

The Limits of Finnis’s Nontheistic Account of Human Dignity and Rights

A review of John Finnis, *Human Rights and Common Good* (Oxford University Press, 2011)
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John Finnis’s *Human Rights and Common Good* is a wide-ranging selection of Finnis’s essays in political and social philosophy spanning the period from 1968 to 2007. Although most of the essays have been previously published, even the most avid readers of Finnis’s works are unlikely to have tracked down all of his previously published essays on politics and law. Thus, this collection is a worthwhile read for anyone who would like a more panoramic view not only of some of the core principles of Finnis’s ‘new natural law’ view of social and political life, but of their application to a wide range of contemporary political and legal issues, from the merits of a bill of rights and the justification of limited government to the rationale for punishment and the rights of immigrants. Bucking the tendency among analytic philosophers to ‘go with the flow’ of ‘our’ intuitions on a range of moral and political subjects, Finnis is not afraid to defend academically unpopular positions on some profoundly controversial subjects, including abortion, same-sex marriage and anti-obscenity laws. To his credit, he confronts these heated subjects with rigorous, measured, and well reasoned arguments.

One of the challenges presented by the task of reviewing an edited volume of essays, even essays by a single author, is identifying the conceptual thread that holds the parts together. The difficulty with *Human Rights and Common Good* is that it was not originally written as a single manuscript; it was compiled from 40 years of reflections by Finnis on political and social life. Thus, while it has obvious value as a convenient and accessible source for Finnis’s political writings, it is not immediately apparent what unifying principle or line of thought—beyond the general theme of politics and law—holds together such a seemingly disparate set of essays: ‘Duties to Oneself in Kant’, ‘Limited Government’, ‘Migration Rights’, ‘Hart’s Philosophy of Punishment’, ‘Euthanasia and Justice’, and ‘Law, Morality, and “Sexual Orientation”’ do not appear, on their face, to fall neatly under a single analytic framework.

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But beneath this appearance of eclecticism, there is an underlying cohesion to Finnis's political reflections: all of his arguments are bound together by a distinctive conception of human nature and what it means to flourish as a human being. Unfortunately, aside from Finnis's introductory remarks and several arguments scattered throughout the book, the normative and anthropological foundations of Finnis's vision of politics are not presented in an explicit and systematic manner in the present book. Rather, they are either briefly touched upon, assumed, or to be found in other volumes of Finnis's works, in particular *Reasons in Action*.¹ Therefore, in this review I will take the slightly unorthodox step of focusing quite disproportionately on ideas that are largely presupposed, and not extensively developed, in the present volume of essays. Later, I will touch on some of the applications of these foundational ideas to be found in the present volume.

FIVE FOUNDATIONAL PREMISES

Although *Human Rights and Common Good* does not explicitly set out the normative and anthropological basis for its conception of justice in any systematic way, at least not in this particular volume, there are five foundational premises that are either explicitly invoked or tacitly assumed throughout the book:

(1) The first premise is that human beings ought to orient themselves and their lives towards a set of 'basic goods'—all of which are intelligible to human reason unaided by any special revelation from God, and conversely, that we ought never act in such a way as to directly attack any of those goods. Through direct introspection and/or observation of human reasoning and action, we can identify the sorts of goods that are readily apprehensible as *basic* to a flourishing human life. On Finnis's account, these include, most prominently, life, knowledge, play, aesthetic experience, friendship, practical reasonableness, and religion. By 'basic', Finnis means sought after for their own sake, not necessitating any further justification or explanation beyond themselves. For example, friendship has intrinsic value as a constituent of human flourishing, and thus we can make sense of its goodness without appealing to some more fundamental good.

