT

This thesis is mainly a critical examination of Professor Mark C. Murphy's theory of defectiveness. In his view, being backed by decisive reasons for action is a standard internal to legality, to the property of being law, such that a law or a legal system that is not backed by decisive reasons for action fails to measure up and thus, is *defective* qua law or legal system. Following a short introduction, I will devote chapter I to presenting Professor Murphy's theory of defectiveness in the context of his defence of the natural law tradition. In the remaining two chapters, I shall state and assess two types of argument in support of this main thesis. Chapter II is concerned with the functional argument, which holds that law's characteristic activity, thus law's function, is to provide dictates backed by decisive reasons for action. I criticize Murphy's account claiming that his explanation is bereft of a causal mechanism that links certain characteristic activities with certain effects, which is the main element of non-agentive functional explanations. The different type of argument that attempts to present the presence of decisive reasons as a non-defectiveness condition of illocutionary acts in general, and thus for legal illocutionary acts, is considered in chapter III. Here, I argue that Murphy's position is not supported by the orthodox theory of illocutionary acts. From this I conclude that we have reason to doubt Professor Murphy's success in providing an appropriate theory of legal defectiveness.

DECLARATION OF ACHIEVEMENT

The following is a declaration that the content of the research in this document has been completed by Jorge Luis Fabra-Zamora.

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Introduction

The possibility of legal defectiveness, that is, the idea that laws and legal systems can be *legally defective* if they fail to measure up to certain standards internal to legality, is a central element of Professor Mark C. Murphy's powerful jurisprudential project. In his view, being backed by decisive reasons for action is the main standard of the property of being law, such that a law or a legal system that is not backed by decisive reasons for action falls short and thus is *defective* qua law or legal system.[1]

The consequence of this understanding is that instances of law that lack the proper grounding in decisive reasons (take as dramatic examples the Nazi Legal System in the Third Reich or the Fugitive Slave Act in *antebellum* United States) are similar to a horse with three legs, which fails to meet a standard internal to its species; a broken alarm clock, which is an instance of a clock that does not perform its function; or an insincere promise, which is an illocutionary act not meeting a condition for non-defectiveness pertaining to commissives. They "exist" as members of their respective kinds, but they are imperfect instances as they lack something they ought to have.

This view, that Murphy labels the "weak" reading of natural law, is clearly not susceptible to the objections of incoherence and self-contradiction that affect the traditional, "strong" reading of natural law which holds that unbacked instances are not law at all. However, his project goes further than rescuing natural law from familiar criticisms. Murphy attempts to develop a more comprehensive jurisprudential theory

[1] Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge: Cambridge University Press, 2006), 12–3 [henceforth, NLJP].

based on this idea of legal defectiveness. This theory includes: a characterization of the idea of legal defects; three arguments in favour of the weak reading of natural law which are techniques for distinguishing law's existence conditions from its non-defectiveness conditions; and a differentiation of this particular position from the position held by legal positivists and other natural lawyers.

One has to notice that Murphy's theory is not the first or the only one that has considered the possibility of defectiveness in law.[2] However, his version stands out

[2] Perhaps what I discuss here as "legal defectiveness" can be traced as far as the Aquinas' dictum: "if in any point [human law] deflects from the law of nature, it is no longer a law but a perversion of law [*legis corruptio*]" Aquinas, *Summa Theologicae,* I-II, 95, a. 2, co. All my references are to the Thomistic doctrine, see Thomas Aquinas, *The Summa Theologica of St. Thomas Aquinas*, trans. Fathers of the English Dominican Province (New York: Christian Classics, 1981). In contemporary jurisprudence, Finnis seems to be mainly responsible for the introduction of the idea of defective law. (For some discussion of his views, see I.4).

Most of the endorsements of the idea of legal defectiveness by legal positivists seem to be strongly influenced by Finnis's views. For example, Neil MacCormick explicitly refers to Finnis when he suggests that a positivist can accept that "the validity of the relevant statutory norms as members of the given system of law is not as such put in doubt by their injustice. The legal duties they impose, or the legal rights they grant, do not stop being genuinely legal duties in virtue of the moral wrongfulness of their imposition or conferment. There are, however, *defective or substandard or corrupt instances of that which they genuinely are,* –laws, legal duties, legal rights." Neil MacCormick, "The Separation of Law and Morals," in *Natural Law Theory*, ed. Robert P. George (Oxford: Oxford University Press, 1992), 108. For a more recent formulation and further development of the same idea, see *Institutions of Law: An Essay in Legal Theory* (Oxford: Oxford University Press, 2007), 254–5, 274–8, 293–8. Here he states: "There can indeed be unjust laws, and what is alarming about this is that they are perfectly genuine laws, upheld and enforced through the coercive power of the state. 'An unjust law is a corruption of law' – yes, but it is real law that is thus corrupted." Ibid., 271 (internal citation omitted).

A similar formulation appears in Shapiro's planning theory of law, where law is seen as a complex form of social planning with the characteristic aim of remedying the moral deficiencies of the circumstances of legality. A regime that fails to satisfy the moral aim "is a genuine legal system that simply does not do what it is suppose to do," and thus is defective. Scott J. Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011), 391. For Shapiro, "broken clocks are not diluted, peripheral, borderline clocks. They differ from merely decorative clocks, which do lie on the borderline of clock-hood. Broken clocks are real, but defective, clocks. They do not do what objects of their type are supposed to do… A proper theory of law must not be so hard-boiled that it denies the jurisprudential significance of injustice; yet it must not be so starry-eyed that it exaggerates this significance… Unjust systems have all the properties that make legal systems the things that they are, but they do not do what things of this sort are supposed to do. While they may be pure and unadulterated, they are nonetheless poor and defective." Ibid., 391–2.

In a similar vein, John Gardner has insisted that it is possible to make sense of the "superficially oxymoronic" idea that there can be *illegal* law: There are "specialised moral norms that are partly constitutive of law as a genre," in such a way that if a legal norm –an artefact of the genre law– "fail to live up to the moral ideal of legality that artefacts of that genre should by their nature live up to," that thus it

because its weak reading of natural law is the clearest and the most thorough attempt to analyze the notion. None of the other theories compares to Murphy's in the detail in which he develops the notion of legal defectiveness. There is a more important reason: Murphy is the only one that gives it a privileged position in our theorization of the nature of law. He regards this idea as so crucial for the project of analytic jurisprudence that, while defending and differentiating the natural law methodology from the positivist one, he claims that "the natural law theorist's appeal to the weak natural law thesis does not change the subject" of jurisprudence from a description of the nature of law towards a moral theorizing about the law, as some critics have asserted. For him, "it is more accurate to say" that the weak natural law thesis "defines the subject."[3]

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should be considered "illegal." John Gardner, "The Legality of Law," *Ratio Juris* 17, no. 2 (2004): 180; see also, "Hart on Legality, Justice and Morality," *Jurisprudence* 1, no. 2 (2010): 253–265.

The idea of legal defectiveness is also part of the theoretical arsenal of non-positivists. For example, in the version advanced by Robert Alexy, legal defectiveness is seen as one of the two ways in which law is connected to morality. While "classifying connections" are those connections that determine whether a law or a legal system is law or not (in the *lex iniusta non ius ist* fashion); a "qualifying conditions of legality" is "reflected in the claim that norms or systems of norms that do not meet a certain moral criterion can indeed be legal norms or legal systems, but, for either conceptual or normative reasons, are legally defective legal norms or legal systems. What is crucial is that the asserted defect is a legal defect and not simply a moral defect. Arguments addressed to qualifying connections are based on the assumption that necessarily legal ideals are contained within the reality of legal system." See, Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, trans. Stanley L. Paulson and Bonnie L. Paulson, (Oxford: Clarendon Press, 2002), 26. See also, Robert Alexy, "On the Concept and the Nature of Law," *Ratio Juris* 21, no. 3 (2008): 289. Alexy extends this argument as a defence of "super-inclusive non-positivism," which is a theory that maintains "that legal validity is in no way whatever affected by moral defects or moral incorrectness. At first glance, this seems to be a version of positivism, not of non-positivism. This first impression is, however, mistaken, as one sees as soon as one has granted that in addition to a classifying connection between law and morality, there exists a qualifying connection. These two connections are distinguished by the effects of moral defects. The effect of a classifying connection is the loss of legal validity or of legal character. By contrast, the effects of a qualifying connection are restricted to legal defects that do not rise to the level of undermining legal validity or legal character." Robert Alexy, "The Dual Nature of Law," *Ratio Juris* 23, no. 2 (2010): 176.

[3]Mark C. Murphy, "The Explanatory Role of the Weak Natural Law Thesis," paper to be published in *The Nature of Law: Contemporary Perspectives,* ed. Wilfrid J. Waluchow and Stefan Sciaraffa (Oxford: Ox ford University Press, 2013), 34 (references to electronic version submitted by the author).

The objective of this thesis is to provide a critical examination of Murphy's views on legal defectiveness. That is, my main concern is not with his defence of the natural law tradition in legal philosophy or his methodological challenge to legal positivism, but with the credentials of the characterization of legal defectiveness that is immersed in his weak reading of natural law. In particular, I want to critically examine his idea that the connection between law and decisive reasons for action is a standard internal to legality that has the potential to generate the special type of defectiveness he argues for. Through an examination of Murphy's understanding, it is my hope that we obtain a clearer idea of this pervasive yet undertheorized notion, and assess its feasibility as a conceptual tool for jurisprudence.

I proceed by first providing a statement of his theory of defectiveness in the context of his defence of natural law jurisprudence in chapter I. In my exposition, I shall provide a detailed exploration of Murphy's jurisprudential project, emphasizing those aspects that are relevant for understanding his theory of defectiveness, and trying to clarify those features that I find difficult or inconsistent. In the remaining two chapters, I shall state and assess two types of argument in support of this main thesis.

Chapter II is concerned with the functional argument, which holds that law's characteristic activity, and thus law's function, is to provide dictates backed by decisive reasons for action. I criticize Murphy's account claiming that his explanation is bereft of a causal mechanism that links certain characteristic activities with certain effects, which is the main element of non-agentive functional explanations.

The different type of argument that attempts to introduce the presence of decisive reasons as a non-defectiveness condition of illocutionary acts in general, and thus, for

legal illocutionary acts, is considered in chapter III. Here, I argue that Murphy's position is not supported by the orthodox theory of illocutionary acts. From this is concluded that we have reason to doubt Professor Murphy's success in providing an appropriate theory of legal defectiveness.

Chapter I

Professor Murphy's Jurisprudence

1. **Introduction**

Professor Murphy's theory of legal defectiveness has to be understood as one piece of a bigger project where the main aim is to defend the weak natural law tradition in jurisprudence.[4] In this chapter, I will present a discussion of the three most important elements of that project and will extract the main features of his theory of legal defectiveness from this framework. First, I begin by presenting his attempt to provide an acceptable formulation of the natural law thesis in jurisprudence and some problematic aspects of it. Then, I explore and comment on the three possible interpretations of this central commitment. Murphy's theory of defectiveness is the correct interpretation among these three views, and I will devote some time to analyzing this formulation. In the following section, I will explore the arguments he provides for his selected view and the reasons he provides to favour it instead of other possible readings. Finally, I will end

[4] The most mature presentation of his argument in jurisprudence is in *NLJP*, 1–59. The argument in this book expands the position advanced in some previous pieces such as "Was Hobbes a Legal Positivist?," *Ethics* 105, no. 4 (1995): 846–873; "Natural Law Jurisprudence," *Legal Theory* 9, no. 4 (2003): 241–267; "Natural Law Theory," in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, ed. Martin P. Golding and William A. Edmundson (Oxford: Blackwell, 2005), 15–28. The argument advanced in *NLJP* is substantially complemented by two papers: "Defect and Deviance in Natural Law Jurisprudence," in *Institutional Reason: The Jurisprudence of Robert Alexy*, ed. Matthias Klatt (Oxford: Oxford University Press, 2011), 45–60 [henceforth, "Defect and Deviance"]; and, Murphy, "Explanatory Role." For other posterior developments of the jurisprudential argument in *NLJP;* see also, *Philosophy of Law: The Fundamentals*, 1st ed. (Oxford: Wiley-Blackwell, 2006) [henceforth, Philosophy of Law]; "Finnis on Nature, Reason, God," *Legal Theory* 13, no. 3–4 (2007): 187–209; "Book Review of Scott Shapiro, 'Legality'," *Law and Philosophy* 30, no. 3 (2011): 369–375; "No More Fresh Starts," *Analysis* 72, no. 3 (2012): 563–573; "Real Aristotelianism About Law's Authority," in *McMaster Graduate Conference of Legal Philosophy* (presented at the McMaster Graduate Conference of Legal Philosophy, Hamilton (Canada), 2012).

with a general statement of the position that I will investigate in the following two chapters.

2. **The Decisive Reasons Thesis**

The point of departure of Murphy's entire project is to provide a reinterpretation of the main commitment of the natural law tradition in legal philosophy.[5] The "central claim of natural law jurisprudence," in his reading, "is that there is a positive internal connection between law and decisive reasons for action: law is backed by decisive reasons for action."[6] I will call this idea the Decisive Reasons Thesis.

This thesis is thought to replace the traditional statement of the chief commitment of natural law jurisprudence in terms of a necessary connection between law and morality.[7] The traditional formulation fails not only because it incurs the anachronism of attaching to traditional natural law theory the modern notion of morality, but also because it does not state with sufficient precision what the relevant necessary connection is. Instead of referring to morality, the Decisive Reasons Thesis attempts a formulation of natural law jurisprudence that is intended to cover the entire range of good reasons for action with which the traditional natural law theorist is concerned. Also, the thesis states that the precise relationship between law and reasons for action is about "backing." For a norm to be backed by decisive reasons is for there to be "sufficient reasons for acting in conformity with that norm and sufficient reasons not to act in any way that is

[5] *NLJP*, 10; "Natural Law Jurisprudence," 244; "Natural Law Theory," 18.
[6] *NLJP*, 1.
[7] "Natural Law Jurisprudence," 244.

incompatible with acting with that norm;"[8] that is, "for there to be a decisive reason to ϕ is for ϕ-ing to be a reasonable act for one to perform and not ϕ-ing an unreasonable act for one to perform, and so for a law to be backed by decisive reasons is for there to be decisive reasons to perform any act required by that law."[9]

There are many aspects that are worthy of comment with respect to this formulation, but I shall confine myself to presenting only three that are important for the arguments and criticisms that are advanced in the following chapters.

The first aspect refers to the explanatory role of the Decisive Reasons Thesis. Murphy explicitly puts forward the thesis as a descriptive claim about the nature of law. However, this does not seem to be the case at first glance. Notice that the thesis does not seem to answer the question of analytical jurisprudence (roughly speaking, "what is law?") but is answering the different question about the normativity of law (i.e., "what kind of reasons back law?") After all, if law is backed by decisive reason for action, one reasonably asks: what is the *X* that is backed by decisive reasons for action?

Murphy would not be disturbed by such a complaint. For him, the descriptive adequacy of a thesis whose main claim is that there is a connection between law and reasons for action can be understood through an analogy. Imagine that someone builds a machine that provides dictates backed by decisive reasons when one pulls the handle.[10] In this example, to say that the function of the machine bears a relationship with decisive reasons for action is a description of what the machine does and not an evaluation of it or

[8] "Defect and Deviance," 45n3.
[9] *NLJP*, 1.
[10] "Natural Law Theory," 17. See also, *NLJP*, 32.

a justification of obedience to its dictates. Analogously, he wants one to take the Decisive Reasons Thesis as a description of the nature of law, and as such it should not be interpreted as applied ethics, normative jurisprudence or political morality. More importantly, the crucial idea of the thesis is that "decisive reasons constrain legality, not just as an ideal (law ought to be backed by them) but as a matter of necessity (in order to be law, norms must in some way be backed by decisive reasons.)"[11] Hence, the Decisive Reasons Thesis acts as a master explanatory principle; that is, any possible instance of the *X* constitutive of legality must in some way be related to decisive reasons for action.

To defend the possibility of such a master explanatory principle of legality, Murphy recurs to an Aristotelian type of explanation that is called hypothetical necessity. The crucial idea in a hypothetical necessity explanation is a relation between an end (a final cause) and certain conditions that must obtain if the end or goal is to be realized.[12] Murphy provides an interpretation of that doctrine in the following terms:

> [1] It is the office of *X*'s to ϕ
> [2] Only things that are *Y* are constitutionally able to ϕ
> [3] Therefore, nothing is an *X* unless it is *Y*.

Murphy's take on the Aristotle argument is based on the idea of being "constitutionally able." Constitutional ability is related to the constitution of the object, that is, "the stuff that something is made of, and how is configured."[13] Consider the Aristotelian examples: He claims that for Aristotle a hand is characterized by its office, that is, grasping, so any object that is not capable or constitutionally able to do that job is not a "a hand in more than name." Similarly with the axe, whose office is chopping: Any

[11] Here I am paraphrasing, *Philosophy of Law*, 36.

[12] Aristotle, *On the Parts of Animals*, trad. William Oggle (K. Paul, French & co., 1882), 10 (642b). But there also some references in *Physics,* II 9 and *De Generatione et Corruptione,* II 11

[13] "Explanatory Role," 16–26.

object that is unable to do so is an axe in "no more than name." In this understanding, the office and the constitution are *not* independent truths. The constitution is explained *by* the office, and thus is a necessary truth of that kind.

For Murphy, hypothetical necessity is "the key pattern of explanation in natural law jurisprudence."[14] When applied to the law, the hypothetical necessity argument departs from characterizing the office of the law as a normative property. The key condition of this characterization for Murphy is that law is a rational standard for conduct –that is, the Decisive Reasons Thesis.[15] Any other normative or non-normative truths about the existence of law are explained in terms of this principle. That is, "these other conditions that make for law are conditions that make for law because their presence is necessary for law to perform its office as a rational standard for conduct."[16] This is how the natural lawyer will respond to this first challenge: The Decisive Reasons Thesis is a master explanatory principle that will constrain the possible objects that can be law. In this sense, it does not change the question; it answers an explanatorily prior question.

