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NATURAL LAW THEORY: ITS PAST AND ITS PRESENT

JOHN FINNIS*

The past in which theory of this kind had its origins is notably similar to the present. For this is theory—*practical* theory—which articulates a critique of critiques, and the critiques it criticizes, rejects and replaces have much in common whether one looks at them in their fifth century B.C. Hellenic (Sophistic) or their modern (Enlightenment, Nietzschean or postmodern) forms.

I

In the name of nature or the natural (in some of the many dozens of meanings of those terms), the thinkers whom natural law theory corrects have scathingly criticized conventional conceptions of justice and injustice, of (more generally) right and wrong, and (most generally) of good and bad in human action, affairs and institutions. The conventional conceptions are denounced, or more covertly subverted, as unjustifiable impositions on what is *natural*: a life pursuing passionate satisfactions such as power, sex, and other bodily and emotional interests (today often conceived as psychological or “subconscious” drives or “complexes”). The Sophistic conception of the natural is not naïve; it accommodates some main realities of social existence: typically it counsels compliance with social norms whenever one’s detected violation of them would incur sanctions, or other resistance that would frustrate one’s pursuit of one’s interests. And it acknowledges that one’s interests need not be individualistic; one may find one’s satisfactions in one’s group’s power and prestige, lorded ruthlessly over other groups. The survival and predominance of the fittest, which is the natural goal of existence, is naturally a social matter. It includes winning the support or acquiescence of other members of the group by such stratagems as professing the conventional belief in justice and morality, and making or postulating agreements (“social contracts”) to abstain from harming them, to lend them reciprocal assistance, and so forth—agreements silently

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subordinated always to their purpose of advancing the natural priority of one's own purposes and interests in survival, domination, pleasure, etc.

The critique of such theories and forms of life that was carried through by Socrates and Plato ("the Platonic critique") included a purposeful capturing or radical reshaping of the idea of nature, the natural and the naturally fitting. The Platonic critique shares with the Sophists some elements in their critique of the conventional and traditional. For although people who respect traditional norms and standards of evaluating human conduct may well regard these not merely as a social fact but as having directive force for them, and thus a kind of moral truth, nonetheless this attitude of theirs is often—indeed, characteristically—marked by its uncritical marginalizing of the question of truth. For them, the fact that the norms and standards are what they found respected in their society and among their forebears counts in practice as if it were sufficient warrant. The Platonic critique foregrounds the question of the truth or error, the moral reasonableness or unreasonableness, of any and all normative propositions (claims, norms) held out—whether in traditions, dialogue or personal reflection (conscience)—as directive for individuals and groups. It insists on the distinction basic also to the present article: that if there is a natural law that, by reason of the true goodness to which it directs us, is entitled to direct all consciences, it has no past, present or future; only beliefs and theories about it have temporality and a history.¹

A central text in this critique of the Sophists' critique is Plato's dialogue *Gorgias*. Here Plato presents, in fictionalized parties to the discourse, a spectrum of Sophistic positions, from the less (Gorgias) to the more radical (Polus) and most thoroughgoing (Callicles). Socrates triumphs dialectically over Callicles while the reader knows that, in real history, politically unprincipled operatives of perhaps Calliclean type worked on a malleable crowd of conventionally minded jurymen fired up about the state's traditions to bring Socrates to his unjust condemnation and execution. The Socratic thesis that it is better to suffer injustice than to do it² is thus given a tacit force and challenge even as Plato tests and vindicates it through a probing discussion of what the criteria of "good" and "better" really are, in reasonable judgment. So, for example, the Calliclean proposals to assimilate the better to the stronger (entitling the strong to rule over the weak regardless of other merits or deservings) is refuted by the consideration that the weak collectively are stronger than the strong, and that a life spent in

1. See John Finnis, *Natural Law and Natural Rights*, 2d ed. (New York: Oxford University Press, 2011; 1st ed., 1980), 24-25.

2. *Gorgias* 469b-c, 479c, 489b, 508d-e.

avoiding this menace to the unscrupulous is a life of servitude to the opinion, interests and whims of the crowd. So if the naturally superior strength of the many entails (as Callicles would have it) that they and their views are better, the Calliclean position breaks down, in a kind of self-refutation:

Socrates: Don't the many [who collectively are stronger] have a rule that says it's just to have an equal share, and a rule that doing what's unjust is more shameful than suffering it?...So it isn't merely "as a matter of law" that doing what's unjust is more shameful than suffering wrong, or that justice is a matter of equal shares, but "by nature" too. So you seem to have spoken falsely, earlier, when you challenged me with your claim that *nature* and *law* [instituted by people] are opposites.³

The demonstrations that the Calliclean position is incoherent are less important, in the end, than the dialogue's more implicit disclosures of the intelligible goods that are at stake in any dialogue worthy of the name. Dialogue is real, and worth pursuing, only under conditions of knowledge, goodwill and frank free speech among the participants. They, and any audience, can find it worthwhile as a dialogue only if they value both truth and the sharing in discovery and acknowledgement of truth by all concerned. To value and secure this active *sharing* is a further intelligible good, worthy of pursuit alongside the good of *truth and knowledge*. This further good can be called *friendship*.

