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ARTICLE

HLA Hart and the Making of the New Natural Law Theory

Santiago Legarre*

This article considers HLA Hart's influence in the making of John Finnis's book *Natural Law and Natural Rights*. In the style of an intellectual biography it traces the history of the interaction between the two Oxford legal philosophers using their correspondence as a starting point. It also delves into Finnis's years in Africa—a period of his life both crucial for the writing of the book and utterly unknown. It argues that Hart's role was significant not only insofar as he was behind the idea of the book but also (and this has been little known as of yet) because of the restrained way in which he freely chose to conduct his role as editor despite the extent of the reservations he had regarding Finnis's work, fully revealed here. Given the importance of *Natural Law and Natural Rights* for what has been called the 'new natural law theory' the article concludes by awarding Hart his due credit in the making of one of that theory's main sources of inspiration.

Keywords: natural law; Hart; Finnis; new natural law theory; *Natural Law and Natural Rights*; Oxford philosophy

1

A Critique of the New Natural Law Theory. That was the title of Russell Hittinger's first book, published by the University of Notre Dame Press in 1987. It seems a safe bet to say that it was Hittinger who coined the term 'new natural law theory' in order to

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describe a purported school of thought that has in Germain Grisez its founder and architect, in John Finnis a main builder, and in Robert P George its more recent (and most exuberant) voice. These three, however (as well as others who purportedly fall under the related label ‘new natural lawyers’), never seemed to like the term ‘new natural law theory’.¹ In an apparent compromise, Finnis—who without question holds these days the banner highest—has accepted an alternative, not altogether different brand: ‘new classical natural law theory’.²

My intention here is neither to quarrel with Hittinger nor to accept his branding. Rather, I call attention to this term with a view to displaying a little known fact: that Herbert Lionel Adolphus Hart—the father of what one could call ‘new positivist theory’³—had a significant, if peculiar, role in the formation of the ‘new natural law theory’. His unique contribution to the existence of a primary source of the latter theory—John Finnis’s 1980 book *Natural Law and Natural Rights*—makes it possible to credit him with this midwifely role.

I will bring to light for the first time some correspondence between Hart and Finnis on natural law and on *Natural Law and Natural Rights*. These hitherto unpublished letters show the extent to which natural law theory is indebted to the father of the new positivism while at the same time they make clear the extent to which the attitudinal barriers faced by modern natural law theory in the times of Hart—especially in what has to do with the connection of that theory to God—made it more difficult for him to buy the natural law project.

In order to understand the Hart-Finnis correspondence some context is required, which I will start by providing. My main sources for what comes next are conversations with and emails to me from Finnis.⁴

2

How did it happen that John Finnis met professor Hart? The story starts with Finnis’s father. An academic himself,⁵ Finnis Sr sailed from Australia to Oxford on sabbatical

- 1 After recognising that Finnis’s work with Germain Grisez and Joseph Boyle in developing the understanding of practical reasoning has come to be known as the ‘new’ natural law theory, Robert P George argues, in his opening contribution to Finnis’s festschrift, that this is problematic: Robert P George, ‘Introduction: The Achievement of John Finnis’ in John Keown and Robert P George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 6 n15. Finnis’s own reservations regarding the label also feature there: John Finnis, ‘Reflections and Responses’, in Keown and George, *Reason, Morality, and Law* 468 n31.
- 2 John Finnis, ‘Natural Law: The Classical Tradition’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 5. In 1991 Finnis had already alluded to ‘the new classical theory’: John Finnis (ed), *Natural Law* (New York University Press 1991) vol I, v.
- 3 Jonathan Crowe has made a parallel perhaps in the same vein with the one implicit in the text (ie, new natural law theory/new positivist theory): ‘Finnis’s position within contemporary natural law theory is similar to Hart’s within legal positivism’: Crowe, ‘Natural Law Beyond Finnis’ (2011) 2(2) *Jurisprudence* 293, 208.
- 4 Interviews with John Finnis, University of Notre Dame, South Bend (Indiana), USA (23 March and 5 April 2014).
- 5 Mr MMS Finnis was a Lecturer and then Senior Lecturer in Philosophy at the University of Adelaide from 1940, the year of his return from graduate studies (interrupted by the war) in Oxford, and of the birth of his eldest child, John. See Juan B Etcheverry, ‘Entrevista a John M Finnis’ (2012) 35 *Doxa* 859, 859.

in the late 1950s or perhaps 1960. Upon returning, he told Finnis Jr—then an undergraduate law student at the University of Adelaide—that the interesting philosophical work in Oxford was being done by GEM (Elizabeth) Anscombe and HLA Hart. Finnis heeded his father when he was examined in Jurisprudence in the third year of his LLB course and he relied on Hart as the principal source for most if not all the questions he answered. Indeed, he had read a lot of Hart for that exam, though not *The Concept of Law*, which was published in 1961 by Oxford University Press, some months after the examination.⁶

At the end of 1961 Finnis was awarded a scholarship specifically for study in Oxford, and chose to apply to the Oxford college at which Hart held (since 1952) his Oxford Chair, University College.⁷ Finnis says he thought that if he was admitted as a member of Univ—short for University College—he would be more likely to end up working with Hart. In retrospect he realised this was not true:

Choosing Univ because of Hart was of course an error of logic—supervisors can be from any [Oxford college]. But I don't regret it.⁸

Hart held the chair of jurisprudence until 1968—six years before the mandatory retirement age⁹—and after his resignation he was succeeded by Ronald Dworkin. During his professorial tenure he had supervised a handful of brilliant students who, in time, became stars in their own right of the jurisprudential firmament; the list includes Finnis and Joseph Raz—who also studied at Univ, from 1964 until 1966.¹⁰ Other Oxford students of that era were in one way or another taught by Hart though not as his doctoral supervisees—notable examples are Neil MacCormick and Dworkin himself.