(2) Secondly, there is no uniform rule or measure that can guide our judgments concerning potential conflicts among, or tradeoffs between, the basic goods. This is a matter of prudence or practical wisdom. For example, if I am deciding whether to pursue an academic career heavily oriented towards the acquisition of knowledge, or a life of service to the poor, heavily oriented towards human friendship, there is no independent ranking of the goods involved that can shape my decision. Instead, I must make a potentially difficult 'all things considered' judgment about how best to promote 'integral human fulfilment'. Indeed, it is perfectly possible that there is more than one acceptable strategy for instantiating the basic goods in any given sit-

¹ vol 1 (Oxford University Press, 2011).

uation. Finnis insists that the goods involved are profoundly 'incommensurable': 'whenever there is a morally significant choice', he asserts, there is no 'calculus' for comparing net outcomes (244). The incommensurability thesis, which is shared by many other modern philosophers such as Isaiah Berlin, HLA Hart, Joseph Raz and William Galston, is one of the weapons Finnis uses to defuse the appeal of utilitarian and consequentialist moral theories, which presuppose that human goods can be traded off against each other according to a single measure of value.

(3) A third premise critical to Finnis's political morality is that we can infer the unique dignity or high rank of human beings (as opposed to other creatures we find in nature), and the rights that flow from that dignity, from their capacity for a 'spiritual' form of striving, choice and knowledge, that far outranks the sort of striving and cognition available to other species. Here, Finnis adopts the Thomistic principle that in the order of knowledge or discovery, we start out by observing actions, and from actions we can infer capacities; and finally, from capacities we can infer the nature of the actor. As Finnis puts it, '[h]uman persons share a nature that is known by knowing the many and deeply varied objects that make sense of human acts; for it is those acts that reveal what human beings can do, and to know a being's capacities is to know its nature' (4). Finnis uses a Shakespearean poem to illustrate our capacity to attain a form of knowledge and participation in the good that he terms 'spiritual':

Shakespeare's so-called 'Phoenix and Turtle' is the kind of *spiritual* object we call a poem, in which formality, linguistic and literary form, and allusion are put in service of meanings and here of double-meanings celebrating not merely the upper-level's abstract possibilities of interpersonal unity but also, in mourning, the concealed and secret lower-level's requiem and urn/poem burial of a wife and husband united despite parting by exile and then death. The reflectively astounding multi-vocality and many-levelled complexity of the objects referred to in such an object—such objects as fidelity to marital commitment, fiat in things not seen but reasonably believed and hoped in, political opposition, preservation of secrecy, secret sharing of secrets, and many more—gives us a way of grasping the *kind* of radically trans-material, *spiritual* objects of human action (the lovers', the poet's, the witnesses' and audiences', and one's own). And thus of grasping human capacities. And nature. (5, italics added)

From this capacity for 'spiritual' participation in the basic goods, Finnis infers that human beings hold a uniquely high rank or 'dignity' when compared with other animals: 'For dignity denotes a rank of being, and all beings of this rank have the *worth* that we reasonably predicate of beings and ways of being that participate (even if only radically) in those intelligible goods ... (even the bodily and earthly goods) in the remarkable way I earlier called spiritual' (8).

It is this unique dignity enjoyed by all human beings which provides the rationale for a system of rights, on Finnis's view. For it is only in a society with a widely recognised system of rights and institutions capable of enforcing them that people can realise the basic goods in a secure atmosphere, and live in peace and justice with their peers. Furthermore, Finnis is careful to specify that there is no single correct way to give effect to human rights. Although certain rights are universal or common

to all human beings, such as the right not to be tortured, arbitrarily killed, or treated unfairly by authorities, we should not fall into the trap of thinking that every civil and/or constitutional right we encounter is an absolute requirement of human dignity. Just as the precise configuration of individual laws are a local *determinatio* or specification of natural law (following Aquinas's logic), so too many details of a system of rights, such as the right to remain silent when accused, the right to a jury of one's peers, and the right to freedom of speech, take on the hue of the partly discretionary and contextual judgments of a particular people and/or judicial system. None of this is to deny that rights give people access to the basic goods; but it is to insist that there is a plurality of eligible schemes of rights. As Finnis puts it, 'laws and decisions declaring and giving effect to human rights have the complexity characteristic of positive law. Some of them stand to the right in question as a simple application or deductive conclusion. More commonly they stand to the right in question as determinations, that is, specifications and delimitations which when reasonable could nonetheless reasonably have been different ...' (3).

