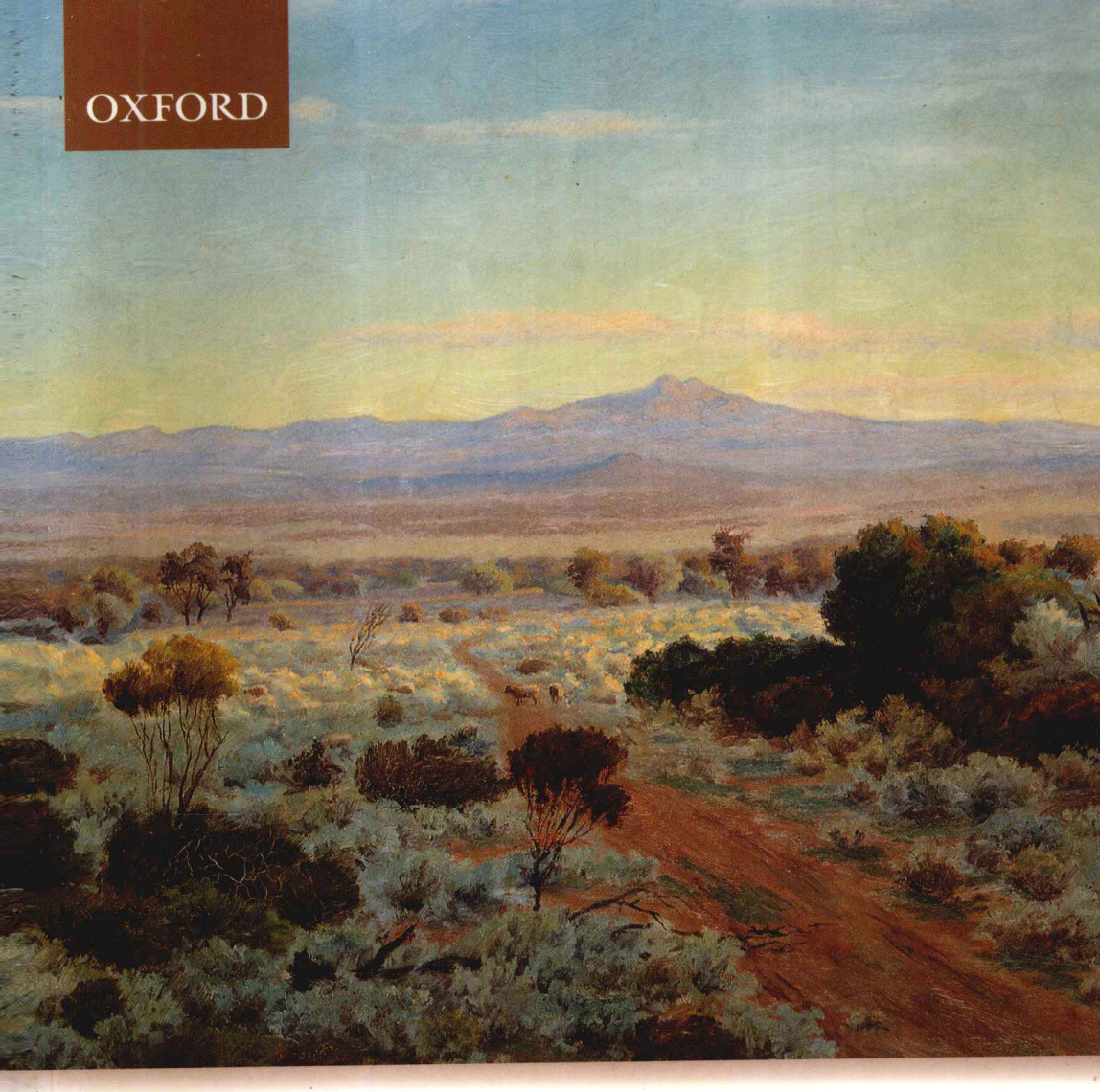
OXFORD



JOHN FINNIS

Natural Law & Natural Rights

Second Edition

NATURAL LAW AND NATURAL RIGHTS

Second Edition

JOHN FINNIS

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford ox2 6DP

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in

Oxford New York

Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto

With offices in

Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
South Korea Switzerland Thailand Turkey Ukraine Vietnam

Oxford is a registered trade mark of Oxford University Press
in the UK and in certain other countries

Published in the United States
by Oxford University Press Inc., New York

First published 2011 (first edition 1980)

British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data
Data available

Typeset by SPI Publisher Services, Pondicherry, India
Printed in Great Britain
on acid-free paper by
CPI Antony Rowe

ISBN: 978–0–19–959913–4
ISBN: 978–0–19–959914–1 (Pbk.)

