REASON, MORALITY, AND LAW

THE PHILOSOPHY OF JOHN FINNIS

Edited by

John Keown
and Robert P. George

OXFORD

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UNIVERSITY PRESS

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UNIVERSITY PRESS
Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom
Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
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First Edition published in 2013

Impression: 2

British Library Cataloguing in Publication Data
Data available

ISBN 978-0-19-967550-0

Printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Editors' Preface

It is a sign of the high esteem in which John Finnis is held that we had no difficulty securing contributions from the distinguished scholars whose essays grace this volume in his honour. (Indeed, we were in the enviable, albeit awkward, position of having to decline offers from other distinguished scholars who had got wind of the project.) The essays, which reflect the remarkable breadth of his scholarly achievements, range across philosophy of law, moral philosophy, political philosophy, philosophy of religion, constitutional law, medical/health law, bioethics, and Shakespeare.

This, then, is a *Festschrift*. But it is not a typical *Festschrift*. It includes scholars who are, more or less, sympathetic to the ideas about natural law that he has articulated, and scholars who are critical of those ideas (and in some cases, of the natural law tradition broadly). Moreover, it was always our intention to invite John Finnis to offer some sort of response, and he kindly agreed. But, to his surprise as much as ours, his 'Reflections and Responses' developed into a serious engagement with the main arguments, or other important issues raised, in almost all the essays, and thus into something of the substantial length we now see. This venture was timely: his *Collected Essays*, and a second edition of *Natural Law and Natural Rights*, both of which include important new material, appeared in 2011. Contributors to this volume have written their essays in light of those publications.

The influence of John Finnis's work, especially among younger scholars, is growing globally, particularly in the UK and the US. We trust that this volume will promote even greater interest in, and understanding of, his thought, not least by clarifying points of agreement and disagreement with leading thinkers representing a wide range of perspectives.

We end on a very sad note. One of the contributors was to have been a brilliant, younger scholar of natural law: Dr Amanda Perreau-Saussine of the Faculty of Law in the University of Cambridge and of Queens' College, Cambridge. Amanda died before she could complete her essay. *Requiescat in pace.*

Acknowledgments

We thank all those who contributed essays to this volume, and especially John Finnis for his thoughtful and highly detailed response to the arguments they present. We are also grateful to Alex Flach and Natasha Flemming of Oxford University Press for their help with this volume from conception to birth.

One of us (JK) carried out much of his work on this volume while a Herbert Smith Visitor in the Faculty of Law at Cambridge University. He is grateful to Herbert Smith and to the Cambridge Law Faculty, not least to David Wills, the Squire Law Librarian. The other (RPG) worked on the volume in Princeton, his institutional home, and at Harvard, where he is a Visiting Professor in the Law School. He is grateful to Sherif Girgis and Ryan Anderson for their help.

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Introduction

The Achievement of John Finnis

Robert P. George

> 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.

With these words, John Finnis, while still in his late 30s, began his masterwork, *Natural Law and Natural Rights*—the book that would not only revive scholarly interest in the venerable, but deeply misunderstood, idea of natural law and natural rights, but also powerfully challenge dominant ways of thinking among philosophers of law and moral and political philosophers in the analytic tradition.[1]

Future intellectual historians will no doubt present the book, together with Professor Finnis's other philosophical writings, as part of the broad revival in more or less Aristotelian approaches to moral and political thinking that gained prominence beginning in the late 1970s. And they will be right to do so. Like Elizabeth Anscombe, David Wiggins, Philippa Foot, Alasdair MacIntyre, and many others, Finnis adopted or adapted Aristotelian methods to overcome the defects of utilitarian and other consequentialist approaches to ethics, on the one side, and Kantian or purely "deontological" approaches, on the other.

