

# Reading Finnis' Natural Law Theory in the Shadow of Hart

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## 1 Introduction

Within the longstanding debate between legal positivism and natural law theory, no two figures loom larger than John Finnis, perhaps today's most influential natural law theorist, and H.L.A. Hart, perhaps legal positivism's most influential 20th century advocate. In light of the continued relevance of both scholars' legal theories to a proper understanding of jurisprudence, the purpose of this critical review is threefold. Taking Hart's *The Concept of Law*<sup>1</sup> and Finnis' *Natural Law and National Rights*<sup>2</sup> as my point of departure, I begin by (1) outlining the commonalities that exist between the two scholars; I subsequently proceed to (2) locate the sources of fissure between their legal theories, and I conclude with an (3) assessment of Finnis' efforts to provide an alternative framework for jurisprudence.

## 2 Part I: Commonalities

In this section, I argue that there exist three broad areas of agreement between Hart and Finnis' legal theories. These constitute (1) a unity of opposition to scholars such as John Austin and Oliver Wendell Holmes, and (2) a descriptive conceptual unity with regards to the social function of law and (3) the distinctions between law and morality. Let us consider each of these commonalities in turn.

First, Finnis' natural law theory and Hart's legal positivism both reject John Austin's command theory of law. Hart posits that Austin's theory crucially ignores what he terms the "internal aspect" of law, namely

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<sup>1</sup>H. L. A. Hart. 1961 [2012]. *The Concept of Law*. New York, NY: Oxford University Press.

<sup>2</sup>John Finnis. 1980 [2011]. *Natural Law and National Rights*. New York, NY: Oxford University Press.

the fact that norm subjects embrace a “critical reflective attitude to certain patterns of behavior as a common standard . . . which find[s] [its] characteristic expression in the normative terminology of ‘ought’, ‘must’, and ‘should’, ‘right’ and ‘wrong.’”<sup>3</sup> This normative orientation towards the law dissolves in the face of Austin’s instrumental, brute force-induced compliance at the behest of the coercive sovereign. Following Hart, Finnis is quick to highlight that “the ‘directive’ force of law is not to be reduced to, or explained by reference only to, the ‘coercive’ force of law.”<sup>4</sup> For Finnis, Hart’s willingness to highlight the quotidian “*use* of rules as standards for the appraisal of their own and others’ behavior” helps to fruitfully and “sharply differentiate” the internal point of view “from the point of view of those who merely acquiesce in the law. . . to the extent that they fear the punishments that will follow non-acquiescence.”<sup>5</sup>

Beyond unity in opposition, there also exists a descriptive conceptual unity between Hart and Finnis. This arises in both scholars’ discussion of the social function of law. Contra Oliver Wendell Holmes’ dictum that “to know the law and nothing else” one must look to the law “as a bad man” to “predict” how public officials will respond to non-compliance,<sup>6</sup> Hart emphasizes that legal rules serve as “common standards of behavior.”<sup>7</sup> Here, too, Finnis is only all-too pleased to embrace Hart’s appeal, “again and again, to the practical point of the components of the concept” of law, whereby “law is to be described in terms of rules for the guidance of officials and citizens alike, not merely as a set of predictions of what officials will do.” In other words, authoritative laws, to borrow Joseph Raz’s terminology, offer exclusionary reasons for action,<sup>8</sup> a conceptualization that Hart explicitly embraces in referring to the existence, within the “internal” perspective, of “content-independent” reasons for following legal rules.<sup>9</sup> Finnis endorses this approach when he notes that authoritative laws provide “sufficient and exclusionary reasons for acting.”<sup>10</sup> In short, for both Hart and Finnis law fundamentally functions as a guide for social action.

Finally, Hart and Finnis are in broad agreement over the distinction between law and morality. Hart

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<sup>3</sup>Hart, *Concept of Law*, p. 57.

<sup>4</sup>Finnis, *Natural Law and Natural Rights*, p. 314.

<sup>5</sup>Ibid: p. 13.