The second aspect concerns the origin of the thesis: How do we know that the Decisive Reasons Thesis reflects a view representative of the natural lawyers and not mere stipulation? For Murphy, the answer is in Aquinas. To demonstrate his claim, he does not provide a historical reconstruction of the natural law tradition in legal philosophy,[17] but simply holds that Aquinas is a paradigmatic or central case of a natural lawyer. Thus, the more elements a putative natural law theory shares with the Thomistic

[14] Ibid., 22.
[15] "Explanatory Role", 21.
[16] "Explanatory Role,", 22-3.
[17] "Natural Law Theory," 15.

position, the more natural law credentials it gains.[18] The doctrine that is central to the natural law tradition is the following:

> Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting: for "lex" [law] is derived from "ligare" [to bind], because it binds one to act. Now the rule and measure of human acts is the reason, which is the first principle of human acts…. since it belongs to the reason to direct to the end, which is the first principle in all matters of action, according to the Philosopher (Phys. ii). Now that which is the principle in any genus, is the rule and measure of that genus: for instance, unity in the genus of numbers, and the first movement in the genus of movements. Consequently it follows that law is something pertaining to reason.[19]

Murphy considers the argument not only expressed in strange words, but also ambiguous,[20] and he feels obliged to provide a better formulation of it. His interpretation is that to understand Aquinas' doctrine one must take into account that the standards that law promulgates are issued to rational beings like us; and since rational beings only can accept and abide by a standard if it is backed by decisive reasons, for something to be an ordinance over rational beings it has to be backed by decisive reasons.[21]

To be sure, Aquinas displays a full definition for all human and divine law in the four articles of the same question in his *Treatise:* "law is nothing other than [1] an ordinance of reason [2] for the common good, [3] issued by one who has care of the community, and [4] promulgated."[22] But for Murphy, the elements [2]-[3] are "subordinate"[23] and explained by [1]. That is, "the essential character of both the non-positive and the positive elements of law are explained through the master thesis that law

[18] Cf., Mark C. Murphy, "The Natural Law Tradition in Ethics," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2011, sec. 1, http://plato.stanford.edu/archives/win2011/entries/natural-law-ethics/.

[19] *Summa Theologicae*, IaIIae 90, 1.

[20] "Natural Law Theory," 18.

[21] Ibid., 16; *Philosophy of Law*, 39; *NLJP*, 2.

[22] *Summa Theologicae*, IaIIae 90, 4.

[23] "Natural Law Theory," 16; *Philosophy of Law*, 39.

is a rational standard for conduct."[24] Murphy thinks, then, that *law is a dictate of reason* means that *law is backed by decisive reasons for action.*[25] Since [1] is the core explanatory principle of the central case of natural law jurisprudence, the disambiguation advanced by the Decisive Reasons Thesis is representative of the natural law tradition.

The third and final aspect concerns to the scope of the thesis. Murphy states sometimes that the Decisive Reasons Thesis is a claim about the nature of law (that is, *law* is backed by decisive reasons for action), but other times he formulates and substantiates it as a theory about the instances of law (that is, *legal systems* and *laws* are backed by decisive reasons for action).[26] One simply notices this in his definition of "backing" and in the formulation of the three versions that are going to be discussed in the next section. He seems to advance his claim under the assumption that whatever is true for norms or laws is also true for legal systems and the nature of law in general.

However, we ought to take into account H. L. A. Hart's advice that "there may be many things which are untrue of laws taken separately, but which are true and important of legal system considered as a whole."[27] If Hart is right, it is doubtful that the assumption that particular legal norms are backed by decisive reasons implies that legal systems or law itself are similarly backed. And the thesis that law and legal systems are

[24] "Natural Law Theory," 17.

[25] "Defect and Deviance," 45.

[26] I thank Wil Waluchow for pushing me to clarify this point.

[27] H. L. A. Hart, "Positivism and The Separation between Law and Morals," in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 78. Interestingly, he writes that "[p]erhaps the differences with respect to laws taken separately and a legal system as a whole are also true of the connection between moral (and some other) conceptions of what law ought to be and law in this wider sense." Ibid., 78–9. More strongly, Kelsen claims that "it is impossible to grasp the nature of law if we limit our attention to the single isolated rule." Hans Kelsen, *General Theory of Law and State*, 1st ed. (New Jersey: Transaction Publishers, 1946), 3.

backed by decisive reasons for action does not entail that each and every law should be so backed.

Similarly but more subtly, even if we assume that whatever is true of norms is true for legal systems more generally, a different argument has to be provided (or an assumption revealed) to determine that the resulting picture of legal systems is an illumination of the nature of law.[28] After all, law and legal systems are different ideas. For example, it is certainly uncommon but not implausible to claim that laws and legal systems are *instances* of law. Under this approach, the theorist may consider the nature of law as a philosophically richer (or more restricted) notion whose complete nature is not exhausted by referring to the features of legal norms or legal systems. Hence, if Murphy formulates his position as the claim that legal systems are backed by decisive reasons for action, it remains to be seen why this is an answer to the general question of the nature of

[28] Here is an example. Hart, who seems to identify the nature of law with the nature of legal systems, is susceptible to some ambiguity. It is well known that Hart identifies the key to jurisprudence in understanding law as the union of primary and secondary rules. One of the most famous elements of Hart's theory are his "two minimum conditions": "There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials" Hart, *The Concept of Law*, 117. But are the two conditions an explanation of the nature of *law* or an explanation of the *legal system*? There has been some debate about this. Some early commentators on Hart's work claimed that if the two minimum conditions constitute a "formal elucidation" of the concept of legal system, a further element should be added to explain the nature of law. For example, one may claim that the rules of the National Hockey League, as a system of primary and secondary rules, could count as a legal system according to Hart's definition but not as "law" insofar as they do not aim to respond to the "minimum content of natural law" (Or so Sartorious argued in "Hart's Concept of Law," in *More Essays in Legal Philosophy: General Assessments of Legal Philosophies*, ed. Robert S. Summers (Berkeley & Los Angeles: University of California Press, 1971), 139.). Others have argued the concept of law is much wider than the concept of legal system insofar as law includes both "*sets* of primary rules" as primitive of international law" and systems as defined by the two minimum conditions. While the sets lacks secondary rules, they still are law (Michael Payne, "Hart's Concept of a Legal System," *William and Mary Law Review* 18 (1977 1976): 287–319.) My point is not to claim that this is a real problem in Hart; rather I use him as an example to show that an additional argument has to be provided to move features we identify in legal systems to the nature of law.

law. Certainly, this is not an insoluble problem, but I think we have to be careful about the level of generality in which Murphy's argument is to be read.

3. **Three Readings of the Decisive Reasons Thesis**

The most important element of Murphy's defence of natural law is his identification of three possible interpretations of the Decisive Reasons Thesis: The moral reading, the strong reading, and the weak reading.[29] While the first version is implausible and uninteresting and the second defensible but ultimately unworthy of acceptance, the third one is endorsed by Murphy as an adequate description of the nature of law. More importantly, the third one is his theory of defectiveness. Let me present these three versions.

According to the *moral* thesis, "all that a natural law theorist wants to do in affirming a connection between law and reasons is to issue a dramatic reminder that adherence to some laws would constitute such a departure from reasonableness that there could not be adequate reason to obey them; the only law that merits our obedience is law that meets certain minimum standards of reasonableness."[30] In other words, the moral authoritativeness of law is partly constituted by being backed by decisive reasons for action, so we should not obey unbacked norms.

It is apparent that the moral reading is not a descriptive jurisprudential claim, so those who hold that view have belittled natural law jurisprudence as revolving round a thesis pertaining to moral philosophy, specifically, about the morality of obedience or

[29] *NLJP*, 10–20; "Natural Law Jurisprudence," 243–253; "Natural Law Theory," 18–22; "Defect and Deviance," 46–9; "Explanatory Role," 1–3. See also, *Philosophy of Law*, 43–5.

[30] *NLJP*, 9; also, "Natural Law Theory," 21. See also, "Natural Law Jurisprudence," 252.

political obligation. But Murphy finds this image to be "implausible in itself" and "excruciatingly uninteresting."[31] He finds it implausible to suppose that natural law does not make a claim as to the nature of law, as did the paradigmatic natural lawyer Aquinas. To be sure, the Thomistic doctrine –the central case of natural law– was *also* occupied with the problem of obedience, but for Murphy, Aquinas's views concerning the nature of law are independent of his views on obedience. Further, he finds this picture uninteresting and unworthy of discussion because almost everybody in the history of moral or political philosophy has accepted the idea represented by the moral version. The thesis is so weak that it does not even set forth a distinctive and contentious position for natural law jurisprudence (or perhaps for anyone). The moral reading is thus rejected. The crucial debate is going to occur between the strong and weak version.

Let us now turn to the *strong version,* which is the best-known understanding natural law theory.[32] According to this reading, the proposition "law is backed by decisive reasons for action" is a universal generalization as is the proposition "triangles have three sides." From any universal generalization "*S*'s are *F*"[33] (or the "The *S* is *F*"), it follows that "if *x* is not *F*," then "*x* is not *S*." Hence, from "triangles have three sides" and "this figure does not have three sides," we may deduce this "figure is not a triangle." Similarly, from "law is backed by decisive reasons for action" and "this dictate is not backed by decisive reasons," we may deduce "this dictate is not law."[34] Murphy thinks that this

[31] *NLJP*, 10, also, "Natural Law Jurisprudence," 252; "Natural Law Theory," 15–6.

[32] See, *NLJP*, 10–11, 13–20. See also, "Natural Law Theory," 21–2; "Natural Law Jurisprudence," 244–7.

[33] Henceforth, I will understand *S* as Subject, and *F* as Feature. "is" should be understood as "is/do/have." I am further going to use *s* for an instance of the kind *S*, and *x* for any object that is not a member of the kind *S*. I am going to take the freedom to modify Murphy's formulations and present them in these terms.

[34] *NLJP*, 10.

formulation of the strong reading "underwrites" the common natural law slogan *lex iniusta non est lex* if we add the further premise that an unjust law does not generate decisive reasons for action. Hence, "the strong natural law thesis entails that an unjust law is not law at all." [35]

It is worth noting that, even though Murphy disagrees with the strong reading, he tries to respond to two well-known objections against the position.[36] The first objection is the idea that strong natural law is self-contradictory, because, after all, it is widely accepted in contemporary jurisprudence that unjust laws *are* laws. The second objection is that natural law is at odds with the pervasive intuition that legal existence is determined by the shared understanding of officials –that is, that norms are laws because the relevant officials accept them as such.

Contra the self-contradiction objection, Murphy claims that the slogan can be understood as an *alienans* adjective, that is, an adjective "that appears to be qualifying a subsequent description, but in fact functions to deny or leave open the question of whether the description applies": [37] "rubber," "counterfeit" and "bad" are examples of *alienans* adjectives in "rubber ducks are not ducks," "counterfeit money is not money," and "a bad argument is not an argument."[38] Since in this strategy, to say "a $_{\text{alineans}}X$ is not an X" is not obviously contradictory, we can safely read the unbacked-by-decisive-reasons element of the Decisive Reasons Thesis without any sort of inconsistency.

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[35] *NLJP*, 10; also, "Natural Law Theory," 19.

[36] *NLJP*, 9–20; "Natural Law Jurisprudence," 245–252; "Natural Law Theory," 19–20.

[37] Simon Blackburn, *The Oxford Dictionary of Philosophy* (Oxford: Oxford University Press, 2005), 12.

[38] See, *NLJP*, 13–4.. For the source of this reading, David Lyons, *Ethics and the Rule of Law* (Cambridge: Cambridge University Press, 1984), 62–4. For some discussions, Norman Kretzmann, "Lex Iniusta Non est Lex - Laws on Trial in Aquinas' Court of Conscience," *American Journal of Jurisprudence* 33 (1988): 103–107; Peter T. Geach, "Good and Evil," *Analysis* 17 (1956): 33–4.

Contra the "officials-say-so" objection, Murphy relies on an argument presented by means of an example. Imagine that on a different planet, everybody agrees that a certain animal is a black tiger –they call it a *bliger*. One day a zoological expedition, through a telescopical observation, discovers that bligers are in fact a strange combination of six different animals which, when they are at a sight-distance to human beings, modify their structure to black tigers.[39] This example seems to suggest that our shared understanding about objects in nature can be mistaken. Applying the moral of this example to the legal case, we can see that it may be possible that the social understanding of the notion of law can be mistaken, because there is a correct understanding of law which does not depend on human conventions.

Hence, according to this metaphysical assumption, a strong natural lawyer will claim that the unbacked law is kind of a "fake": it looks like law and some people may accept it and use it as such, but these users are mistaken so long as it contradicts the correct idea of law. In this sense, as the language users do not have the final say in determining the nature of the reality, the legal theorist plays a certain revisionary metaphysical role in correcting wrong linguistic usages by the folk. This is crucial for his understanding of law: law, which is normally thought of as a hermeneutic concept –that is, determined by its users– has to play certain natural kinds of functions to be useful for social science. Answering both objections, Murphy thinks the strong reading of natural law still is a plausible view and an alternative to the weak reading.

[39] The example is from Peter van Inwagen, *Material Beings* (Ithaca, N.Y.: Cornell University Press, 1995), 105.

Now we move to the *weak* reading, which is the most crucial for our current purposes. Here, the Decisive Reasons Thesis should not be compared with universal generalizations (recall "triangles have three sides"), but instead with propositions such as "ducks are skilful swimmers," "horses have four legs," or "cheetahs are fast runners," which are a special type of proposition that gives rise to the idea of "defect."[40] He formulates the weak reading in the following way:

> There is a class of propositions of the form "The *S* is *F*" or "*S*'s are *F*" from which, in conjunction with a premise of the form "this *x* is not *F*" we cannot conclude that "this *x* is not a *F*"; rather, we can conclude (and we can conclude no more than) "this *x* is either not an *S* or is a defective *S*." So, if we come across an animal that is not a skilful swimmer, we cannot conclude that the animal is not a duck; we can conclude no more that it either is not a duck or is a defective duck. According to this weaker reading of the fundamental thesis of natural law jurisprudence, then, it does not follow from a dictate's not being backed by decisive reasons for compliance that it is not a law. It follows only that it is not a law *or* that it is defective precisely as law.[41]

Thus, the *weak* natural law thesis is the contention "that there is some standard internal to legality, to being law, such that a law that is not backed by decisive reasons for compliance fails to measure up and thus is defective precisely as law."[42] Here, we find Murphy's most clear statement of his theory of defectiveness and the remainder of the exposition is focused on defending this reading not only as the most adequate version of natural law, but also as the most adequate account of the nature of law.

This formulation has been developed in three ways. First, Murphy recognizes that his approach has roots in a certain Aristotelian tradition in philosophy of biology (which leads to certain form of virtue ethics) developed by Michael Thompson, Philippa Foot,

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[40] See, "Explanatory Role," 1–2; "Natural Law Theory," 21; "Natural Law Jurisprudence," 253; *NLJP*, 10.

[41] *NLJP,* 10-1 (internal citations omitted). I have adapted some terms to keep uniformity in the exposition. The same formulation is repeated in many other places, without any modification "Natural Law Jurisprudence," 253; "Natural Law Theory," 21; *Philosophy of Law*, 44; "Defect and Deviance," 46; "Explanatory Role," 3.

[42] *NLJP*, 12–3.

and others.[43] From this tradition, we can obtain a clearer picture of the "special kind of proposition" to which Murphy refers. Michael Thompson calls "natural-historical judgement" those statements about species we expect to find about species on a Discovery Channel's natural documentaries or in Natural Historical Books –for example, "bobcats breed in the spring," "ducks are skilful swimmers" or "horses have four legs." The Natural-Historical Judgement has a special logical form "The *S* is *F*" or "*S*'s are *F*," which is expressed in the present tense, but it is atemporal insofar as it does not describe what an individual is/has in some particular time, but what the individual is/has as characteristic of its species or kind or, as Thompson calls it, its "life-form."[44]

This special type of proposition has three important features: (i) it is logically unquantifiable and defeasible. To say "rabbits eat grass" does not entail that *every* rabbit eats grass, and certainly, it is not falsified by the fact that a particular rabbit does not feed in that way. The odd rabbit that does not eat grass, is a defective instance of rabbit. (ii) The truth of a Natural-Historical Judgement is not determined by the statistical regularities among the members of the life-form. They are determined, instead, by their "proper constitution." That is, the Natural-Historical Judgement "humans have thirty-two

[43] See, *NLJP*, 11; "Natural Law Jurisprudence", 273; "Natural Law Theory", 21., where Murphy refers to Michael Thompson, "The Representation of Life," in *Virtues and Reasons: Philippa Foot and Moral Theory: Essays in Honour of Philippa Foot*, ed. Rosalind Hursthouse, Gavin Lawrence, and the late Warren Quinn (Oxford: Oxford, 1998), 247–97; reprinted in Michael Thompson, *Life and Action: Elementary Structures of Practice and Practical Thought* (Cambridge, MA: Harvard University Press, 2008) (All my references to this version), see also, Michael Thompson, "Apprehending Human Form," in *Modern Moral Philosophy: Royal Institute of Philosophy Supplement: 54*, ed. Anthony O'Hear (Cambridge: Cambridge University Press, 2004), 47–75, and, Philippa Foot, *Natural Goodness* (Oxford: Oxford University Press, 2003), 26–32; Rosalind Hursthouse, *On Virtue Ethics* (Oxford: Oxford University Press, 2000), 147–183.

[44] Thompson, *Life and Action*, 64. Henceforth, I am going to use the expressions "kind," "species" and "life-form" interchangeably.

teeth,"[45] is not true because most humans have that number of teeth (probably, if we take into account babies and elderly, that will not be true as a statistical claim); but by the proper bite of the members of the human kind. And finally, (iii) True natural-historical judgements about animals include facts about reproduction and survival of that species.[46] The Natural-Historical Judgement "rabbits eat grass" characterizes the kind rabbits because the nourishing is an important element of the rabbits' survival.