Each of these intelligible goods is the subject of a normative proposition which naturally—or, more precisely, rationally—even if inexplicitly, comes into play when one is reflecting or deliberating about one's opportunities, and which directs us to be interested in the actualizing of this good and in the avoiding of what negates it (such as ignorance or superstition, or hatred and deception). This normativity or directiveness is not yet "moral," as justice and injustice are. But it soon unfolds into the normativity of the virtuous or vicious (the right and the wrong, if you prefer) because the competition between various worthwhile opportunities (knowledge, friendship, service of country, marriage, etc.), and between all or any of these and opportunities for gratifying more or less subrational, emotional desires and aversions, calls urgently for adjudication and control by some further and, as controlling, higher principle or source of *order* in one's deliberating, choosing and acting—in one soul, as Plato puts it. This is the adjudication that only practical reasonableness (Plato's virtue of *phronêsis*) can make, and make actual in one's life and conduct. It is this virtue that enables one to discern, practically, what is just and unjust, courageous and

3. *Ibid.*, 488–9, with 483a–b.

cowardly and rash, and so forth. Its adjudications are, in the last analysis, propositional, and the normativity of these propositions is moral. We have arrived at a new conception of (moral) law, to transcend and replace the directiveness attributed to subrational nature by the Sophists.

The last step in this conceptual reordering is the transfer of the predicate “natural” to this moral “law.” The transfer is justified for multiple, distinct reasons. First, one’s understanding that truth, friendship, human life itself and the other such possible objects of choice are indeed good—not only as means to other ends but intrinsically—is an understanding achieved readily, non-inferentially and in that sense spontaneously, as an achievement of one’s intelligence when attentive to real possibilities and alternatives and free from external distractions or dominantly passionate, subrational factors in one’s psychic makeup. It is in these senses a natural understanding, an achievement of natural reason (to be carefully distinguished from data-free intuition). It is available even to children, once they have had sufficient experience of the world to be aware of real possibilities and their alternatives.

Second, the intrinsic and thus basic intelligible goods are understood precisely as pursuit-worthy. So this understanding is practical, concerned not merely with what truly *is*, but also and essentially with what truly *is-to-be* in a sense that is not predictive but directive, normative, articulable from the outset in the language of normativity: should, ought, is-to-be-done. Nonetheless, this practicality of one’s understanding of human good in no way entails that the objects of practical understanding and judgment are a matter of invention or creation. Rather, the basic human goods are discovered (as *to-be-brought-into-existence*). In this way, each basic good stands over and against our understanding, and *in this respect* is like the natural world of objects that are what they are, and have the natural order they have and follow the natural laws they do, quite independently of human thought, contrivance and action.

Third, life, knowledge, friendship and so forth are understood as basic aspects of *human* flourishing or well-being or fulfillment, actualizable if chosen intelligently and pursued and acted upon. They are understood as good “for me” and anyone like me—and this “like me” soon becomes intelligible securely as: any other being capable, at least radically, of self-conscious flourishing or failure—any human being or person. As aspects of such flourishing, these basic human goods give point, shape, meaning and specific identity to human action. But such actions are always the actualizing of human capacities (powers, potentialities), and capacities in turn are given us by our makeup, our nature, prior to all choice or action of our own. So: to understand the basic aspects of human flourishing is

implicitly to understand basic outlines of human nature. Propositions picking out and directing us to the basic human goods can thus be well described as principles of natural normativity, natural rightness or fittingness, and natural law.

Such natural law, though sharply and cleanly distinguishable from laws of nature that govern entities and processes (including many aspects of human reality) independently of any understanding or choices, is factually (that is, ontologically: in the order of being) dependent upon natural reality that we find, not make. But epistemologically (that is, in the order of coming to know), the first principles of natural law are first principles of practical reason and, as such, are not dependent upon a prior adequate knowledge of human nature. Our understanding of them presupposes some knowledge of the factually given structures of possibility, availability, causality and realizability, but adds very significantly to that prior knowledge. In so adding, it makes possible an adequate understanding of human nature via understanding of the human flourishing made possible by human *openness* to ways of acting and living that quite transcend the given—possibilities such as courageous friendship, devotion to justice, humane artistic creativity, holiness of life and so forth. In sum: the *oughts* of the first practical principles (principles of natural right and law) are not inferred from prior knowledge of the *is* of nature. Rather, our *ought*-knowledge of them both presupposes some elements of, and very significantly contributes other elements to, the eventual body of such *is*-knowledge.

II

This account has got ahead of Plato's, and fallen behind it. It has fallen behind by omitting, thus far, his critique of the tradition-bound states of mind and culture which the Sophists themselves criticized and delegitimated (even when conforming, by choice, to traditions and conventions). Plato's critique of tradition is presented, explicitly, not so much in the *Gorgias* as in his later, greater work, *The Republic*. And it is a critique not so much of particular customs, perhaps more or less peculiar to one or more societies, but rather of conventional wisdom. But what exactly is that? Plato identifies the object of his critique by exemplifying it. Cephalus, representative of the oldest living generation, the grandparents, defines justice as paying one's debts and telling the truth, and loses interest in the matter when Socrates points out that there are occasions when it is wrong to return what one has borrowed (say, a weapon from a lender who has now gone mad), and wrong

to tell the truth (say, to a dangerous maniac).⁴ Cephalus's son Polemarchus, host of the whole occasion of the dialogue, is a little closer to the sophistication of the Sophists. He holds that justice is a matter of benefiting one's friends and harming one's enemies, or (under dialectical pressure from Socrates) of benefiting just people and harming the unjust.⁵ Socrates demonstrates that it is never just to (choose/try to) harm anyone, and Polemarchus has to concede that what he learned about justice from powerful political and financial leaders was unsound.⁶ The stage is cleared for the intervention of the radical Sophist, here in the person of Thrasymachus who, like Plato's Callicles, holds that:

injustice, if it is on a large enough scale [as in the tyrant's efficacious rule over his community], is stronger, freer and more masterly than justice [conventionally conceived] . . . [J]ustice [truly conceived] is what is advantageous to the stronger, while injustice [conventionally conceived] is to one's own profit and advantage.⁷

The rest of the dialogue, in effect, is Plato's response, his critique of the Thrasymachean (and Calliclean) critique and rejection of the *conventional* conceptions of injustice.