Like utilitarians, and unlike Kantians, these thinkers (who can even be called neo-Aristotelians) hold that ethical thinking must be deeply linked to considerations of human well-being or flourishing—Aristotle's *eudaimonia*. But such thinking, they maintain, cannot treat the human good as subject to aggregation and calculation in a way that could somehow render coherent and workable a norm directing people to choose the option (or act on the rule) that will, for example, produce the greatest happiness of the greatest number or the net best proportion of benefit to harm overall and in the long run. So, like Kantians, they reject the belief that ethics is a matter of technical reasoning (or "cost–benefit analysis") aimed purely and simply at producing the best possible consequences. Unlike Kantians, however, they also reject the idea of a purely deontological ethics, with its reduction of moral thinking to the domain of logic. To be sure, they accept the idea of morality as a matter of rectitude in willing, but they argue that morally wrongful choosing is not merely a matter of inconsistency in thought. Rather, immorality consists in choosing (and thus willing) in ways that are contrary to the good of human persons.

[1] *NLNR*.

A critical moment—one might say *the* critical moment—in Finnis's intellectual biography occurred when, nearly 15 years before the publication of *Natural Law and Natural Rights*, he encountered the work of Germain Grisez. It was Grisez's "re-presentation and very substantial development" of Aquinas' understanding of the first principles of practical thinking, the understanding articulated in the "treatise on law" of the *Summa Theologiae*, that made it possible for Finnis to deploy with the rigor rightly demanded in the analytical tradition of philosophy an Aristotelian approach to problems in philosophy of law and moral and political philosophy.[2] According to Grisez and Finnis, Aquinas correctly understood that the underived (*per se nota* and *indemonstrabilia*) first and most basic principles of practical reason direct human choosing and acting towards intelligible human goods—the various irreducible aspects of human well-being and fulfillment which provide more-than-merely-instrumental reasons for action—and away from their privations. These first principles (and the basic human goods to which they refer in directing our choosing and acting—friendship, knowledge, critical aesthetic appreciation, skillful performances of various types, etc.) are not themselves moral norms. (Knowledge of them is moral knowledge incipiently, but only incipiently.) Rather, they guide and govern *all* coherent practical thinking, whether it results in morally upright action (e.g., visiting an ailing colleague in the hospital simply as an act of friendship) or immoral action (e.g., telling a lie to protect the reputation of a friend who has done something disgraceful).

Moral norms, whether general ones, such as the Golden Rule ("do unto others as you would have them do unto you"), or more specific ones, such as the prohibition of lying even to protect the reputation of a friend, are specifications of the obligation to honor the dignity of all human persons (including oneself) by respecting human well-being in its fullness—i.e., the basic goods of human persons considered integrally. And so what Grisez and Finnis, who (together with Joseph M. Boyle, Jr.) would later collaborate extensively in developing the moral theory pioneered by Grisez, call "the first principle of morality" enjoins us to choose and otherwise will in ways that are compatible with a will towards integral human fulfillment.[3] And just as the various "basic human goods" are specifications of the first and most general principle of practical reason, which Aquinas formulates as "good (*bonum*) is to be done and pursued and bad (*malum*) is to be avoided," the various moral norms which we strive to live by and transmit to our children are specifications of the first and most general principle of morality. These norms of morality governing human choosing are not mere projections of feeling or

[2] Grisez, "The First Principle of Practical Reason," 168–96. In the Preface to *NLNR*, on p. vii, Finnis acknowledges his intellectual debt to Grisez, noting that "[t]he ethical theory advanced in Chapters III–IV and the theoretical arguments in sections VI.2 and XIII.2 are squarely based on my understanding of his vigorous re-presentation and very substantial development of the classical arguments on these matters."