At this point it is important to undercover one of the assumptions of this approach. Murphy follows the Aristotelian approach in the idea that philosophical explanations do not begin at the level of individuals or bare universals, but at the level of kinds (species or life-forms).[47] Kinds are normally understood as categories or taxonomic classifications into which particular objects may be grouped based on shared characteristics of some sort which are independent from human will. It is a basic idea of Aristotle's metaphysics that everything that exists belongs to a kind (except for being itself). In this sense, the Aristotelian will not be concerned with Socrates, Daffy or Bucephalus as individuals, but as instances of the kinds human, duck, and horse –that is, a certain kind of mammal, which pertains to a bigger kind of animal which in turn pertains to the bigger kind of living thing. (As the higher-level kinds are called "categories," I have followed the normal usage of calling this tenet *categorialism*). Notice that in this usage, when someone says "animal *x* is *S*" ("Daffy is a duck"); he should be interpreted as saying that "x is [fundamentally classified as] as *S"* ("Daffy is a member of the kind duck.")

[45] I take this example from Elisabeth Anscombe. See G.E.M Anscombe, "Modern Moral Philosophy," *Philosophy* 33, no. 133 (1958): 2 and14.

[46] Foot, *Natural Goodness*, 29.

[47] For Murphy's endorsement of this idea, see "Aristotelianism."

Similarly, the predicates are properties or feature that characterize the kind: when someone says *"S*'s are *F"* (ducks have feathers)*,* what he mean is "*F* is a property of the kind *S"* (it is a property of ducks to have feathers).

When applied to legal philosophy, it seems to be the natural consequence of Categorialism that we are not concerned primarily with making sense of the practice of legal officials, but with studying the law as a kind –whose nature is independent of human will. This feature is clearly seen in his theory of defectiveness. For example, he defines a legal defect as "a failure to exhibit some feature that an instance of law ought to have in virtue of being a member of the kind law."[48] He also claims that "being a dictate of reason [i.e. being backed by decisive reasons for action] is a standard set by the kind law."[49] One of the implications of categorialism in legal theory seems to be that Murphy is abandoning conceptual analysis, the mainstream model of explanation in legal theory, and embracing a different type of naturalistic jurisprudence that is closer to the project advanced by Brian Leiter or Michael S. Moore. Due to reasons of space, I will not address this complication here.

Second, another development of the weak reading is clarification of the crucial concept of "defect." This idea of defect is put forward in response to Brian Bix's charges about the distinctiveness of the weak reading: "Is it either sensible or tenable to have an idea of 'defective' that is not reducible to 'legally valid but immoral' or 'legally invalid?"[50] That is, can we think of "being backed by decisive reasons for action" in such

[48] "Explanatory Role," 4–5.

[49] "Defect and Deviance," 46.

[50] Brian H. Bix, "Robert Alexy, Radbruch's Formula, and the Nature of Legal Theory," *Rechtstheorie* 37 (2006): 146, n. 28.

a way that it does not collapse into nothing over and above the moral reading, and at the same time, is not so strong that it is transformed into a universal generalization, and thus, the strong reading? Murphy's response is clearly based on the Aristotelian approach we have just sketched. In this understanding, for one to call something defective requires one (a) to make reference to some *kind* to which it belongs; (b) to say that it lacks something that things of that kind *ought* to have, and (c) to assert that it is in some way not a *good* instance of that kind.[51]

The element (a) is the idea that "the criteria of defectiveness are always in relationships to a kind; as it is sometime said, these criteria are internal to the kind… in the sense that they at least partly define the kind in question."[52] It should be clear by our explanation of categorialism that defects are kind specific –that is, they entail a relationship between an instance and its species. More importantly, for something to give rise to a judgement of defectiveness, that something has to define the kind. In this sense, if I say "Bucephalus, the three-legged horse, is defective", what I mean is that "Bucephalus is a defective member of the kind horse." Notice that for the statement to count as a true judgement of defectiveness having four legs must be a property that characterizes the kind horse.

The element (b) is more obscure. It refers to a sense of normativity that the Aristotelian finds in the way we describe reality. For the Aristotelian, if "horses have four legs" is a true Natural-Historical Judgement, it entails a *normative* claim: "horses *ought* to have four legs." In this sense, if a horse does not have four legs, it is a defective

[51] "Explanatory Role," 1–3.
[52] Ibid., 2.

instance because it lacks something it ought to have. As Murphy puts it, this is "a distinctive class of 'ought', the ought of kind-membership."[53] This is not a practical assessment of the world or a guide to action; it is, for the Aristotelian, the normativity that is derived from the way the world is. To clarify the idea, consider an artefact. For example, if the object *x* is a toaster, that very fact of being a toaster, implies that *x* ought to toast –that is, to do what toasters do.[54] In other words, the "ought" here is plainly derived from an "is," but this "ought" is different from a "moral"-ought or a practical-rationality ought.

The element (c) refers to the idea of good, that is, "what makes a good *X* is, at least, in part, that it is a nondefective *X*."[55] Murphy presents this idea of good with the distinction between "predicative" and "attributive" adjectives advanced by Peter Geach.[56] However, there is a simpler way to present the distinction. Following Reid Blackman, one can differentiate the "*simplist*" notion of the good from the "*kindist*" notion.[57] For the simplist notion, there is one idea of good that is common to everything that is good. One possible way to see it is the following: when I say "*x* is good" I am pointing to a

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[53] "Explanatory Role," 2. Or as Thompson puts it: "This is a intrinsic, non-relative oughtness" *Life and Action*, 75.

[54] Ibid., 74–7; Thomson, *Normativity*, 207–10.

[55] "Explanatory Role," 2.

[56] Geach's defines attributive and predicative adjetives in the following way: "I shall say that in a phrase 'an *A B*' ('*A*' being an adjective and '*B*' being a noun), '*A*' is a (logically) predicative adjective if the predication 'is an *A B*' splits up logically into a pair of predications 'is a *B*' and 'is *A*'; otherwise I shall say that "*A*" is a (logically) attributive adjective." Peter T. Geach, "Good and Evil," *Analysis* 17 (1956): 33. Consider an example: In "My is a red Mercedes" is *red* is predicative because is equivalent to say that "my car is red", and "my car is a Mercedes". But in "Mickey is a big Mouse" or "Dumbo is a small elephant", does not "split up split up into Mickey is a Mouse and Mickey is big, nor *x* is a small elephant into *x* is an elephant and *x* is small. As Geach puts is, for if these analyses were legitimate, a simple argument would show that a big [mouse] is a big animal and a small elephant is a small animal. The lesson is the following: For Geach, good is a attributive adjective, that is, it cannot be separated from its noun. That entails that goodness is a property of the kind to which the noun refers.

[57] Reid D. Blackman, "Meta-Ethical Realism with Good of a Kind," *European Journal of Philosophy* (2012): n/a–n/a.

relationship that *x* has with a universal idea of the Good (or, if you wish, a Platonic Form of Good.) The kindist denies that such a universal idea exists, and instead, claims that the idea of good is relative to the particular kind in question. That is, what makes a good sculptor is different from what makes a good musician; the kinds "sculpture" and "music" have different and irreducible standards of goodness internal to their kind. What Murphy is trying to point out with this idea is that the condition of non-defectiveness is part of the conditions that make an instance a good member of its kind.

In conclusion, applying the three elements to the kind law, the predicate "being backed by decisive reasons for action" in the weak reading of the Decisive Reasons Thesis should be thought as a standard internal to the kind law; it is something that the kind law ought to have, and it is part of what makes a good instance of that kind law. Hence, a law that is not backed by decisive reasons is defective. With this concept, Murphy is in a position to respond to Bix's challenge.[58] On the one hand, weak natural law is different from the moral reading because there is nothing in the idea of defect that implies immorality. On the other hand, weak natural law is different from the strong natural law because law's being defective is not equivalent to law's being invalid. In fact, only things that "exist" as law (that is, that are members of the kind law) can be deemed defective. Thus, the distinctiveness of the weak reading is secured.

Finally, it should be noted that, for Murphy, the weak reading of the Decisive Reasons Thesis should be read as a master explanatory principle according to the hypothetical necessity explanation. Recall that on the general reading of hypothetical necessity, the Decisive Reasons Thesis sets a constraint on the possible objects that can

[58] "Explanatory Role," 6.

exist as members of the kind law. Hence, since the weak reading of the thesis refers to certain conditions of non-defectiveness, it implies that the non-defectiveness conditions of law are a constraint on the existence conditions. That is, for Murphy, the crucial element of the weak natural law (and in fact, the element that "unites all natural lawyers"[59]) is a commitment to the explanatory priority of law's normative non-defectiveness conditions over its existence conditions. That is, legal defectiveness explains legal existence.

4. **The Case for the Weak Reading of the Decisive Reasons Thesis**

For our study of Murphy's theory of defectiveness, his discussion of three putative arguments for supporting the weak reading of natural law –the "legal point of view argument," the "functional argument" and "the illocutionary act argument– are especially interesting. These three strategies are not only arguments favouring the weak reading, they are also techniques for distinguishing between law's existence conditions and its non-defectiveness conditions. They also provide some clue to identifying what law's non-defectiveness conditions are.[60] While Murphy rejects the legal point of view argument, the functional and the illocutionary act arguments are accepted and extensively discussed. Importantly, he uses the second and third arguments as a response to the strong natural law view and the objections made against it. As I will be concerned with the strategies employed by Murphy in the functional and illocutionary act arguments in the following

[59] "Defect and Deviance," 60.
[60] *NLJP*, 25.

chapters, for the moment my focus will be on two elements: the legal point of view argument and his response to the strong reading.

Let me begin with the *legal point of view argument.*[61] According to Murphy, this strategy revolves around the idea, advanced by John Finnis, that there exists a central paradigmatic point of view from which "we will be able to classify some social systems and social norms as clearly law, some as entirely extralegal, and some as simply falling short or distinctive from the central case in one or another specific way."[62] Finnis's point of departure is the important idea developed by Hart that an explanation of the nature of law has to appeal to the internal point of view, that is, to the perspective of those who accept the law as a standard that guides their conduct. For Hart, the existence of a legal rule is explained partly because certain people accept that rule as a standard to guide their conduct, and not because they feel threatened by the sanction that this rule imposes. However, Hart insisted that people can accept a rule (or a system of rules) for any reason without affecting the existence of the rule (or the existence of the system). For example, officials can accept laws and legal systems for reasons of long-term interest, traditionalism or egoism, and their acceptance still gives rise to the legal rules and the legal system they accept.[63]

Finnis's disagreement with Hart lies in this last feature. He claims that Hart's position is "unstable and unsatisfactory,"[64] as Hart fails to consider the point of view of the more paradigmatic participants. For Finnis, the relevant point of view from which the

[61] Ibid., 26–8; "Defect and Deviance," 48–53; and, "Natural Law Jurisprudence," 255–7.
[62] *NLJP*, 26. The basic formulation of this argument, Finnis, *Natural Law and Natural Rights*, 3–22, 426–436.
[63] Hart, *The Concept of Law*, 203.
[64] Finnis, *Natural Law and Natural Rights*, 13.

nature of law should be accounted is not the point of view of those who see law as a "discretionary and statistically customary order," but rather the point of view of those who treat the law "as a moral ideal if not a compelling demand of justice."[65] Even more, a further differentiation within this central viewpoint is that of one who regards law as an aspect of practical reasonableness. As some views are more reasonable than others, the *most* central point of view from which we can explain legal practice is not only the view of those who appeal to practical reasonableness, but of those who *are* practically reasonable.[66]

Murphy finds in this distinctive point of view a putative avenue for legal defectiveness. He writes: "Law that fails to be morally obligatory will be seen, from this central viewpoint, as defective, deficient, falling short. And since the central legal view point is the proper vantage point from which to do analytical jurisprudence, we have a basis for holding that law that fails to serve as a mandatory requirement of practical reasonableness is defective precisely as law."[67]

However, he disapproves of this argument for two sets of reasons. On the one hand, Finnis does not explain why we should restrict the Hartian internal point of view to the moral point of view. As Murphy correctly explains, Hart's explanation of the point of view is not unstable, because it is derived from a precise rationale: His point is to take into account in the explanation of the nature of law the perspective of people who take legal rules as reasons for action. But this does not entail a need to consider the basis under which the citizens and officials treat those reasons in that way. Those who want to

[65] Ibid., 14–5.
[66] Ibid., 15.
[67] *NLJP*, 27.

appeal to a stronger point of view have the burden of proof, and Finnis does not provide an argument against Hart's rationale.[68] For Murphy, this first criticism has as a consequence that Finnis's view leads one away from descriptive jurisprudence, and limits itself to the work of applied ethics. In this sense, Finnis will end up defending the moral reading, and not advancing a theory of defectiveness.

On the other hand, the argument is rejected because it does not display a way in which certain instances of law may be defective, but only shows how certain instances may be deviant.[69] As I understand Murphy's explanation, an instance is deviant if it lacks one property that is "salient" or "explanatorily central" in the explanation of that kind, but it is not internal to it –that is, it does not characterize the kind. He exemplifies the distinction between defect and deviance with the speed of cheetahs and turtles, and with soccer. For Murphy, a slow cheetah is a defective one, but a fast turtle is only deviant, not defective; pee wee soccer may not be the central case of soccer, but that does not render it defective, it is only a deviant instance. For him, Finnis's legal point of view argument is not able to show why some instances lack a property internal to the kind law. It merely shows that some instances are not the paradigmatic case of law, that is, they lack some explanatorily central properties. The laws that are outside this central case may not be defective law; rather, like a slow turtle or pee-wee soccer, they may well be non-central cases of their kind, and thus, they are merely deviant. Thus, Finnis's argument fails as an avenue for explaining what is meant by legal defectiveness.[70]

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[68] Ibid., 27–8; "Defect and Deviance," 49–50.
[69] "Defect and Deviance," 51.
[70] Ibid., 52–3.

In my view both, sides of the argument are correct and illuminating in many respects. The first part of the argument rehearses familiar ways to criticize Finnis's focal meaning argument,[71] and decisively defends Hart's position against Finnis, one of his most valuable critics. The second part is important insofar as it clarifies several important ideas surrounding the notion of defectiveness. For example, under this clarification, instead of claiming that international law and primitive law suffer from "defects" as Hart does,[72] it would be more appropriate to call them "deviant" or "non-central cases" of law.

However, I do not see how Finnis's heuristic device, even prima facie, can be interpreted in a way that generates an argument for legal defectiveness: the argument is clearly aiming to show that there are some central and non-central instances of law, and it does not seem to be Finnis' aim to show that non-central instances are defective. One may wonder why Murphy introduces an argument with so little feasibility. It may be suspected that the role of this argument is to display the differences between his project and Finnis's project; that is, in rejecting the legal point of view argument Murphy is stressing the extent to which he is not taking the torch passed by Finnis.

Furthermore, it is noticeable that Murphy seems to limit himself to arguing for the weakest part of Finnis's position. It is true that Finnis has presented the legal point of view argument, but his picture of the nature of law is not exhausted there. To be sure, the Finnisean argument should be completed with some further premises that seem to include

[71] See, for older versions of the same argument, Peter Danielson, "Review of 'Natural Law and Natural Rights' by John Finnis," *University of Toronto Law Journal* 30, no. 4 (1980): 443; Michael Payne, "Finnis on Viewpoint and Focal Meaning," in *Filosofía del Derecho y Filosofía de la Cultura: Memorias del X Congreso Ordinario Mundial de Filosofía del Derecho y Filosofía Social (IVR)*, ed. Jose Luis Curriel, vol. VII, 1st ed. (Mexico: UNAM, 1982), 163–167, biblio.juridicas.unam.mx/libros/1/469/17.pdf.

[72] Hart, *The Concept of Law*, 227 and 230.

a version of the functional argument. In this reading, the function or the "point" of having law is to secure justice by reasonably resolving co-ordination problems for the common good of a given community. Thus, while those instances that fulfill this point are justified and constitute the central case of law, those instances that do not fulfill that point could be called "law" only in a secondary, technical sense of the word, but they are not "really" law in the focal meaning of the term.[73] It is the point of having law, and not the perspective from which the theorist studies law, which determines what is central and what is non-central. Thus, since the "point" is one of the elements internal of the nature of law, one should think that the instances that do not fulfill this point are not merely deviant. In fact, this seems to justify Finnis in referring to instances that do not fulfil the point of law as "defective."[74] If this view is right, Finnis' view does not seem to be a transparent turn towards normative jurisprudence. In fact, Finnis' argument seems to highlight much the same explanatory features as the Decisive Reasons Thesis. This may not be a correct theory of defectiveness in the end, but at least this reading is more faithful to Finnis's overall project and it does not seem susceptible to the same objections that Murphy raises against the legal point of view argument.

Finally, this rejection of the legal point of view argument has a surprising consequence. It is noticeable that Murphy, while rejecting Finnis's views on Hartian grounds, does not seem to endorse the Hartian view. More importantly, he seems to reject

[73] See *Natural Law and Natural Rights*, 1, 24, 294, 352 and 366. However it is important to notice that, in other places, he defends the strong reading of natural law, "Law and What I Truly Should Decide," *American Journal of Jurisprudence* 48 (2003): 114.

[74] Finnis, *Natural Law and Natural Rights*, 3, 24 and 294.

the strategy of the legal point of view in full.[75] The point is important: the internal point of view has served as the bedrock of contemporary, descriptive jurisprudence. As law is a social normative practice, the relevant evidence about the nature of law is taken from the internal point of view. The Hartian, for example, is not describing the law from a purely "external" point of view –that is, the point of view of a social scientist, a sanction-based theorist, or a legal realist. Rather, he is aiming to *understand* the practical attitude of the participants towards legal rules. In that sense, one may say that the Hartian is "describing," in addition to certain regularities of behaviour, certain beliefs and mental states in officials and citizens, which are a crucial part of his generalizations about the nature of law.