The Platonic critique takes it as obvious that the large elements of truth in conventional wisdom about (say) giving people their due⁸ must be vindicated against the corrosive Sophistic critique, which sophistically inverts and negates that truth; and obvious too that the vindication will have to be critical and philosophically grounded in ways that conventional wisdom has simply not inquired after or understood. In the terminology of the eventual theory emergent in Plato: natural law and natural right must be vindicated by the theoretical reflections, conceptualizations and arguments that a textbook or companion to philosophy may label *natural law theory*.

Enough has been said in this sketch of some Platonic dialectic to indicate that the conventional or traditional morality which Plato is concerned both to criticize and to (partially) vindicate is not to be understood as merely "positive morality" or "social morality" in the sense proposed by John Austin and H. L. A. Hart. They (especially Hart) spoke as if such a morality were held *as* positive, rather than *as true*. Plato, the more accurate sociologist and philosopher, is clear that even those who hold to a partially untrue morality, and do so without sufficient critical attention to its

4. *Republic* 331b-d.

5. *Ibid.*, 334.

6. *Ibid.*, 335d-336a.

7. *Ibid.*, 334c.

8. *Ibid.*, 335e.

coherence or its warrant, nonetheless are very unlikely to hold and consider it as simply a fact about their society's beliefs, and equally unlikely to explain it to themselves as warranted precisely and simply because their society or their elders have held them; almost certainly they will hold it rather as a truth (as they suppose) about what is good and bad for people and right and wrong in human action. The problem, as Plato rightly sees it, is that their lack of critical interest in the grounds of their belief—the lack that makes their belief conventional—leaves them (and the conventions) exposed to distortion and error about the truth of, or error in, the belief's moral content.

How is moral error detected and avoided? Implicitly, the answer given by Plato and the whole philosophical tradition which he initiated (the tradition represented by Aristotle and Aquinas) is something like this. A judgment—the affirming or denying of a proposition—is erroneous when it does not cohere with judgments which, even after critical questioning and the test of dialogue and dialectic, one holds to be rationally justified and expects other similarly critical and careful persons, similarly placed, would agree with. In the case of judgments about realities that are what they are independently of anyone's thinking about them, their justification is that they conform/correspond to—fit, and are in line with—those realities; that they so correspond is what is meant in calling them true. These realities, of course, are only known in judgments, but the judgments are based on the data of experience (evidence in all relevant forms), and are justified only on condition that they do not overlook or neglect, but rather do rationally account for, the data. In the case of judgments about human goods whose realization is dependent on being conceived, considered desirable, opted for, and pursued and achieved or instantiated by action carrying out such choices, the justification of the judgments is again a matter (i) of coherence with other judgments that one thinks all other people would, under ideal epistemic conditions, agree with, and (ii) of correspondence with something that stands over and against one's judgments as their object, something that is affirmed when the judgment is true and misstated or denied when the judgment is false. What is this something, in relation to judgments about what is good and right in human action and achievement? There has been a tendency in the tradition to respond: human nature. But that kind of response overlooks the difference between realities that are what they are affirmed to be, independently of our thought or affirmation (which can thus be called “theoretical” or descriptive reason), and realities that it would be good to achieve by rational choice and action (and as such are the primary subject matter of *practical* reason). A better response is: practical reason's judgments are true when they accurately anticipate—are in anticipatory

correspondence to—the human good that can be realized (call it fulfillment or flourishing) by actions in accordance with them.⁹

As with theoretical/descriptive judgments, there is no vantage point outside or prior to practical judgments for assessing this correspondence, and the grandmasters of the natural law tradition did not suppose there was. So the working criterion of truth is coherence with other practical judgments, and capacity to be shared in judgment by other persons in epistemically like cases. The judgments of the Sophists largely fail this test; the Socratic showing of Callicles's self-refutation is only one instance. The Thrasymachean judgments that justice—whether understood as the most reasonable choice for me, or as the “natural order of things”—consists in the rule of the stronger or more deceitfully cunning, and that it is reasonable (because and when advantageous) to practice injustice, have their plausibility only when envisaged as the judgments held and acted upon by a few persons in a community which by and large adheres to the contrary judgments: that promises should generally be kept and debts paid even when a strong or ruthless debtor could get away with reneging on his debt; that lies should not be told (even if false propositions can be defensively articulated to unjust aggressors); that distributions should follow principles of fairness using criteria such as need, desert, function or (by default) equality rather than imperiousness of demand or forcible seizure of the common stock by the strongest or greediest; that one should do to others only what one would be willing to have them do to oneself; and so forth. Similarly, the judgment or thesis that practical reason should look only to the *future* advantage promised by the present choice (whether of the reasoner or of everybody) shows itself false by its incoherence with any reliance on the promised cooperation of others, and with the reasonableness of them contributing (say as one's employees) to one's well-being or other interests in reliance on one's promise. And so forth.