(4) Once we accept that our spiritual capacities (such as freedom and self-knowledge) as human beings provide a sufficient basis for elevating our dignity far above that of other species, we are bound on pain of inconsistency to affirm the very same dignity and rights in our fellow humans as we affirm in ourselves. After all, if I recognise that the judgment that 'I matter' is grounded in my identity as a free and intelligent being, and that other humans are also free and intelligent by nature, then I must also recognise that, by the very same logic, *other* human beings 'matter', or, if you will, have 'dignity'. The fact that we all have the capacity for spiritual acts such as free choice and thought, at least in *radical* form (whether fully developed and actualised or not), is what accounts for what Finnis calls the 'ontological unity' of the human race, and thus for our duties to respect and promote not only our own good, but the good of *others* (7).

(5) But our reasons for respecting and caring for others are, in a sense, overdetermined: they are not only implicit in our shared 'dignity' as persons, but in the inescapably *social* structure of the human good. Finnis follows Aristotle, Aquinas, and a host of other thinkers in maintaining the radical dependence and sociality of man, and therefore the fundamentally social or *communal* character of the human good. Finnis identifies two distinct senses in which a good is to be considered communal or 'common': first, there are *basic* common goods, which include the fellowship or 'communio' of 'real friends'; the good of married life; and the '*communio* of religious believers cooperating in the devotion and service called for by what they believe to be the accessible truths about the ultimate source of meaning' (89). All of these goods are *basic* in the sense that they are valued immediately, for their own sakes, not necessarily in reference to some further good.

But there is a second sense of common good that is *instrumental*: here, Finnis has in mind especially the common good of a modern state or nation. This good consists of 'the whole ensemble of material and other conditions, including forms of collaboration, that tend to favour, facilitate, and foster the realization by each indi-

vidual [in that community] of his or her personal development'.² These conditions, while they enable a range of associations and persons to achieve their aims, are instrumental common goods insofar as they are valued as enabling conditions, not for their own sake. Nonetheless, Finnis acknowledges that even associations that serve an instrumental function, such as the modern state, have 'more than a merely instrumental character in as much as they instantiate the basic good of friendship in one or other of its central or non-central forms' (89).

So far we have established that on Finnis's account, a flourishing human life is constituted by a range of intelligible goods which are basic or self-explanatory, including friendship, knowledge and religion; that human beings possess a special dignity or worth grounded in their 'spiritual' capacities; that this universal dignity imposes upon us the duty to respect and promote the well-being and rights of others; and that human flourishing has an inescapably communal or social character to it. These are the fundamental building blocks, if you will, of Finnis's vision of political and social life and right human relationships. Naturally, his prudential judgments about how to instantiate the good will vary from case to case, but the view of human nature and relationships sketched above is held constant throughout the book, whether it is invoked explicitly or not.

IMMIGRATION, ABORTION, AND SAME-SEX MARRIAGE

Indeed, what is particularly satisfying about this work is that it does not attempt to sidestep foundational questions of morality and justice, nor does it hide beyond vague generalities or platitudes. Because Finnis is never shy about explicating the connection between his conception of justice and his conception of the human good, his arguments are always an invitation and a challenge to reflect on the ethical and moral foundations of our political commitments. There is a boldness, clarity and directness to his treatment of difficult issues in political morality that is refreshing in an age in which scholars often content themselves with explicating the 'intuitions' of our political culture, and chiefly those that hold sway among their academic peers. To help bring these points home, let us consider just three of the many issues Finnis addresses: the rights of migrants, the morality of abortion, and the permissibility of same-sex marriage.

When Finnis discusses the rights of migrants, and more specifically the obligations of countries toward potential immigrants, he invites the reader to return to the Thomistic understanding of property rights, which are intended for the benefit of all, and are derived from the original purpose of the world's resources, namely, the flourishing of all human beings. Discussing the problem of immigration and border restrictions, Finnis surmises that:

the fundamental norms of justice which underlie the institution of property ... are applicable, *mutatis mutandis*, to the institution of territorial dominion by politically organized

² John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980) 89.

communities. The first of these fundamental norms is that the world with its resources is radically common to all, for the benefit of each and every member of the human race. The second is that a system of dominion—entailing restrictions on the availability of defined parcels of land and resources—tends to result in important benefits to all and can be fair, provided that its immediate negative implications for those who remain in serious deprivation by reason of their exclusion from lands and/or resources are alleviated (120).