Furthermore, this aspiration is not exclusive to those who espouse descriptive jurisprudence. Proponents of normative jurisprudence have suggested that the only point of view relevant is the point of view of the participant (Dworkin and Perry). If the relevant evidence is not understood as an interpretation of the legal practice as captured in the participants' understanding, from where does Murphy look for evidence to support his claim? The solution does not seem to be clear and this is going to be one point that will be stressed in the following chapters.

Now let us move to the other two arguments for the weak natural law thesis. The first, the *functional argument*, expresses the familiar idea that if an instance of a functional kind or an artefact does not fulfill the putative function of that kind, that instance would be rendered defective. For instance, a broken alarm clock is a defective clock insofar as it does not fulfill its function of telling the time. Murphy applies a similar

[75] *NLJP*, 28.

idea to jurisprudence claiming that the function of law is to provide dictates backed by decisive reasons. And if he is successful in demonstrating that thesis, he is justified in claiming that instances of law that fail to perform this function are defective laws.

Murphy's second argument, the *illocutionary-act argument*, appeals to the identification of the conditions of non-defectiveness that the theory of speech acts offers and applies them to the legal domain. For example, since being able to show the truth of what is asserted is a non-defectiveness condition of assertions, a lie is considered a defective illocutionary act. In his illocutionary act argument Murphy contends that, from the perspective of speech act theory, being backed by decisive reasons is part of the non-defectiveness conditions of laws qua directive illocutionary acts in the same way that sincerity is a non-defectiveness condition of promises. If this understanding of directives and other legal illocutionary acts is correct, it will reveal that the presence of a particular type of reason is part of the non-defectiveness conditions of law. In case both arguments are correct, the weak reading of the natural law thesis will be demonstrated.

As these arguments are going to be extensively discussed in chapters II and III, I will not advance their discussion here. What is important now is to comment that these views provide reasons to reject the strong reading of the natural law thesis.[76] The functional argument rejects the strong reading because "ϕ-ing is the function of *S*" does not imply that "if *s* does not ϕ," then "*s* is not *S*." For Murphy, there is "nothing more ordinary than things that have the function of ϕ-ing but which at the moment are not ϕ-ing and, in their

[76] *NLJP,* 56-8.

present condition, cannot ϕ: witness broken alarm clocks, broken arms, and so on. A broken alarm clock is an alarm clock; it is just defective alarm clock."[77]

In the illocutionary act argument something similar happens. A defective speech act is not nonexistent, it exists qua speech act (a propositional content uttered by someone). But it is defective. In this sense, Murphy claims that in the same way that a lie is still an assertion, and an insincere promise still a promise, then if being backed by decisive reasons for action is a condition of non-defectiveness for legal illocutionary acts, an unbacked-by-decisive-reasons legal illocutionary act still exists as an illocutionary act of its kind. But it too is a defective one. Hence, both arguments serve as the relevant evidence to show that the strong natural law is false.

5. **Summation**

Whatever flaws there are in the formulation of the thesis, Murphy has advanced a compelling and interesting theory of legal defectiveness. The main claim of this theory is that the Decisive Reasons Thesis is the main standard of defectiveness inherent in the kind law, so that an instance of law that fails to measure up to this standard is a defective law. This idea is explicitly defended by Murphy by way of two arguments: (i) the function of law is to provide dictates backed by decisive reasons for action, and (ii) it is a feature of legal language that, among the conditions of non-defectiveness of laws is that they are backed by decisive reasons for action. Finally, since, for Murphy, the Decisive Reasons Thesis is interpreted as a master explanatory principle, which, via hypothetical necessity, determines what the existence conditions of law are, the weak reading is also a

[77] *NLJP*, 56.

master explanatory principle that entails the explanatory priority of the non-defectiveness conditions of law over its existence conditions. That is, the non-defectiveness conditions explain what the existence conditions are. In the remaining two chapters, I shall asses arguments (i) and (ii).

Chapter II

The Functional Argument

1. **Introduction**

The functional argument is the main strategy that Professor Murphy advances in defence of his theory of defectiveness.[78] Here, the Decisive Reasons Thesis is compared with the function of certain artefacts and organs in living beings such as "paperclips hold paper together," "clocks tell the time," and, "hearts pump blood." The relevant proposition takes the form "*S* does/has-the-function of ϕ-ing," that is, the kind *S* has the function of ϕ-ing, such that an instance of *s* that does not perform ϕ – a weak paper clip, a broken clock, or a sick heart– is a defective member of the kind. Under this argument, since providing dictates backed by decisive reasons for action is the function of the kind law, any instance of law that is not so backed, is a defective instance of law. Or so Murphy argues.

In this chapter, I provide a critical examination of Murphy's functional argument. After stating the argument and some preliminary concerns about it, I advance two lines of criticism. On the one hand, I present a set of criticisms that concern the validity of Murphy's account of functional explanations. On the other hand, I claim that the success of the functional argument will lead Murphy to reject his views on defectiveness and embrace some form of strong natural law.

[78] "Natural Law Jurisprudence," 257–60; "Natural Law Theory," 23–27; *NLJP*, 29–36, and also, *Natural Law and Practical Rationality* (Cambridge: Cambridge University Press, 2001), 6–45.

2. **The Argument**

Murphy's exposition begins by discussing and rejecting a previous version of the functional argument advanced by Professor Michael S. Moore.[79] Moore's main claim is that the most promising avenue for natural law jurisprudence is to define law as a functional kind, that is, as a kind whose nature is determined by the end it fulfills, not but its structure. For example, stomach is a functional kind whose essence is determined by the end of first-stage food processing. In this sense, there is no need that the organ has a round structure and is made of flesh. It is possible that an artificial device, plastic, and cubic, could also be classified as of the same kind if it performs the same function as biological stomachs.[80]

To think of law as a functional kind, in Moore's view, imposes two strong burdens on the natural lawyer: On the one hand, the end that law serves has to be *distinctive*, that is, "the very idea that law is a functional kind depends on there being some such good that law can uniquely serve."[81] On the other hand, Moore introduces an additional requirement that will distinguish the natural law position from the positivist one: the natural lawyer must show that *law necessarily obligates obedience.* In his view, while the natural lawyers follow Augustine in holding that only morality can obligate, and thus, laws need to be just to be law, the positivists follow Bentham in embracing the idea that an unjust norm can fail to obligate and still be law. This is proved in a particular way.

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[79] Michael S. Moore, "Law as a Functional Kind," in *Natural law theory: contemporary essays*, ed. Robert P. George (Oxford: Clarendon Press, 1992), 188–243. A more recent version of the same argument can be found in Michael S. Moore, "Law as Justice," *Social Philosophy and Policy* 18, no. 1 (2001): 115–145. Also, Michael S. Moore, "Four Reflections on Law and Morality," *William and Mary Law Review* 48 (2007): 1568–9.

[80] Moore, "Law as a Functional Kind," 208–210.

[81] Ibid., 223.

The natural law theorist has to show that the means that law uses to perform its function (legal systems, areas of law, particular laws, laws of cases) must actually possess the feature of obligating obedience to their terms by citizens and officials.[82] In other words, it must be shown that some dictate *x* is law only if it serves the distinctive function of law of ϕ-ing, but ϕ is served only if *x* obligates. Hence, *x* can only be law if it fulfils two requirements: (a) *x* serves the distinctive function of law of ϕ-ing, and (b) *x* has a structure such that it is able obligate obedience to its terms on the part of citizens and officials. [83] It is apparent that the natural conclusion of this reasoning is some form of strong natural law.

Ultimately, Moore finds that both requirements are difficult to fulfill. His functional argument depends on the existence of an end, a good that uniquely law can serve. But that end cannot simply be "all things that are good," because this end is not distinctive to law. However, this is precisely the conclusion that the natural lawyer seems to demand: a natural law cannot accept as a source of obligation something less than all the good there is.[84] Thus, a dilemma emerges: The function has to be distinctive and exclusive to law; but, at the same time, it cannot be less than "all things that are good," which is, for the natural lawyer, the only ground that makes obedience necessary. Moore explores several alternatives, but finds that none is successful and leaves the dilemma as an open question for the natural lawyer.[85]

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[82] Moore, "Law as a Functional Kind," 224.
[83] Moore, "Law as Justice," 121.
[84] Ibid., 223.
[85] Moore, "Law as a Functional Kind," 224; "Law as Justice," 145.

Murphy consider Moore's dilemma unproblematic as he disagrees with both requirements of Moore's functional argument. On the requirement of obligating obedience, Murphy correctly thinks that the law's function does not have to duplicate its source of obligation. One may hold that law has a distinctive end, and hold that the source of law's bindingness is derived from some other source –for example, from consent, fairness, gratitude– which does not collapse with that end. More importantly, on the requirement of distinctiveness, Murphy claims that the basis of Moore's failure to find a distinctive function for law basically lies in his notion of a functional kind. He thinks that there is no reason to hold Moore's "overly strict" and "unnecessarily spartan" notion of a functional kind defined in terms of its end.[86] Instead, Murphy claims that functional kinds are not only determined by the goals they serve, but also by their serving that goal through some characteristic activity. That is, a function is not only a relationship to an end; but also it is also a relationship between an end and a means of its achievement. Under this understanding, to say that x is a member of functional kind S is to say, in part, that its characteristic activity of ϕ-ing tends towards the realization of some particular end state E. For example, Murphy claims, not every object whose end is to circulate the blood could be fundamentally classified as a heart. Only objects whose characteristic activity is that of *pumping* can be thought as pertaining to this kind.[87]

After criticizing Moore, Murphy advances his own version of the functional argument, one that aims to show that, whatever end-state law serves, it performs that end by way of the law's characteristic activity of providing dictates backed by decisive

[86] Moore, "Law as a Functional Kind," 224; "Law as Justice," 145.
[87] *NLJP*, 31.

reasons for action. I have to confess I have found his position difficult to follow. So, I am going to reconstruct his argument, as best I can, by presenting five premises.

His *first premise* simply starts by saying:

> So, one may say that while legal systems might promote various ends, all of these involve the imposition of order; but one might say that it is the characteristic activity of law to realize this end through the provision of rules with which agents have decisive reasons to comply. This would give us reason to say that the (or a) function of law is to impose order by laying down dictates backed by decisive reasons to comply.[88]

Murphy claims that there is nothing incoherent in holding such a premise where an object can have as its function the provision of dictates backed by decisive reasons. As we already have seen in I.1 above, he suggests that we can imagine a "rule-backed machine" that provides decisively backed dictates when a subject pulls its handle. In the case of this imaginary machine, "normative conditions enter into the account of the machine's function, and normative argument would be needed to establish when the machine is defective and when is not."[89] Still, when someone says "the function of the machine is to provide decisively backed dictates" he is advancing a description of the machine, and not an evaluation of it.

Murphy's *second premise* claims that providing dictates backed by decisive reasons for action is the function of law. The support he provides for this premise is somewhat puzzling. Murphy claims to follow Moore in holding that the way to show that ϕ is the function of law is to "look at is the various ways that systems pre-theoretically designed as 'legal' operate, and see whether their activities are explicable in terms of, and

[88] Ibid., 32.
[89] Ibid.

regulated by, the giving dictates by decisive reasons."[90] Then, he considers three pieces of evidence: (i) Raz's position that law claims to be authoritative; (ii) the fact that law ties sanctions to certain activities, and (iii) Fuller's eight ways in which legality can fail – which indicate ways in which law fails to provide reasons for action. With this evidence in place, he "simply argue[s] *directly*[91]" as follows: "On the basis of such considerations [that is, (i)-(iii)], one might well come to the conclusion that it is part of law's characteristic activity to lay down norms with which agents will have decisive reasons to comply."[92]

A complication in this argument is considered in Murphy's *third premise*. Here, he confesses a doubt about the claim that law's characteristic activity is to provide dictates backed by decisive reasons for action. A critic may claim that "it can hardly be the case" that law's characteristic activity is to provide decisive dictates for conduct, when "it is clear that many dictates of law are no such thing. To take the low road, we can appeal to cases as dramatic as the Fugitive Slave Law or as banal as parking ordinances. To take the high road, we can appeal to the growing literature in support of the claim that the law lacks authority, that is, its dictates do not in fact typically constitute decisive reasons for agents to comply with them."[93]

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[90] Ibid., 33; "Natural Law Jurisprudence," 260. In what sense this follows Moore is unclear. Moore's way to attribute function to the law seems to be much more sophisticated .(See, "Law as a Functional Kind," 213–4.) Moore's functionalism in general, see, *Law and Psychiatry: Rethinking the Relationship* (Cambridge: Cambridge University Press, 1984), 26–32, 189–194, 285–289. Also, "The Semantics of Judging," *Southern California Law Review* 54 (1981): 151–294.

[91] "Natural Law Theory," 26.

[92] *NLJP*, 34.

[93] Ibid.

He responds to this objection in the following way: "To say that ϕ-ing is *S*'s characteristic activity is not to say that all *S*'s always ϕ. It is to say that *S's* are the *kind of thing* that ϕs, and this is compatible with there being instances –even perhaps a majority of cases– where *S*'s fails to ϕ."[94] Hence, it is possible that the characteristic activity of law is to provide dictates backed by decisive reasons for action and yet in the majority of cases law does not do such thing. But this answer raises an important question: How do we know that providing dictates backed by decisive reasons for action is actually the real characteristic activity of the kind law in spite of such pervasive counter examples?

The *fourth premise,* the most crucial one, is supposed to provide the answer. Here Murphy suggests that the function of law should not be explained like the function of an artefact. The function of an artefact is normally determined by the intention of its creator, and law, understood a social institution, is clearly not the product of some particular maker. Instead, he attempts to find an analogy between the function of the law and the function of some organs in animals –in particular, hearts. It is relevant to quote this comparison in full:

> We know that a heart's characteristic activity is to pump blood, and this is its function; and we can know this without appeal a designer's intuition. We can know this in spite of the fact that animals can have heart attacks. We say that a heart's characteristic activity is to pump blood not just because of statistical frequency… We persist in the judgement that the characteristic activity is pumping blood because judgements of *characteristic activity are made against a background, a privileged background of normalcy.* An objects'departure from its characteristic activity is to be accounted for through appeal to a change in normal background.[95]

We should appreciate that the notion of a *background of normalcy* is the crucial element of this premise. Considering this notion, Murphy introduces the claim that the characteristic activity of law is to provide dictates backed by decisive reasons for action

[94] Ibid.
[95] Ibid., 34–5.

because there is an "intuitively appealing" background of normalcy from which human institutions should be assessed:

> The background from which human institutions are to be assessed, so far as possible, is one in which humans are properly functioning. But human beings are rational animals, and when properly functioning act on what the relevant reasons require. And so law would not be able to realize the end of order by giving dictates in a world in which humans are properly functioning unless those dictates are backed by adequate reasons.[96]

With this background now established, Murphy simply jumps to his conclusion: "it is law's characteristic activity to provide dictates backed by compelling reasons for action, and that law that fails to do so is defective as law."[97]

A *fifth premise* merely reinforces the fourth one. Murphy suggests that another possible way to think about the background of normalcy is the relationship between a system and its parts. When a system and parts of that system have functions, they are not independent from one another, nor do they contradict each other. Instead, the functions of a system and the functions of its parts tend towards an equilibrium and coordination between them. He proposes this as a further reason to appeal to the background of normalcy: "for humans are natural objects whose basic proper functioning is prior to the various institutions in which they find or make themselves. And so the assessment of law in functional terms rightly presupposes as its privileged background properly functional human beings."[98]

To summarize, the functional argument is put forward by Murphy as establishing that the characteristic activity of law, and thus its function, seen from the proper

[96] Ibid., 35.
[97] Ibid.
[98] Ibid., 36.

background of normalcy from which to asses human institutions, is to provide dictates backed by decisive reasons for action.

3. **A General Assessment of the Functional Argument**

Murphy's functional argument has a perplexing structure. He wants to claim that providing decisive reasons for action (ϕ-ing) is the function of the kind law (*L).* He begins in the first premise by defending the coherence of ϕ-ing as a possible function of an object; then in, in the second premise, after exploring how certain instances of *L* can be accommodated by being explained in terms of ϕ-ing, he jumps to "attributing directly" the function ϕ-ing to *L* because ϕ is *L's* characteristic activity. However, in the next step, the third premise, he recognizes that many instances of *L* do not actually ϕ, but nonetheless he responds that *L* is the kind of thing whose characteristic activity is to ϕ. To provide evidence that ϕ is in fact the characteristic activity, he suggests, in the fourth premise, that *L* should be assessed against an "intuitively appealing" background of normalcy, that reveals the fact that many instances of *L* that do not ϕ are departures from that background. He further bolsters this background, in the fifth and last premise, analyzed from the perspectives of systems and its parts.

It is clear that the first and fifth premises do not add much to the argument. The first one is an minimally useful piece of evidence since showing that it is not incoherent to think that ϕ-ing is the function of any kind *S,* does not establish that ϕ-ing is actually the function of the kind in question, in our case, *L.* The fifth one is superfluous as it is merely a repetition of the fourth one without adding much to the discussion.

The crucial questions arise from the second, third and fourth premises. And these are by no means above reproach. The second premise, which is a "direct attribution" of ϕ-ing to *L*, seems to be the violent imposition of a hypothesis and not a demonstration. It is one thing to advance a hypothesis about ϕ-ing and contrast it to the evidence; it is quite a different thing to be selective in highlighting only evidence that tends to support the hypothesis. Murphy's claim seems to be closer to the latter than the former.

The response Murphy presents in the third premise against the claim that many *l*'s do not actually ϕ is also perplexing. He claims that it is not necessary that *L* always ϕs, but *L* *"*is the kind of thing that ϕs*."* This is correct but a much stronger response is needed. If we simply establish that *L* is the kind of thing that ϕs, it does not mean that ϕ-ing defines the kind *L*. Notice, for instance, that a hammer is the kind of thing that can be a paperweight (or, put differently, a hammer is the kind of thing that can *function as* a paperweight); but the kind hammer is not a kind that keeps loose papers in place. Hammer is an artefactual kind that breaks things and drives nails in. Applied to the law, the fact that law is the kind of thing that provides decisively backed dictates does not entail that the function of the kind law is to provide such dictates. It only means that law can *function as* providing dictates without this being its function.

