

# Natural Law and Its History

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John Finnis, [\*Natural Law Theory: Its Past and Its Present\*](#), 57 **Am. J. Juris.** 81 (2012).

The image of natural law to the modern mind is one in which certain actions, states-of-affairs, and “values,” are represented as being right or wrong, reasonable or unreasonable, depending upon whether they can claim to be in accord with or contrary to nature. Though apparently hard to shift, this image, as John Finnis and others have pointed out on numerous occasions, is misconceived: the orientation of thinking running rather from what is reasonable and right to what is (therefore) in accord with nature.

The matter is dealt with in some detail in the second chapter of *Natural Law and Natural Rights*, and the rest of that book constitutes an example precisely of arguments of practical reasonableness (a reworking of Aquinas’s *prudencia*) as the ground of a theory of “natural law” (i.e. a fully critical basis for evaluation of human acts and institutions, and the subject-matter of the social sciences). It is taken up again, in much greater detail, in Finnis’s book on Aquinas, in the context of Aquinas’s own account (itself quite clear on this point) of human choosing and deliberating. The present essay situates the discussion within a much broader historical context, ranging from the treatment of “nature” in Platonic and Sophist philosophy through to the positivism of Hart and Austin. Just as the idea of “natural law” must be logically separated from the beliefs and opinions of those who assert its existence (only the latter having a temporality and history), so the skeptical, nihilist or agnostic assertion that there is no moral law, but only the satisfactions of “animal” nature (subrational emotions, desires to which reason is the ingenious servant), represents a single permanent idea which plays out in numerous different forms in different times and places. How could it be otherwise? For the skepticism is directed precisely at reason’s governance, its ability to identify and work its way towards those human goods that stand at the center of natural law thinking. In one long argument, the essay unpicks, steadily and relentlessly, the confusions that underpin the strand of skeptical thinking that unites the Sophists’ outlook to Hart’s own commitment to legal positivism.

Many discussions of positivism have been hampered by uncertainty as to whether the subject of discussion, the “relationship between law and morality”, is conceived as a relationship between two sets of norms held (conventionally) by members of a community, or as a relationship between just such a set of conventional (legal) standards and some truths about right and wrong in human choosing and acting (P. 90-91). But the features of Hart’s own discussion of law make clear that the real issue is none other than the question whether there is indeed knowledge of human good and evil (P. 99). Hart believed that one could elaborate a theory of law without taking a stand on that issue. But Hart’s very case for conceiving law as a union of primary with secondary rules, descriptive as it may be of the actual workings of (certain, mature types of) legal order, is nonetheless formed from a series of evaluative efforts to comprehend what is wrong with, and thus what is required in order to remedy, the defects of immature, “non-standard” legal orders or of societies that lack law (P. 98-99). Thus his explanation of the functional operation of secondary rules (as opposed to their malfunction) reaches back into a consideration of the character and causes of such defects. Despite Hart’s suggestion that their nature is fully comprehended by the ways in which they manifest inefficiency, the reality is that they embody defects of justice, matters which are suspended only to come crashing back in Chapter IX of *The Concept of Law*.

There are two respects in which the essay might have gone further. First, it could have indicated a means (if there is one) of tackling those virulent forms of skepticism that are anti-rational. One of the strongest lessons of the essay (and of Finnis's work generally, building on Aquinas's own insights) is that the skeptic is led to truth not by leading him into contradiction, but by exposing the commitments which underlie all practical thinking and deliberation. Those who, for instance, commit themselves to a maxim of "live and let live" must be prepared to defend that principle against the very moral tyrants they do not wish to become; and in doing so immediately set normative limits to human action. The point is not that such a principle, applied without restriction, annihilates itself (though that is true), but that its underlying assumptions involve a commitment to autonomy as a "human good" to be pursued and secured: a good the nature of which is only fully understood when placed within those normative structures which limit human action, and which can then be elaborated in terms of other, distinct goods: sociability, knowledge and the like.

The success of this argument (i.e. not its logical consistency but its success in actually moving minds toward acceptance of truth) is dependent upon the skeptic's realization that morality is not held "as positive" but "as true" (P. 86). But this is often not the case: some modern "liberals" claim to assert moral principles precisely as cultural artifacts, refusing even in the case of deep commitments (such as injunctions against hate crimes, rape, murder) to acknowledge them as more than merely conventional commitments: they are indeed held self-consciously "as positive". Aristotle famously acknowledged that arguments alone cannot move men toward truth: the mind must first be cultivated so as to be open to rational persuasion. How then should the philosopher go about cultivating that integration between rational and subrational factors (to use Finnis's terms) in the human personality required in order to persuade recalcitrant listeners?

Secondly, natural law's own identity and commitments could be further clarified by considering these theses in relation to those (major) representatives who lie outside the Thomist tradition to a greater or lesser degree: such as Grotius or Locke for example. There is indeed some debate as to the extent to which Grotius departs from Aristotelian and Thomist premises, but his own position is grounded in an idea of self-ownership (or self-right, precisely as a ground of further duties) that Aquinas specifically rejects. Do all moral understandings reach back into ideas of human goods as the ground of their intelligibility (or truth), so that eudaimonism is an inescapable basis for ethical reflection?

The essay is not really directed toward answering either of these questions. But as a self-standing inquiry and as an eloquent survey of Finnis's considerable body of thought, it should command careful and sober attention.

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