<sup>6</sup>Oliver Wendell Holmes. 1897 [1997]. “The Path of the Law.” *Harvard Law Review* 110 (5): p. 993.

<sup>7</sup>Hart, *Concept of Law*, p.116.

<sup>8</sup>Joseph Raz. 1990. *Practical Reason and Norms*. Princeton, NJ: Princeton University Press.

<sup>9</sup>H.L.A. Hart. 1982. *Essays on Bentham* New York, NY: Oxford University Press.

<sup>10</sup>Finnis, *Natural Law and Natural Rights*, p. 269.

highlights that whereas “new rules can be introduced and old ones changed or repealed by deliberate enactment,” moral rules or principles “cannot be brought into being or changed or eliminated in this way.”<sup>11</sup> In parallel form, Finnis asserts that “legal rules, *qua* legal, are always subject” to the possibility of their being “acts of deliberate or at least datable creation or amendment . . . in contrast to moral rules, which *qua* moral rules morally considered have no datable origins and cannot be amended.”<sup>12</sup> Hart further conceives of the demands of morality, or “moral pressure,” as being driven less by threats or “appeals to fear of interest,” and more so “by reminders of the moral character of the action” - a *pull*, one might say, rather than a *shove*.<sup>13</sup> This conclusion, too, emerges as congruent with Finnis’ concept of morality, for Finnis draws from Aquinas in noting that “human movement” should not be interpreted “as the effect of a push . . . but rather as a person’s response to the attraction of (something considered to be) good.”<sup>14</sup> Finally, just as Hart believes that there is “no special incompatibility between clear laws and evil,”<sup>15</sup> in the sense that legally valid laws, promulgated in accordance with the procedures set out by recognized secondary rules, could still be morally repugnant, so too Finnis goes out of his way to stress that “the central tradition of natural law . . . accords to iniquitous rules legal validity . . . The tradition goes so far as to say that there may be an obligation to conform to some such unjust laws.”<sup>16</sup>

### 3 Part II: Fissures

Following an exposition of the commonalities between Hart and Finnis’ theories of law, one might begin to wonder whether the legal positivism vs. natural law debate boils down to ‘much ado about nothing.’ Such a conclusion, however, is premature. For in Hart’s construction of an edifice to house his legal theory, he leaves a plethora of doors open to a scholar of Finnis’ sensibilities<sup>17</sup> - openings which Finnis proceeds exploit

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<sup>11</sup>Hart, *Concept of Law*, p. 175.

<sup>12</sup>Finnis, *Natural Law and Natural Rights*, p. 320.

<sup>13</sup>Hart, *Concept of Law*, p. 180.

<sup>14</sup>Finnis, *Natural Law and Natural Rights*, p. 339.

<sup>15</sup>H.L.A. Hart. 1965. “Review of *The Morality of Law*.” *Harvard Law Review* 78: p. 1287.

<sup>16</sup>Finnis, *Natural Law and Natural Rights*, p. 365.

<sup>17</sup>I am indebted to a conversation with John DiIulio for the “door” metaphor and for crystallizing the points of divergence between Hart and Finnis.

to construct his own normative legal theory to contextualize and criticize Hart's work.

Hart lays the foundations for fissure in his description of the "minimum content of natural law." He highlights that because men are vulnerable, approximately equal, imperfectly altruistic and law-abiding, and inhabiting a world of scarce resources, legal systems everywhere must include (1) prohibitions against violence or killing, (2) a minimal institution of property, (3) mechanisms to sanction non-compliance, and (4) mechanisms for mutual forbearance and compromise.<sup>18</sup> Finnis does not dispute the validity of this list - what he does dispute is its completeness. The moral foundations of legal systems, Finnis argues, cannot be reduced to the avoidance of a Hobbesian state of nature. Rather, the "central case," or ideal-type, of law is one where legal rules are promulgated by a legitimate authority "to reasonably resolv[e] any of the community's co-ordination problems . . . for the common good of that community."<sup>19</sup>

