Osgoode Hall Law Journal

Volume 19, Number 2 (June 1981)

Article 6

Book Review: Natural Law and Natural Rights, by John Finnis

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Book Reviews

NATURAL LAW AND NATURAL RIGHTS, JOHN FINNIS, OXFORD: Clarendon Press. 1980. Pp. xv + 425.

The publication of this monograph as the tenth volume in the Clarendon Law Series gives that prestigious series an historical symmetry. Its first volume, now twenty years old, is the classic treatise by H.L.A. Hart, *The Concept of Law*. While paying due respect to Hart's achievements, Finnis works out a very different kind of jurisprudence; though with many of the same tools and out of the same tradition of philosophical style and method. With only a slight risk of simplification, it could be said that his book has the same object as Hart's, the construction of a concept of law. Yet, it fetches in a richer set of data by building the argument up in the opposite direction.

Hart began with a structural analysis of law and produced a descriptive definition that concentrated on the formal features of the legal order. A wealth of background suppositions must be ignored with this approach. As a result, Hart's definition of law explicitly reflects the standard features of a modern British parliamentary system, and the autonomy or logical closure of the legal order remains unexamined. From this standpoint, the relation of law to morality, or of the rule of law to the ideal of justice, or of the whole legal order to the ethics and culture of a society, is left problematic and contingent. Hart finds no broader basis for law than that provided by a Hobbesian "minimum content of natural law."

Working in the opposite direction, Finnis first sets himself the task of hammering out the essentials of moral and political theory [Chapters III-IX of Part Two], so that the concept of law that is finally reached [Chapters X-XII] is not only descriptive but normative. The logical self-sufficiency of a sophisticated legal system is thereby both justified and at the same time is given its proper circumscription, rather than being taken for granted. More importantly, it turns out that a concept of law derived in this manner has the full generality of explanatory power that it needs. In the end, Finnis has much less difficulty than Hart in incorporating international law, customary law, tribal law and so forth into the cluster of phenomena that deserve to be called law. His paradigm of law is so complex that it is easy to delineate just how each of the different varieties of law departs from the central or typical case. The advantages of working in this direction become apparent in the course of the work. The book begins with a defence of its method in Part One, which contains a chapter on the impossibility of segregating evaluation from description in jurisprudence and a chapter refuting the usual image of "natural law" theories as fundamentally descriptive.

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To reconstruct jurisprudence as a modern version of Aristotle's "political science," proceeding as he did from ethics, to politics and then to law, is no small order. The author begins with a set of chapters that presents what could be called, in the light of our contrast with Hart, "the maximum content of natural law." Much of this work has its source in traditional authors (elaborately cited in the notes), but it is defended independently. Finnis refers not only to the parochial character of Aristotle's evaluation of the Greek city-state, but also to gaps, obscurities, and irrelevant analogies in Aquinas's arguments. Much of his normative ethics is taken over, with due acknowledgement, from the work of the contemporary Catholic moral philosopher, Germain Grisez, which is an original reformulation of much of the natural law tradition. In his Preface, Finnis promises no appeals to authority and he keeps his word with a sharply argumentative style. In Chapter III on Knowledge and in Chapter VI on Community, readers are challenged to reflect on what they are doing while reading, teaching or learning. In earlier parts of the book on general principles, the frequent ellipses points invite readers to take part in the writing by supplying their own comparisons and examples. As the subjects become more specific in later chapters, the ellipses gradually give way to increasing numbers of internal cross-references that pull the threads of the intricate argument together. At critical junctures the author formalizes his subject-matter with the tools of symbolic logic so as to display separately the sets of empirical and normative premises that are intertwined in ordinary moral and legal discourse.[1]

Two significant departures from the way Aquinas argued his theory of natural law should be noted. The first is that Finnis drops the reference to other classes of beings in the universe that St. Thomas makes in the course of listing the precepts of the natural law.[2] There are instead a list of seven (the number is not crucial to the method) "basic human values" that are experienced as desirable and worthwhile.