If what I have just argued is essentially correct, Murphy is faced with more than a minor problem. If showing that *L* is the *kind* of thing that ϕs –and not that *L* is a kind that ϕs— is what Murphy is aiming at, one may suggest that all he has shown is that its failure to provide decisive reasons for action results in a law's exhibiting deviance not defect. For example, if we can imagine a hammer that cannot function as a paperweight, it would not be, certainly, the central case of a hammer, but insofar as it performs its function well,

one cannot say it is defective. Similarly, if the kind law is a kind of thing that *ϕs* –but not a kind that *ϕs*–, one cannot say that an instance of *l* that does not *ϕ* is defective; the most charitable interpretation may be that a non-*ϕ*-ing *l* is deviant, similar to a non-paperweight hammer. If I am right, the result will be devastating for Murphy's project. So, I am going to assume henceforth that Murphy is aiming to show the stronger thesis that *L* is a functional kind that *ϕs*.

Finally, there are two flaws in the fourth premise. On the one hand, Murphy's interpretation of the essence of artefacts is only in terms of the function attributed by an individual creator, which leads us to reject any analogy between law and artefacts. This is too restrictive in several ways. In one sense, it is plausible to think that the function of the artefact may be attributed not by its maker, but by its users. To take a classic example, think of dynamite, which was created by Alfred Nobel as a "safe powder" to use in mining, quarrying, and demolition, but to which later users attributed military employments. In another sense, while Murphy focuses on cases of functional explanations with an individual creator, it is possible to think that the function of some artefactual kinds is determined by collective intentionality. For instance, it is widely accepted the fact that we regard certain objects (paper notes, metal coins, bits of plastic) as "money" is not primarily a matter of certain individuals imposing that function upon the object, but is a matter of certain conventional usages of certain social groups. These two premises give rise to a fruitful avenue to address functionalism in law. One may think of law as a functional kind whose function is not attributed by an individual creator, but rather collectively imposed by the users of the concept. This is, I think, the most

familiar understanding of the function of law and one that Murphy does not even consider. For reasons of space, I will not further discuss this alternative here.

On the other hand, and more importantly, Murphy does not put forward the fourth premise as a defence of the hypothesis that the function of *L* is ϕ. He presents the premise as if we already know (or we were forced to accept) that ϕ is the function of *L,* and his burden is simply to reconfirm the explanation. Notice this particular feature in his example: he claims that it is part of our knowledge of a heart that its function is to pump blood, and this function is not falsified by the fact that animals have heart attacks. Thus, as it seems to be clear what the function of the heart is, we see that heart attacks are a failure that does not undermine the claim that the function of law is to pump blood. This is because, for Murphy, there is a background of normalcy –a no-sick heart- from which we confirm the function as truly predicated of hearts. In a similar vein, he seems to suggest that there is an analogy between heart attacks in animals and the third premise– the fact that many instances of law do not ϕ–: if, Murphy suggests, heart attacks were "disastrously more frequent", this would give reason to think that hearts were "malfunctioning all over the place", and not reason to think that the characteristic activity has changed. This is correct, but I do not see how this is helpful to his case. The analogy seems to be only helpful under the assumption that we have a correct understanding of what the function of law is; that is, if we do not know what the function is in the first place, we have no reason to know whether or not the function has changed. Once again, Murphy seems to be taking as an assumption what should be the result of his inquiry.

4. **The Failure of the Functional Argument (1): Characteristic Activity**

In any case, I am going to accept the three premises in *arguendo* as a valid explanation and I shall concentrate on their two main elements, that is, *characteristic activity* and the *background of normalcy.* I will argue that neither of these elements provides reason to think that providing decisive reasons for action is the function of law.

To explain why Murphy's account of the function of law fails, let me begin by introducing a non-controversial distinction between two types of functions. On the one hand, we have what are normally called *agentive functions*, those functions imposed on an object by its creator or its users and are therefore dependent on the human will. On the other hand, we have what are normally called *non-agentive functions* that are independent of human will or human intervention. For example, when we say the "function of the heart is to pump blood" or the "the function of the shark as the top of ocean's food chain is to keep the food web in balance", we are referring to functions that are not attributed by agents. On the contrary, those functions are normally thought of as explanations of processes to which humans attribute certain types of value or goodness (the function of the heart is good for the animal body, the function of the shark is good for the ocean's ecology.) The main difference is that while agentive functions are imposed or attributed; non-agentive functions are explained or discovered.

According to this distinction, Murphy is proposing in the fourth premise a non-agentive functional explanation of law. Importantly, this imposes a certain requirement on the kind of evidence that should be brought to bear on the question of law's function. In that regard, I think that backgrounds of normalcy, in spite of how intuitively appealing

they are, are not enough to provide the proper evidence about what is the characteristic activity of a functional kind. Instead, it is normally thought that explanations of non-agentive functions require that we link characteristic activities or processes of activities with certain effects through a *causal mechanism.*

Consider Murphy's two favourite examples: the heart and the rule-backed machine. First, the fact that we know that the heart's characteristic activity is to pump blood – which explains the fact that animals with hearts could have heart attacks– is explained not only in terms of the background of normalcy of hearts. We know that hearts have this function because we explain certain effects in the body in light of the heart's engaging in the activity of pumping blood. That is, there are causal relationships between a certain activity displayed by the heart (certain dilatations and contractions), and certain effects that are in the body (circulation of the blood). Those activities tend to bring about some end-state *E* (sustenance of the cells) and display a relevant degree of goodness in certain background conditions of normalcy. Thus we know that the heart has the function of pumping blood because there is a causal mechanism between these activities and these effects.[99]

Or recall the way that Murphy suggests is necessary for his functional, non-agentive explanation of the rule-backed machine.[100] Here he suggests consulting the "evidence," which includes the fact that the machine *actually* produces the appropriate dictates, i.e. dictates backed by decisive reasons. Only then is it possible to reconstruct a series of inductions that are based in the observation that, when I pull the handle, I get the right

[99] Cf. Berent Enc, "Function Attributions and Functional Explanations," *Philosophy of Science* 46, no. 3 (1979): 359–60.
[100] *NLJP*, 33.

dictate. The chain of reasoning here is based on the existence of actual effects produced by the characteristic activity. It would be difficult to say, for instance, that what one has is a rule-backed machine when everyday that I pull the handle, I get an insult. In this sense, the evidence he provides for the machine includes a causal mechanism.

In both cases, what holds the explanation together when attributing a characteristic activity to an object is that certain consequences are related to a particular activity in a particular way. That is, ϕ is the characteristic activity only if ϕ is at least causally relevant in the generation of *E.* In a word, then, an appropriate causal mechanism is crucial for non-agentive functional explanations, a point well expressed by John Searle: "When we discuss such a natural function, there are no natural facts discovered beyond causal facts. Part of what the vocabulary of 'functions' adds to the vocabulary of 'causes' is a set of values (including purposes and teleology generally.)"[101]

Murphy clearly fails to provide a causal mechanism from which to assess law's characteristic activity. To that extent his argument is seriously flawed. But the problems for the argument do not end here as the lack of a causal mechanism in Murphy's explanation also entails that it fails as a description. For a functional explanation to count as a description of a kind, it is not enough that it explains the plausibility of thinking that the kind has a particular function, or how successfully that putative function may coherently explain certain features in the nature kind. The explanation has to refer to the actual function that the kind actually has. The descriptions provided might be true or false, according to whether they respond to what we regard as proper evidence. And in most of cases, the relevant evidence seems to be the causal mechanism.

[101] John R. Searle, *Construction of Social Reality* (New York: Simon & Schuster, 1995), 15.

In a model of explanation like Murphy's that lacks a causal mechanism, one may simply use another intuitively appealing background of normalcy and claim that the law has a different characteristic activity and thus a different function. Consider, for example, that a theist may say that the function of law is to guide people to God's will, because the intuitively appealing background of normalcy in humans is God's creation. Or consider that it is also open for a Marxist to claim that the real background of normalcy is constituted by forces of production that determine the structure of social institutions, and then claims that law's characteristic activity is to provide dictates that keep the stability and reliability necessary for successful modes of production. In principle, there will be no reasons to prefer any of these options over the others –and certainly, it does not seem justified to think that they are reducible to decisive reasons. Hence, there will be no basis for supposing that Murphy's explanation is uniquely correct when there is no element excluded in any other putative explanations that use the same structure.

Therefore, I think it is safe to say that Murphy's functional analysis fails as his account is bereft of an appropriate causal mechanism. However, my claim is very limited for two reasons. On the one hand, I am not saying that non-causally based functional attributions are impossible or that Murphy's position is indefensible. All I am saying is that to the extent that his aim is to provide a non-agentive functional explanation, he has not provided the crucial evidence. Of course, we cannot dismiss the possibility of discovering further arguments not considered which would succeed in demonstrating the preferability of Murphy's functional argument. But until such time as this possibility is actualized, we seem entitled to conclude that his presentation, as stated, is wanting. And, on the other hand, my thesis is not that the background of normalcy, which is Murphy's

main element, is irrelevant to functional attribution. On the contrary, the background of normalcy is important in the functional explanation; but its role is dependent on the causal mechanism.[102]

5. **The Failure of the Functional Argument (2): Background of Normalcy**

Now let me say a word about the second element of Murphy's functional explanation: the background of normalcy. As we have presented in the fourth premise, the "crucial move" in Murphy's argument is the existence of a privileged background from which the characteristic activity of the object should be assessed. In the case of law, the background is one where humans function properly. Here, since humans are rational beings, and rational beings can only be guided through decisive reasons, the way that the law has to fulfill its ends of guiding humans is by having as its function to provide dictates backed by decisive reasons.

As I have already explained, it is difficult for me to see how the background can count as evidence. It is just apparent that the background itself does not show what the function of law *is*; all that it aims to show is what the function of law *must be* for Murphy's picture of law to make sense. But this is not the only flaw. It is plausible to argue that the background implies some form circular reasoning: the *explanandum* (Decisive Reasons Thesis) it is justified by the same reasons as the *explanans* (functional argument). Recall that the aim of the functional argument is to show the truth of the Decisive Reasons Thesis. But the *explanandum* was originally justified as a description

[102] Cf. Sandra D. Mitchell, *Biological Complexity and Integrative Pluralism* (Cambridge: Cambridge University Press, 2003), 97. also, 99.

of the kind law precisely because law regulates rational beings, and rational beings cannot accept dictates that are not backed by decisive reasons. However, now, when Murphy is using the background requirement to provide evidence for the *explanans*, he recurs to the same rationale he uses to justify the *explanandum*. Some readers will be less than satisfied with this as an explanation.[103]

Although I think this is enough as a response to the background of normalcy, I am going to advance an additional objection. I think that the way that the argument introduces as an explanation of a certain kind (law) the property of a different kind (human beings) is not only unconvincing, but also potentially fallacious. To see this, let me use an extremely dramatic example: Imagine that *A*, a biologist, is convinced of the existence of unicorns. *A* holds that such existence forces us to modify the way we think about common horses. Since, for him, horses and unicorns are the same species, an appropriate description of species horse should include the presence of a horn.

A is, however, aware that there is a major problem with his thesis: It can hardly be the case that it is a feature of the horse to have a horn, when is clear that no known horse has this feature. Even worse, he knows that the scientific literature supports the claim that typical horses do not have a horn at all. But *A* has a response to this problem: To say that having a horn is a feature of the species horse is not to say that each and every horse has a horn; it is to say that horses are the kind of thing that have horns. That is compatible with there being instances –and perhaps in the majority of cases– where they fail to meet this

[103]A similar charge was by Daniel Robinson holds against Moore's functional natural law. Daniel N. Robinson, "Antigone's Defense: A Critical Study of 'Natural Law Theory: Contemporary Essays'," *Review of Metaphysics* 45, no. 2 (1991): 382–3.

standard. If someone claims that no known horse has a horn, that statement only means that every known horse is defective.

He further claims that it is possible to persist in the judgement that the presence of a horn is a feature of horses, because the description of organs in animals are made against a "privileged background of normalcy," which is nothing different from the higher-level kind to which the species pertains. This is the crucial move of his argument: Horses are animals with hooves, and as such, the background from which the features of horses are to be assessed, so far as possible, is one where hoofed-animals can survive and reproduce. But since hoofed-animals are a source of food for many predators, they cannot survive adequately without a mechanism of protection. Horns provide such protection. Notice that most of the cloven-hoofed animals, and some of those that have a solid hoof, have horns that serve them as a defensive weapon (and, in some cases, as a offensive one)[104]: Cattle, goats, antelopes, deer, rhinoceroses, and moose are just the most notable examples. Hence, it is clear that the presence of horns is clearly an element of a successful life of hoofed animals. And so, since horses are hoofed animals, they would not be able to protect themselves from predators unless they have at least one horn. Thus, for *A,* we should say that horses have a horn, and that a horse that fails to have one is defective as horse. I do not think it requires much argument to see why this argument is unsound: *A's* claim is at odds with our normal experience and the relevant evidence about horses. To claim that horses have a horn, in spite of how coherently this explains certain features of the species in relationship higher-level species, simply cannot count as a

[104] Cf. Aristotle, *Parts of Animals,* 663a. In this passage, Aristotle explains that most hoofed animals (including the "Indian ass," a horse-like animal with a horn in the middle of the head) have horns as mean of protection. But see, *infra,* footnote 107.

"description" of how horses really are. It is valid for *A* to think that unicorns are better horses in every respect. He might even think that horses are defective hoofed-animals. But there is nothing in this that gives us reason to believe that his thesis modifies our understanding of horses.

Back to Murphy's argument. I have introduced this example to illustrate a possible fallacy in the background of normalcy of the functional explanation. Notice that, *mutatis mutandis,* what Murphy is doing in the background of normalcy is somewhat similar to *A*'s argument for horns in horses. In both cases, a property is introduced in the description a kind K_1 (the function of the kind law, the presence of horns in the kind horse). However, this property is not introduced by analyzing the evidence of that kind (e.g., taking into account the third premise of the functional argument, looking at the evidence about horses); but rather by "transferring" the property from the higher-level kind K_2 (humans, hoofed animals) to which K_1 pertains. In both cases, the conclusion is that the property of K_2 is part of the description of K_1.

Formally speaking, the pattern of reasoning seems to be adequate and allows certain coherence in the explanation, because the properties of different kinds explain each other.[105] However, I think that this type of explanation is unable to show anything with certainty because it does not have to respond to the actual evidence about the described kind, and, thus, we can simply be introducing false conclusions via formally sound reasoning. Michael Thompson has claimed that what we have with this type of reasoning

[105] Compare "Aristotelianism"; "Finnis on Nature, Reason, God," 198–9; "Defect and Deviance," 68.

is an "empty concept, and thus that our proposition would come out true whatever we put in the predicate place."[106]

This is why I think that, instead of explaining properties of a K_1 by recurring to K_2, it seems to be more accurate to verify the relevant evidence about K_1, and only when we have an adequate idea of the lower level kind, can we move with certainty to the higher-level K_2. To put that idea in Aristotelian terms, we can say that, instead of explaining K_1 by recurring to the final cause of K_2, we should explain the formal, material, efficient and final cause of K_1 first, and only when has a decent grasp of the elements of that lower-level kind, are we able to move up and transfer properties. For example, if we look at the material constitution of horses, we will not only see that they do not have a horn, but also we may appreciate that their speed is their mechanism of protection.[107] If we reason contra the relevant evidence, we are at risk of ending up with conclusions that do not capture the reality of the described phenomena.

In any case, for what is important now, I have shown that the background of normalcy, in the way that Murphy presents it, is also flawed, as it does not constitute conclusive evidence and it is a potentially fallacious way of reasoning.

6. **Functional Kinds and Strong Natural Law**

Having seen that the chief elements of Murphy's functional argument are faulty, let us move to a different criticism. Here, I will suggest that, even if Murphy's argument were successful (that is, he were able to show that providing decisively backed dictates is

[106] Thompson, *Life and Action,* 73
[107] Or so Aristotle's argues. *See,* Aristotle, *Parts of Animals,* 663a

the function of law, i.e., is the characteristic function of law as there is a causal mechanism that provides the proper evidence, and the transference between properties of the kind is not fallacious), the functional argument does not seem cohere with Murphy's overall project, and will force him to abandon the idea that law might be defective.

To see this, one has to begin by noticing that there is a disanalogy between Murphy's argument and the functional kinds to which he compares law (clocks, hearts, paperclips). Functional kinds are defined by their function, that is, when I say that ϕ-ing is the function of the kind *S*, and *S* is a functional kind, ϕ-ing is part of the sortal definition of the kind and differentiates *S*'s from non-*S*'s.[108] In its simplest form: The kind clock is defined by the function of measuring time and this function is what differentiates the kind clock from other kinds. Notice that this formulation of functional kind allows multiple realizability: an object *x* can be made of different materials, perform different activities, and use different mechanisms and still qualify as *S*. Consider that, for example, in spite of the differences that exist between a digital watch, a sand clock, a solar clock and a traditional cuckoo clock all are members of the same kind insofar as they perform the same function. This is clearly the idea that Moore has in mind when he thinks of law as a functional kind, and this justifies his attempt to find a function that is distinctive to law.

However, Murphy is correct when he suggests that it is not open for law to be defined in terms of a distinctive end that is served exclusively by it.[109] Whatever function we establish for law, it is open for other institutions to perform it as well. For example, if the function of law were to provide dictates backed by decisive reason for action, it is

[108] For some useful discussions, see, David Wiggins, *Sameness and Substance Renewed* (Cambridge: Cambridge University Press, 2001), 95–97.
[109] *NLJP*, 11.

possible that non-legal institutions and authorities perform the same function, perhaps as well (consider parental authority), yet that fact does not render them members of the kind law.