3 5 7 9 10 8 6 4 2

PREFACE

THE core of this book is its second Part. In one long movement of thought, these chapters (III–XII) sketch what the textbook taxonomists would label an 'ethics', a 'political philosophy', and a 'philosophy of law' or 'jurisprudence'. We may accept the labels, as a scholarly convenience, but not the implication that the 'disciplines' they identify are really distinct and can safely be pursued apart. Parts One and Three are, in a sense, outriders. Anyone interested in natural law simply as an ethics may omit Chapter I; anyone whose concerns are limited to jurisprudence may omit Chapter XIII. And those who want to see, in advance, how the whole study yields an understanding very different from the accounts of 'natural law' in their textbooks of jurisprudence and philosophy might turn first to Chapter XII, and then perhaps to Chapter II.

The book is no more than introductory. Countless relevant matters are merely touched upon or are passed over altogether. Innumerable objections receive no more than the silent tribute of an effort to draft statements that would prove defensible if a defence against objections were explicitly undertaken. No effort is made to give an ordered account of the long history of theorizing about natural law and natural rights. For experience suggests that such accounts lull rather than stimulate an interest in their subject-matter. And indeed, the history of these theories can only be properly understood by one who appreciates the intrinsic problems of human good and practical reasonableness with which the theorists were grappling. So my prior concern is to give my own response to those problems, mentioning other theories only where I think they can both illuminate and be illuminated by the theory presented in this book. My hope is that a re-presentation and development of main elements of the 'classical' or 'mainstream' theories of natural law, by way of an argument on the merits (as lawyers say), will be found useful by those who want to understand the history of ideas as well

as by those interested in forming or reforming their own view of the merits.

Every author has his milieu; this book has roots in a modern tradition that can be labelled 'analytical jurisprudence', and my own interest in that tradition antedates the time when I first began to suspect that there might be more to theories of natural law than superstition and darkness. Someone who shared my theory of natural law, but whose focus of interest and competence was, say, sociological jurisprudence or political theory or moral theology, would have written a different book.

In 1953 Leo Strauss prefaced his study of natural law with the warning that 'the issue of natural right presents itself today as a matter of party allegiance. Looking around us, we see two hostile camps, heavily fortified and guarded. One is occupied by the liberals of various descriptions, the other by the Catholic and non-Catholic disciples of Thomas Aquinas'.[1] Things have changed during the last 25 years, and the debate need no longer be regarded as so polarized. Still, the issues tackled in this book go to the root of every human effort, commitment, and allegiance, and at the same time are overlaid with a long and continuing history of fierce partisanship. So it may be as well to point out that in this book nothing is asserted or defended by appeal to the authority of any person or body. I do quite frequently refer to Thomas Aquinas, because on any view he occupies a uniquely strategic place in the history of natural law theorizing. Likewise, I refer occasionally to the Roman Catholic Church's pronouncements on natural law, because that body is perhaps unique in the modern world in claiming to be an authoritative exponent of natural law. But, while there is place for appeal to, and deference to, authority, that place is not in philosophical argument about the merits of theories or the right response to practical problems, and so is not in this book.

My arguments, then, stand or fall by their own reasonableness or otherwise. But that is not to say that there is much that is original in them. My debts to Plato, Aristotle, Aquinas, and other authors in that 'classical' tradition are recorded in the

[1] Strauss, *Natural Right and History* (Chicago: 1953), 7.

footnotes and in the more discursive notes following each chapter. My debt to Germain Grisez is similarly acknowledged, but calls for explicit mention here. The ethical theory advanced in Chapters III–V and the theoretical arguments in sections VI.2 and XIII.2 are squarely based on my understanding of his vigorous re-presentation and very substantial development of the classical arguments on these matters.

I have, of course, many other debts, particularly to David Alston, David Braine, Michael Detmold, Germain Grisez, H. L. A. Hart, Neil MacCormick, J. L. Mackie, Carlos Nino, and Joseph Raz, who from their diverse standpoints offered comments on the whole or substantial parts of a draft.