Finnis arrived in Oxford in 1962, and made an early visit to the Oxford University Press bookshop there, to exchange his well-used but defective copy of *The Concept of Law* for a new copy with all the pages. During that academic year he attended seminars on the book being given in Lincoln College by AWB Simpson, the legal historian and Oxford philosopher (whose last book, in 2011, was on Hart).¹¹ In the Postscript to the second edition of *Natural Law and Natural Rights*, Finnis recalls that in October–November 1963 he attended Hart's set of eight lectures on Hohfeld's analysis of rights.¹² Finnis still has his notes of those lectures, which took place in Oxford's famous Examination Schools, adjacent to University College. In addition to attending the Hohfeld lectures and Hart's graduate

6 Email to author from John Finnis, 4 June 2014.

7 Email to author from John Finnis, 3 June 2014.

8 Email to author from John Finnis, 4 June 2014.

9 For the possible reasons of Hart's early retirement see Nicola Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (OUP 2004) 289 ff.

10 This information was kindly provided by University College's secretary. I thought I would state it here as it is little known that Raz—usually (and rightly) associated with Balliol College—was first a Univ man.

11 See AW Brian Simpson, *Reflections on The Concept of Law* (OUP 2011).

12 John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 415.

seminar on Jurisprudence and Political Theory, Finnis had Hart as the appointed Supervisor of his work towards his doctoral thesis on ‘The Idea of Judicial Power, with Special Reference to Australian Constitutional Law’.¹³

In those years of the early and mid-1960s Hart’s teaching room or office was located in Kybald House, a house at the back of Univ, on Kybald Lane, parallel to Merton Street off Magpie Lane—the same room that Dworkin would use throughout his tenure of the Chair from 1969 to 1998. When Hart returned to Univ as a research fellow in 1978,¹⁴ he was provided with a different working room: ‘an attractive room abutting the secluded Fellows’ Garden’, in Nicola Lacey’s words.¹⁵ Later, as a result of a car accident in 1987, Hart substantially lost the ability to walk.¹⁶ Finnis recalls that Hart:

moved to the Master’s Lodgings only after he became wheelchair-bound. The room became available when Master Brewster died in November 1988, and Hart probably moved very soon after that.¹⁷

This last Hart room in Univ was occupied by then-Professor John Finnis after his old supervisor’s death in 1992¹⁸—the large room to the right as soon as one enters the north side door of the Master’s Lodgings, where so many of us had supervision or tutorial meetings with Finnis until he retired from his Oxford chair (an *ad hominem* one to which he was appointed in 1989) in 2010.¹⁹

It was in this last Hart room that, soon after he took possession of it, Finnis found in a segment of one cupboard a jumble of papers including three or four notebooks of Hart’s that had been left accidentally by the people who had cleared the room after Hart’s death. Finnis had all these papers—which also included copies of some of the last doctoral theses supervised by Hart, as well as a folder with letters connected to the ‘Harari affair’²⁰—delivered to Jenifer Hart, the professor’s

¹³ Finnis’s doctoral thesis has remained unpublished. There is a copy of it in Oxford University’s Bodleian Law Library.

¹⁴ From 1969 until 1973, when he became the Principal of Brasenose College, he also held a research fellowship in University College: Lacey, *A Life* (n 9) 290.

¹⁵ Lacey, *A Life* (n 9) 323. A former student of Finnis explains that ‘[in] late 1986 ... Hart also had a room in college just a short walk away from the Fellows’ Garden’: Bryan Horrigan, ‘Global and Jurisprudential Dimensions of Natural Law, Human Rights and the Common Good’ in Mark Sayers and Aladin Rahemtula (eds), *Jurisprudence as Practical Reason: A Celebration of the Collected Essays of John Finnis* (Supreme Court Library Queensland 2013) 48, 92.

¹⁶ Lacey, *A Life* (n 9) 353.

¹⁷ Email to author from John Finnis, 16 June 2014.

¹⁸ Prior to 1992 Finnis had a room in Kybald House—first a small room next to Hart’s and then the large room above Hart’s/Dworkin’s. Horrigan, ‘Global and Jurisprudential Dimensions’ (n 15) 92 confirms that in 1986 ‘Kybald House, on the grounds of University College in Oxford ... housed a number of the college’s academics, most notably Professor John Finnis and Professor Ronald Dworkin’.

¹⁹ As I write, in 2016, Finnis still retains his chair in the Law School at the University of Notre Dame, in the United States, where no mandatory retirement rules are in force; he became associated with Notre Dame Law School in 1995.

²⁰ Finnis told me about his discovery in one of our interviews. Lacey also refers to it: ‘Professor John Finnis, in an interview for the Hart biography, told me that he had seen a folder relating to Hart’s correspondence with Abraham Harari ... in Hart’s University College office’: Nicola Lacey, ‘The Path Not Taken: HLA Hart’s Harvard Essay on Discretion’ (2013) 127 *Harvard Law Review* 636, 645 n29, citing an interview with John Finnis.

widow and executor. (Abraham Harari, a student at Oxford, took it personally when his dissertation was turned down by an examining committee which included Hart; not only did he write to him hostile letters but Hart even feared that Harari might try to kill him.²¹) The Harari file, in the words of Lacey (Hart's main biographer), 'unfortunately never materialised among the papers at Hart's home' at the time she was working on her biography.²²

Back in the 1960s, Hart had given ample freedom to his Australian doctoral student. Finnis confirmed in conversation his own experience of what Lacey states more generally: that Hart 'always encouraged his students to pursue their own ideas'.²³ Finnis's interests by then were already different in part from his supervisor's. While he was, on Hart's suggestion, reading deep first into Bentham's jurisprudential writings, and modern philosophical writings influenced by Bentham's, and then into Kelsen, Finnis was also working intensely on contemporary Thomist-influenced writing such as Lonergan's *Insight* and that Jesuit's earlier work on the concept of *verbum* in Aquinas—all this on the periphery of or simply outside Hart's focus and interests. In Australia Finnis had been a sceptic, under the influence of Hume and Russell, until in his final year as a law student he had read his way into the Catholic tradition²⁴ and had in substance converted from atheism to Catholic Christianity in the year before arriving in Oxford²⁵—though without yet finding any philosophically persuasive exposition of the natural law tradition. Not only did his supervisor not block his student's newfound inclinations; Hart maintained a benign neutrality about Finnis's interest in Lonergan, and he and Finnis never touched on the question of religion as such. (Finnis was surprised to discover, when attending Hart's obsequies and writing Hart's obituary for the *Daily Telegraph*, that Hart was deeply hostile to religion.) Lacey illustrates nicely Hart's attitude as a supervisor: he even spent time 'discussing with John Finnis a Jesuit critique of empiricism which would have been deeply uncongenial to him (and which was tangential to Finnis's research)'.²⁶

21 Lacey, *A Life* (n 9) 275.

22 Lacey, 'The Path' (n 20) 645, n29. In the text to which this footnote corresponds she further adds (ibid 645): 'I have some reason to believe that a number of Hart's papers went missing after his office at University College was cleared following his death in 1992.'