[3] This development is discussed intensively in Joseph Boyle's essay herein (Essay 4), in Finnis's response to it (Essay 28), and Grisez's essay too (Essay 27). In *NLNR*, Finnis did not formally articulate the first principle of morality—something he accounts as a "failure" in the post-script to the book's 2nd edition (see p. 419). This was, however, soon rectified in his writing, as a result of collaboration with Grisez and Boyle in the refinement and development of their "new" natural law theory. As Finnis points out, in 1983 "openness to integral fulfillment" is accorded the status of the "master principle of morality" in his *Fundamentals of Ethics (FoE)*, 70–4, 120–4, and 151–2. A more formal articulation of the principle first appears in Grisez et al., "Practical Principles, Moral Truth, and Ultimate Ends," 126–9.

emotion, nor are they imposed upon reason extrinsically; rather, they are the fruit of reasoning about the human good and its integral directiveness, and are, in that sense, as Finnis says, requirements of (practical) *reasonableness*.

When Finnis arrived in Oxford in the early 1960s as an Australian Rhodes scholar holding an LL.B. from the University of Adelaide, he was fortunate to be able to write his doctoral dissertation (on the idea of judicial power) under the supervision of Herbert Hart, holder of the University of Oxford's Professorship of Jurisprudence and the preeminent anglophone legal philosopher of his time. Hart had recently published his own masterwork, *The Concept of Law*.[4] Much of what Finnis would go on to achieve in legal and political philosophy would be rooted in critical engagement with Hart's thought. This was an engagement that Hart welcomed. Indeed, in his role as editor of the prestigious Clarendon Law Series of Oxford University Press, Hart would commission Finnis (who in the mid-1960s became his colleague on the Oxford law faculty) to write *Natural Law and Natural Rights*, even specifying the title. While resisting most of Finnis's criticisms of his work, Hart had a keen appreciation of the power of his young colleague's intellect and the force of his arguments.

Although Hart's sympathies tended to run in a moderate empiricist, and to some extent utilitarian, direction, there is a sense in which his work (especially *The Concept of Law*) prefigured the Aristotelian revival. Despite his firm commitment to what he regarded as "legal positivism"—which he understood as a strict commitment to the "conceptual separation of law and morality"—Hart was a severe critic of Jeremy Bentham's externalist and reductionist view of law (or the concept of law). Bentham supposed that the social phenomenon (or set of phenomena) we know as "law" is best understood on the model of "orders backed by threats"—orders issued by a sovereign who is habitually obeyed, but who obeys no one. On this understanding, laws function as *causes* of human behavior. They do not create obligation, at least in the normal, normatively flavored sense of that word. Rather, they merely oblige—by way of threats of punishment for non-compliance. They oblige in the way that an armed bandit obliges a victim to turn over his wallet when the villain points a loaded pistol at the victim's head and says "your money or your life."

Now, Hart's objection to Bentham's account was not moralistic; rather, he argued that it failed *descriptively*—it did not "fit the facts."[5] In particular, it did not account for the ways in which laws characteristically function in the lives of citizens and officials as frequently providing certain types of intelligible *reasons* for action, what he would later describe as "content-independent peremptory reasons."[6] To "fit the facts" an account of law must pay attention to the practical point of laws and legal institutions, and draw the distinctions between various types of laws and their various functions. But this, in turn, required the legal theorist, or descriptive sociologist[7] of law and legal systems, to adopt what Hart called "the internal point of view," that is, the practical viewpoint of citizens and officials for whom the laws provide *reasons* for acting by, among other

[4] Hart, *The Concept of Law*.
[5] Hart, *The Concept of Law*, 78. [6] Hart, *Essays on Bentham*, Ch. 10.
[7] On the very first page of *The Concept of Law* Hart invites the reader to regard the book as an exercise in "descriptive sociology."

things, enabling them individually and/or collectively to pursue certain objectives and accomplish certain goals (e.g., transporting themselves on the highways, getting married, creating a binding commercial contract, establishing a charitable trust).[8]