Murphy thinks, nonetheless, that this should not stop us in thinking of law as a functional kind. As we explained in section 2, he complains that Moore's understanding is too spartan and strict. Instead, he proposes a different characterization of functional kinds that is defined both by the end the kind serves, and by its characteristic activity. Although it is not a fully faithful interpretation of Moore, this argument seems to be cogent. For example, consider the function of sudoriferous glands in mammals, which is to perform thermoregulation: sweat that these glands produce cools the surface of the skin and thus reduces body temperature. However, some mammals do not have sudoriferous glands but instead have alternative means of performing this function. Dogs, for example, use their tongues to fulfil the function. As I understand Murphy's charge, he suggests that Moore will be forced to claim that dog's tongues, insofar as they perform the same function as sudoriferous glands, will have to be classified as being of the same kind. But his interpretation in terms of end and characteristic activity does not fall into this same mistake. Glands perform that function through a characteristic activity, that is, excreting sweat; while dogs, since they lack sweat glands, perform that function by panting which results in water loss from the tongue. In this case, then, we have two different functional kinds.

Applied to the legal case, law is a functional kind characterized both by a particular end and a characteristic activity. For Murphy, the particular end that law serves is maintaining social order, but he claims we can accept other putative ends. However, this

functional explanation is completed by a particular characteristic activity providing dictates backed by decisive reasons for action. Thus, the distinctiveness of the law as a functional kind seems to be secured. It is clear that other institutions may also serve the end of maintaining social order, but they do not do so by providing dictates backed by decisive reasons; and, conversely, other authorities provide dictates backed by decisive reasons, but do not serve the end of maintaining social order. Whatever difficulties Murphy has in advancing evidence about what the characteristic activity actually is, we have to recognize that this provides a potentially useful avenue for functionalist jurisprudence to pursue.

But I think that this success in the functionalist explanation of law is a partial victory. If this functional explanation is correct, it seems to follow that Murphy will be forced to renounce the idea of defective law and instead accept some version of the strong reading of natural law. Notice, first, it is difficult to understand why, in the end, this is a less strict understanding of the idea of functional kind than Moore's. In fact, it is clear in Murphy's account that one has to explain an end *plus* a characteristic activity. More importantly, his account is more restrictive as it precludes multiple realizability through different characteristic activities. If this were applied to common artefacts, such as clocks or pens or mousetraps, we would have much limited sortal definitions of the functional kinds. Consider for example, if we claim that the characteristic activity of a clock is indicating hours and minutes by hands on a round dial. We will end up excluding many objects that realize the end of keeping track of time, such as a digital watch, a sand clock, or a solar clock. Yet these seem clearly to be clocks.

It is at this point that a problem with the notion of defectiveness emerges for Murphy. On the Moorean account, an object that does not realize the characteristic activity of a kind but does realize its end may be classified as a member of that functional kind. If the object realizes the function poorly, it would be what Murphy calls a defective member of the kind. Yet as we have seen, the position resulting from his understanding of function as ends plus characteristic activities is much stronger. In his understanding, an object that does not realize the characteristic activity *cannot* be classified as a member of the kind. Recall his example of hearts: "Moore is obviously right that *heart* is a functional kind, that there could be hearts of various structures and made of various materials. *But while the end of the heart is to circulate the blood, it is clear that only objects whose characteristic activity is that of pumping can be classified as hearts.*"[110] The message seems to be clear and consistent with his idea of functional kind previously exposed. An object that circulates blood but does not do it through the characteristic activity of pumping is not a defective heart; it is not a heart at all.

However, a couple of pages after, Murphy denies that interpretation when applied to law. In the conclusion of his functional argument, Murphy simply claims: "Thus we should say that it is law's characteristic activity to provide dictates backed by compelling reasons for action, and that law that fails to do so is defective as law."[111] It is hard for me to understand what conceptual difference there could be between, on the one hand, not classifying, as a heart, a putative blood-circulating organ that does not pump blood and, on the other classifying, as a system or particular dictate that is not backed by decisive

[110] *NLJP,* 31
[111] *NLJP,* 35.

reasons for action, a defective member of the kind law, but *law* nevertheless. At first glance, it seems that the two – hearts, on the one hand, and laws (or legal systems), on the other – are lacking in the same way. Each fails to realize its characteristic activity.

If this is correct, we have reason to doubt Murphy's interpretation of the functional argument. He will not be entitled to say that a dictate that does not fulfill the characteristic activity of law is simply defective; on the contrary, he will be forced to claim that those dictates are not law at all –that is, despite his desire not to do so, he will end up being committed to the strong reading of the Decisive Reasons Thesis. The idea of defectiveness will occupy only a secondary place: only those instances that display the characteristic activity, and fail to fulfill the function, will be regarded as defective.

The resulting picture is much more complex. Here, Murphy seems to be committed to both the strong and the weak reading. However, I think this will end up in a distorted and strange idea of law. Since he suggests in the third premise that most of the "dictates of law" do not display law's characteristic activity of providing dictates backed by decisive reasons for action, and his strict functional interpretation will preclude him from regarding those dictates as members of the kind law, the result is that most of the dictates of law will end up not being law at all. In other words, like the community that was mistaken about bligers, we are mistaken about most of the cases we regard as law because a closer functional inspection will reveal that they are not law at all. I do not think this will possibly give rise to any feasible jurisprudential project.

7. **Conclusion**

In the course of this chapter I have presented a criticism of Murphy's functional argument that we must attribute to law the function of providing dictates backed by decisive reasons for action. My argument has attacked the position on two different fronts. In the first part of the chapter, my argument revealed that the two elements Murphy provides to support his thesis that being backed by decisive reasons for action is a standard internal to legality do not suffice to attribute this function to the kind law. In the second part, I argued that if the argument were successful, it would end up proving too much: if it accomplishes its purpose, it will entail the rejection of the very idea that law can be defective. Both sides of my argument provide us with strong reasons to doubt the feasibility of Murphy's position

Chapter III

The Illocutionary Act Argument

1. **Introduction**

A different strategy that Professor Murphy uses to defend his theory of legal defectiveness is to approach legal norms from the perspective of a theory of illocutionary acts.[112] This argument appeals to the detailed account of non-defectiveness conditions of several illocutionary acts that are part and parcel of the orthodox speech act theories developed by John Searle, Daniel Vanderveken, William Alston, and others.[113] For instance, in their orthodox theories the truth of what is asserted is a preparatory condition for assertions, from which it follows that lies and fictional language count as defective assertions.

In similar vein, Murphy attempts a reading of the orthodox theory where being backed by decisive reasons for action is a non-defectiveness condition for certain illocutionary acts that represent the main types of legal norm.[114] The argument has three steps. In the *first step*, he claims that law can be viewed as a speaker, and thus it can perform illocutionary acts.[115] In the *second step,* he considers the nature of one particular kind of illocutionary act, demands, claiming that the presence of decisive reasons backing

[112]*NLJP*, 37–56, also, "Defect and Deviance," 54–57; and, for a different purpose, *An Essay on Divine Authority* (Ithaca, N.Y.: Cornell University Press, 2002), 24–27.

[113] The theory of illocutionary acts has been developed specially by John R. Searle and Daniel Vanderveken, *Foundations of Illocutionary Logic* (Cambridge: Cambridge University Press, 1985); William P Alston, *Illocutionary Acts and Sentence Meaning* (Ithaca, N.Y.: Cornell University Press, 2000).

[114] To be sure, he claims to ground his view in the orthodox theory. See, *NLJP*, 45–47; "Defect and Deviance," 55–57; "Explanatory Role," 15.

[115] *NLJP*, 37-41.

them up is a non-defectiveness condition for this type of illocutionary act. Thus, he thinks that duty-imposing norms, the paradigmatic case of laws, are structured as demands. Hence, being backed by decisive reasons is among their non-defectiveness conditions.[116] The *third step* is to extend the argument to commisives and declaratives, other types of illocutionary acts that Murphy identifies with right- and power-conferring norms.[117] If he is correct in taking these three steps, he is justified in claiming that law has among its non-defectiveness conditions a connection with decisive reasons, from which we can conclude that law is, by its very nature, backed by decisive reasons for action.

In this chapter, after establishing some relevant elements of the theory of illocutionary acts, I attempt to offer a refutation of this attempt to co-opt illocutionary act theory. My focus will be on criticizing some unstated assumptions underlying the argument and clarifying the original view of illocutionary act theory. Finally, I will provide a general assessment of the role of the illocutionary act argument in accounting for legal defectiveness.

2. **Some Theoretical Elements**

In order to understand correctly Murphy's illocutionary act argument, one has to understand what an illocutionary act is and what makes such an act defective. An illocutionary act is the "minimum unit of human communication,"[118] such as a statement, a question, a promise, an order, etc. Besides the utterance (a physical element, that is, some sounds and pauses), the illocutionary act consists in some *illocutionary force* and

[116] *NJLP,* 44-8.
[117] *NLJP,* 48-52.
[118] Searle and Vanderveken, *Foundations of Illocutionary Logic*, 1.

some *propositional content.* The illocutionary force is the combination of the illocutionary point (that is the purpose of the speaker in making the utterance) with particular presuppositions that accompany that point. The propositional content is a reference and a predicate. According to Searle and Vanderveken, who developed the most influential version of this theory, there are five types of illocutionary forces. To assert something (assertives, e.g., a declaration); to commit to doing something (commisives, e.g., a promise); to attempt to get someone to do something (directives, e.g., an order); to bring about a state of affairs by the utterance (declaratives, e.g., pronouncing a marriage) or to express an attitude or emotion (expressive, e.g., apologies, compliments). Each one of these kinds comes with its own presuppositions, which are the strength of the illocutionary point, preparatory conditions, propositional content conditions, mode of achievement, sincerity conditions, and strength of sincerity conditions.

The first notion that we have to understand is the *success* of an illocutionary act. Whenever a speaker utters a propositional content in the proper context with certain intentions, he is performing one or more illocutionary acts.[119] That performance makes that act "existent." But this existence is not equivalent to success. For an utterance to be a successful illocutionary act, the propositional content uttered must achieve one of the seven illocutionary points.[120] For example, if the propositional content of an utterance means that one has committed oneself to doing something ("I hereby promise…" or "I'll do it tomorrow"), then one is achieving the commisive illocutionary point, and thus, one

[119] Ibid.
[120] Ibid.

is making a successful commisive illocutionary act. That is, an existing act is successful if it achieves one illocutionary point.

However, this is not to say that there are no limitations at all on the nature of the state of affairs described by the propositional content of an illocutionary act due to the nature of the illocutionary force employed. The failure to meet those conditions, called *propositional content conditions*, can make an existent illocutionary act unsuccessful. Take two examples: For *X* to make a successful promise, the promise has to be related to something that she is going to do in the future; or for *Y* to apologize, she has to refer to something that she is responsible for. For instance, if *X* promises to stop World War II or *Y* apologizes for the elliptical orbit of the planets, they will be performing unsuccessful illocutionary acts, and then, their utterances will not count as a promise or as an apology at all.

The second notion to take into account is the *conditions of non-defectiveness*. Existence and success are prerequisites for the non-defectiveness of an act but not conversely.[121] In the orthodox theory, only two elements generate nondefectiveness conditions for illocutionary acts: the preparatory conditions and the sincerity conditions. *Preparatory conditions* determine a class of presuppositions peculiar to the illocutionary force of the type of act in question. For example, in making a promise it is implied that the speaker has the capability of performing the action; that is, is *X* promise to ϕ , she should be able to realize ϕ , otherwise, her promise is defective. Similarly, *sincerity conditions* are the psychological states of the speaker towards the propositional content of an illocutionary act. For instance, promises commit the speaker to the intention to

[121] Ibid., 13–4.

perform the promised act; that is, if *Y* promise to ϕ, she should intend to ϕ, otherwise, her promise is defective.

Finally, we should take note of a final element: the *perlocutionary effect* of the act. This is constituted by what the speaker tries to achieve by performing the illocutionary act. For example, declaratives are used to inform and commisives are employed to create particular expectations.[122] An act however, may fail to achieve the speaker's intended perlocutionary effect, without affecting that act's existence or without rendering the act in some way defective. If *X* advises *Y* not to do ϕ, but *Y* nonetheless does ϕ; that advice still is successful and nondefective, but it has failed to fulfill its perlocutionary effect.

All those conditions can be clearly exemplified by the case of assertions, from which Murphy attempts to draw some inferences.[123] For Searle, the illocutionary point of an assertion is "to describe the world," i.e. to present a proposition as representing an actual state of affairs in the world of the utterance. In the case of an assertion, its existence is equivalent to its success, as there is no propositional condition –any proposition can be the content of an assertion. The non-defectiveness of the assertion is accounted for by its preparatory and sincerity conditions. The preparatory condition include the fact that the speaker has reasons, grounds or evidence that count in support of the truth of the propositional content. The sincerity conditions include the fact that the speaker believes the proposition he claims.[124] In this sense, a lie and fictional language will be defective

[122] Ibid., 22–3.
[123] *NLJP*, 45.
[124] See, Searle and Vanderveken, *Foundations of Illocutionary Logic*, 37, 54–55., for a substantial list of non-defectiveness conditions for assertions. A more detailed account can be found in John R. Searle, "Response: Meaning, Intentionality, and Speech Acts," in *John Searle and his Critics*, ed. Ernest Lepore and Robert Van Gulick (Oxford: Blackwell, 1993), 82–102.

because the speaker does not believe what he is claiming.[125] The perlocutionary effect is to inform the addressee, an effect, of course, which may not be secured despite the existence of an assertion that successfully meets all the relevant preparatory and sincerity conditions.

3. **The Failure of the Illocutionary Act Argument (1): Directives**

With this framework established, let us now turn to the argument. I am going to accept the *first step* because I agree with Murphy with the idea that many of current jurisprudents "accept the legitimacy" of holding that law may act as a speaker.[126] Thus, my exploration is going to begin in the crucial *second step* where Murphy makes a case for the idea that directives have, as non-defectiveness conditions, that they are backed by decisive reasons for action. The following represents the general structure of his argument as it pertains to directives:

> [1] Demanding is a species of directive illocutionary act: the point internal to the laying down of demands is to present an act as-to-be-done.
> [2] When one directs another to ϕ, then one necessarily implies that the other has some reason to ϕ.
> [3] Though some directive acts give the addressed party the option of not acting on the directive, demanding does not give them this option.

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[125] Not everybody agrees: 'Lying is a language game that has to be learned like any other', Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe (New York: Macmillan, 1953), 76.

[126] *NLJP,* 37. However, Murphy's extensive discussion seem to overlook a great deal of the contemporary debate about what are the implications and problems of holding such a view, see John Gardner, "How Law Claims, What Law Claims," in *Institutional Reason: The Jurisprudence of Robert Alexy*, ed. Matthias Klatt (Oxford: Oxford University Press, 2012), 29–44; Philip Soper, "Law's Normative Claims," in *The Autonomy of Law: Essays on Legal Positivism*, ed. Robert P. George (Oxford: Oxford University Press, 1996), 215–248. See also, Kenneth E. Himma, "Law's Claim to Authority," in *Hart's Postscript : Essays on the Postscript to The concept of Law*, ed. Jules L Coleman (New York: Oxford University Press, 2001), 275–83; Carsten Heidemann, "Law's Claim to Correctness," in *Jurisprudence or Legal Science?: A Debate About the Nature of Legal Theory*, ed. George Pavlakos (Oxford: Hart Publishing, 2005), 125–146; Neil MacCormick, "Why Law Makes No Claims?," in *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy*, ed. George Pavlakos (Oxford: Hart Publishing, 2007), 59–68; Ronald Dworkin, "Thirty Years on," *Harvard Law Review* 115 (2002): 1655–7; but compare Dworkin's own remarks on the agency of agents such as legislatures in *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 169–71.

> [4] The features of demands noted in [2] and [3] –commitment to reasons for compliance and the non-optionality of such compliance–[together with the fact the norms are issued by rational beings to rational beings] yield the result that when one demands that another ϕ, then one necessarily implies that the other has decisive reasons to ϕ.[127]

I think this reading of the nature of directives is not adequate according to the framework I provide above.[128] None of the premises demonstrate that a directive has, among its non-defectiveness conditions, being backed by decisive reasons for action. Let me examine each of the premises to help substantiate my claim. My criticisms of the first and third premises will reveal a misreading of the illocutionary act theory espoused by Searle *et. al*., and my objections to the second and fourth premises will specify further difficulties in Murphy's argument.

Consider the *first premise*. Murphy characterizes duty-imposing norms as "demands,"[129] which are a special type of the directive illocutionary force. He further makes a distinction between optional and non-optional illocutionary acts according to whether the hearer is obliged to comply with it or not. In his view, demands "clearly fall on the side of the non-optional."[130] In my view, this is not an accurate characterization of the nature of the directive illocutionary act for two reasons. First, Murphy's understanding of demands is not exact. According to the normal reading of illocutionary acts, a demand is certainly a directive, but it does not necessarily display the features implied by Murphy.[131] For Searle and Vanderveken: "requiring or demanding of someone that he do something is telling him to do it with a greater degree of strength than simply

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[127] *NLJP*, 45–7.

[128] I am assuming that we can represent laws as imperative illocutionary acts as Murphy proposes. For some interesting doubts about this possibility, *see,* Jaap Hage, "Why Norms Are Not Imperatives," *Archiv für Rechts- und Sozialphilosophie* 110 (2007): 151–159.

[129] *NLJP*, 42–3.

[130] Ibid., 47.