23 Lacey, *A Life* (n 9) 161. In a letter to me Ruth Gavison (who studied under Hart from 1972 to 1975) wrote along the same lines that Hart 'was extremely generous. He was truly liberal in allowing people to go their way. He had a gift of presenting views with which he disagreed clearly and strongly.' Email to author from Ruth Gavison, 25 September 2015.

24 Finnis, *Natural Law and Natural Rights* (n 12) 415. Finnis added in an interview that immediately before he left Adelaide for Oxford he 'had decided that Christianity was true': Etcheverry (n 4) 860.

25 It is easy to speculate that the public fact of Finnis's reception into the Catholic Church had something to do with his turn from scepticism: either as its cause or as its consequence or both. John Finnis was formally received in the Catholic Church at Oxford in December of 1962, at the end of his first term as a doctoral student. See Santiago Legarre, 'Apuntes para una biografía intelectual de John Finnis' in Juan B Etcheverry (ed), *Ley, moral y razón. Estudios sobre el pensamiento de John M Finnis a propósito de la segunda edición de Ley natural y derechos naturales* (UNAM 2013) 233, 244. See also the informed account given on Grisez's website, at <http://www.twotlj.org/Finnis.html>

26 Lacey, *A Life* (n 9) 161. In an email of 2 October 2014 Finnis confirmed what I had guessed when I read Lacey: that the book in question is *Insight* and the Jesuit author Bernard Lonergan: 'I gave Hart a longish hand-written essay that I wrote about some part of the book—I can't now remember

After three years of fruitful work under Hart, Finnis was awarded his doctorate in 1965. Then started a new phase of their relationship as Finnis soon became Hart's colleague: after teaching for one year at the University of California at Berkeley (a position to which he was directly recommended by Hart himself), Finnis returned to University College as a Fellow and Tutor in Law (which after one year carried with it a Lectureship in Law at Oxford University). He was elected to the post in the week he left for California in August 1965, and his only Oxford referee was Hart, whose opinion must have carried decisive weight with the Fellows of Univ. Thus Hart and Finnis were together working Fellows of Univ from 1966 to 1968; and then, after Hart's return as an emeritus fellow in 1978, until Hart's death in 1992.²⁷

It was in 1966 that Hart and Finnis had the crucial conversation without which *Natural Law and Natural Rights* probably would never have existed, or at least would doubtless have had some other title and taken a different form. In 1958 Hart had founded the Clarendon Law Series published by Oxford University Press, which was to produce 'short monographs unencumbered by detailed footnotes and designed to introduce students in an interesting and thought-provoking way to the various fields of law'.²⁸ In 1961 the editor of the series himself had contributed to it with *The Concept of Law*. It is, I think, debatable whether this book fits within the aforementioned description of the objectives of the series, and even more debatable whether Finnis's 413-page magnum opus does so. Regardless, 'in 1966, [Hart] signed John Finnis up to write a book on natural law, the title of which—*Natural Law and Natural Rights*—Herbert specified'.²⁹ We can now add to these words from Hart's biography Finnis's own recent revelations, included in his Postscript to the second edition of his book, published in 2011, which opens thus:

The book was commissioned by the editor of the Clarendon Law Series, H.L.A. Hart, soon after I became a colleague of his as a Fellow of University College, Oxford, in the autumn of 1966. He asked me to write a book for his series, a book called *Natural Law and Natural Rights*; he repeated this title, to make clear what he wanted. I was very pleased to be asked, and said I would try to have it done by Christmas 1970. He said 'Don't hurry'.³⁰

So the title was provided by Hart himself.³¹ It entailed some degree of restraint for the author: it was clear that Hart wanted him to deal with both natural law *and*

whether it was about the failed effort to explain first practical principles, in ch. 19, or about some more central aspect of the book, or both. Anyway, he patiently read it, and made some comments.' Finnis dates this happening 'probably in the middle of my second academic year with him (63–64)'.

²⁷ Hart was a significant presence in Univ even after his retirement (and until his death), with the partial exception of the period 1973–78, when he was the principal of another College: Brasenose.

²⁸ Lacey, *A Life* (n 9) 161.

²⁹ *ibid* 273.

³⁰ Finnis, *Natural Law and Natural Rights* (n 12) 414.

³¹ The translator of *Natural Law and Natural Rights* to Spanish (a translation discussed extensively with Finnis face to face in Notre Dame Law School in or about 1999) had already written in 2000 that 'the title was chosen by Hart and it was never the subject of discussion': Cristóbal Orrego, 'Estudio Preliminar' in John Finnis, *Ley natural y derechos naturales* (Abeledo Perrot 2000) 10.

natural rights.³² But Finnis remained in all other respects quite free to approach the project as he saw fit: 'beyond this specification that the book deal with rights as well as natural law, he never gave the least indication of what he hoped the book would or would not say.'³³ I see here a double credit in Hart's favour: he knew who he was choosing and, therefore, he trusted him. We are much indebted to Hart for this attitude, which was a prerequisite for the production of a masterpiece.

The masterpiece, however, took a long time to come into existence, much longer than foreseen by the author. By Christmas 1970 Finnis had not even started writing, though from 1967 his teaching at Oxford (and on one long occasion in 1971 at Adelaide) provided the opportunity to develop most of the ideas that were eventually set forth in the book.³⁴

By about 1975 the real writing of *Natural Law and Natural Rights* began.³⁵ It was published in England in 1980 but the preface is signed by the author in 1979 and essentially ends by saying that 'the book was mainly written in Africa'.³⁶ In what follows I will show on the one hand that, although the *real* writing started only in the early 1970s, something crucial by way of writing had already happened in the late 1960s; and on the other hand I will analyse some newfound correspondence between Hart and Finnis during the African years to which the book's preface alludes.