In each case, the Platonic critique lends support to moral positions more or less traditional in his day as in ours. In each case, the critique lends rational support to the positions in several ways. It shows that the counterpositions of the enlightened Sophists tend directly towards a disintegration of social well-being insofar as it depends on taking into account (i) the intelligible relations of present and future to the past (of promises, reliances, undertakings, gifts and gratitude, merit, desert, responsibility of parent for

9. Germain Grisez, Joseph M. Boyle, and John Finnis, “Practical Principles, Moral Truth, and Ultimate Ends,” *American Journal of Jurisprudence* 32 (1987): 99–151; and John Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998), 99–101.

child . . .), (ii) the rational requirement that a judgment of self-interest be subjected to a test of compatibility with others' similar judgments (universalizability, the Golden Rule . . .), (iii) the human goods that depend upon friendly social cooperation extended stably though creatively through time (goods such as science and learning, trust, political compromise and moderation, a rule of law and not of the whims and prejudices of the powerful . . .) and so forth.

It is the intelligible attractiveness of such goods that is the deep source of the critique, and equally of the normativity of the propositions about right and wrong that the critique shows to be warranted and truly worthy of affirmation as the grounded anticipations of human fulfillment and thus as true. The art of the dialogues is the displaying of the sheer *desirability* of these goods, despite the sometimes demanding character of their preconditions. Such desirability is in line with subrational, animal desires or inclinations, but is much more a matter of intelligibility, that is, of a *worth* that only reason understands. Against the self-refuting Calliclean blunder, resumed later by Hume, of supposing that practical reason can only be the slave (ingenious servant) of the passions, Plato already shows that a "practical reason" which has no *reasons* for its proposing of means is not worth calling reason, and that there are indeed intrinsically, intelligently desirable human ends available to give true reason(s) for selection and adoption.

The intelligible beauty, the fineness, worth and excellence of the goods discernible by reason includes the sense of *good* implicit in the *better* of the Socratic "better—more choiceworthy, less shameful—to suffer injustice than to do it" exemplified historically by Socrates, willing (quite without publicity of any kind) to decline participation in an unjust execution,¹⁰ and unwilling¹¹ to escape from prison and unjust execution by an act which he judged, for considered reasons (even though we now can judge them less than fully sufficient), to be subversive of his own society and its law, and of proper gratitude.¹²

III

What, then, of the ways in which the foregoing account has got ahead of Plato? After all, his works foretell, at least implicitly, most if not all of the

10. See Plato *Apology* 32c–e.

11. See Plato *Crito*.

12. See Finnis, *Fundamentals of Ethics* (Washington, DC: Georgetown University Press, 1983), 112–20; and *Moral Absolutes: Tradition, Revision, and Truth* (Washington, DC: Catholic University of America Press, 1991), 47–55.

arguments revived or proposed in the Enlightenment that is well under way with Machiavelli and Hobbes, darkens into the chiaroscuro of Benthamite utilitarianism, and after the failed Kantian and post-Kantian resistance reaches full darkness in the overt irrationalities enunciated, verbosely, by Nietzsche and his pragmatist and postmodern epigones. The main anachronisms in our rendering of the Platonic critique are (i) our use of the term “moral(ity)” and (ii) our talk of principles and thus of law rather than right and justice. The two are interrelated. In modern times, morality is thought of as a code (set of rules or standards) of conduct, a code subscribed to or acknowledged by members of a community. And “moral” is understood, accordingly, as a predicate whose proper application is settled by the norms of that or some such code. But even in the work of Aquinas, a pivotal figure in the transition from the ancient to the modern world, “moral” means: pertaining to human conduct as a matter of choice rather than as determined by nature. Moral knowledge or instruction is, accordingly, knowledge of or instruction about the factors that make choices reasonable or unreasonable, good or bad. Of course, the criteria of reasonableness and goodness can and must be able to be stated propositionally, and can thus be articulated in lawlike form—that is, as universal propositions directive of choice and action. And therefore there are strong links and even overlaps between the ancient or medieval usage and the modern. But modern morality-talk’s focus on rules or norms of lawlike form, rather than on the goods that give actions their intelligible objects and thus their appropriate description(s), has some real disadvantages. The modern term “morality” is deeply ambiguous,¹³ above all between a “descriptive” sense in which what is decisive is that the code is subscribed to or acknowledged by some concrete historical community, and a “normative” or “internal” sense in which what is decisive is that the standards referred to are taken to be true and authoritative guides to the predication of virtue or vice, goodness or badness, rightness or wrongness in some (class of) human choices and actions. Discussion, for example, of inclusive legal positivism is hampered if not altogether frustrated by uncertainty about whether what is under discussion as “the relation between law and morality” is a relationship between two sets of standards cognizable as such because *held* by some community or one or more of its judges, or rather a relationship between (on the one hand) a set of (legal) standards so

13. Bernard Gert, “The Definition of Morality,” *The Stanford Encyclopedia of Philosophy* (Fall 2012 Edition), ed. E.N. Zalta, <http://plato.stanford.edu/archives/sum2011/entries/morality-definition>.

held and (on the other hand) some truths about right and wrong in human choosing and acting.

In any event, what interests Plato in criticizing and transcending the Sophistic is the truth about justice and injustice, and good and bad or superior and inferior in human action. Dispositions to act well, in a humanly superior way, are virtues, and dispositions to act badly, in an inferior way, are vices. The reasonableness or unreasonableness of the relevant kinds of action is what makes them virtuous or vicious. He does not speak, in his own voice, of “natural law,” but rather of what is naturally (*physei*; or *kata physin*) superior, reasonable, virtuous, truly choice-worthy.