Thus, Hart's "concept" (and philosophy) of law, having identified and adopted the internal point of view, begins to move away from the voluntarism (law as will) that lies at the heart of Benthamite legal positivism, and towards a recognition of law as *rationally* grounded—that is, as providing reasons that guide choosing. Law (and laws), according to Hart, cannot be reduced to *causes* of human behavior, nor can it accurately be described as the sheer imposition of (the) *will* (of a sovereign). It is characteristically (though not always) reasoned and reasonable. At least, it is capable of being so, and will be so in the central or "focal" cases in which law functions in the ways that make it intelligible as a product of human deliberation and judgment in the first place. And yet, Hart himself drew short of committing himself to any such conclusion. He wished to retain the core of legal positivism even while jettisoning Bentham's externalism (and strict voluntarism) and reductionism. It was precisely for this drawing short, this refusal to identify fully reasonable (i.e., just) law as the focal case of law, and the point of view of the morally motivated legal official and citizen as the focal case of the internal point of view, that Finnis criticized the otherwise powerfully compelling philosophy of his teacher.

For Finnis, the focal case of a legal system is one in which legal rules and principles function as practical reasons for citizens as well as judges and other officials because of people's appreciation of their virtue and value, i.e., their *point*. Aquinas' famous *practical* definition of law as an ordinance of reason directed to the common good by the persons and institutions having responsibility for the care of the community here has its significance in *descriptive* legal theory. As Finnis observes,

> if we consider the reasons people have for establishing systems of positive law (with power to override immemorial custom), and for maintaining them (against the pull of strong passions and individual self-interest), and for reforming and restoring them when they decay or collapse, we find that only the moral reasons on which many of those people often act suffice to explain why such people's undertaking takes the shape it does, giving legal systems the many features they have—features which a careful descriptive account such as H.L.A. Hart's identifies as characteristic of the central case of positive law and the focal meaning of "law," and which therefore have a place in an adequate concept (understanding and account) of positive law.[9]

Yet, as I have noted, Hart himself, in *The Concept of Law* and elsewhere, refused to distinguish central from peripheral cases of the internal point of view. Thus, he treated cases of obedience to law by virtue of "unreflecting inherited attitudes" and even the "mere wish to do as others do" as indistinguishable from morally motivated fidelity to law.[10] These "considerations and attitudes," like those which boil down to mere

[8] As Finnis points out, Hart in *The Concept of Law*, "gives descriptive explanatory priority to those who do not 'merely record and predict behavior conforming to rules', or attend to rules 'only from the external point of view as a sign of possible punishment', but rather '*use* the rules as standards for appraisal of their own and others' behavior,'" *NLNR*, 12, quoting Hart, *The Concept of Law*, 95–6.

[9] *CEJF* IV.7, 204.

[10] Hart, *The Concept of Law*, 198.

self-interest or the avoidance of punishment, are, Finnis argues, "diluted or watered-down instances of the practical viewpoint that brings law into being as a significantly differentiated type of social order and maintains it as such. Indeed, they are parasitic upon that viewpoint."[11]

Now, this is not to suggest that Finnis denies any valid sense to Hart's insistence on the "conceptual separation" of law and morality.[12] It is merely to highlight the ambiguity of the assertion of such a separation and the need to distinguish, even more carefully and clearly than Hart did, between the respects in which such a separation obtains and those in which it does not. Still less is it to suggest that belief in natural law or other forms of moral realism entail the proposition that law and morality are connected in such a way as to confer upon judges as such plenary authority to enforce the requirements of natural law or to legally invalidate provisions of positive law they judge to be in conflict with these requirements. The scope and limits of judicial power is a separate issue—one that has been the focus of criticism of Hart's jurisprudence by another of his eminent former students, Ronald Dworkin, who has faulted Hart's positivism for excessively narrowing the authority of judges and other officials to bring moral judgments to bear in the enterprise of legal interpretation.[13] Finnis has not signed on to Dworkin's critique of Hart's jurisprudence—a critique that is sometimes regarded as proceeding from a natural-law vantage point of its own—and parts of Finnis's work suggest reasons for believing that Dworkin's critique is in important ways misguided. For Finnis, the truth of the proposition *lex iniusta non est lex* is a moral truth, namely, that the moral obligation created by authoritative legal enactment—that is to say, by positive law—is conditional, rather than absolute. The *prima facie* moral obligation to obey the law is *defeasible*. Finnis does not claim that unjust laws are in no legitimate sense laws,[14] nor does he argue that judges enjoy as a matter of natural law some sort of plenary authority to invalidate or even to subvert or ignore laws that they regard (even reasonably regard) as unjust.