3

More or less a year and a half after the crucial 1966 conversation with Hart, John Finnis produced an 'Outline of a book on Natural Law and Natural Rights for the Clarendon Law Series'.³⁷ The author keeps a copy of it, dated 14 January 1968, which includes barely legible annotations by Hart. The outline is included as an appendix to this article as it may be of use for researchers. Indeed it is a gold mine for the student of the ('new') natural law tradition, especially the first part called, 'General Principles'. To offer but one example, the Outline sheds light on the view then held by Finnis regarding the so-called 'naturalistic fallacy'—which would become, as it is well known, a key problem for the new natural law theory. In Part B of the 'General Principles' Finnis stated that in his book it 'will be argued that a fully developed and self-conscious theory of natural law can both incorporate and surmount ... [the modern] critiques' of that fallacy.³⁸ Also, it is apparent that the Outline differs significantly from the final table of contents of

³² In his Postscript, Finnis speculates about the reasons for Hart's interest in having a discussion of natural rights: Finnis, *Natural Law and Natural Rights* (n 12) 415.

³³ *ibid* 415.

³⁴ *ibid* 414.

³⁵ *ibid*.

³⁶ *ibid* vii.

³⁷ See Appendix.

³⁸ *ibid*, 'General Principles', B.

the book; but it is also clear that much of the substance of *Natural Law and Natural Rights* is already there, even if in different form.³⁹

Finnis says in the Postscript of the second edition that it took him ‘until 1972 or 1973 to begin any real writing of the book’;⁴⁰ and that Hart ‘read it as it developed between 1974 and 1977’.⁴¹ But he now thinks (having consulted more accurate family memories) that it would be more correct to say that the real writing began in the English summer vacation of 1975, while his wife and four children were away for six weeks (16 July–3 September) in Australia. Be that as it may, little has hitherto been known to readers about the feedback—if any—provided by Hart, or about the interaction between the former supervisor and the former student during those years.⁴² Even less is publicly known about a period of John Finnis’s professional life that, as he seems to say in the preface to the first edition, had some impact on the construction of the book: I refer of course to his 22-month secondment in Africa, ‘an environment at once congenial and conducive to contemplation of the problems of justice, law, authority, and rights’.⁴³

In January of 1976 John Finnis was in hospital in Oxford for the major surgery that still in those days was indicated for acute duodenal ulcer. From there he wrote a very long letter to Hart.⁴⁴ We can deduce from it that Finnis had sent some time earlier two or three chapters of the manuscript to Hart: those dealing with the basic epistemological problems, included in the final version of *Natural Law and Natural Rights* mostly in chapter 3, titled ‘A Basic Form of Good: Knowledge.’ Obviously he sent them to Hart in his capacity as editor of the Clarendon Law Series. We can also infer from Finnis’s January 1976 letter that, as a result of reading those chapters, Hart had written him a letter some time late in 1975 to which Finnis was now replying from the hospital. Furthermore, Hart’s letter had been accompanied by the copies of those chapters themselves, with handwritten, marginal annotations by Hart. As we know from another Hart letter, he had read those chapters during the Christmas vacation of 1975 with a view to meeting with Finnis in early January in order to discuss them—without knowing that Finnis had been taken to the hospital.⁴⁵

On 14 February 1976 Hart answered the January letter, expressing his distress about Finnis’s hospitalisation and hoping his former student would find what

³⁹ Finnis’s own view is that the outline was ‘utterly different’: Email to author from John Finnis, 22 April 2014.

⁴⁰ Finnis, *Natural Law and Natural Rights* (n 12) 414.

⁴¹ *ibid* 415.

⁴² The Postscript to the second edition tells us only that Hart ‘made the argument which appears as a “positivist” objection at 236–7, discussed the placing of Chapter XIII, and beyond that left the book to its author’: Finnis, *Natural Law and Natural Rights* (n 12) 415. Regarding the first of these three 2011 revelations Finnis adds later in the same postscript that the ‘discussion of kinds of statements, on 234–7, is a response to objections (both of which appear together as “the ‘positivist’ objection”) raised to the first draft of the chapter by Hart’: Finnis, *Natural Law and Natural Rights* (n 12) 469.

⁴³ Finnis, *Natural Law and Natural Rights* (n 12) vii.

⁴⁴ Letter from Finnis to Hart, 22 January 1976. Finnis’s copy of this letter has several marginal annotations by Hart, barely legible. I suppose Hart returned it to Finnis thus annotated.

⁴⁵ Letter from Hart to Finnis, 14 February 1976. Finnis will have written these chapters mostly in the summer of 1975, and sent them to Hart sometime around the beginning of the Oxford academic year in early October.

Hart himself had found in his ‘only prolonged visit to a hospital, that once accustomed to the routine one could put in hours of peaceful reflection and reading which is most enjoyable’.⁴⁶ More seriously, he comments briefly on the ‘basic epistemological problems’ tackled in the draft chapters he had read.⁴⁷ But he reserves further discussion of these and other points for a meeting that he suggests for March.

The March meeting took the form of dinner at Brasenose College (where Hart was the Principal) on Wednesday 17 March 1976,⁴⁸ just days before Finnis (after a final supervision meeting with his doctoral student Carlos Nino on 19 March)⁴⁹ left Oxford to take up the post of Professor and Head of the Department of Law at Chancellor College in the University of Malawi. At or after the dinner in Brasenose, Hart doubtless delivered the promised, expanded feedback on the ‘basic epistemological problems’.

Finnis would hold his new post (on secondment from his Oxford posts) for 22 months from his arrival in that central African country on 20 March 1976. For, as he breakfasted one day with his wife early in 1975, they had read an advertisement that interested them in *The Times* of London, for the chair of Law that had been vacant for some time (after, as Finnis was soon to discover, the expulsion in 1973 or 1974 of its first holder, a US academic who had established the Law school in the new academic portion of the University of Malawi, Chancellor College in Zomba). The post was partly funded by the British government as part of its assistance to new Commonwealth universities. (Malawi had until 1964 been the British Protectorate of Nyasaland, latterly included briefly in the ill-fated Federation of Northern Rhodesia, Southern Rhodesia and Nyasaland.) The job description included the opportunity to redesign the Law School’s curriculum, and plenty of teaching in a department with only four or five other academics. Finnis found it an enticing opportunity and for a time even considered resigning his Oxford positions to take it up—a possibility that was headed off by the secondment arrangement whereby the British Government subsidised Oxford for allowing Finnis unpaid leave to occupy the Malawi position for just under two years. Others did not find the post so enticing—it appears that Finnis was the only applicant. After a brief look-see visit to Malawi he decided to accept the offer he had received.