Still, we are entitled to translate the argumentation and position-taking of Plato into *propositions* justified, implicitly, by higher or deeper justifying *principles*, picking out and directing us all towards goods, and higher and highest goods, and supplying us with criteria of reasonableness in choice and action. And we are entitled to go further. We can distinguish between a first level of principles which pick out and direct us all towards goods such as truth (or knowledge) and life, and a second level of principles. Principles on this second level mediate, so to speak, among the first-level directives, enabling us to discern between reasonable and unreasonable ways of following those first-level directives, calling the reasonable ways just (or rationally tempered) and right and the unreasonable unjust (or cowardly or lust-driven) and wrong. First-level principles can be called (as Aquinas calls them) first principles of natural law, and second-level principles can be called standards or precepts of natural moral law.

Albeit without this terminology, Plato’s critique concerns itself with both kinds of principle. We have noticed, in passing, his concern to display the intrinsic goodness of truth (knowledge), and of friendship (including the fellow-feeling of citizens, political friendship). In his critique of sexual immoralities such as fornication, masturbation and same-sex sex acts, the search for an underlying principle leads him to identify, almost explicitly, a further basic human good: marriage (the committed union of man and woman in a procreative or would-be procreative friendship).¹⁴ A state law restricting sex acts to marriage is, he affirms, a matter of true reason¹⁵ and is *kata physin*, natural¹⁶--and this “natural” is not a matter of the nature we share with other animals but rather of reaching standards higher than the animals: reasonableness (*logos*).¹⁷

14. See Plato *Laws* 838e–840e, where Plato’s spokesman also speaks of the abuse he expects to get for advancing these arguments and expressing these judgments.

15. *Ibid.*, 835e, 836e.

16. *Ibid.*, 839a.

17. *Ibid.*, 840e.

No doubt Plato is going too fast in proposing that this standard of practical judgment be also enforced as a coercive state law. But the focus of his thought is on what reasonableness requires of us as individuals, couples and so forth, in our free deliberations and reflections. And his rigorous assimilating of the humanly natural to the reasonable,¹⁸ and his clear indication that, in the last analysis, an action's reasonableness is the *ground* for calling it natural (not vice versa), are an important phase in the development of the theory we now call natural law theory. The argumentation's conclusion is propositional, law-like; its premises must be, too. But the *force* of the argument, the principles and the conclusions, comes from the goods to which the premises of principle refer, and more precisely from their attractiveness to practical understanding, as goods that we *need* to have as objects of our actions if we are to be fully intelligent and fully masters of our subrational inclinations just insofar as these work to distract us from such full reasonableness rather than (as they do when our psyche is in good order) supporting and giving fully human weight to our reasonable judgments.

The rendering of ethics (synonymously, morality) and of natural law theory's primary account—an ethics of political society and law—into the form of lawlike propositions (principles, norms) is accomplished gradually over the millennium and a half after Plato. Important currents in this are Aristotle's *Ethics* and *Politics* and *Rhetoric*; the Stoics; the Roman publicists and jurists (tightly linking law, right, rights and justice); the Pauline New Testament (pronouncing the revealed moral commandments of the Decalogue to be *also* and equally requirements of humanity's nature and of sound conscience);¹⁹ Augustine of Hippo's Platonizing speculations on the directive ideas in the supreme creative intelligence creator and on "the eternal law" of that creator's ongoing providential ordering and sustaining of every creature; and Thomas Aquinas's synthesis of the whole tradition (despite the unavailability to him of all but a tiny fragment of Plato's works), a synthesis that for the first time penetrates fully to principles and at the same time builds up and builds in a distinct and carefully elaborated theory of human, positive law.

18. V. Bradley Lewis, "Reason Striving to Become Law': Nature and Law in Plato's *Laws*," *American Journal of Jurisprudence* 54 (2009): 79, citing *Laws* 642a, 689b, 690c, 720d, 728d, 733a, 875d, 943a, 966b.

19. *Romans* 2: 14–16.

IV

About a century before Plato, the greatest of the pre-Sophistic Greek philosophers, Heraclitus of Ephesus, articulates—albeit *without* the word “natural” or its cognates, and *with* a reference to the divine—the heart of the tradition of natural law theory:

Those who speak with intelligence (*xyn noô*) must hold fast to [or: strengthen themselves with] what is common (*xynô*) to all, as the political community does with the law (*nomô*), and more strongly so. For all human laws (*anthrôpeioi nomoi*) nourish themselves from the one divine (law), which governs as far as it will and suffices (and more than suffices) for all things.²⁰

Much of Plato’s treatment of these matters can be taken as a vast expansion, defense and explication of this. And Plato’s greatest pupil makes his clearest statement of the theory, in the unpropitious context of his *Rhetoric*, with a similar appeal to what is common because entitled by its reasonableness and thus its naturalness to be adopted in and by any community:

Justices and injustices, then, have been defined in relation to two kinds of law . . . : I mean, law which is distinctive (*idion*), and law which is common [to everyone] (*koinon*). Distinctive law is that which a particular group sets down for its own members (it is partly written down, and partly unwritten); law which is common to everyone is that which accords with nature. For there really is, as everyone senses, something just by nature and common to all—and something unjust—even when people have no association or agreement with one another. This for example is what Sophocles’s *Antigone* is plainly referring to, when she says that the burial of Polyneices, although prohibited, is just, meaning that it is just by nature: “Not belonging to today or tomorrow, /It lives eternally: no one knows how it arose.”²¹

Sixteen-hundred years later, Aquinas will start to popularize the term “positive law” for what Aristotle had called law distinctive or particular to a particular political group, and will decisively supersede Aristotle’s distracting concern with the relatively superficial distinction between written and unwritten, replacing it with a categorization of positive law

20. Diels-Kranz, fragment B114; the wordplay serves, not leads, the thought, which can be taken with fragment B44: “The people should fight for the law [*nomos*] as if for their city-wall.” Hermann Diels and Walther Kranz, *Die Fragmente der Vorsokratiker*. Zürich: Weidmann, 1985).