Two points of clarification are in order. First, Finnis conceives of the common good not as a conventional morality, emerging out of common agreement as to the principles of the good life, but rather as "a set of conditions which enables the members of a community to attain for themselves reasonable objectives . . . for the sake of which they have reason to collaborate with each other . . . in a community."<sup>20</sup> The content of natural law, in other words, is not to provide the minimum necessary conditions for orderly social life, but also to enable purposive community members to realize their life-plans within a cooperative milieu. Second, Finnis broadly endorses Lon Fuller's eight constitutive principles of the "inner morality of law" via his conceptualization of the "rule of law:" laws should (1) be non-retroactive, (2) render compliance possible, (3) be publicly promulgated, (4) clear, (5) coherent with one another, (6) stable, (7) capable of limiting and regulating decrees/orders, and (8) binding on authorities as well as subjects.<sup>21</sup> Hart explicitly rejects the validity of the foregoing list, highlighting that "the classification of these eight principles as a form of morality breeds confusion," for their fulfillment does not preclude the promulgation of a morally evil law.<sup>22</sup> But Finnis rebuts that Fuller had "more underlying sense than his critics were willing to allow," for a "tyranny devoted to pernicious ends has no self-sufficient *reason* to submit itself to the discipline of operating consistently"

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<sup>18</sup>Hart, *Concept of Law*, pgs. 194-196.

<sup>19</sup>Finnis, *Natural Law and Natural Rights*, p. 276.

<sup>20</sup>Ibid: p. 155.

<sup>21</sup>Finnis, *Natural Law and Natural Rights*, p. 270. See also: Lon L. Fuller. 1969 [1964]. *The Morality of Law*, 2nd ed. New Haven, CT: Yale University Press.

<sup>22</sup>Hart, "Review of *The Morality of Law*," p. 1286.

with Fuller's principles of inner legal morality or Finnis' principles of the rule of law.<sup>23</sup>

This initial fissure, once crystallized, exposes a whole host of divergent conceptions between Hart and Finnis. Consider the scholars' portrayal of the rationale for the creation of legal rules. Hart conceives of the transition from the "pre-legal" world, comprised of only primary rules, to the "legal" world, comprised of both primary and secondary rules, as motivated by the demands of institutional efficiency. To remedy uncertainty, a "rule of recognition" must be introduced; to remedy the static quality of primary rules, "rules of change" must be created; and to remedy the inefficiencies inherent in addressing non-compliance, "rules of adjudication" must be promulgated.<sup>24</sup> On the other hand, for Finnis legal rules meet not only the demands of institutional efficiency but also the requirements of practical reasonableness. These requirements, which need not be universally realized or self-evident, are nonetheless intelligible to "anyone of the age of reason:" they include (1) the possession of a rational plan for life; (2) non-arbitrariness vis-a-vis fundamental human values;<sup>25</sup> (3) impartiality among human beings; (4) openness to all the basic forms of good; (5) commitment; (6) efficiency within reason; (7) respect for every basic value in every act; (8) favoring the common good of one's communities; and (9) following one's conscience.<sup>26</sup> These principles are innate, non-derivable, and "have no history," in the sense that they are intelligible to all people regardless of time and place.<sup>27</sup> It is this basic understanding of morality that motivates human beings (where social interdependence is understood as a fundamental component of what it means to be human) to promulgate laws to foster coordination for the asymptotic realization of the common good.

The most noteworthy consequence of Hart and Finnis' divergent conceptualization of the motives for bringing legal rules into being is found in their treatment of authority. For Hart, authoritative legal rules emerge where "a secondary rule of recognition is accepted and used for the identification of primary rules of obligation."<sup>28</sup> Conversely, for Finnis authority cannot have its source within a power-conferring secondary rule; rather, and following Sir John Fortesque, "governing power has its beginnings under, and in virtue

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<sup>23</sup>Finnis, *Natural Law and Natural Rights*, p. 273.

<sup>24</sup>Hart, *Concept of Law*, pgs. 94-97.

