1986

The "Natural Law Tradition"

John M. Finnis
Notre Dame Law School, john.m.finnis.1@nd.edu

The "Natural Law Tradition"

John Finnis

It scarcely makes sense to talk of a natural law tradition. For "natural law" (in the context of ethics, politics, law and jurisprudence) simply means the set of true propositions identifying basic human goods, general requirements of right choosing, and the specific moral norms deducible from those requirements as they bear on particular basic goods. But there is a tradition of theory and theorizing about natural law (and the preceding sentence, a contemporary instance of such theorizing, is in line with the classics of that tradition). This "tradition of natural law theory" has three main features:

First, critique and rejection of ethical scepticism, dogmatism and conventionalism;

Second, clarification of the methodology of descriptive and explanatory social theories (e.g., political science, economics, jurisprudence, . . .);

Third, critique and rejection of aggregative conceptions of the right and the just (e.g., consequentialism, utilitarianism, wealth-maximization, "proportionalism" . . .).

In jurisprudence, the concerns of the tradition are to show:

(1) how an understanding of law presupposes a practical understanding (i.e., an understanding of the point, the good) of community, justice and rights, and authority—as reasons for choice and action;

(2) how a definition (i.e., a summary of one's understanding) of law can and should include a reference to the moral functions or point of law (especially, but not only, the procedural "ideals" of the Rule of Law), without thereby excluding immoral laws from the lawyer's perception of the study of jurisprudence;

(3) how positive laws are derived from natural law (moral principles) in at least two radically different ways;

(4) how unjust laws, being laws, can sometimes create moral obligations, but always lack the moral authority (and thus a part of the character) which laws, by virtue of being lawfully made, characteristically have.

A. Against Ethical Scepticism, Dogmatism, Conventionalism

(a) Sceptical denials of at least one basic human good (truth and knowledge) are self-refuting. Natural law theory is a theory which tries to account for the fact that doing it (or questioning it) is worthwhile. Theories which make no room for the fact of their own existence, or for the worth of their own pursuit, are self-refuting.

(b) Most contemporary scepticisms about the basic human goods, and/or

John Finnis is Reader, Oxford University. This paper was prepared for the AALS Workshop on Jurisprudence and Legal Philosophy and Their Application to the Basic Curriculum, held on March 20-22, 1986, in Philadelphia.

 Cite as 36 J. Legal Educ. 492 (1986).

the requirements of practical reasonableness, are based on a logically illicit slide (particularly common in the modern era) from "is" to "ought". For example:

- I have a sentiment of approval of X; so X is good (worthwhile . . . , or obligatory . . . , or . . .)
- I am committed to, have adopted, have opted for, have chosen, have decided upon . . . the practical principle that X . . . ; so X ought to be done
- in modern thought/contemporary society, X is widely regarded as [not] good/obligatory, so X is [not] good/obligatory
- X is not universally/commonly regarded as good/obligatory, so X is not good/obligatory.

Explicit natural law theory was launched, by Plato and Aristotle, precisely as a critique of *non sequiturs* such as these. These theorists, and followers such as Aquinas, respect the distinction between *is* and *ought*, fact and value, much more carefully than, for example, David Hume. Statements to the contrary are myth or misreading.[1]

The critique of scepticism is closely linked to the main strategy of contemporary jurisprudence: attention, not merely to the externals of structure, practices or even feeling, but rather to the characteristic *reasons* people have for acting in the ways which go to constitute distinctive social phenomena (such as law). Jurisprudence attends to types of justifications for decision.

Note: being concerned with truth, natural law theory is quite distinct from political movements, whether conservative, liberal, radical, or whatever.