[131] Compare, *NLJP,* 46 with Searle and Vanderveken, *Foundations of Illocutionary Logic,* 198.

telling or requesting. Requiring, but not demanding, also has an additional preparatory condition of need that it be done. Normally there must be a specific reason for requiring the act."[132] But "commanding" and "ordering" are notions that seem to represent better what Murphy is aiming at. Let us quote Searle and Vanderveken:

> The difference between telling someone to do something on the one hand and commanding or ordering him to do it on the other hand is that commanding and ordering have a greater degree of strength than telling, and this greater degree of strength derives from the fact that when one issues a command or an order one invokes a position of power or authority over the hearer. The main difference between commands and orders is that orders do not require an institutional structure of authority. One can order somebody to do something simply in virtue of one's position of power whether or not that power is institutionally sanctioned. The issuance of a command, however, requires that the speaker be in a position of *authority* over the hearer. Without too much idealization, one can say that orders require that the speaker be in a position of power, and one form of this may be institutional authority; where commands require that the speaker be in a position of authority and not simply one of power. To direct someone by invoking a position of authority or power commits the speaker to not giving him the option of refusal (the 'not' here is an illocutionary negation).[133]

If we take seriously this canonical formulation, a more adequate reading of the type of illocutionary act that constitute duty-imposing norms will view them as commands or orders, not mere demands. The element of "institutional authority" seems to play a crucial role in the intuitions we have about the nature of law.

Second, and more importantly, Murphy's distinction between optional and non-optional directives is based on a confusion of two different elements of illocutionary acts: the degree of the strength of sincerity conditions and the mode of achievement. The *degree of strength of the sincerity condition* is the strength of the psychological state to which the speaker commits in employing a particular illocutionary force.[134] This concept explains how the same propositional content can have different strengths: The degree of

[132] Searle and Vanderveken, *Foundations of Illocutionary Logic*, 201.
[133] Ibid.
[134] Ibid.

the sincerity conditions is the precise difference between a request and an order, and between asking and begging.

The *mode of achievement*, on the other hand, is the means employed by a speaker to accomplish the illocutionary point of an utterance.[135] The clearest example of the mode of achievement is a testimony: when a person testifies, he is not merely making a statement. The status of that person as witness is what makes that a particular statement count as a testimony. Searle and Vanderveken clearly write about the mode of achievement in directives when he says:

> An order, for example, has a greater degree of strength of its illocutionary point than a request, even though it need not have a greater degree of strength of its expressed psychological state. The greater degree of strength of the illocutionary point of ordering derives from the mode of achievement. The person who gives an order must invoke his position of power or authority over the hearer in issuing the order.[136]

It should be clear, then, that what Murphy calls optional and non-optional directives are in fact differences in the degree of strength of the sincerity conditions and the mode of achievement of some directives illocutionary acts. Some directives will be considered non-optional because they have a stronger degree of sincerity and they have been achieved in a particular way (presumably, uttered by a power or authority), so they leave no other option to the hearer than complying. Here is the crucial point: the alleged non-optionality is generated in principle by some attributes of the *speaker* –that is, his *intentionality* (a psychological state) and his position– not in the kind of reasons embodied by the directive or the relationship the speaker has with the correct reasons.

[135] Ibid., 19–20, 41–43, 100.
[136] Ibid., 15–16, 40.

4. **The Failure of the Illocutionary Act Argument (2): Reasons**

Now we move to the *second premise*, that is, the claim that a directive act has the existence of a reason to act as directed as one of its non-defectiveness conditions. Murphy claims that "in performing a directive act one invariably implies that the party addressed has a reason to perform the directed act,"[137] that is, when *X* directs *Y* to ϕ, X necessarily implies that *Y* has a reason to ϕ. He claims that this can be noticed by surveying various sorts of illocutionary acts and noting that in each case, "it seems to be the case that one who performs that act puts himself or herself forward as holding that there is some reason, of some strength, to perform the directed act."[138] Moreover, the most transparent evidence he provides for this claim is the so-called paradox test. For example, if *X* asks *Y* to pass a book, for Murphy, it would clearly paradoxical to say that *Y* has not any reason to act as requested: "it is paradoxical to deny the existence of any reason for compliance while making the request. Directives are issued by rational beings to rational beings, and thus they carry with them the implication that compliance with the directive is, in some respect, supported by reasons."[139]

According to the mainstream illocutionary act theory, however, to claim that the hearer has a reason to comply with the directed act is too strong a requirement for a directive speech act. There are three main ways to oppose to Murphy's claim. First, the orthodox theory has a detailed account of the success and non-defectiveness conditions in the case of directives, and none seem to include any relationships with decisive reasons.

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[137] Ibid., 20.
[138] Ibid., 46.
[139] *NLJP,* 47. (internal citations omitted).

The success of a directive is explained by its *propositional content*, which is related to the fact that the directive should represent a future course of action.[140] If *X* orders *Y* to clean *Y's* room two weeks ago, *X* is failing to meet the propositional content condition and thus this directive will be considered unsuccessful. The conditions of non-defectiveness are related to the preparatory conditions and the sincerity conditions: The general *preparatory condition* of all directives is that the hearer is capable of doing what he is directed to do.[141] The successful directive "pass me the salt" will be defective if there is no salt on the table, precisely, because the preparatory condition (capability) is not met. In the particular case of orders and commands, the presence an institutional authority is a special preparatory condition.[142] The *sincerity condition* in a directive commits the speaker to having a state of desire.[143] In other words, if one orders something it is because one really wants that thing to happen. According to the normal reading, then, the non-defectiveness conditions of a general directive are only two: that the hearer is not capable of doing the act (i.e., a state of affairs related to himself or his context)[144] and the speaker does not desire the directed thing to be done (i.e., some psychological state of the

[140] Searle and Vanderveken, *Foundations of Illocutionary Logic*, 37, 55–6, 198.

[141] Ibid., 16–7, 22, 55–6.

[142] Ibid., 100–1 and 201; Alston, *Illocutionary Acts and Sentence Meaning*, 98. In other place, he puts this requirement more clearly: "A non-linguistic institution is necessary for me to give an order, and the rules of ordering already specify the extralinguistic features of the world that are necessary in order to perform a successful and non-defective order." John R. Searle, "How Performatives Work," in *Essays in Speech Act Theory*, ed. Daniel Vanderveken and Susumu Kubo (Amsterdam: J. Benjamins Pub. Co., 2002), 100.

[143] Searle and Vanderveken, *Foundations of Illocutionary Logic*, 16–7, 22, 55–6.

[144] I am not going to discuss here the relationship between possibility and rationality. For possibility I will understand only factual possibility, that is, that the agent is materially able perform the action. For the sake of the descriptive argument I am making here, I am assuming that we can order and do irrational things. I do not think that nothing else is required in the standard reading of the theory of illocutionary acts.

speaker).[145] Thus, Murphy's additional requirement is not justified here. There is nothing to suggest that in performing a directive act one invariably implies that the party addressed has a reason to perform the directed act. To be clear, Searle claims that directives (in particular, demands) normally should specify a reason for directing the act, but that is not required as preparatory condition of any particular speech act.[146]

Second, there seems to be a misunderstanding of the nature of the directive illocutionary act in Murphy's proposal. In the orthodox understanding, a directive illocutionary act does not imply that the hearer has a pre-existent reason to do what the speaker directs. In fact, the very of objective of the act is to *create* the reason. To see this clearly, consider the most dramatic example: A sergeant orders a private "Do twenty push-ups!" without any apparent reason. The order that a sergeant gives to the private normally should be backed by a reason, but it is not structurally defective if it is not so. According to the normal reading of speech act theory we just sketched, this order is successful and not defective because it is an act to be done in the future, the private is capable of doing it, there is a framework of institutional authority that backs the dictate, and the superior desires that the act be done. What it is more important, prior to the utterance of the order by the sergeant, the private did not have a reason to do as required. But after the order is uttered, the private is obliged to act as requested mainly because the order itself.

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[145] Alston, *Illocutionary Acts and Sentence Meaning*, 99; Searle and Vanderveken, *Foundations of Illocutionary Logic*, 18, 56, 201. For a illuminating exploration of this point, see, Caterina Mauri and Andrea Sansò, "How Directive Constructions Emerge: Grammaticalization, Constructionalization, Cooptation," *Journal of Pragmatics* 43, no. 14 (November 2011): 3491.

[146] Searle and Vanderveken, *Foundations of Illocutionary Logic*, 18, 56, 201.

Third, the paradox test is not helpful for Murphy. The illocutionary act theorists do not call a paradox any contradiction in the illocutionary act. Paradoxes should be understood in terms of the special logic that has been developed for speech acts. They necessarily refer to certain types of inconsistencies between the illocutionary point of an act with certain propositional content, or between the illocutionary point and the sincerity and preparatory conditions of the act.[147] To see how this logic of an illocutionary act works, consider the following examples:

(1) I assert that I am not asserting
(2) I commit myself to never keeping any commitment.
(3) I promise you not to keep this promise
(4) I assert that I do not exist.
(5) I assert this assertion is false.
(6) I order you to clean the house but I do not want you to do that.

Examples (1) – (2) are called by Austin *performative contradictions* and by Searle and Vanderveken *self-defeating* illocutionary acts. On those types of act, the illocutionary content simply cannot be obtained with the propositional content. Those imply real logical paradoxes and are taken to be no illocutionary act at all because they result in empty illocutionary forces. Examples (3)-(4) are called *inconsistent* illocutionary acts and there are so characterized because it is impossible for the speaker to presuppose the preparatory conditions. However, as they achieve an illocutionary point, they are successful illocutionary acts, yet they are defective. Examples (5) and (6) are called *insincere* illocutionary acts because it is impossible for the speaker to commit to the

[147] Searle and Vanderveken, *Foundations of Illocutionary Logic*, 88–93, 148–152; for a more general presentation, see, Daniel Vanderveken, "Illocutionary Logic and Self-Defeating Speech Acts," in *Speech act theory and pragmatics*, ed. John R. Searle and Manfred Bierwisch (Dordrecht: Springer, 1980), 247–272; A Essa and L Kalle, "Notes on the Success of Speech Acts and Negotiating Commitments'(Berlin, Springer, 1996).," in *Communication Modeling: The Language/Action Perspective*, ed. F Dignum (Berlin: Springer, 1996).

mental state expressed in the act. Insincere illocutionary acts also achieve an illocutionary point, but they are defective.

What Murphy seems to be suggesting is that a different example (7) "I direct you to do ϕ, but I recognize that you have not the slightest reason to that" is also paradoxical and a condition of nondefectiveness. However, it is apparent that (7) is not one of the three special cases considered by the orthodox theory of paradoxical illocutionary. The reason it does not count as a paradox is because the requirement it includes (i.e., being backed by a reason) is not related to any of the three relevant elements of the illocutionary acts. Hence, (7) cannot yield a nondefectiveness condition.

However, this answer admits of a reply.[148] Cannot we change the orthodox reading and thus introduce the requirement of having a reason as one of the preparatory conditions or sincerity conditions of illocutionary acts? I think that the answer to this question must be negative. To justify the answer, I have to recur to the whole picture of directives speech acts. We already know that the presence of reasons is not an implication of a directive utterance. Instead, the point of the directive is to create the reason. In that regard, the fact that the hearer has a reason to act as directed seems to be better explained as the perlocutionary effect of the illocutionary act –that is, its consequence– not a presupposition that affects the nondefectiveness of the act.

To see this clearly, consider the following example: *X* says to *Y* "I invite you to dinner tomorrow at 7." Assume both the capability of *Y* to do so –the preparatory

[148] If that were true, I am unsure whether he wants to include the presence of a reason as a preparatory condition (i.e., it is a presupposition of the directive illocutionary act that there preexist a reason to act as directed) or as a sincerity condition (i.e., it is a mental state of the speaker). I will set this complication aside.

condition–, and *X*'s wish to have *Y* for dinner –the sincerity condition. Does *X's* invitation imply that *Y* has a reason to accept? The answer is clear: Not at all. Consider two facts. First, it is not paradoxical that *X* invites *Y* without a pre-existent reason for *Y* to go to *X*'s house; it is clear that the point of the invitation is precisely to create the reason for *Y*. Second, the fact that *Y* accepts the invitation is not explained that by the fact he had a pre-existent reason that is now decisive. The explanation is different. If *Y* accepts the invitation, what is normally taken to happen in this situation is that the perlocutionary effect of the invitation was successful.

Something similar happens in the directive illocutionary act. Now transform the former example into a directive where *X* says to *Y* "Come to my house tomorrow for dinner at 7!" Here, *X* is not implying that *Y* has a reason for coming for dinner. In fact, he wants to create the reason. The fact that *Y* says: "I have no reason at all to that," does not make the act paradoxical in the first place (nor does *Y* saying "That's a great idea!" render the act non-paradoxical.) Simply, if *Y* refuses, the perlocutionary effect has not been achieved. Whatever problems *X's* directive may have (it may be a very bad directive, it may be inappropriate, it may violate the rules of courtesy and good manners), according to the standards put forward by the illocutionary act theory, the act is not defective.[149] In a word, then, the absence of reason does not render an act paradoxical or defective, it only implies that it is likely that the perlocutionary effect it is not to be met.

[149] It is plausible to think that Murphy is confusing the "paradox test" used by Searle and Vanderveken with a weaker "rule of thumb" proposed by William P. Alston. The rule of thumb Alston proposes is based in a question: When a speaker performs an illocutionary act conjoined with a denial of a fact *p* or a mental states that the spacer ought to have about a *p*, would that denial of *p* inhibit us from taking the speaker to be making the illocutionary act? "If so, the condition should be included, if not, not." (Alston, *Illocutionary Acts and Sentence Meaning*, 77–8; Murphy quotes Alston in *NLJP*, 35.) . This is merely a "test" to identify which "conditions" are relevant for our explanation of the illocutionary act similar to what Murphy calls a

5. **The Failure of the Illocutionary Act Argument (3): Decisive Reasons and Rationality**

The third premise and fourth premise deals with the relationships between Non-Optional Directives, Decisive Reasons, and Rationality. Both premises fail for similar reasons. In the *third premise*, since directing an agent to do ϕ means that the agent has a reason to do ϕ, whenever the agent does not enjoy the option of non-compliance it is implied, Murphy contends, that the reason the agent has is decisive.[150] This idea has two parts: first, there is the distinction between optional and non-optional directives; and second, there is the fact that when we face a non-optional directive, a decisive reason must be present.

Let us criticize in turn each of these parts. In the first part of the idea, Murphy is putting the cart before the horse again. The fact that you are not at liberty to refrain from complying with a directive is not explained by the fact that the directive is non-optional. As we saw before, the lack of liberty derives from the strength of the degree of sincerity and the mode of achievement. Only an appropriate authority, speaking at the appropriate time and place, can christen a ship, pronounce a couple married, appoint someone to an administrative post, declare the proceedings open, or rescind an offer. Likewise, only an appropriate authority can create an order that is non-optional for the addresses. Perhaps the authority is *wrong* in christening the particular ship in question, or in issuing certain

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paradox. Interestingly, even when Alston uses similar patterns of reasoning and examples as Murphy (he also refers in several occasions of the example of passing the book), he ends up proposing the same account of the non-defectiveness conditions of directive illocutionary acts advanced by Searle *et al:* The only non-defectiveness conditions of directives are related to the capacity in the hearer to do as directed, and to the intention of the speaker to get the action directed done. (Alston, *Illocutionary Acts and Sentence Meaning*, 78.)

[150] Alston, *Illocutionary Acts and Sentence Meaning*, 97–102.

dictates, but this does not make those acts defective. In other words, the position of the speaker, and not the reasons (decisive or not), is what plays the central explanatory role in the descriptive account of the non-optionality of certain directive acts.

More importantly, in second place, there is no evidence that the reason has to be decisive. Let us accept, for purposes of argument, the non-optional character of directives. Let us further accept that there should be at least a reason in favour of complying with any non-defective directive. Do these two points together show that there must be decisive reasons behind every directive? I think not. In some contexts, it is not possible to refrain from doing what the speaker directs one to do, particularly, when the speaker has power or is an institutional authority. Again, if the sergeant orders a private to do twenty push-ups, there can be a decisive reason to do so, a less than decisive reason to do so, or there may be simply no reason at all. The fact that the order is not based on a decisive reason does not make it defective if it sincerely expresses the sergeant's wish that a future possible act be done.

To put it roughly (and with no intention to be exact), the objective of the directive is "do ϕ because I say so" and not "do ϕ because you have reason"(decisive or not). Some speakers in certain contexts can say "do ϕ because I say so" and the hearer should comply. Structurally speaking, the fact that ϕ-ing is not the right thing (or is unbacked by decisive reasons) does not make it defective, irrational or paradoxical. To be clear, the possibility of challenging the power of the authority or questioning whether the hearer should comply or not to a directive is not necessarily based on the presence or absence of decisive reasons for action. The latter is a different question. In sum, a strict analysis of

the structure of the directive illocutionary act reveals that the fact that a non-optional directive is *not* backed by decisive reasons does not make it defective.

Finally, the *fourth premise* is merely the union of the second and third premises. The second premise shows that what Murphy calls "demands" are non-optional illocutionary acts. The third premise shows that all directive illocutionary acts imply the existence of decisive reasons for action of the hearer to comply from what is directed. Both premises together are going to show, then, that "in making a demand, one implies that there is no option other than compliance. But how can rational beings be left with no option other than compliance unless the reasons that favour that compliance are decisive ones?"[151] The way to "confirm" this result is, once again, the paradox test. For Murphy it is a paradoxical statement to say "I hereby demand you ϕ, while recognizing that you can reasonably, all things considered, refrain from ϕ-ing."

I think that now it should be clear why this premise is flawed. The rhetorical question can be answered by one of Murphy's own remarks: "we should be wary of philosophical arguments the central move of which is a rhetorical question asking why one would deny the contradictory of the conclusion thought."[152] The rest of the elements have been addressed: I have already explained why the act is not paradoxical, and why Murphy confuses several elements in "non-optionality," so I do not think I have to repeat the previous argument. Hence, the presence of decisive reasons is not a nondefectiveness condition for directive illocutionary acts.

[151] *NLJP*, 47.
[152] "Defect and Deviance," 50.

However, I want to be clear on the limits of my claim. I am not, of course, denying that human beings often consider reasons for obeying a directive. The weak point that I am stressing is the difference between two approaches. It is one thing is to know whether what we have is a successful, non-defective directive; it is quite another to know whether or not the directive fits with the relevant reason for action. These are two separate projects, and the fact that a directive does not fit the standard in the second project does not make it defective in the first one. When the soldier faces an order, it is one thing to determine whether he is facing a successful non-defective order (that is, a sincere, possible expression of his superior's wish). It is quite another to determine whether he has reason to comply with, or perhaps criticize, the order.