<sup>25</sup>These human values include (1) life, (2) knowledge, (3) play, (4) aesthetic experience, (5) friendship, (6) religion, and (7) freedom; see: Finnis, *Natural Law and Natural Rights*, p. 155.

<sup>26</sup>Ibid: pgs. 33; 225; 103-125.

<sup>27</sup>Ibid: p. 24.

<sup>28</sup>Hart, *Concept of Law*, p. 100.

of, the 'law of nature'."<sup>29</sup> Put differently, Finnis' "rule of thumb" is that a law is authoritative "when practically reasonable subjects, with the common good in view, would think that they *ought* to consent to it."<sup>30</sup> What this means is that although positive law will be "guided by the circumstances of a particular society," and hence will contain some degree of arbitrariness, it will nonetheless be "derived from [natural law]" even if it is not fully "entailed by it."<sup>31</sup> For it is the intelligible requirements of practical reasonableness that motivative community members to see themselves as bound by an authority that "can in fact effectively settle co-ordination problems for that community."<sup>32</sup> The foundations of authority and obligation, in other words, are conceived by Finnis as pre-legal.

This understanding pushes Finnis to follow Ronald Dworkin<sup>33</sup> in chastizing Hart for failing to adequately develop his concept of the "internal point of view." "There seems to be no good reason," Finnis writes, "for this refusal to differentiate the central from the peripheral cases *of the internal or legal point of view itself*."<sup>34</sup> Having leveraged this critique, Finnis proceeds to conceive the "central case" of the "internal point of view" as one where "legal obligation is treated as at least presumptively a moral obligation."<sup>35</sup> This approach enables Finnis to further outline the contours of more "peripheral" cases of the internal point of view which are collapsed within the central case by Hart's theory. For example, where laws are motivated by factional or self-interest, incongruent with substantive principles of distributive and commutative justice,<sup>36</sup> representative of an *ultra-vires* act, or violative of Fuller's procedural principles of inner legal morality, they emerge as morally unjust and consequently "fail to create any moral obligation whatever."<sup>37</sup> Yet such laws can still be legally binding and, in fact, there may remain a moral obligation to obey unjust laws "to the

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<sup>29</sup>Finnis, *Natural Law and Natural Rights*, p. 251.

<sup>30</sup>Ibid.

<sup>31</sup>Ibid: p. 286.

<sup>32</sup>Ibid: p. 246.

<sup>33</sup>Dworkin, Ronald. 1978 [1977]. *Taking Rights Seriously*. Cambridge, MA: Harvard University Press: Chpts. 2-3.

<sup>34</sup>Finnis, *Natural Law and Natural Rights*, p. 13.

<sup>35</sup>Ibid: p.14.

<sup>36</sup>Finnis defines distributive justice as the "reasonable resolution of a problem of allocating some subject-matter that is essentially common but that needs . . . to be appropriated to individuals" (such as natural resources); he defines commutative justice as the proper dealings "between persons (including groups)" (in other words, interpersonal relations). See: Ibid: pgs. 166-167; 179.

<sup>37</sup>Ibid: pgs. 351-354; 359

extent necessary to avoid weakening the legal system (of rules, institutions, and dispositions) as a whole.”<sup>38</sup>

We can conclude from the foregoing non-exhaustive exposition that there exists a fundamental, meta-fissure of scholarly purpose between Hart and Finnis. Whereas Hart's efforts constitute descriptive conceptualization with the goal of “providing an improved analysis” of law,<sup>39</sup> Finnis' efforts, on the other hand, are evaluative, namely “to determine what the requirements of practical reasonableness are” such that one can show “how and on what conditions [legal institutions] are justified and the ways in which they can be and often are defective.”<sup>40</sup> In this way, Finnis's natural law theory fundamentally eschews Hart's efforts to remain within the confines of “descriptive social science.”<sup>41</sup>