⁴⁶ Letter from Hart to Finnis, 14 February 1976. Punctuation here, and always, as in the original. This letter is typed.

⁴⁷ ‘Perhaps I should just say that I meant by meeting epistemological objections mainly the question of self-evidence. Of course I know that you distinguish between psychological conviction and self-evidence, but I think you need to show how they are to be distinguished and I certainly think that you need to show in a quite detailed way that in other fields of knowledge there is also a reliance on self-evidence. I don’t quite understand in what sense the criteria of truth themselves are said to be self-evident: surely in the case of empirical statements what counts as a criterion of truth depends upon their meaning. This however is among the points that we might discuss’: Letter from Hart to Finnis, 14 February 1976.

⁴⁸ A note in one of Finnis’s Oxford diaries refers to this dinner.

⁴⁹ As this may be of interest—especially for readers from Argentina—I will state here that Finnis has recorded that this supervision meeting with the renowned Argentine legal philosopher Carlos Nino (1943–93) was the ninth one since October of the year previous (1975).

Finnis's apparently first letter to Hart from Africa is dated 24 July 1976. It accompanied the draft of a new chapter: the one on 'law', then chapter 7. If we have a look at the 1968 outline we will readily observe that, by way of contrast, there is no chapter 7 on law there. It can also be inferred from the letter that the book was, in mid-1976, projected as a 12-chapter work;⁵⁰ the final 1980 version would have 13 chapters.

On 10 August 1976 Hart kindly acknowledged receipt of Finnis's first African letter—something the latter had requested on account of what Finnis judged to be the likely shortcomings of the Malawian post office. We now enter a period of silence in the surviving correspondence, though it will become clear from Hart's next letter that these months had been productive for Finnis, who had sent some new materials to his reader in England.

On 2 April 1977 Hart wrote another letter to Finnis.⁵¹ My general impression after reading these letters is that they are all quite warm; but this one is particularly full of affection and confidence. It also gives every sign of Hart's character as humane and generous. It is addressed to 'My Dear John' and starts with the Latin 'Peccavi', which he uses to convey his sincere apology for the delay in getting back to Finnis. In a similarly familiar fashion, he wraps up the letter by expressing 'great apologies for sloth' and adding that he would be 'fascinated to hear about Africa'.⁵² Incidentally, this Hart letter has the peculiar value of containing his initial reaction to Ronald Dworkin's very recently published *Taking Rights Seriously*: 'seen the book—only 1 novelty', is Hart's sharp and brief verdict (though it is to be recalled that the book was substantially a collection of already-published essays that Hart and Finnis would assume each other had read).

In this crucial April 1977 letter Hart reports having read 'all 3 chapters' of Finnis's manuscript; that is, the one on 'law', that Finnis had sent in July 1976, and two newer ones on 'obligation' and 'God'—which he had obviously sent at some later point. Although Hart's hope was to reread and comment on them before leaving to the United States (where he would lecture 'on (inter alia) Dworkin' later that month of April 1977),⁵³ he takes advantage of the letter to anticipate some remarks and observations. Before addressing these, it may be worth noticing that, as is made clear in the letter, the chapter on obligation was then number 9 (in the final version it is 11) and the one on God was then 10 (as opposed to 13 in the final version).

Hart was very enthusiastic about the chapters on law and on obligation: they were 'very good'. In contrast, he elegantly suggests that 'invincible ignorance' blinds him to the one on God. This is doubtless a sceptic's play upon Catholic moral theological terminology and equally a courteous way of suggesting that the

⁵⁰ Letter from Finnis to Hart, 24 July 1976.

⁵¹ Letter from Hart to Finnis, 2 April 1977. This letter is a handwritten aerogram, dated in 'BNC', ie, Brasenose College.

⁵² Letter from Hart to Finnis, 2 April 1977.

⁵³ Hart added that he would leave the annotated chapters 'with my secretary at B.N.C. for you [Finnis] to pick up.'

ideas in the chapter were wrong. In any case Hart, who—as the editor of the Clarendon Law Series—clearly *could* veto the chapter decided not to: ‘BUT of course I couldn’t *veto*.’⁵⁴ This revelation is consistent with what other sources had already told us about the question. Hart’s biographer had explained that ‘Herbert ... thought for a long time “about the fact of that chapter”, and ultimately suggested that it be placed as an Appendix to the book.’⁵⁵ Finnis himself wrote in the postscript to the second edition that Hart ‘discussed the placing of chapter XIII.’⁵⁶ These two statements are better understood in the light of another remark in the April letter: ‘Is God (I mean the chapter on) really necessary? It will not charm lawyers into reading the book.’

The crucial 1977 letter contains other jewels. Hart declares himself convinced of the book project: ‘I see better now the general character of the book.’ At the same time, however, he expresses his doubts about its commercial success: ‘I still think it runs a danger of being received and judged as purely a book of philosophy + [it] may not hit the lawyers jurisprudence market.’ Nevertheless, the editor of the Clarendon Law Series goes on to add that this is ‘an acceptable risk’.⁵⁷ The risk proved worth running even from a commercial point of view: *Natural Law and Natural Rights* was quite a success and has gone through many reprints and two editions. More importantly, it is clearly the most significant and influential book on natural law ever written in English.

The acceptance of the risk notwithstanding, Hart (not without humour) offers some suggestions to the author. While going through them it is worth keeping in mind that in his capacity as editor he could certainly have been more imperative in his tone. This, again, tells about Hart’s way of handling these issues.