We see, then, that Finnis takes on board Hart's key insights deriving from his critical engagement with Benthamite legal positivism and pushes them to their logical conclusions—conclusions that move legal philosophy beyond legal positivism, even in its comparatively modest Hartian iteration, into a recognition of law as, in a meaningful sense, connected with reason's quest for justice and the common good (law as reason and not merely will). In the process, he strikes a blow against a familiar caricature of natural law whose wide acceptance (including, incidentally, by Hart

[11] *NLNR*, 14.

[12] See generally *CEJF* IV.7.

[13] Finnis comments on Dworkin's critique, in *Taking Rights Seriously*, of the "positivism" of Hart and Joseph Raz in an illuminating endnote to Chapter 1 of *NLNR*, arguing that the debate "miscarries" because Dworkin "fails to acknowledge that their theoretical interest is not, like his, to identify a fundamental 'test for law', in order to identify (even in the most disputed 'hard cases') where a judge's legal (moral and political) duty really lies, in a given community at a given time. Rather, their interest is in describing what is treated (i.e., accepted and effective) as law in a given community at a given time, and in generating concepts that will allow such descriptions to be clear and explanatory, but without intent to offer solutions (whether 'right answers' or standards which if properly applied would yield right answers) to questions disputed among competent lawyers."

[14] *NLNR*, Ch. 2.

himself as well as by Hans Kelsen and others) had provided apparent grounds for its quick dismissal by serious scholars and students of jurisprudence.

The achievement of John Finnis goes well beyond his signal contributions to philosophy of law. It certainly includes his work with Grisez and Boyle in developing the understanding of practical reasoning and moral judgment that has come to be known, problematically, as the "new"[15] natural law theory and (not unrelatedly) his critical writings against moral skepticism, utilitarianism and other forms of consequentialism in ethics, and ethical theories that purport to lay aside considerations of human well-being in identifying norms of conduct for the moral life.[16] It also includes significant work in political philosophy, some of it directed to pulling the rug out from under the most influential forms of "liberal" political theory of our time, namely, those "anti-perfectionist" theories (often underwriting an ideology of expressive and/or possessive individualism), such as the theory of justice and "political liberalism" advanced by the late John Rawls, proposing that political decisions may not legitimately be based on controversial ideas of what makes for or detracts from a valuable and morally worthy way of life, or that in decisions pertaining to constitutional essentials and matters of basic justice, liberty may not legitimately be limited except on the basis of "public reasons" (where the concept of a public reason strictly excludes reasons drawn from "comprehensive" philosophical and religious views—however reasonable those "comprehensive views" may be).[17]

Finnis's contributions in political philosophy go beyond the criticism of major works by influential contemporary liberal thinkers, such as Rawls, Dworkin, and the late Robert Nozick. *Natural Law and Natural Rights*, especially Chapters VI–XI, constitutes a major affirmative contribution to thought about (1) justice and its requirements, (2) the content (and scope) of the political common good; (3) rights, including human rights, and their identification; (4) the rational grounds for honoring legal and political authority and recognizing legal and political obligation; and (5) the nature and social functions of law. In all of these areas, his analysis and prescriptions are notable not only for their analytical rigor and precision, but for their attention to the complexities of the subject matter. (For example, Finnis carefully explores, in *Natural Law and Natural Rights* VII.4, the relevance of (a) need, (b) function, (c) capacity, (d) desert, and (e) consideration of who may have created or at least foreseen and accepted a risk of loss or harm, in analyzing problems of distributive justice.) In all of these areas, what was originally presented in *Natural Law and Natural Rights* has been expanded, deepened,