This passage is illustrative of the clarity and rigour with which Finnis traces his political views back to the basic preconditions of human flourishing in a political community.

In his essay 'The Rights and Wrongs of Abortion', Finnis undertakes a painstaking critique of Judith Thomson's 'A Defense of Abortion'.³ In that article, Thomson considers the case of a woman who finds herself, upon waking, back to back with a violinist, who is now hooked up to her kidney in order to survive. She is told that while the situation is regrettable, if she will just wait nine months he will be cured of his ailment. During those nine months she must remain in bed, with her kidney attached to his body. Thomson argues that the woman in question would be perfectly within her rights to withdraw her support, or 'unplug' herself from the violinist, even if this unavoidably resulted in his death. She suggests that this case is morally indistinguishable from that of a woman who finds herself pregnant with an unwanted child. But Finnis remains unconvinced, arguing that the case of the woman unplugging herself from the violinist, and the case of abortion, are morally disanalogous in three key respects: first, abortion involves a 'bystander' or third party who intervenes to perform the abortion, whereas the 'unplugging' is performed exclusively by the woman herself, not a third party; second, the 'unplugging' does not involve a direct assault upon the body of the violinist, whereas abortion does involve a direct assault on the body of the child; and third, the case of the violinist being hooked up to the woman involves a flagrant injustice against the woman (albeit not by the violinist himself), whereas the conception of the child is in no way an injustice or wrong against the woman (298–303). In short, on Finnis's view, abortion involves the intentional or deliberate destruction of an innocent child, whereas the unplugging from the violinist involves a defensive action on the part of the woman against an unjust intervention in her body, and insofar as it involves no direct assault on the violinist, cannot be characterised as an intentional killing even if it foreseeably and unavoidably leads to his death.

Finally, Finnis comes out very strongly against the desirability of extending the legal status of marriage to homosexual unions, arguing that such a move would effectively corrode public understanding and support for the goods associated with heterosexual marriage, in particular the mutual support of spouses and the procreation and rearing of children. He makes an articulate and forceful case that the goods available to heterosexual unions are simply unavailable to homosexual unions, and that 'non-marital sex' of any sort—whether homosexual or heterosexual—is a counterfeit good insofar as it is divorced from the 'complex good' of marriage,

³ (1971) 1(1) *Philosophy & Public Affairs*.

namely procreation and mutual support of spouses. 'Without the possibility of truly marital intercourse', he argues, the good of marriage is seriously impaired. Any willingness to (counterfactually or actually) engage in non-marital sex radically undermines my marriage itself. For it disintegrates the intelligibility of my marriage; our sex acts no longer truly actualise and enable us authentically to experience our *marriage*; they are unhinged from the other aspects of our mutual commitment and project. And this unhinging or disintegration threatens—runs contrary to—both of the goods inherent in the complex basic good of marriage: not only the good of friendship and fides but also the good of procreation and of the children whose education etc so depends on the context of a good marriage. So any kind of assent—even if conditional—to non-marital sex is unreasonable (347).

INSUFFICIENT GROUNDING FOR THE DIGNITY OF PERSONS

I would like to conclude this review by pointing out two potential weaknesses in the foundational structure of Finnis's political morality. The first weakness is the way Finnis grounds the equal worth and dignity of persons. He suggests, as we have seen, that the dignity of persons can be derived from their 'spiritual' capacities. The question is, what does Finnis mean by 'spiritual' capacities or modes of participation in the good, and why does this sort of capacity confer special dignity upon the agent? Since he does not elaborate on the notion of 'spiritual' capacity, we must speculate that he means something like a capacity that is not reducible to material processes or deterministic laws of nature—perhaps a capacity for free choice, self-awareness, and rationality.