21. Aristotle *Rhetoric* 1373b2–15. (Translation by Michael Pakaluk: <http://www.nlnrac.org/classical/aristotle/primary-source-documents>.) See also the similar but more difficult passage in his *Nicomachean Ethics* 1134b18–1135a5.

according to its two modes of derivation from principles that are common to every people precisely because they are reasonable and therefore “natural.”²² Where the derivation is by logical specification (as killing or wounding are distinct specifications of harming), that part of the state’s positive law can be called natural law or *jus gentium* (law common to all peoples). Where the derivation involves not only rational connection but also a choice between reasonable alternatives, the process of specification is not so much logical as legislative or at least partly creative and optional; Aquinas labels it *determinatio* and indicates that this part of the state’s positive law is “positive” in a strict sense – but for its positing by some lawmaker (legislative or judicial), it would have no claim to be part of the state’s law. Where such a *determinatio* (strictly: a rule made by such a *determinatio*) is just in its content and procedure, it is *morally binding* (on members of the community to which it applies) *even though it is not “part of morality”* but rather is purely positive law and could reasonably have been different in many, many details.

It is of first importance to understand this fully achieved thesis of natural law theory with precision. Any proper example (central case) of legal systems will be *positive law* in its entirety and all its parts, and at the same time will comprise two elements, (i) a set of rules, principles and institutions which are natural and are, or ought to be, common to all other legal systems, and (ii) a set, doubtless much larger, of rules, principles and institutions which are *purely* positive, and more or less distinctive of this particular political community and legal system. The relationship of natural law to the positive law of a particular state (or of the international order) is thus not best thought of as coexisting of two normative orders. Rather it is a matter of acknowledging (or denying) the validity and legitimacy (not independent of sufficient efficacy and widespread acknowledgement) of that positive law/legal system, while at the same acknowledging the normative principles which are necessary (though by far not sufficient) to the validating and legitimating of that law and are capable of invalidating or delegitimizing it.

The preceding sentence refers to both validity and legitimacy because “validity” (and to some extent also “legitimacy”) is here ambiguous. Partly, the source of the ambiguity is the permanent tension whereby natural moral law (morality; moral truth about justice. . .) can serve both to make positive law morally binding and to deprive it of moral obligatoriness. But partly, the ambiguity’s source is that a main reason for wanting to introduce

22. See Finnis, “The Truth in Legal Positivism,” in *Philosophy of Law, Collected Essays Vol. IV* (Oxford: Oxford University Press, 2011), 174-88.

positive law and the Rule of Law is to resolve disputes within a political community about what justice and the rest of morality requires or authorizes. There is thus good reason to introduce a way of thinking—call it legal or juristic thinking—within which (within undefined but important limits) the sheer fact that a legally (“constitutionally”) authorized person or body of persons has pronounced its *determinatio* of some disputed or disputable issue is taken as sufficient ground for affirming the legal validity of the *determinatio* and its propositional product (rule, judgment, etc.). In this way of thinking, issues of the justice or injustice of the *determinatio* are pushed to the margins of the legal domain (though they retain within that domain a kind of underground existence in the form of *juristic* principles or presumptions of interpretation). Only when the moral limits are approached do questions of justice and morality become once again overtly relevant. Thus talk of “validity” can be more or less fully and cleanly reserved to intra-systemic legal (positive-law) discourse, and taken to entail not moral but *legal* obligatoriness (an obligatoriness not to be reduced to liability to penalty or punishment). In such a discourse context, one may choose to use “legitimacy” to signify *moral* relevance, grounding moral obligatoriness. But “legitimacy” too is not free from ambiguity, since some writers in contemporary legal theory seem to treat it, perhaps, as synonymous with (purely legal) validity.

Natural law theory has no quarrel with—indeed, promotes—a bifurcation between *intra-systemic [legal] validity* (and *obligatoriness*) and *legal validity* (and *obligatoriness*) *in the moral sense*.²³ Indeed, it is not unreasonable to see such a distinction at work in the famous tag “An unjust law is not a law.” This is mere self-contradiction and nonsense unless “unjust law” here refers to an intra-systemically valid legal rule or order, and “not law” signifies that, moral limits having been transgressed, this same law lacks validity in the moral sense (i.e., legitimacy) and thus, at least presumptively, lacks moral obligatoriness. (Of course, the speaker could alternatively be intending to predicate injustice of certain beliefs and practices—observable as social facts of acknowledgement of certain acts and facts as laws—while not intending to assess legal validity even in a technically and constrained and amoral sense.) That said, it is unfortunately necessary to remark that there is nothing even *prima facie* self-contradictory, nonsensical or paradoxical about the tag. For the idiom is widespread and quite unremarkable: “an insincere friend is not a friend”; “a logically invalid argument is no argument”; “a quack medicine is no medicine”; and so forth.

