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Natural Law Theories

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This entry considers natural law theories only as theories of law. That is not to say that legal theory can be adequately identified and pursued independently of moral and political theory. Nor is it to deny that there are worthwhile natural law theories much more concerned with foundational issues in ethics and political theory than with law or legal theory. A sample of such wider and more foundational theories is the entry Aquinas' Moral, Political, and Legal Philosophy (Finnis 2005/2011). In the present entry, "natural law theory" is to be taken as shorthand for natural law theories just insofar as they bear on law and are theories of or about it. This focus has the important incidental effect that many historically important differences between natural law theorists can be omitted, differences which pertain more to the foundations of normativity than to the nature and functions (or "the concept") of positive law.

Legal theorists who present or understand their theories as "positivist", or as instances of "legal positivism", take their theories to be opposed to, or at least clearly distinct from, natural law theory. Natural law theorists, on the other hand, did not conceive their theories in opposition to, or even as distinct from, legal positivism (contra Soper 1992 at 2395). The term "positive law" was put into wide philosophical circulation first by Aquinas, and natural law theories of his kind share, or at least make no effort to deny, many or virtually all "positivist" theses—except of course the bare thesis that natural law theories are mistaken. Natural law theory accepts that law can be considered and spoken of *both* as a sheer social fact of power and practice, *and* as a set of reasons for action that can be and often are sound as reasons and therefore normative for reasonable people addressed by them. This dual character of positive law is presupposed by the well-known slogan "Unjust laws are not laws." Properly understood, that slogan indicates why—unless based upon some skeptical denial that there are any sound reasons for action (a denial which can be set aside because defending it is self-refuting)—positivist opposition to natural law theories is pointless, that is redundant: what positivists characteristically see as realities to be affirmed are already affirmed by natural law theory, and what they characteristically see as illusions to be dispelled are no part of natural law theory. But because legal theories conceived of by their authors as positivist are, by and large, dominant in the milieux of those likely to be reading this entry, it seems appropriate to refer to those theories along the way, in the hope of overcoming misunderstandings that (while stimulating certain clarifications and improvements of natural law theorizing) have generated some needless debate.

The point made in the preceding paragraph is made in another way by Orrego (Orrego 2007). When the accounts of adjudication and judicial reasoning proposed by contemporary mainstream legal theories are added to those theories' accounts of (the concept of) law, it becomes clear that, at the level of propositions (as distinct from names, words and formulations), those theories share (though not always without self-contradiction) the principal theses about law which are proposed by classic natural law theorists such as Aquinas: (i) that law establishes reasons for action, (ii) that its rules can and presumptively (defeasibly) do create moral obligations that did not as such exist prior to the positing of the rules, (iii) that that kind of legal-moral obligation is defeated by a posited rule's serious immorality (injustice), and (iv) that judicial and other paradigmatically legal deliberation, reasoning and judgment includes, concurrently, both natural (moral) law and (purely) positive law. Orrego's point seems to be