Fair enough. But Finnis does not really explain why or how these 'spiritual' capacities confer special dignity upon us. Perhaps he thinks this is simply self-evident. That is not so clear to me. This is surely a point worth dwelling on, since it provides a foundation for Finnis's approach to human rights and for his resistance to a utilitarian approach to the common good. The worth or dignity of the human being, on Finnis's view, is not conditional upon his contribution to the community, the quality of his life, his stage of development, his past crimes, and so on. But I do not find his 'spiritual' foundation for that worth especially convincing. That is because it seems to me that someone could coherently affirm man's 'spiritual' capacities—his capacity for free choice, intellectual knowledge of himself and the world, and religious striving—and still deny his special dignity and worth. For example, if someone believed that man's 'spiritual' capacities were simply the result of the accumulation of neuro-biological genetic adaptations, and that human beings lived a few short years in a godless universe, then he might not be so quick to infer human dignity from spiritual capacities. On the contrary, he might take note that man is capable of both great good and great evil, and he might logically view dignity or worth as a function of achievement, whether achievement of a spiritual, moral or cultural character. At a purely natural level, it is very tempting, and arguably reasonable, to withhold 'dignity' from human beings who commit gravely evil and destructive acts

against their fellow humans, such as murder, robbery, torture, physical and sexual abuse, and so on.

This objection against universal dignity is not insurmountable, but it requires us to go beyond the argument from 'spiritual capacities' to consider the origin or source of such capacities. Indeed, Finnis himself advances the 'hypothesis' that our own 'free intending of benefits in choices and actions' might be viewed as a 'cooperation ... in [divine] Providence' and that God's willing or intending us to be 'ends in ourselves' ratifies our high status or dignity. An 'inference' of this kind is, on Finnis's own admission, 'highly if not indispensably supportive of the thesis that human beings are of equal worth and bearers of true moral rights by virtue of their humanity' (9). Of course, much turns on whether man's divine origin is or is not an 'indispensable' foundation for human rights. Since Finnis both downgrades the notion of a personal God from a known truth to a 'hypothesis' and seems distinctly ambivalent about its role in his argument for human rights (it is 'highly if not indispensably supportive' of human equality and rights), his argument for rights is vulnerable and question-begging for those of us who happen to view 'spiritual capacities' *without God* as an insufficient basis for human dignity.

This has implications for Finnis's defence of the 'basic good' of life, whether in the case of euthanasia, abortion, or any other life-and-death issue. Since Finnis does not insist on a theistic grounding for dignity, and seems content to settle for grounding dignity in man's 'spiritual capacities', the argument against abortion, euthanasia and other attacks on human life seems at best incomplete, and perhaps unconvincing to those who have a 'disenchanted' or a more or less agnostic view of the universe and our place in it. For example, how does the mere fact that the foetus is a member of *homo sapiens*, a species capable of 'spiritual' activities, give the foetus that extraordinary, transcendent worth that puts it beyond the calculus of costs and benefits? What precisely makes it so precious, and what makes it so wrong to weigh its life, at the very earliest stage, against the life and goals of its mother, or of society at large? It seems to me that without recourse to some idea of participation in the divine, or creation in the image of God, the extraordinary, transcendent dignity of the person cannot be convincingly explained, and the absolute prohibition on abortion and similar acts cannot be effectively defended.

MORALITY WITHOUT GOD AND NATURAL TELEOLOGY?

A second weakness in the foundations of Finnis's political morality is that they seem highly indeterminate and formalistic. Many would agree that human beings seek out a range of 'basic goods' in their lives, that these goods are intelligible to human reason, and that deciding how to arrange these goods in a single life can require subtle and prudential judgments that are irreducible to any simple utilitarian calculus. But insofar as Finnis both cuts himself off from the idea of a providential God (except as a 'hypothesis' inessential to his main argument) and deprives himself of the traditional Thomistic reliance on a teleological universe in which norms

are embedded, so to speak, in the very design of nature, the foundations of his arguments may appear rather weak to someone who is *not* theistic and does *not* view nature as inherently teleological or normative. The best way to illustrate what I have in mind is to consider two of the arguments already discussed: first, the argument for national boundaries; and second, the argument against same-sex marriage.

