NATURAL LAW AND NATURAL RIGHTS

JOHN FINNIS

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BY

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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 twenty-five 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 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), p. 7.

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 'main stream' 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

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 III. 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

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 Philosophie du Droit.*
Arch.R.S.P.	*Archiv für 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 ed., 1783, the last revised by Blackstone).
Concept of Law	H. L. A. Hart, *The Concept of Law* (Oxford: 1961).
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, English)], ed. 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 ed., Paris: 1970).
General Theory	Hans Kelsen, *General Theory of Law and State* (Cambridge, Mass.: 1945; reprint, New York: 1961).
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 ed., 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.*
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

I.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 a theorist cannot give a theoretical description and analysis of social facts, unless he also participates 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-

ceptual distinctions they draw and fail or refuse to draw. Moreover, these actions, practices, etc., and correspondingly these concepts, vary greatly from person to person, from one society to another, from one time and place to other times and places. *How, then, is there to be a general descriptive theory of these varying particulars?*

A theorist wishes to describe, say, law as a social institution. But the conceptions of law (and of *jus*, *lex*, *droit*, *nomos*, ...) which people have entertained, and have used to shape their own conduct, are quite varied. The subject-matter of the theorist's description does not come neatly demarcated from other features of social life and practice. Moreover, this social life and practice bears labels in many languages. The languages can be learned by speakers of other languages, but the principles on which labels are adopted and applied—i.e. the practical concerns and the self-interpretations of the people whose conduct and dispositions go to make up the theorist's subject-matter—are not uniform. Can the theorist do more, then, than list these varying conceptions and practices and their corresponding labels? Even a list requires some principle of selection of items for inclusion in the list. And jurisprudence, like other social sciences, aspires to be more than a conjunction of lexicography with local history, or even than a juxtaposition of all lexicographies conjoined with all local histories.

How does the theorist decide what is to count as law for the purposes of his description? The early analytical jurists do not show much awareness of the problem. Neither Bentham nor Austin advances any reason or justification for the definitions of law and jurisprudence which he favours. Each tries to show how the data of legal experience can be explained in terms of those definitions. But the definitions are simply posited at the outset and thereafter taken for granted. Bentham's notion of the 'real elements' of ideas encourages us to speculate that he was attracted to his definition of a law ('an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state ...'[1]) by the fact that assemblages of signs (and the commands and prohibitions of a definite individual or set of individuals) are 'real entities' that make an empirical impres-

[1] Bentham, *Of Laws*, p. 1; on 'real elements' and 'real entities', see ibid., pp. 2–3, 251–2, 278, 294, and *A Fragment on Government* (1776), ch. V, para. vi, note 1(6).