First, he underscores that Finnis’s prose does not help the reader: ‘your writing at times is v difficult needing wet towels though rarely does the puzzle (as it often seems) fail to yield to multiple re-reading.’⁵⁸ Hart’s quarrel with Finnis’s writing style went back to the years when the former had supervised the latter’s thesis: Finnis told me that in those days Hart had repeatedly complained about his pupil’s style.⁵⁹ Second, Hart objects to some ‘tricks of style’, such as excessive hyphenation of terms, ‘which makes the reader wonder what is meant by the hyphens + it seems (?) nothing is’.⁶⁰ The reader *of this* may wonder (and perhaps wonder forever) if it is a joke. I tend to think that Hart was merely exaggerating in order to convey his point in a more charming way. Third, he seems to be

54 Letter from Hart to Finnis, 2 April 1977. The use of capitals and the emphasis are in the original. Simpson observes that Hart ‘was uneasy about the inclusion of Chapter XII, “Nature Reason God” but did not insist on its removal’: Simpson (n 11) 209. Simpson clearly means chapter 13 (of the final version). He goes on to observe somewhat sarcastically perhaps that ‘after this [uneasiness] or indeed earlier they [Hart and Finnis] did not establish an ongoing working relationship’.

55 Lacey, *A Life* (n 9) 347, citing an interview of the author with Finnis.

56 Finnis, *Natural Law and Natural Rights* (n 12) 415.

57 Letter from Hart to Finnis, 2 April 1977.

58 Double underlining of ‘v’ in the original. In the letter he gives a few examples from the chapter on obligation.

59 Interviews with John Finnis (n 4) 5 April 2014.

60 Question mark after seems in the original.

worried about the length of the book: ‘Length. How emphasis will the book be?’⁶¹ And he goes on to add that ‘[for] the Clarendon 100,000 is optimum. Some cutting would be possible but I’d like your views on this.’ In the end the editor yielded to the author’s views: although *Natural Law and Natural Rights* was planned by Finnis to be shorter than it finally was—as one can gather from the words that precede the ‘Outline’: ‘*Aim*: About 80,000 words’⁶²—the final version of 413 pages well exceeded both figures. But the editor let it stand: another display of Hart’s delicacy.

4

On 10 April (Easter Sunday, as he notes), eight days after the crucial letter, Hart fulfilled his promise and commented on the three chapters: law, obligation, God. For this purpose he handwrote a letter, plus some notes, all of it on the reverse of the entrance exams in Greek from several Benedictine School Downside applicants to Oxford. This likely indicates that Hart was the only senior member available at Brasenose at this juncture who both could read Greek and was willing and able to read schoolboy efforts in it. It also shows the pains he could undertake to discharge well a duty that would seem disproportionately minute for the former professor of Jurisprudence, at the same time that this apparently trifling circumstance probably tells us about his will to save his College’s paper (and money).⁶³

Instead of sending this new letter plus the notes (and the annotated draft chapters) off to Africa, Hart left everything in Brasenose with his secretary for the author to collect: Finnis had told him that he would be in Oxford from 16 to 30 April 1977. (He was there not least to retrieve or find books to take to Malawi, where he was working on the late stages of the manuscript of *Natural Law and Natural Rights* with only a very basic University library there.)

The handwriting of Hart’s letter and notes is exceptionally difficult: Hart had then a slipped disk and he was writing while lying on his back, in an effort to recuperate in time for the upcoming journey to the United States.⁶⁴ He writes on the eve of his departure for America and expresses his wish to return in good time to see Finnis before he leaves for Africa.

Hart affirms in the letter that he provided ‘fairly detailed comments’ on the three chapters, both in the added notes and on the manuscript itself. He repeats that the chapters on law and on obligation are ‘excellent’. The one on God, (then) chapter 10, he says he ‘would rather see in an Appendix’,⁶⁵ thus attenuating

⁶¹ Emphasis in the original.

⁶² See Appendix.

⁶³ It may serve to recall that he was then the Principal of Brasenose.

⁶⁴ Letter from Hart to Finnis, 10 April 1977.

⁶⁵ It may be useful to reiterate here what Lacey has explained, along the same lines of what Hart says in the letter of 10 April 1977: ‘Herbert ... thought for a long time “about the fact of that chapter”, and ultimately suggested that it be placed as an Appendix to the book’: Lacey, *A Life* (n 9) 347, citing an interview of the author with Finnis.

his previous stand. There is more about ‘God’ in the added notes: Hart thinks this chapter ‘may deter readers (lawyers) buyers by making them fear they cannot understand I–IX without *the tremendously difficult X*’.⁶⁶ Which leads him to take up again the idea of the Appendix he had foreshadowed in the accompanying letter: ‘You could avoid the latter by treating it as an appendix. We will discuss this.’ We know what the result of the discussion was, if it ever took place: there is no appendix in *Natural Law and Natural Rights*. The author’s way of meeting Hart’s suggestion half-way was to divide the book into three parts—with accompanying instructions provided in the preface—with Part Three only including one chapter, 13, titled ‘Nature, Reason, God’.⁶⁷

Let us pause for a moment and dwell in more detail on the implications for the new natural law theory of the chapter on God—a chapter absent as such in the 1968 Outline.⁶⁸ Mark Murphy (a prominent natural law theory commentator)⁶⁹ argued in 2007 that ‘the theistic theses of chapter 13 are best read ... as exhibiting a large measure of detachability from the natural law ethics and jurisprudence defended in [*Natural Law and Natural Rights*]’.⁷⁰ He added, furthermore, that ‘Hart need not have worried: readers of Finnis’s work have themselves done the job of making that chapter a mere appendix.’⁷¹ Murphy himself disagrees with those readers. Although he thinks that the chapter on God as it stands is ‘largely detachable in the way his readers have by and large supposed it to be’—a view that we may now, in the light of the correspondence aired in this essay, perhaps venture to ascribe to Hart as a reader of the manuscript— in Murphy’s view the topic in chapter 13—if not the way in which Finnis tackled it in his 1980 book—is relevant (and in relevant ways non-detachable)⁷² from the argument in the rest of the book.⁷³

⁶⁶ Emphasis in the original.