This lexicon of principles is deontological from the start, as suggested anyway by Aquinas's "The good is to-be-done." Unburdened by parallels to a cosmology that one might often regard as quaint, this normative lexicon can readily be co-ordinated with, though not copied from, modern psychology and anthropology (*e.g.* Maslow's basic human needs). It deserves to be compared with numbers of other lists of "intrinsic goods" such as G.E. Moore's two and W.D. Ross's five; some of them drawn up, of course, in the context of a different ethical theory. The moral philosophy, in the modern sense of a decision procedure with rules and principles governing particular choices, is completed with a chapter on the ideal of rationality in life, "The Basic Requirements of Practical Reasonableness." There is a contemporary echo in this sequence of the ancient *dictum* that the virtues (developed worthy inclinations) cannot be acquired without the ruling virtue — "prudence" or practical wisdom.

The second departure is more original and also more fruitful for legal

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[1] Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980) at 199, Ch. VIII, Rights; at 234, 242; Ch. IX, Authority; at 315, Ch. XI, Obligation.

[2] *Id.* at 94-95, discussing *Summa Theologiae*, I-II, q. 94, a. 2.

theory. Finnis argues that the logical relation of positive law to natural law is usually, in the technical language of Aquinas, one of both "deduction" and "determination," and hardly ever just the one or the other.[3] For example, not only does the arbitrary British decision to have everyone drive on the left side of the road have a remote "deductive" basis in principles like safety and order, requiring that there be one rule or another; but also the most serious portions of the criminal law are not simply "deduced" from morality; they too involve legislative determination. A sign of this is the future indicative "It shall be an offence to . . . ," which along with the stipulation of degrees, procedures, complete and partial defences, graded sentences, and so forth, suggests that the legislator in an advanced legal system selects certain moral material for subsumption under pre-existent legal categories that imply their own normative context. This element of decision by legislative authority grounds the autonomy of the legal order without in any way cutting its basic ties to the entire moral order. The point is well taken, and even helps to correct some impressions that might be left by Hart's description of "primary rules."

Professionals will in fact be favourably impressed by Finnis's learning in the law. Part of his evidence for the thesis that distributive justice is a moral standard for the relations between citizens, and not just a goal to be reached by state action "from above," is a detailed study of the rules of bankruptcy proceedings. For an example of the creation of authoritative rules without the benefit of an authoritative source, he goes into an elaborate analysis of the genesis of international conventions. The Holmesian concept of legal obligation as nothing more than liability for non-performance is refuted by an analysis of the common law of contracts, where the desirability of performance by both parties comes first. The "formal invariance" of legal obligation, or in other words, that law is a matter of rules where even the exceptions have to be rules, is shown to hold even for the most difficult instances, such as where the language of the law is extremely vague.[4] More than once, Finnis takes note of natural law premises that arise like signposts along the maze of pathways that constitute the practice of law. It is just these elements of substance that are usually neglected at the level of abstraction required by a formalistic approach to legal theory.

Another kind of learning in which this book is rich is the history of ethics and jurisprudence. Over a dozen now obscure, but at one time influential, fifteenth to eighteenth century English and Continental teachers of ethics, moral theology and law are quoted for their contribution to contemporary positions. Though the question 'who said what' is the least of the author's concerns, his original scholarship in this area brings a number of fringe benefits to those who enjoy the detective work of hunting down the sources of popular but questionable theories. Early on, one discovers that Hume's *dic-*

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[3] *Id.* at 281-90. Aquinas introduces these terms in the *Summa Theologiae*, I-II q. 95, a. 2. Finnis points to more complicated statements of the distinction by Hooker and St. German.