[15] The substance of the account of natural law offered by Finnis et al. is hardly new. Its core can be found in Aquinas, and much of that, in turn, Aquinas draws from Aristotle. It is true that Finnis, Grisez, and others have developed the Thomistic theory of natural law in various ways, and articulated the theory in a modern philosophical idiom. But to develop a theory is not to reject it. It is, rather, to accept its substance and draw out its further implications. That is what they have done by, for example, showing how reflection on the integral directiveness or prescriptivity of the principles of practical reason that are presented by Aquinas enables us to identify moral principles and norms that distinguish options for choice that are fully in line with all that reasonableness demands from options that, in one way or another, fall short or afoul of the full demands of practical reasonableness.

[16] See especially *FoE*.

[17] See Rawls, *A Theory of Justice*; Rawls, *Political Liberalism*; Nozick, *Anarchy, State, and Utopia*; Dworkin, *A Matter of Principle*.

and in various ways enriched by papers Finnis subsequently published, most of which are included in the five volumes of *Collected Essays of John Finnis* published in 2011 by Oxford University Press. Taken together, the chapters of the book and the various essays represent an important and distinctive contribution to the contemporary debate about the selection of political principles and the proper design and healthy functioning of political institutions.

In normative ethics and political theory, Finnis has been a force second to none in defending the moral inviolability of human life in all stages and conditions and the norm against making the death or injury of a human being the precise object of one's choosing. And so he has written powerfully against abortion, infanticide, euthanasia, and the intentional (including the conditional) willingness to kill or maim noncombatants (including captured or subdued enemy soldiers) even in justified wars (whether the weapons used are nuclear or conventional). Similarly, he has been a leading voice in defense of the historic understanding of marriage as a conjugal partnership—the union of husband and wife. In many cases, his views have put him at odds with the socially liberal orthodoxy prevailing in the universities and other intellectual sectors of the culture; in a few, they have placed him in dissent from what are regarded today as conservative positions. Like his hero Socrates, in an analogy his commendable humility would cause him vehemently to reject, he has followed arguments wherever they lead, and has never hesitated to state and defend a view because it flies in the face of the intellectual, moral, or political dogmas of the day. The accolades and honors that have come his way were not purchased by conformity to allegedly enlightened opinion or by silence in regard to what he judges to be its grave defects. His powerful and very public dissent could hardly have been contrived to gain him a personal chair in Oxford or election as a Fellow of the British Academy. In this, as in so many other ways, he has always been an inspiration to those (like the two editors of this *Festschrift*) fortunate enough to have been his students and to young scholars in the various fields of his interest and influence who know his work and the witness to the unconditional pursuit of truth it represents.

And this takes us to one last area of his interest and influence, an area in which the truths pursued are truths about ultimate things. While still a young philosopher, in a milieu dominated by the secularism he had hitherto shared—and one that was already showing signs of hostility to dissent—he made the move from secularism to (Catholic) Christianity, under the influence of classic philosophers as well as Christian saints. It was not that he came to faith and therefore saw the world differently. If anything, the reverse was true. The closed horizon of secularism artificially constrained the questions which, pursued with Socratic relentlessness, undermine secularism itself and inaugurate a journey of faith that might well lead to the rational affirmation of spiritual realities and an openness to entering into some form of communication and friendship with a transcendent source of meaning, value, and indeed all that there is. It was, in other words, reflection on the world—and the manifold orders of intelligibility (the natural, the logical, the moral, the technical) in which it presents itself to us and yields to our questioning and investigating—that led John Finnis to conclude that there are more things to be understood (and engaged) than can be immediately perceived with the senses or accounted for by empirical inquiry or technical analysis. Like so many