23. Finnis, *Natural Law and Natural Rights*, 314-20.

Shifts of meaning of this kind were studied closely by Aristotle in connection with his accounts of the kinds of equivocation or homonymy, and of what we would now call analogous predication. A word can be said to be analogical when its meaning shifts more or less systematically according to context. The kind of analogy most relevant in the context of human affairs is what Aristotle called *pros hen* homonymy. This is where the various relevant meanings of a word are all relatable to a focal meaning or sense or use, a meaning which picks out a primary or *central* case of the kind of reality or subject matter under consideration—focal and central in some context of discourse or inquiry. The non-focal senses and non-central cases can be thought of as secondary because they are immature or deviant or in some other way watered-down instances or kinds of the reality, at least when regarded from some appropriate viewpoint or for some appropriate theoretical or practical purpose.

One relevant purpose, theoretical but strongly related to the practical, is that of developing an accurate account of human affairs as they have unfolded and are likely to unfold in the existence of manifold human societies of many times and places. Such an account would be highly interesting in its own right, as a matter for contemplation detached from any (other) practical purpose of the reader; but it would also be of practical relevance as a source of accurate information about cause and effect in human affairs. (For all practical reasoning towards choice and action includes, besides its evaluative/normative premise(s), one or more premises about what means are likely to achieve the desired end(s), what are the preconditions for such means, and what the effects and side effects of such means are likely to be.) Aristotle pressed on from achievements of his empirical biological and other natural sciences into the study of human political affairs, his *Politics*; decisive for its method was his decision to select and employ its key terms or concepts by reference to practical reasonableness, human flourishing and the virtues that are both constitutive of and means to human flourishing. Forms of political association and action that embody and favor such virtues are central, and the terms that pick out such central forms are therefore employed in their focal sense—focal at least for the purposes of political science. Other forms of political life, however common and “typical,” will then be understood as non-central cases, immature or deviant (*parekbaseis*), and will be “polities,” “constitutions,” “citizenship,” “political friendship,” “laws,” etc., in secondary rather than focal senses of those terms. It is in this scholarly context, resumed in late-thirteenth-century Aristotelianizing political science, that Aquinas will take up the old tag about unjust laws not being laws: they are, he prefers to say, not laws *simpliciter*, i.e., without

qualification, but rather are laws in a corrupt form (“corrupt form” being his Latinizing of *parekbasis*).

Aristotle’s theoretical program was taken up again, in effect if not in intention, by Max Weber in the early twentieth century. On the basis of vastly more extensive historical information, Weber undertook to give an account of human affairs going wider than his title *Economy and Society* (1922).²⁴ He announced it as value free, purely descriptive-explanatory. But values were involved not only (as he recognized) in his decision to interest himself in all this, but also (as he did not fully acknowledge to himself) in his selection of concepts to provide the explanatory ordering of his whole account and each of its parts. Thus the concepts with which he gives an account of forms of governance are explicitly constructed in terms of greater and less *rationality*. And though his official concept of rationality was quasi-Humeian—the rationality of suitable means to subrationally desired ends—he could not prevent his account from manifesting a more adequate conception of rationality, in which human ends or purposes, too, are ranked for their reasonableness, their coherence with human goods and the flourishing both of individuals and of societies with their institutions.

V

The slow process of recovery of political and legal theory from the devastating crudities and impoverishments of Enlightenment social theorizing accelerated somewhat in the later twentieth century. In legal theory, the process was notably advanced by H. L. A. Hart. His project of understanding law, legal concepts and legal systems from “the internal point of view” was, at least implicitly, a return to the perspective of the political/legal theory that Aristotle put together by developing and redeploying the strategies and elements of Plato’s philosophy. For the internal point of view that Hart took as his point of reference is the thinking of persons (citizens, judges or other officials) who in a given political community (or potential community) are in search or (as they suppose) possession of *reasons* for some specific kinds of individual and social choice: the social choice to develop and maintain rules restricting violence, theft and fraud, and individual choices to acknowledge, adhere to and support these rules; the social choice to remedy the defects of such rules by introducing new forms of rule authorizing and regulating the changing and the judicial application of social (now sufficiently articulated to be worthy of the name legal) rules, and individual choices to recognize them in word

24. Ed. Guenther Roth and Claus Wittich (New York: Bedminster Press Inc., 1968).

and deed. This is legal theory done for descriptive/explanatory, rather than justificatory, purposes. But the explanations give the theoretical satisfaction they do precisely by tracking the route that those who accepted the rules as standards for their own and others' conduct do, or reasonably would, follow in order to justify such acceptance to themselves and others. A natural law theory of law follows the same route with an explicitly justificatory purpose. It can do so without loss of descriptive/explanatory coverage or content because it commands the conceptual technique of reference to central and then to secondary cases, employing focal and qualified senses of the terms and concepts it deploys.

Hart thought of his theory, expounded in *The Concept of Law*, as identifying a "minimum content" of positive law, a content he called natural law. But the content he officially included in this minimum was too minimal even to track faithfully the course he had followed in identifying the case for adding secondary to primary rules to yield a legal system. The human goods at stake in these "remedies" for "defects" went beyond the one human good he allowed into his official account: survival. Rather, the defects concerned conditions for living together relatively *well*, responsively to changing circumstances and opportunities and to the demands of efficiency and fairness in resolving disputes about the content and applicability of society's rules. Hart's resiling from acknowledgement of his own theoretical method and achievement went even further in his posthumous "Postscript," when he said:

Like other forms of positivism my theory makes no claim to identify the point or purpose of law and legal practices as such. . . . In fact, I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct. This will not of course serve to distinguish laws from other rules or principles with the same general aims; the distinctive features of law are the provision it makes for secondary rules for the modification, change, and enforcement of its standards and the general claim it makes to priority over other standards.²⁵