The book was conceived, begun, and finished in the University of Oxford, whose motto could be placed at the end of Part Three. But the book was mainly written in Africa, in Chancellor College at the University of Malawi, in an environment at once congenial and conducive to contemplation of the problems of justice, law, authority, and rights.

March 1979

PREFACE TO THE SECOND EDITION

THE text of the first edition, including its footnotes and the endnotes to each chapter, is almost unchanged. Typographical and other formal errors have been corrected, and two or three kinds of locution whose connotations have altered significantly since 1979 have been adjusted. Although everything has been reset, the pagination is the same, within one line per page, up to the point where the Postscript begins, after which there is also an enlarged Index to both the original book and the Postscript.

The aim of the Postscript is not to say everything that might well be said if these matters were to be treated afresh. Rather it is to indicate where the original needs, I think, amendment or supplementation. The Postscript begins with some general observations, by way of introductory Overview, and then comments on each chapter section by section, in sequence. In the Index, references to pages numbered above 413 are to new material.

This new edition was prepared in conjunction with the five volumes of my *Collected Essays* (hereafter *CEJF*). References in the Postscript to items republished in those volumes use the form essay II.13 and so forth. Where the original edition cited something republished in *CEJF*, a supplementary reference in that form has also been inserted. Each of those five volumes contains a substantially complete Bibliography of my publications both before and after *Natural Law and Natural Rights*. The short Bibliography of Cited Essays, after the Postscript, locates each of the works of mine cited in the Postscript, whether or not republished in *CJEF*.

The editor of the Clarendon Law Series kindly allowed me to use a cover picture in the style of the *Collected Essays*. Like the picture for *CEJF* I, but not the other volumes, this is an oil painting. Done in 1891 by Edward White, it is called *White*

Saltbush, and depicts results of human purpose and action, to 'subdue the earth', in vast areas of marginal land in South Australia that are neither as near-desert as Lake Torrens (*CEJF* V) nor as hospitable and fertile as Adelaide (*CEJF* III and IV) or the Barossa Valley (*CEJF* II).

February 2011

POSTSCRIPT ABBREVIATIONS

Aquinas	John Finnis, *Aquinas: Moral, Political and Legal Theory* (OUP: 1998)
CL^2	H.L.A. Hart, *The Concept of Law* (2nd edn) (OUP: 1994)
FoE	John Finnis, *Fundamentals of Ethics* (OUP; Georgetown University Press: 1983)
LCL	Germain Grisez, *Living a Christian Life* (Franciscan Press: 1993)
LE	Ronald Dworkin, *Law's Empire* (Harvard University Press; Fontana: 1986)
NDMR	John Finnis, Joseph Boyle and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (OUP: 1987)
NLNR	John Finnis, *Natural Law and Natural Rights* (OUP: 1980; 2nd edn 2011)

ABBREVIATIONS

Adel L. R.	*Adelaide Law Review*.
Am. J. Int. L.	*American Journal of International Law*.
Am. J. Juris.	*American Journal of Jurisprudence* (formerly *Nat. L.F.*).
Arch.Phil.Dr.	*Archives de Philosophic du Droit.*
Arch.R.S.P.	*Archiv fur Rechts- und Sozialphilosophie.*
British Moralists	D. D. Raphael (ed.), *British Moralists 1650–1800* (Oxford: 1969).
Camb. L.J.	*Cambridge Law Journal.*
Comm.	William Blackstone, *Commentaries on the Laws of England* ((Oxford: 1765–9) cited to 9th edn, 1783, the last revised by Blackstone).
Concept of Law	H. L. A. Hart, *The Concept of Law* (Oxford: 1961) [page numbers in the 2nd edn, 1994 have been added in brackets where the pagination of editions diverges].
De Legibus	Francisco Suarez, SJ, *De Legibus ac Deo Legislatore* (Coimbra: 1612).
Doctor and Student	Christopher St. German, *Doctor and Student* [1523 (First Dialogue, Latin), 1530 (Second Dialogue, English), 1531 (First Dialogue, Eng.)], eds Plucknett and Barton (London: 1975).
Essays	P. M. S. Hacker and J. Raz, *Law, Morality and Society: Essays in honour of H. L. A. Hart* (Oxford: 1977).
Eud. Eth.	Aristotle, *Eudemian Ethics.*
Gauthier-Jolif	R. A. Gauthier and J. Y. Jolif, *L'Ethique à Nicomaque* (revised edn, Paris: 1970).
General Theory	Hans Kelsen, *General Theory of Law and State* (Cambridge, Mass.: 1945).
Harv. L. Rev.	*Harvard Law Review.*
I. C. J. Rep.	*Reports of the International Court of Justice.*
in Eth.	Thomas Aquinas, *In Decem Libros Ethicorum Aristotelis ad Nicomachum Expositio*, ed. R. M. Spiazzi (Turin and Rome: 1949).

