

Lecture Notes - *Natural Law and Natural Rights* - John Finnis

Key Claim 1: “There are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy.”

Key Claim 2: “No Theorist can give a theoretical description and analysis of social facts without also participating in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.”

Key Claim 3: “[a]ctions, practices, etc., can be fully understood only by understanding their point, that is to say, their objective, their value, their significance or importance, as conceived by the people who performed and engaged in them, etc.”

A theorist must first choose a target: what counts as law for the purposes of description?

- Bentham: ‘real entities’: Assemblages of signs, sets of individuals.
- Austin: wanted leading terms to be simple and definite
- Kelsen: anything we want to call law when we see it: Social order of the African tribe w/ a despotic chieftain and the constitution of the Swiss republic must both count.
 - “What could be simpler? One takes the word ‘law’. Ignoring a wide range of meanings and reference (as in ‘law of nature’, ‘moral law’, ‘sociological law’, ‘international law’, ‘ecclesiastical

law', 'law of grammar'), and further ignoring alternative ways of referring to, e.g., the 'negro tribe's' social order, one looks at the range of subject-matter signified by the word in usage which one has (without explanation) selected."

Choosing a target is a necessary but often neglected task. We simply take it for granted that we know what it is we're trying to explain, as if it's just a thing sitting on the table before us.

But how do we engage in this task? How do we choose a target?

Finnis takes a hint from Hart and Joseph Raz. He thinks that both philosophers were onto something important in breaking with the naive methodology of earlier positivists. They attend to three points:

1. The practical point of view.
2. Attention to a central case and focal meaning of law
3. Selection of a particular practical viewpoint

We'll take these in turn.

1. The practical point of view

Finnis argues that Hart and Raz make a decisive break with earlier positivist theorists by insisting on the centrality of the practical point of view. What is this?

The practical point of view consists in considering the *function* of law and of various types of legal rules.

- Law is aimed at social control
- Different types of legal rules perform different functions of social control.
- It must remedy the various defects that arise in a system of primary rules of obligation.

- It must do this in a way that *gives practical reasons* to those governed to follow the law... **How's it do that?**
- Raz: Law is a system of norms that provides for authoritatively settling disputes by means of norms which:
 - provide binding guidance for 'primary institutions' which resolve disputes by 'binding applicative determinations'
 - the same rules guide the individuals whose behavior might be judged.
- The result is a system in which the '**rule of law**' obtains rather than the rule of men.
- The rules are binding not only on individuals but on institutions...this differentiates legal order from any other social order.
- connect to Fuller
 - “For Fuller, law is indeed a social order in which there are rulers and subjects, but it is to be distinguished from any social order in which the rulers are exercising a managerial direction over their subjects. Law is distinguished from such managerial direction partly by the generality of its major rules, and above all by the fact that its officials are bound to apply the rules which they have previously announced to their subjects. There is thus an essential component of collaboration and reciprocity in the enterprise of subjecting human conduct to the governance of legal as distinct from merely managerial norms.”
- These 'descriptive' theorists are trying to identify law by 'non-evaluative' characteristics, focusing on what is 'important' and 'significant'. **But how does one decide what is?**

2. Central Case and Focal Meaning

The next piece of the puzzle for Finnis is the idea of a *focal meaning*, which he gets from Aristotle.

The goal is to identify a central case from which other instances of law deviate.

We note similarities and dissimilarities from central cases.

- On the one hand, there is no point in denying that the peripheral cases are instances (of friendship, constitutionality. . .). Indeed, the study of them is illuminated by thinking of them as watered-down versions of the central cases, or sometimes as exploitations of human attitudes shaped by reference to the central case. And, on the other hand, there is no point in restricting ones explanation of the central cases to those features which are present not only in the central but also in each of the peripheral cases. Rather, ones descriptive explanation of the central cases should be as conceptually rich and complex as is required to answer all appropriate questions about those central cases.

3. How do we select the 'important' and 'significant' cases? We need to select a particular practical viewpoint.

“So when we say that descriptive theorists (whose purposes are not practical) must proceed, in their indispensable selection and formation of concepts, by adopting a practical point of view, we mean that they must assess importance or significance in similarities and differences within their subject-matter by asking what would be considered important or significant in that field by those whose concerns, decisions, and activities create or constitute the subject-matter.”

- Hart: Internal POV.
- Raz 1: 'the ordinary man's point of view'
- Raz 2: “the point of view of people who believe in the validity of the norms and follow them (paradigmatically, the viewpoint of the judge qua judge).”
- These positions are “unstable and unsatisfactorily.”

- Raz: “[A]llegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do”.
- Even extends to the **anarchist judge**.
- Need to find a better way.
- Legal obligation and moral obligation come together. The **viewpoint of practical reasonableness**.
- This is the viewpoint from which the law acts as an actual guide to human behavior.
- It gets at the *function of law*.

Basic Values

From the practical point of view, the view of practical reasonableness, we can identify some basic human values.

Finnis first notes that attempts to identify basic values from anthropology, etc., suffer from some confusions.

But we can do better if we keep a few things in mind:

- Distinguish between **brute fact** of an urge and the **forms of good** which one who has such an urge can think it worthwhile to pursue and realize. **RECALL** what we said about Aquinas: Object –*i*, Capacity –*i*, Nature
- Distinguish between the material conditions for a value and the value itself. Don’t be seduced by the material conditions; focus on the value at which they’re aimed.
- Recall distinction between general value and particular goal and between ends and means.

Focusing on these distinctions and surveying the anthropological literature, Finnis identifies a variety of basic human goods:

- Concern for human life
- Procreation
- Restrict sexual activity: incest, promiscuity, rape.
- Truth and education.
- Children
- Cooperation
- Common over individual goods
- Justice
- Friendship
- Title or property
- Play
- Respect for dead bodies

These are not reducible, but we can come to a list of basic values if we reflect on what we, as practically reasonable beings, really value

“The proper form of discourse is: ‘...is good, in itself, don’t you think?’”

- (A) Life
- (B) Knowledge
- (C) Play
- (D) Aesthetic Experience
- (E) Sociability (friendship)
- (F) Practical Reasonableness
- (G) ‘Religion’