#### 4 Part III: Evaluation

Finnis owes Hart a great debt of gratitude, for without *The Concept of Law* it is difficult to imagine how *Natural Law and Natural Rights* could have been written. It is only a slight exaggeration to posit that Finnis' book is to Hart's descriptive jurisprudence what John Hart Ely's *Democracy and Distrust*<sup>42</sup> is to Justice Stone's footnote no. 4 in *United States v. Carolene Products*:<sup>43</sup> an extension and development. For although Finnis may criticize Hart for not extending his notions of the “inner point of view” and the “minimum content of natural law” far enough, it is these very concepts that allow Finnis to construct his natural law theory around Hart's legal positivist framework. To put it another way, it is generally possible for someone normatively committed to Finnis' natural law theory to simultaneously embrace Hart's description of the law, and Finnis himself enables this reconciliation by disavowing any notion that laws that violate the principles of practical reasonableness necessarily lose their positive legal qualities.

Consequently, since the domain of Finnis' theory extends beyond that of Hart, is it difficult to leverage the latter's legal positivism to evaluate the efforts of the former. One might, however, leverage Hart's positivist sensibilities to mount an attack on Finnis. Legal positivism, I would contend, is inherently more

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<sup>38</sup>Ibid: pgs. 361-362.

<sup>39</sup>Hart, *Concept of Law*, p. 17.

<sup>40</sup>Finnis, *Natural Law and Natural Rights*, pgs. 290; 3.

<sup>41</sup>Ibid: p. 20.

<sup>42</sup>John Hart Ely. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, MA: Harvard University Press.

<sup>43</sup>*United States v. Carolene Products Company*, 304. U.S. 144(1938).

historicist and institutionalist a perspective than is natural law theory. Embracing this alternative orientation carries implications for how we evaluate Finnis' ambitious endeavor. In particular, Finnis' conception of the requirements of practical reasonableness as ahistorical and pre-legal necessitates greater empirical support than is provided in *Natural Law and Natural Rights*. Basic human goods listed by Finnis, such as religion and work, are difficult to conceive of in a pre-institutional world. Correlatively, it is not at all clear that the pursuit of "aesthetic experience" would be intelligible to all individuals regardless of time and place. Would a community of warriors in a state of perpetual conflict, for example, be able to understand the pleasure derived by community members elsewhere when they visit an art museum? Further, to what extent is the notion of "intelligibility" contingent upon the institution of language and, perhaps even more demandingly, upon the possibility for inter-personal communication via a shared language? If the requirements of practical reasonableness depend upon any of these institutional foundations, then it is absurd to baptize them as transcendental principles. This would consequently cast doubt on Finnis' assertion that the foundations of authority are fundamentally pre- or extra-legal.

Ultimately, however, Finnis' efforts prove successful in introducing a degree of aspiration within the concept of law that tends to get lost within Hart's legal positivism and evaporates completely within Holmes' "bad man" perspective on the law. "The law," Finnis argues, "anticipates and seeks to capitalize upon, indeed to absorb and take over, the 'good citizen's' schema of practical reasoning, and to give it an unquestioned or dogmatic status."<sup>44</sup> Given that Finnis aims for *Natural Law and Natural Rights* to serve as a guide for citizens, judges, and policymakers (ambitions which Hart does not share), this approach appears both necessary and laudable. To this end, one might ask whether the more direct conflict is not between Finnis and Fuller rather than between Finnis and Hart. One might recall that Fuller distinguishes between a morality of duty and a morality of aspiration and concludes that law's empire cannot extend to cover the latter type of morality. Contrariwise, Finnis' treatment of the law, at least in its central type, appears to open the door for legal rules to enable, if not to capture, elements of the morality of aspiration.

Finally, Finnis' extensive discussion of justice and human rights, omitted from this critical review for reasons of space, is laudable, as is his sensitivity for the normative significance of the social interdependence that contextualizes human action, a significance occasionally ignored by liberals and caricatured by utilitarianism and modern consequentialism. In short, Finnis' *Natural Law and Natural Rights* advances an

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<sup>44</sup>Finnis, *Natural Law and Natural Rights*, p. 318.



attractive theoretical framework, but we should not overstate the consequences of this endorsement for the integrity of Hart's descriptive conceptualization of the law.