in Pol.	Thomas Aquinas, *In Octo Libros Politicorum Aristotelis Expositio*, ed. R. M. Spiazzi (Turin and Rome: 1951).
in Primam Secundae	Gabriel Vazquez, SJ, *Commentariorum ac Disputationum in Primam Secundae Sancti Thomae...* (1605).
Int. J. Ethics	*International Journal of Ethics.*
Legal System	J. Raz, *The Concept of a Legal System* (Oxford: 1970).
L.Q.R.	*Law Quarterly Review.*
Meta.	Aristotle, *Metaphysics.*
Methodology	E. A. Shils and H. A. Finch (eds.), *Max Weber on the Methodology of the Social Sciences* (Glencoe, Ill.: 1949).
Morality of Law	Lon L. Fuller, *The Morality of Law* (revised edn, 1969, New Haven and London).
Nat. L.F.	*Natural Law Forum* (now *Am. J. Juris.*).
Nic. Eth.	Aristotle, *Nicomachean Ethics.*
Of Laws	Jeremy Bentham, *Of Laws in General* (ed. H. L. A. Hart, London: 1970).
On Law	Max Rheinstein (ed.), *Max Weber on Law in Economy and Society* (Cambridge, Mass.: 1954).
Oxford Essays II	A. W. B. Simpson (ed.), *Oxford Essays in Jurisprudence: Second Series* (Oxford: 1971).
Phil. Pub. Aff.	*Philosophy and Public Affairs.*
Phil. Rev.	*Philosophical Review.*
Pol.	Aristotle, *Politics.*
Post. Anal.	Aristotle, *Posterior Analytics.*
Practical Reason	J. Raz, *Practical Reason and Norms* (London: 1975).
Proc. Aris. Soc.	*Proceedings of the Aristotelian Society.*
Province	John Austin, *The Province of Jurisprudence Determined* (1832; ed. H. L. A. Hart, London: 1954).
Rev. Thom.	*Revue Thomiste.*
S.T.	Thomas Aquinas, *Summa Theologiae*, cited by Part (I, I–II, II–II, III), Question (q. 94), and Article (a. 2); (a. 2c = body of the reply, in a. 2; ad 4 = reply to fourth objection in relevant Article).
Theory of Justice	John Rawls, *A Theory of Justice* (Cambridge, Mass.: 1971, Oxford: 1972).
U. Pa. L. Rev.	*University of Pennsylvania Law Review.*

CONTENTS

Part One

I
EVALUATION AND THE DESCRIPTION OF LAW

1.1 THE FORMATION OF CONCEPTS FOR DESCRIPTIVE SOCIAL SCIENCE

THERE are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy. It is the object of this book to identify those goods, and those requirements of practical reasonableness, and thus to show how and on what conditions such institutions are justified and the ways in which they can be (and often are) defective.

It is often supposed that an evaluation of law as a type of social institution, if it is to be undertaken at all, must be preceded by a value-free description and analysis of that institution as it exists in fact. But the development of modern jurisprudence suggests, and reflection on the methodology of any social science confirms, that no theorist can give a theoretical description and analysis of social facts without also participating in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.

A social science, such as analytical or sociological jurisprudence, seeks to describe, analyse, and explain some object or subject-matter. This object is constituted by human actions, practices, habits, dispositions, and by human discourse. The actions, practices, etc., are certainly influenced by the 'natural' causes properly investigated by the methods of the natural sciences, including a part of the science of psychology. But the actions, practices, etc., can be fully understood only by understanding their point, that is to say their objective, their value, their significance or importance, as conceived by the people who performed them, engaged in them, etc. And these conceptions of point, value, significance, and importance will be reflected in the discourse of those same people, in the con-