For example, *de facto* authorities or illegitimate powers can (and indeed do) issue non-defective directives (in the sense that they sincerely direct possible future actions). There is nothing problematic in saying that these directives *qua* directives are successful and non-defective. It is quite a different thing, however, to justify compliance with a (successful, non-defective) directive. Here surely normative considerations play a decisive role. We can claim that to comply with the directive is something the agent has decisive reason to do, perhaps because the authority does a better job than the subject in identifying the relevant decisive reasons for action. But this is a different debate: the legitimacy of the authority or the duty to obey its directives.

Therefore, to claim that a non-backed directive is non-defective is not to deny human rationality or the possibility of criticizing norms, nor it is to imply that they are legitimate and should be obeyed. It is simply to say that being backed by decisive reason is *not* part of the defectiveness conditions of the illocutionary act of issuing a directive.

6. **The Impossibility to Extend the Argument**

Now that we have determined that Murphy is not successful in making his case that non-defective directives are necessarily backed by decisive reasons, we can move to examine his extension of this argument to all the different kinds of legal norms that are dealt with in the *third step* of his illocutionary act argument.

Murphy claims that right-conferring rules should be understood as commisives. A commisive is an illocutionary act, such as a promise, that commits the speaker to do a certain thing. A legal right, under this reading, is a commitment from the lawmaker to treat citizens in a certain way.[153] According to Murphy's account of non-defectiveness conditions, every right has to be backed by decisive reasons for action. Once again, this seems wrong. Commisives have particular success and non-defectiveness conditions similar to directives, and none of these include being backed by decisive reasons. Take promises. The propositional content of a promise refers to a future course of action; its preparatory conditions refer to the fact that the speaker is capable of doing the act in the future, and the sincerity condition includes the fact that the speaker really intends to do so. An important element to be bear in mind is that commisive acts are "undertakings," "they create practical reasons for the speaker to do the action to which he commits himself."[154]

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[153] *NLJP*, 49.
[154] Searle and Vanderveken, *Foundations of Illocutionary Logic*, 55.

For example, according to this account, we will think of any right, such as the right to bear arms or the right to an abortion in the first trimester, as a promise the state has made to individual citizens. Both are successful and non-defective commisives because the relevant acts are going to be done in the future, the actions are possible for the public institutions and officials to undertake, and the speaker really wants to grant this right (or so we are perhaps safe in assuming). However, whether or not the commisive is backed by decisive reasons seems irrelevant to the question whether the commitment is defective *qua* illocutionary act. In fact, the commitment itself creates a reason for action that applies to the state: the authority should protect this right because it has committed itself to doing so.

Finally, the same considerations apply to norms conferring powers. For Murphy a norm conferring a power should be understood as a declarative illocutionary act. The objection is similar: there is nothing in the structure of declaratives that grounds the connection with decisive reasons. For instance, the preparatory conditions include the fact that the speaker is able to bring the relevant state of affairs into reality (a priest or a judge, but not a doctor, can declare a marriage), and that the speaker attempts to do so. Speaking generally, there is nothing in the nature of declaratives, any more than there is in commisives or directives, that requires a connection to decisive reasons for action. It is clear then, that the argument cannot be extended. Hence, since both the second and the third step of the argument are flawed, there is no ground for Murphy's conclusion.

7. **Concluding Remarks**

In conclusion, the illocutionary act argument fails to establish that laws are necessarily backed by decisive reasons for action. The most plausible interpretation of this requirement is as failure to meet the perlocutionary effects of the act, and not as nondefectiveness conditions.

To finish, there are two aspects worth noticing in this failure. On the one hand, it is worth noticing that since Murphy is focused on trying to introduce a new non-defectiveness requirement for illocutionary acts, he ignores the no less important elements of speech acts highlighted in contemporary illocutionary act theory: the propositional content, and the preparatory and sincerity conditions. These, unlike being backed by decisive reasons for action, are relevant to deciding whether a putative directive should be considered an instance of a successful and nondefective legal illocutionary act. Recall that in our response to the paradox test, we introduced three ways in which the illocutionary act argument illuminates our theory of defectiveness. These are: Self-defeating illocutionary acts, inconsistent illocutionary acts, and insincere illocutionary acts. Simply, as Murphy is concerned in studying a red herring, he has set aside the most interesting discussions.[155]

On the other hand, the remarks and the criticisms I have advanced in this chapter do not imply that his position is baseless. Rather, my claims should be read in a weaker way. I think that Murphy seems to have embarked on a different project from the normal project of the illocutionary act theorist. He is studying the illocutionary acts in light of the

[155] To be sure, the only discussion that Murphy has provided is his endorsement and attempt to amend Alexy's version of the illocutionary act argument, which claims that unjust legal illocutionary acts are self-defeating. See, for Murphy's discussion of Alexy's position, "Defect and Deviance," 54–7. I think that Murphy's argument, for reasons similar to ones which I have exposed in this chapter, fails, but I will not discuss my disagreement any further here.

Aristotelian principles that inform his view. Notice that he seems to be reading all the types of illocutionary acts as kinds that exist independent of human will and analyzing their putative non-defectiveness conditions via hypothetical necessity. This is clear when we see that he uses the same patterns of reasoning he used in the formulation of the Decisive Reasons Thesis and the functional argument. He is introducing his idea of rationality –and thus, his idea that rational beings only obey reasons when they are backed by decisive reasons– as a master explanatory principle, and, from this, he attempts to deduce non-defectiveness conditions for directives that tie into decisive reasons for action.

However, the illocutionary act theorist is attempting something different. Searle and Vanderveken, for example, do not see illocutionary acts as kinds, nor are they committed to arguments of hypothetical necessity or claims of practical rationality as master explanatory principles. They see illocutionary acts as instances of certain human rule-governed skill, whose nature is determined by the users of the language.[156] What they claim to be doing is simply looking at how native speakers use their language, and from this, they offer linguistic characterizations that explain those uses.[157] In that regard, it is clear then Murphy's attempt to co-opt the orthodox illocutionary theory is unsuccessful, as there is a deep disagreement over the questions to be asked and the methods to be used in answering them.

[156] For a description of the method of the illocutionary act theorist, see, John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969), 12.
[157] Ibid., 15.

Conclusion

In this thesis, I have provided a comprehensive exploration of Professor Murphy's powerful theory of defectiveness. In making that journey, we have realized that his effort had one conspicuous success and some failures. The success lies in his ability to isolate legal defectiveness and to provide the first thorough theory of the notion. His discussion of the three most promising avenues for discussing the notion, which covers most of the alternatives available in the literature, is especially important as it sets the baseline from which future inquiries of the notion should proceed. His theory also displays several compelling elements, and it is able to show that the idea of legal defectiveness is a useful conceptual tool that captures many pervasive jurisprudential intuitions about the nature of law which deserve a central place in our jurisprudential studies. In this sense, I think it is safe to say that Murphy has showed us how defect –not weak natural law– is part of what defines the subject of jurisprudence.

However, the argument he has advanced comes with a number of substantive flaws. While in chapter II I was successful in showing that there is no evidence to think that the function of law is to provide dictates backed by decisive reasons for action, chapter III explains that there is nothing in the theory of illocutionary acts that leads us to think that this condition is part of the explanation of legal speech acts. Both sets of criticisms identify contradictions in his position, either with assumptions that are required for the success of the argument or with the coherence of his view as a whole. However, they do not constitute knockdown objections as the disagreements between my position and

Murphy's are much deeper and more complex and cannot be addressed in this thesis. But even so, they are a small contribution to a dialogue I expect this thesis advances further.

Bibliography

Alexy, Robert. "On the Concept and the Nature of Law." *Ratio Juris* 21, no. 3 (2008): 281–299.

———. *The Argument from Injustice: A Reply to Legal Positivism*. Translated by Stanley L. Paulson and Bonnie L. Paulson,. Oxford: Clarendon Press, 2002.

———. "The Dual Nature of Law." *Ratio Juris* 23, no. 2 (2010): 167–182.

Alston, William P. *Illocutionary Acts and Sentence Meaning*. Ithaca, N.Y.: Cornell University Press, 2000.

Aquinas, Thomas. *The Summa Theologica of St. Thomas Aquinas*. Translated by Fathers of the English Dominican Province. New York: Christian Classics, 1981.

Bix, Brian H. "Natural Law: The Modern Tradition." In *The Oxford Handbook of Jurisprudence & Philosophy of Law*, edited by Jules L. Coleman and Scott J. Shapiro, 62–103. Oxford: Oxford University Press, 2002.

———. "Robert Alexy, Radbruch's Formula, and the Nature of Legal Theory." *Rechtstheorie* 37 (2006): 139–149.

Blackburn, Simon. *The Oxford Dictionary of Philosophy*. Oxford: Oxford University Press, 2005.

Blackman, Reid D. "Meta-Ethical Realism with Good of a Kind." *European Journal of Philosophy* (2012): n/a–n/a.

Borowski, Martin. "Classifying and Qualifying Properties of Fundamental Rights." *Archiv für Rechts- und Sozialphilosophie* 108 (2007): 37–45.

Danielson, Peter. "Review of 'Natural Law and Natural Rights' by John Finnis." *University of Toronto Law Journal* 30, no. 4 (1980): 441–447.

Dworkin, Ronald. *Law's Empire*. Cambridge, MA: Harvard University Press, 1986.

———. "Thirty Years on." *Harvard Law Review* 115 (2002): 1655–1688.

Enc, Berent. "Function Attributions and Functional Explanations." *Philosophy of Science* 46, no. 3 (1979): 343–365.

Finnis, John. "Law and What I Truly Should Decide." *American Journal of Jurisprudence* 48 (2003): 107–130.

———. *Natural Law and Natural Rights*. 2nd ed. Oxford: Oxford University Press, 2011.

———. "Natural Law Theories." In *Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta. Fall 2011, 2011. http://plato.stanford.edu/archives/fall2011/entries/natural-law-theories/.

———. "On Reason and Authority in Law's Empire." *Law and Philosophy* 6, no. 3 (1987): 357–380.

Foot, Philippa. *Natural Goodness*. Oxford: Oxford University Press, 2003.

Gardner, John. "Hart on Legality, Justice and Morality." *Jurisprudence* 1, no. 2 (2010): 253–265.

———. "How Law Claims, What Law Claims." In *Institutional Reason: The*

Jurisprudence of Robert Alexy, edited by Matthias Klatt, 29–44. Oxford: Oxford University Press, 2012.

———. "The Legality of Law." *Ratio Juris* 17, no. 2 (2004): 168–181.

Geach, Peter T. "Good and Evil." *Analysis* 17 (1956): 33–42.

Hage, Jaap. "Why Norms Are Not Imperatives." *Archiv für Rechts- und Sozialphilosophie* 110 (2007): 151–159.

Hart, H. L. A. "Positivism and The Separation between Law and Morals." In *Essays in Jurisprudence and Philosophy*, 49–87. Oxford: Clarendon Press, 1983.

———. *The Concept of Law*. Edited by Joseph Raz and Penelope Bulloch. 2nd ed. Oxford: Clarendon Press, 1994.

Heidemann, Carsten. "Law's Claim to Correctness." In *Jurisprudence or Legal Science?: A Debate About the Nature of Legal Theory*, edited by George Pavlakos, 125–146. Oxford: Hart Publishing, 2005.

Himma, Kenneth E. "Law's Claim to Authority." In *Hart's Postscript : Essays on the Postscript to The concept of Law*, edited by Jules L Coleman, 271–310. New York: Oxford University Press, 2001.

Hursthouse, Rosalind. *On Virtue Ethics*. Oxford: Oxford University Press, 2000.

Kelsen, Hans. *General Theory of Law and State*. 1st ed. New Jersey: Transaction Publishers, 1946.

MacCormick, Neil. *Institutions of Law: An Essay in Legal Theory*. Oxford: Oxford University Press, 2007.

———. "The Separation of Law and Morals." In *Natural Law Theory*, edited by Robert P. George, 105–133. Oxford: Oxford University Press, 1992.

———. "Why Law Makes No Claims?" In *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy*, edited by George Pavlakos, 59–68. Oxford: Hart Publishing, 2007.

Marmor, Andrei. *Interpretation and legal theory*. 2nd ed. Oxford: Hart Publishing, 2005.

Mauri, Caterina, and Andrea Sansò. "How Directive Constructions Emerge: Grammaticalization, Constructionalization, Cooptation." *Journal of Pragmatics* 43, no. 14 (November 2011): 3489–3521.

Mitchell, Sandra D. *Biological Complexity and Integrative Pluralism*. Cambridge: Cambridge University Press, 2003.

Moore, Michael S. "A Theory of Criminal Law Theories." *Tel Aviv University Studies in Law* 10 (1990): 115–186.

———. "Four Reflections on Law and Morality." *William and Mary Law Review* 48 (2007): 1523–1570.

———. "Law as a Functional Kind." In *Natural Law Theory: Contemporary Essays*, edited by Robert P. George, 188–243. Oxford: Clarendon Press, 1992.

———. "Law as Justice." *Social Philosophy and Policy* 18, no. 1 (2001): 115–145.

———. "The Semantics of Judging." *Southern California Law Review* 54 (1981): 151–294.

Murphy, Mark C. *An Essay on Divine Authority*. Ithaca, N.Y.: Cornell University Press, 2002.

———. "Book Review of Scott Shapiro, 'Legality'." *Law and Philosophy* 30, no. 3 (2011): 369–375.

———. "Defect and Deviance in Natural Law Jurisprudence." In *Institutional Reason: The Jurisprudence of Robert Alexy*, edited by Matthias Klatt, 45–60. Oxford: Oxford University Press, 2011.

———. "Finnis on Nature, Reason, God." *Legal Theory* 13, no. 3–4 (2007): 187–209.

———. *Natural Law and Practical Rationality*. Cambridge: Cambridge University Press, 2001.

———. *Natural Law in Jurisprudence and Politics*. Cambridge: Cambridge University Press, 2006.

———. "Natural Law Jurisprudence." *Legal Theory* 9, no. 4 (2003): 241–267.

———. "Natural Law Theory." In *The Blackwell Guide to the Philosophy of Law and Legal Theory*, edited by Martin P. Golding and William A. Edmundson, 15–28. Oxford: Blackwell, 2005.

———. "No More Fresh Starts." *Analysis* 72, no. 3 (2012): 563–573.

———. *Philosophy of Law: The Fundamentals*. 1st ed. Oxford: Wiley-Blackwell, 2006.

———. "Real Aristotelianism About Law's Authority." In *McMaster Graduate Conference of Legal Philosophy*. Hamilton (Canada), 2012.

———. "The Explanatory Role of the Weak Natural Law Thesis." In *The Nature of Law: Contemporary Perspectives*, edited by Wilfrid J. Waluchow and Stefan Sciaraffa, TBA. Oxford: Oxford University Press, 2013.

———. "The Natural Law Tradition in Ethics." In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, 2011. http://plato.stanford.edu/archives/win2011/entries/natural-law-ethics/.

———. "Was Hobbes a Legal Positivist?" *Ethics* 105, no. 4 (1995): 846–873.

Payne, Michael. "Finnis on Viewpoint and Focal Meaning." In *Filosofía del Derecho y Filosofía de la Cultura: Memorias del X Congreso Ordinario Mundial de Filosofía del Derecho y Filosofía Social (IVR)*, edited by Jose Luis Curriel, VII:159–173. 1st ed. Mexico: UNAM, 1982. biblio.juridicas.unam.mx/libros/1/469/17.pdf.

———. "Hart's Concept of a Legal System." *William and Mary Law Review* 18 (1977 1976): 287–319.

Robinson, Daniel N. "Antigone's Defense: A Critical Study of 'Natural Law Theory: Contemporary Essays'." *Review of Metaphysics* 45, no. 2 (1991): 363–392.

Sartorious, Rolf. "Hart's Concept of Law." In *More Essays in Legal Philosophy: General Assessments of Legal Philosophies*, edited by Robert S. Summers, 131–161. Berkeley & Los Angeles: University of California Press, 1971.

Searle, John R. *Construction of Social Reality*. New York: Simon & Schuster, 1995.

———. *Expression and Meaning: Studies in the Theory of Speech Acts*. Cambridge:

Cambridge University Press, 1985.

———. "How Performatives Work." In *Essays in Speech Act Theory*, edited by Daniel Vanderveken and Susumu Kubo, 85–108. Amsterdam: J. Benjamins Pub. Co., 2002.

———. "Response: Meaning, Intentionality, and Speech Acts." In *John Searle and His Critics*, edited by Ernest Lepore and Robert Van Gulick, 82–102. Oxford: Blackwell, 1993.

———. *Speech Acts: An Essay in the Philosophy of Language*. Cambridge: Cambridge University Press, 1969.

Searle, John R., and Daniel Vanderveken. *Foundations of Illocutionary Logic*. Cambridge: Cambridge University Press, 1985.

Shapiro, Scott J. *Legality*. Cambridge, MA: Harvard University Press, 2011.

Soper, Philip. "Law's Normative Claims." In *The Autonomy of Law: Essays on Legal Positivism*, edited by Robert P. George, 215–248. Oxford: Oxford University Press, 1996.

Thompson, Michael. "Apprehending Human Form." In *Modern Moral Philosophy: Royal Institute of Philosophy Supplement: 54*, edited by Anthony O'Hear, 47–75. Cambridge: Cambridge University Press, 2004.

———. *Life and Action: Elementary Structures of Practice and Practical Thought*. Cambridge, MA: Harvard University Press, 2008.

———. "The Representation of Life." In *Virtues and Reasons: Philippa Foot and Moral Theory: Essays in Honour of Philippa Foot*, edited by Rosalind Hursthouse, Gavin Lawrence, and the late Warren Quinn, 247–97. Oxford: Oxford, 1998.

Wiggins, David. *Sameness and Substance Renewed*. Cambridge: Cambridge University Press, 2001.