[4] *Id.* at 310-12. Finnis works this out for ss. 14 and 62 of the *Sale of Goods Act, 1893*, 56 & 57 Vict., c. 71 (U.K.) as am. by *Supply of Goods (Implied Terms) Act 1973*, 1973, c. 13 ss. 3, 7(2) (U.K.).

tum on "ought" and "is" was framed in the context of Samuel Clarke and the Cambridge Platonists. Finnis maintains that in its more informative or non-trivial significance, the dictum was anticipated anyway by the scholastic division of theoretical knowledge from practical knowledge. The Thomistic commentators, led off by Cajetan, are found to be responsible for separating the traditional parts of justice (legal, distributive, and commutative) and assigning them either to the citizens or to the state. Policies of the early modern Spanish monarchy had a considerable bearing on the creation of the voluntaristic notion of Suarez's immediate predecessors, "purely penal law."

The most contentious part of the author's argument will be found in the area of ethics. The bewildering variety of objectives, projects, commitments, specialties and roles or combinations of these that different persons adopt has always proved to be a source of scepticism about any attempt to delineate a set of basic human values. Finnis has carefully defined the logic whereby his list of basic values enters into practical reasoning so that the indefinite variety of valuable lives is not controverted. For one thing, he finds the classic language of ends and means inadequate, and misleading as an expression of the relation between one's choices and these values. The ends one decides to seek are necessarily particular. No individual human being's goals can exhaust any or all of the basic values. Projects that frustrate their achievement can be condemned, however, and it is a measure of human development that a person's life should in its own way participate to some degree in each of them.

It may be that Finnis will be labelled by some readers as a conservative, but that would not be particularly illuminating. He makes it clear that the proper sense of the "common good" includes the several goods of all the individuals in the community and their personal prospects for flourishing and development; it is not the collective good of some form of utilitarian calculus. He regards utilitarian reasoning as incoherent when it is detached from its role as a subordinate instrument within general moral deliberation and turned into an absolute decision procedure. He has a similar remark to make about the theory of rights; in itself a fruitful and powerful development of one specific area of morality, but incapable of doing the whole job alone. The only point at which the label conservative might stick is in the section on community, where the author seems, from an Anglo-American viewpoint, too mild or benevolent toward the civilian tradition of *ordre publique* that is adopted in so many Latin countries. That angle, however, does not really matter; a normative concept of law, if grounded on a sufficiently rich ethical base, will necessarily be of itself critical and reformative.

It is only in the last chapter (by itself forming Part Three) that Finnis takes up the link between natural law ethics and religion. Religion was unobjectionably included among his basic human values, with the neutral definition that it stands for our necessary concern with ultimate questions. In this perspective, religion would encompass even theses such as that the whole point of the present is simply in the future of history. His own views are theistic, but they are introduced with a brilliant and original reflection on Plato's ancient metaphor of the world as divine play, echoing the idea of play that had already been introduced as a basic human value.

In this sequence of chapters, Finnis's opening argument for the common norms of our humanity will stand or fall on its own. The requirement to ground jurisprudence on considerations of that sweep is expressed in a couple of the author's summary sentences: "The principal concern of a theory of natural law is to explore the requirements of practical reasonableness in relation to the good of human beings who, because they live in community with one another, are confronted with problems of justice and rights, of authority, law, and obligation."[5]

The admittedly defeasible foundation of law within basic morality is derived from "the principles that the common good is to be advanced, that authoritative determination of co-ordination problems is for the common good, and that legal regulation is (presumptively) a good method of authoritative determination."[6]

Materially, the book is well arranged, with the very detailed notes introduced by section numbers and small titles in italics at the end of each chapter (as in other volumes of the series), so that the text of each chapter is not larded with superscript numbers.

Some years ago, a less competent critic of Hart, Lon Fuller, applied the label "analytical jurisprudence" to Hart's work in the course of his own somewhat confused defence of certain features of the natural law tradition.[7] For Fuller, however, analytical jurisprudence is largely identified with legal positivism. John Finnis finds the roots of his own work in that same modern school of analytical jurisprudence;[8] his book attempts to show that a full analysis of the concept of law will find much that must be recaptured from the classic theories of natural law.

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[5] *Id.* at 351.

[6] *Id.* at 335.

[7] Fuller, *The Morality of Law* (2nd ed. New Haven: Yale Univ. Press, 1969) at 190-97.

[8] Finnis, *supra* note 1, at vi, Preface.