The argument for national boundaries with accommodations for those excluded from the world's resources appeals to the notion that 'the world with its resources is radically common to all, for the benefit of each and every member of the human race' (120). It would seem to follow from this premise that anyone 'left behind' or excluded by the division of the world's resources into nations should be 'alleviated' in some way (120). Thus, an international partition of the world, while useful and fitting as a way of distributing the world's resources, should be prevented from becoming too exclusionary or restrictive. I do not dispute the truth of any of these claims. However, the crucial premise underlying them—that the resources of the world are 'for the benefit of each and every member of the human race'—seems to silently rely on some notion that the world is in fact *intended* for all. To say that its resources are 'for the benefit of all' is a strange locution, if we do not assume that the world is somehow teleological or purposeful in its very nature; or at least that it was created or intended *for* some purpose *by* some intelligent being. However, Finnis only considers the idea of a providential ruler of the universe as a likely 'hypothesis' which he introduces *after* his fundamental justification for human rights. Insofar as his account of migrant rights in fact rests inescapably on that 'hypothesis', Finnis should stop being ambivalent about the role of a providential God in his argument for migrant rights.

I doubt Finnis's argument against same-sex marriage can withstand close philosophical scrutiny. It is easy to concede to Finnis that the 'complex good' of companionship and procreation is indeed a genuine good enjoyed by married couples—indeed, we might even agree with Finnis that it is a 'basic' good. However, since Finnis himself casts aside any teleological view of nature, and does not rely on the notion that there is a divine design imprinted on our nature that is somehow normative for us, his argument against homosexual unions ends up relying on the notion that homosexual acts *attack* one of the basic goods, namely the good of marriage. But it is hard to see how homosexual acts directly or deliberately *attack* the good of marriage. If we grant to Finnis that the 'basic goods' are mutually incommensurable and the only rule governing practical deliberation is that we ought to act so as to promote and never deliberately attack them, then how can we fault two men for deciding to seek the good of friendship through a sexual relationship? As Finnis's adversaries frequently point out, homosexual unions and heterosexual unions can embody the good of friendship in different ways. Why not recognise the legitimacy of both?

Traditionally, the argument by Christian authors against homosexual relations has been either scriptural (homosexuality is openly condemned in the scriptures) or teleological (homosexual relations flout the design of human nature itself, and the in-built complementarity and procreative power of the male-female union). Setting aside the scriptural arguments, which clearly have little or no authority for

non-Christians, what are we to make of the teleological argument against same-sex unions? While many people find natural teleology unconvincing or outdated, at least there is a tangible argument there about the structure of the universe and man's place in it, an argument one might find intelligible and internally coherent, even if it proves unconvincing. By contrast, Finnis's argument against same-sex unions seems to simply assume that the 'basic good' of marital intimacy and procreation as traditionally understood is normative for everyone. Perhaps he is right, but the language of basic goods, divorced from a teleological, purposeful universe, does not seem to give him adequate grounds for asserting this. Thus, it remains unclear to me how, taking the basic goods and the injunction against attacking them as a starting-point, Finnis can justify his opposition to same-sex marriage.

As I mentioned at the outset, the task of reviewing a volume of essays spanning much of Finnis's career is nothing if not daunting. I felt compelled to choose between conducting an eclectic tour of the book on the one hand, and a highly selective discussion on the other. I have opted for the latter, focusing in this review on some of the foundational premises that are either stated very briefly in this book, or largely presupposed by its arguments. I have suggested that the underlying thread holding all of these essays together is twofold: first, the claim that human flourishing is attained through the pursuit of a range of mutually incommensurable but individually intelligible 'basic goods'; and second, the claim that our rights as human beings are derived from our dignity as rational, 'spiritual' beings capable of thoughts and choices that transcend the material world. Finally, I have argued that while Finnis's arguments are both rigorous and wide-ranging, they are burdened by some serious cracks in the foundations. Two stand out in particular: first, an incomplete justification for human dignity; and second, an excessively abstract or rationalistic account of human nature and the basic goods, unmoored from the sorts of constraints necessary to yield Finnis's practical conclusions, whether the constraint of a divine lawgiver, or that of a purposeful universe.