That statement is unfaithful to his book itself, which insistently specified the "general aims" of social regulation as aiding survival by restricting violence, fraud, etc., and made its signature contribution to legal theory by specifying the aims of secondary, law-introducing rules in ways that make intelligible and potentially *reasonable* the claim of the new set of rules to be now a *system* and to give reason, in "priority over other standards," for the

25. H.L.A. Hart, *The Concept of Law*, 2d ed (Oxford: Clarendon Press, 1994; 1st ed., 1961), 248-49.

allegiance of its officials and, in nonpathological cases, of all save criminal citizens. What, then, motivated Hart's recoil from his own method and its achievement? The only plausible answer seems to be that, in face of the questions debated between Plato and the Sophists, his own answers favored the Sophists' denial of moral truth. He thought legal theory could be pursued without confronting or taking a stand on those questions; even the discussions of morality in *The Concept of Law* are framed by him as "seek[ing] to evade these philosophical difficulties" about whether moral principles, so-called, can be anything other than mere "expressions of changing human attitudes, choices, demands, or feelings," in no way matter for discovery (or misidentification) by exercise of reason attaining (or missing) knowledge.²⁶ But this programmatic agnosticism about good and evil and right and wrong is transgressed, albeit cautiously and with unwarranted restrictions, throughout the legal theory he developed. The transgressions, which give the theory all its substance and worth, are sometimes almost explicit, as when he celebrates the emergence of private powers (and power-conferring rules) as a "step forward as important to society as the invention of the wheel,"²⁷ or vindicates the rectificatory justice of compensation for tortious/delictual injuries,²⁸ or treats as decisive for legal theory's selection of concepts the need for clear-sighted confrontation of, and readiness to disobey, "the official abuse of power,"²⁹ or says and repeats that judges "must not" exercise their lawmaking powers arbitrarily but rather "must act as a conscientious legislator would,"³⁰ that is, "relying on his sense of what is best."³¹

Hart's characterization of his work as "positivism" gets its meaning from the implicit contrast: positivism rejects "natural law theory." But the contrast, like the rejection, is a blunder. There is indeed a worthwhile theoretical issue at stake, but it is the one at stake between Plato and Callicles or Thrasymachus or, in real life, Antiphon³²: between acceptance and denial that there is *knowledge* of human good and evil and right and wrong. Beyond that, there is really nothing strategic in dispute. A modern natural law theory of law builds on Aquinas's account of positive law, itself a systematization and terminological refinement of the elements in

26. *Ibid.*, 168; also 186, 206.

27. *Ibid.*, 42.

28. *Ibid.*, 164-65.

29. *Ibid.*, 210.

30. *Ibid.*, 273.

31. *Ibid.*, 275.

32. See Eric Voegelin, *Order and History, Volume II: The World of the Polis* (Baton Rouge, LA: Louisiana State University Press, 1957), 312-19.

Heraclitus, Plato, Aristotle and the Roman jurists around the turn of the eras. It incorporates without the least strain anything upon which self-styled *positivist* accounts of positive law may have shed light, for example the conceptual structure of bilateral, three-term rights, the interrelationships between power, authority and validity, or the legal identity and personality of corporations. It distinguishes intra-systemic from morally predicated legal validity and correlative senses of obligatoriness. A modern natural law theory steadily repudiates all confusion, such as pervades positivist works, between *Is* and *Ought*, for (like Plato, Aristotle and Aquinas, in their basic theorizing) it permits normative predicates only when grounded in, or articulating, principles which are normative all the way to the bottom (where intelligence understands and is directed by goods whose worth is self-evident to anyone with sufficient information about or experience of what is possible). Its account of authority builds in the achievements of game theory and other theories of rational choice, without their arbitrary assumptions about the sufficiency of “self-interest” and the commensurability of all goods and transitivity of all preferences. And modern natural law theory is the proper context for reflection and deliberation about human rights, and about the appropriate reach of global as opposed to national or state sovereignty, territorial dominion and law (a question to be approached through the grounds identified by natural law theory for instituting property rights over resources originally common to, and for the benefit of, all human persons).

In modern natural law theory, law (in its central cases) is a modality of authority, available in specifically political communities, a modality responsive in its form to the “procedural” values and justice that (as Fuller showed in illustrating and systematizing scattered observations of Aquinas³³) are involved in the Rule of Law, a form of governance which Plato and Aristotle contrasted and, in all but the most exceptional circumstances, preferred to the legally unrestrained rule of a ruler. Its account of deviant forms—abuses—of law is as rich as any positivist’s, and richer because its critical understanding of them is unrestrained by fears of over-stepping the bounds of “positivism.” For those bounds cannot in the last analysis be other than freely contestable decisions by particular theorists or schools of theorists who have not fully *recovered from the Enlightenment’s* peculiar mixture of unwarranted skepticism with unwarrantable reliance on the models and methods employed in the successful natural sciences—descriptive/explanatory sciences whose subject

33. Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969; 1st ed., 1964), 242.

matter is the nature that *is what it is* regardless of our free choices and thus is radically other than a nature that flourishes only in forms conceived by practical reason and made actual only in and by the free choices which not only shape the course of events but also build up human character as just or unjust, vicious or virtuous. What can be said of human character can be said also of the legal systems that people choose to constitute and maintain in and for their communities.

There is every reason to hope, and some reason to expect, that that recovery will continue and that the future of the philosophy of law will be mainly as a recognizably (even when unlabeled) natural law theory of positive law.