⁶⁷ The three-part 1968 schema of the Outline, long abandoned by 1977, envisaged a totally different kind of third part: see the Appendix for that abandoned schema. One may speculate that the almost total disappearance of the heavily Voegelinian elements present in the 1968 schema owes something to Finnis’s intense collaboration with Grisez in 1974–75 (a collaboration which would continue and intensify for decades); on this see Grisez’s remarks at <http://www.twotlj.org/Finnis.html> (The collaboration reported by Grisez in 1979 was after the text of *Natural Law and Natural Rights* had been settled all but definitively.)

⁶⁸ See Appendix.

⁶⁹ See for example his ‘state of the art essay’, ‘Natural Law Jurisprudence’ (2003) 9 *Legal Theory* 241–67.

⁷⁰ Mark C Murphy, ‘Finnis on Nature, Reason, God’ (2007) 13 *Legal Theory* 187, 202.

⁷¹ *ibid* 188, quoting Lacey, *A Life* (n 9) 347. On this same page Murphy considers Brian Leiter’s judgment that Finnis restored natural law theory to its place in the jurisprudential table ‘in a way that is detachable from ... broader theological views’ as representative: *ibid* 188, with reference to Leiter’s ‘The End of Empire: Dworkin and Jurisprudence in the 21st Century’ (2004–2005) 36 *Rutgers Law Journal* 165.

⁷² While Murphy recognises that by Finnis’s own lights his natural law theory has theological detachability in some relevant senses he argues that—again, by Finnis’s lights, according to Murphy’s lights (but also by Murphy’s own lights (Murphy [n 70] 204–206)—the theory in *Natural Law and Natural Rights* is not detachable from theology in other relevant senses. For these different sorts of detachability, see Murphy (n 70) 193–200.

⁷³ The considerations in Murphy’s 2007 symposium essay ‘militate in favor of a much more thorough-going, largely nondetachable theistic account’ of natural law: *ibid* 189. Murphy thinks that ‘it is just such an account that we find Finnis affirming in developing his views after *NLNR*’ though, in my

In the preface of *Natural Law and Natural Rights* Finnis had already indicated that Part Three (the one including only the chapter on God) is in a sense, an outsider; and that ‘anyone whose concerns are limited to jurisprudence may omit Chapter XIII’.⁷⁴ From the preface and from his reply to Murphy’s observations at a symposium it follows that Finnis agrees with Murphy that the topic of God is relevant for the argument in the book: the affirmation of intelligible orders, including moral principles, ‘invites the further questions pursued in chapter 13’.⁷⁵ No wonder he resisted Hart’s insistence in making of that chapter (best case scenario) a mere appendix to the book.

Back to the April 1977 letter, Hart also expresses his wish to ‘re-look at earlier chapters ... having understood better your general approach’ and suggests that:

you need an explanatory preface saying the work is a demonstration of the importance of the view of law from standpoint of reasonable man concerned to do what common good requires + hence preliminary (non-legal seeming) chapters are to establish the ideas of intelligible, rationally graspable ends which constitute for this approach law’s framework and justification.⁷⁶

This amazing summary shows that Hart did understand the natural law project presented in the book—what Hittinger would later label ‘the new natural law theory’. What was Hart’s take on it? That we don’t know for certain. One could read a caveat into his ‘for this approach’ but Hart’s post-1980 writings do not shed much further light.⁷⁷ In 1983 he spoke complimentarily of ‘Finnis’s flexible interpretation of

view, he does not sufficiently substantiate this claim. As far as I can see, in the relevant section of his article (IV) Murphy only makes reference to one post *NLNR* essay, one which is co-authored with Grisez and Boyle: *ibid*, 203, quoting Germain Grisez, Joseph Boyle and John Finnis, ‘Practical Principles, Moral Truth, and Ultimate Ends’ (1987) 32 *American Journal of Jurisprudence* 99. In the closing page of his symposium piece (Murphy [n 70] 209) he offers another citation—perhaps too late into his argument? The reference is to John Finnis, ‘On the Practical Meaning of Secularism’ (1998) 73 *Notre Dame Law Review* 491. Instead, Murphy does not consider Finnis’s book *Aquinas: Moral, Political, and Legal Theory* (published in 1998, long before the symposium) even though this book might offer a more promising avenue for Murphy’s argument. And see what Finnis himself says about that book in the postscript of his 2011 second edition of the 1980 book. Finnis, *Natural Law and Natural Rights* (n 12) 424–25: ‘Later, working further on Aquinas’s arguments, I came to think that rational reflection and argumentation on [God] ... can establish significantly more ... than Chapter XIII allows’.

⁷⁴ Finnis, *Natural Law and Natural Rights* (n 12) v.

⁷⁵ John Finnis, ‘Grounds of Law and Legal Theory: A Response’ (2007) 13 *Legal Theory* 315, 341. In this symposium article Finnis also reinterprets what he had said in the Preface of *Natural Law and Natural Rights* and by so doing he confirms the part of that preface that I addressed in the text above. While in the preface we can read that ‘[a]nyone interested in natural law simply as an ethics may omit Chapter I’ in the 2007 symposium piece Finnis explains that in the preface he had argued that ‘someone interested only in legal theory could omit chapter 13, but not someone “interested in natural law simply as an ethics”’: *ibid* 343. It seems to follow that if someone interested in natural law simply as an ethics may omit chapter I that same person may *not* omit chapter 13. Finnis’s symposium article was reprinted in his *Collected Essays* with a different, telling title ‘Philosophy and God’s Nature: Second Thoughts’, essay 13 in vol 5 of *Collected Essays of John Finnis* (OUP 2011).

⁷⁶ Double underlining, as everything else, in the original.

⁷⁷ Most relevant is section 4 of his introduction to his 1983 *Essays in Jurisprudence and Philosophy*, to which I will refer incompletely in the next footnote.

natural law',⁷⁸ but at the same time he intimated his fear that what would later be called the new natural law theory might 'revive old confusions between law and the standards appropriate for the criticism of law'.⁷⁹

One cannot but wonder if, having understood natural law so well (as the quoted summary suggests), Hart was perhaps unwilling to carry on and assume its full consequences. It may also have been possible for him to *understand* natural law theory, from a detached perspective, while at the same time disagreeing with its truth or worth. But because of natural law's claim to the relevance of practical truth with a view to acting (what some call 'virtue theory') it would be difficult to fully distinguish that situation from the unwillingness 'to carry on and assume its full consequences'.