B. On the Methodology of the Social Sciences

It can be shown conclusively that "analytical jurisprudence" or "descriptive sociology of law," launched by Bentham, and developed by Austin, Kelsen, Weber, Hart, Raz, and others, escapes methodological arbitrariness only by presupposing certain evaluations in its selection and/or formation of concepts for use in its analyses, descriptions and explanations. But it tends towards arbitrariness insofar as (in the case of Bentham, Austin and Kelsen) it disclaims and suppresses these evaluations, or (in the case of Weber and Hart) pronounces them to be undiscussable options or presuppositions.[2]

Natural law theory fully recognizes the place of descriptive/explanatory social sciences (of which the bulk of Aristotle's *Politics* is an early model), quite distinct from justificatory/critical practical reasoning about the good and the right in social arrangements. But natural law theory argues that the formation and selection of concepts for social descriptions and explanations is and (unless they are to remain parochial) must be guided by the evalua-

1. For textual verification of the last two sentences, see John Finnis, Natural Law and Natural Rights 330-38, 470-48, 53-55 (Oxford and New York, 1980).
2. See Finnis, *supra* note 1, chapter I; and John Finnis, On "Positivism" and "Legal Rational Authority", 5 Oxford J. Legal St. 74-90 (1985).

tions which critical reflection on the human situation shows to be critically justified.

In short, natural law theory tries to do openly, critically, and discussably, what most other analytical and descriptive theorists do covertly and dogmatically. Once one recognizes the method of definition used by Aristotle (into central- and secondary-cases, as judged by persons of practical reasonableness), one can see that his social-science methodology (as distinct from some of his historiographically primitive applications of it) is vastly more sophisticated, and more open to fresh data and improved understanding than much modern work in these fields.

C. Critique of Aggregative Theories of the Right

More important (for ethics, political theory and jurisprudence) than the account of basic human goods is the account of the second level of ethical reflection, identifying the "requirements of practical reasonableness" or "modes of responsibility." Much modern ethical and jurisprudential thinking uncritically assumes that reasonableness requires *aggregation* of goods or value(s). But outside the contexts established by simple goals (projects, or the fulfilment of straightforward commitments), there is, in situations of morally or political significant choice, *no* net greatest good or lesser evil to be identified by aggregative calculations or assessments. The belief that there is is not merely practically chimerical, but incompatible with free choice, and incoherent.

Human rights, and institutions such as the Rule of Law, justifiably have the shape they do just insofar as aggregative ethical/political methods are unjustifiable. Kant's principles of fairness and respect for "humanity" are much more reasonable than the various utilitarianisms, but these principles need (and can get) the support of the account of human nature ("humanity")—and of basic practical principles—provided by the account of basic human goods.

By going deeper than contractarian theories of authority, or will-based theories of contract, a theory of natural law can give a better account of traditional jurisprudential problems such as the formation of binding customs (such as in international law), the continuity of law through revolutions, the authority of *de facto* governments, the relations between contractual and other obligations, the relations between tort and other schemes for repairing loss, etc.

D. A Note on Teaching Jurisprudence

Jurisprudence, it seems to me, can well be introduced into *Introduction to Law* courses:

(a) to show how the procedural/constitutional standards of the Rule of Law (well expounded in Fuller, *The Morality of Law* chs. II and VI) relate law (and our law) to political theory (and to the beliefs and commitments of our polity), and cash out in highly specific and debatable legal rules and institutions;

(b) to show how institutions of private law, such as tort, contract, or bankruptcy, represent moral conceptions elaborated partly by application,

partly by *determination* (constructive, nondeductive, and in that sense "free," implementation or specification of general notions), and then partly by considerations of consistency which are partly deductive.[3]

Courses dedicated to "Jurisprudence" need to tackle head-on the methodological questions suggested above as the framework for fruitful reflection on the work of specific jurists (it matters rather less *which* of the substantial jurists, living or dead). To be reflecting on these questions is to be reflecting on "natural law theory"; indeed, it is (whatever labels one favors *doing* natural law theory—unless, of course, one is determined in advance that the answers shall come out in favor of scepticism, or "modern-person conventionalism," or methodological parochialism, or some purely aggregative theory of justice.

3. See, e.g., the reflections on bankruptcy law in Finnis, *supra* note 1, at 188–93.