In any case, Hart's reservations regarding Finnis's (or any!)⁸⁰ exposition of natural law theory did not affect his role in a way that could be detrimental for Finnis's project. Although he was in a position to place several kinds of conditions on Finnis's work he did exactly the opposite: to enhance his freedom by putting forward what he thought to be reasonable suggestions in the form of mere possibilities provided by a senior colleague. We owe Hart a debt of gratitude for this. On the other hand, Hart's approach to the topics of God and, more generally, of natural law—as revealed by my exploration in this article—shed light on the attitudinal barriers that modern natural law theory faced at the time of the writing of *Natural Law and Natural Rights*.⁸¹ These barriers—which were part of the spirit of the time—are vividly reflected in Hart's letters, liberal and fair-minded though he was.

Hart, in sum, never wrote *The Natural Law Concept of Law*; but if it were not for him *Natural Law and Natural Rights*—the main source of inspiration for the followers and critics of the so-called new natural law theory—would likely not exist in its present form. While this article has not proved (or even argued) that one can trace this or that paragraph or philosophical idea in Finnis's book to the influence of Hart's, this investigation will hopefully help to better understand the latter's editorial role in the most important natural law project of the twentieth century.

⁷⁸ *Essays in Jurisprudence and Philosophy* (OUP 1983) 10. Hart adds there something about Finnis's theory very similar to what he wrote in the sentence of the 10 April 1977 letter transcribed in the text above: 'it is mainly concerned to elaborate a conception of natural law as consisting of certain principles of "practical reason" for the ordering of human life and society directed to the realization of certain *allegedly* self-evident objective values or forms of good, and then to show that for their realization an authoritative human law and respect for such authority are required': 10–11, emphasis added.

⁷⁹ He further adds that 'apart from this, the identification of the central meaning of law with what is morally legitimate, because orientated towards the common good, seems to me in view of the hideous record of the evil use of law for oppression to be an unbalanced perspective': Hart (n 68) 12.

⁸⁰ See Finnis's discussion of what he and Raz took to be Hart's radical scepticism about morality, in 'On Hart's Ways', essay 10 in vol 4 of *Collected Essays of John Finnis* (OUP 2011) 249–54, not least Finnis's report at 254 of a conversation between him and Hart at some time when they were colleagues at University College. (Page 254 n82 also makes the relevant citation to Raz's well-informed assessment of Hart's subjectivist stance in meta-ethics.) See also the first essay in that volume, at 27 n4, and essay 11 ('Hart as a Political Philosopher') at 275–76.

⁸¹ One could argue that those attitudinal barriers regarding God and natural law exist, to some extent, even today. But that would embark us on a story different from the one told in this article.

APPENDIX⁸²**Outline of a book on Natural Law and Natural Rights**

For Clarendon Law Series, by JM Finnis

Aim: About 80,000 words, seeking to indicate, primarily to law students, various problems of the limits of ('positive') law and the way men have tried to answer these by linking law with (other) features of the nature of the world or society or man.

General principles: A. There must be an introductory chapter (Part I) to try to lead lawyers out from their dogmatic slumbers into the field of problems which Part III will treat in detail.

B. Part II must indicate the range of ways in which law and legal obligation have been thought to relate to nature. The treatment should not be in chronological sequence of intellectual history, because (i) interest in history as such flags, (ii) such a sequence breed simplistic notions of intellectual 'influences', and (iii) such a sequence breeds simplistic notions of intellectual 'progress' hardly compatible with natural law modes of thought.

On the other hand, the treatment will be guided by the view, thoroughly developed by recent historians of political thought, that modern notions of obligation, freedom, and human rights have developed by way of 'differentiation' of the primitive 'compact' concepts of the order of the world and of law, justice, world, society and man. Prominence will be given to modern critiques of the 'naturalistic fallacy', on the basis that these critiques express a modern sense of these developed differences between moral obligation and the various features of the natural order. It will be argued that a fully developed and self-conscious theory of natural law can both incorporate and surmount these critiques.

C. Part III, the longest part, should deal with the problems canvassed in Part I, in each case providing both a historical review of jurisprudential controversy about these problems and offering a substantive analysis of the author's.

D. In Part II and III efforts will be made to hold the attention of lawyers by not infrequent reference to features and problems of modern legal systems and cases. Tentative sketch

I Introductory

1. Problems that bring lawyers to the limits of their dogmatic resources: Eg interpretation, gaps (cf. non liquet), conflict of norms, revolution and usurpation, unjust laws, 'general principles of law', 'human rights'.

⁸² This appendix reproduces verbatim the first outline of *Natural Law and Natural Rights*. It was produced by John Finnis in 1968 for the Clarendon Law Series.

II Concepts of Law and Nature

2. The world: laws of nature (modern sense), evolutionistic theories of morality, the Naturalistic Fallacy, cosmological order and symbols in early law and thought.
3. Society: laws of society (sociologicistic sense), 'laws common to all', review of cultural relativity, history of notion of *jus gentium*.
4. Man: Calliclean 'nature' (natural law of the strong), Hobbesian 'nature' (natural law of the passions) (cf classical utilitarianism), Suarezian 'nature' (will-of-God and natural-faculties natural law), Naturalistic Fallacy in the foregoing.
5. Man and society: customary law, representative law, social-moral and legal rules, *stasis* and *poenae naturae*, Hart's secondary rules and the concept of legal validity, sociability and force and classical utilitarianism.
6. Man 'in the image of God': nature as reason (Aristotle's 'divine part' and Aquinas's 'divine self-motion of man'), the common *nous*, friendship and the idea of mankind, the idea of freedom, conscience and legitimacy, moral obligation, first principles of practical reason, fundamental values, personality and natural rights.

III Some problems and ramifications

7. Derivation of positive law and *jus gentium*.
8. Paths of natural law (Is it conservative or radical? What are its foci of interest?)
9. Conflict (*lex injusta*, civil disobedience, revolution, tyrannicide, etc.)
10. Formation of international law and of conceptual structure of legal systems and analytical jurisprudence.
11. Rights (a long chapter).
- 14 January 68.