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JOHN FINNIS

Human Rights & Common Good

Collected Essays: Volume III



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PREFACE

The earliest of the essays collected in these five volumes dates from 1967, the latest from 2010. The chronological Bibliography of my publications, near the end of each volume, shows how the collected essays are distributed across the volumes. But each volume also contains some essays previously unpublished.

Many of the essays appear with new titles. When the change is substantial, the original published title is noted at the beginning of the essay; the original can of course always also be found in the Bibliography.

Revision of previously published work has been restricted to clarification. Where there seems need for substantive qualification or retraction, I have said so in an endnote to the essay or, occasionally, in a bracketed footnote. Unless the context otherwise indicates, square brackets signify an insertion made for this Collection. Endnotes to particular essays have also been used for some updating, especially of relevant law. In general, each essay speaks from the time of its writing, though the dates given in the Table of Contents are dates of publication (where applicable) not composition—which sometimes was one or two years earlier.

I have tried to group the selected essays by theme, both across and within the volumes. But there is a good deal of overlapping, and something of each volume's theme will be found in each of the other volumes. The Index, which like the Bibliography (but not the 'Other Works Cited') is common to all volumes, gives some further indication of this, though it aspires to completeness only as to names of persons. Each volume's own Introduction serves to amplify and explain that volume's title, and the bearing of its essays on that theme.

LIST OF ABBREVIATIONS

<i>AAS</i>	<i>Acta Apostolicae Sedis</i> (Rome)
AJJ	American Journal of Jurisprudence
<i>AL</i>	Joseph Raz, <i>The Authority of Law: Essays on Law and Morality</i> (OUP, 1979)
<i>Aquinas</i>	1998d: John Finnis, <i>Aquinas: Moral, Political and Legal Theory</i> (OUP)
<i>CCC</i>	<i>Catechism of the Catholic Church</i> (rev edn, 1997)
CDF	Congregation for the Doctrine of the Faith (of the Holy See)
<i>CL</i>	H.L.A. Hart, <i>The Concept of Law</i> [1961] (2nd edn, OUP, 1994)
CLR	Commonwealth Law Reports (of decisions of the High Court of Australia)
CUP	Cambridge: Cambridge University Press
ECtHR	European Court of Human Rights
<i>FoE</i>	1983b: John Finnis, <i>Fundamentals of Ethics</i> (OUP; Washington, DC: Georgetown University Press)
HUP	Cambridge, Mass.: Harvard University Press
<i>In Eth.</i>	Aquinas, <i>Sententia Libri Ethicorum</i> [Commentary on <i>NE</i>] (ed. Gauthier) (1969)
<i>In Pol.</i>	Aquinas, <i>Sententia Libri Politicorum</i> [Commentary on <i>Pol. I</i> to III.5]
<i>LCL</i>	Germain Grisez, <i>The Way of the Lord Jesus</i> , vol. 2 <i>Living a Christian Life</i> (Quincy: Franciscan Press, 1993)
LQR	Law Quarterly Review
<i>MA</i>	1991c: John Finnis, <i>Moral Absolutes: Tradition, Revision, and Truth</i> (Catholic University of America Press)
<i>NDMR</i>	1987g: John Finnis, Joseph Boyle, and Germain Grisez, <i>Nuclear Deterrence, Morality and Realism</i> (OUP)
<i>NE</i>	Aristotle, <i>Nicomachean Ethics</i>
<i>NLNR</i>	1980a: John Finnis, <i>Natural Law and Natural Rights</i> (2nd edn, OUP, 2011)
OUP	Oxford: Oxford University Press (including Clarendon Press)

<i>Pol.</i>	Aristotle, <i>Politics</i>
<i>ScG</i>	Aquinas, <i>Summa contra Gentiles</i> [A Summary against the Pagans] (c. 1259–65?)
<i>Sent.</i>	Aquinas, <i>Scriptum super Libros Sententiarum Petri Lombardiensis</i> [Commentary on the Sentences [Opinions or Positions of the Church Fathers] of Peter Lombard] (c. 1255)
<i>ST</i>	Aquinas, <i>Summa Theologiae</i> [A Summary of Theology] (c. 1265–73)
<i>TJ</i>	John Rawls, <i>A Theory of Justice</i> (HUP, 1971)
<i>TRS</i>	Ronald Dworkin, <i>Taking Rights Seriously</i> ([1977] rev edn with Reply to Critics) (HUP; London: Duckworth, 1978)

THE COVER PICTURE

Glen Osmond Mine 1845; watercolour by S.T. Gill, Adelaide 1845.

The first mineral discovery in South Australia was here, four miles south-east of the centre of Adelaide, in 1839. By 1841, ore was being lifted from a shaft a little further up the hill. Twenty tons sent back to England were found to be 75 per cent lead with 18 ounces of silver to the ton. The Glen Osmond Union Mining Company was formed in London in 1843–44, with paid-up capital of £30,000, to mine the land under a lease. The high rate of royalty demanded by the landowner, Mr Osmond Gilles, resulted in litigation and abandonment of the mine before the main lodes were reached. The mines up the hill were more productive, until most of those involved (and a large proportion of the colony's men) left for the goldfields in the neighbouring colony of Victoria in 1850–51. These Glen Osmond mines were the first mines in Australia, but by 1850 South Australia was producing 10 per cent of the world's copper, in the districts north and a little east of the Barossa Valley. But the Glen Osmond mines alone had been sufficient, even in the absence of royalties payable to the government, to bring the colony back from ruinous public and private poverty.

Osmond Gilles had come to Adelaide with the first Governor in 1836, as first Colonial Treasurer, having for many years been a merchant in Hamburg. This wealthy, difficult man, who served in public office in the colony for only a couple of years, was one of those responsible for encouraging the emigration of Germans to South Australia in the colony's first years (see 'The Cover Picture' in vol. II).

The picture is looking north-north-east, in or soon after summer. Within a few years, the slopes below the mines were planted with vineyards for red and white wines. On the brow of the hill above the mine, just out of this part of the picture, the artist (whose attitude to the indigenous inhabitants was always sympathetic) has depicted three Aborigines, two with their backs to the mine, the other sitting, relaxed, looking out over the plain to the western sea.

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INTRODUCTION

The reasons each of us has for choosing and acting are those intelligible goods which go to make up the flourishing of human persons and their communities. Though basically common to us all, those benefits of action—common goods, in a first sense of the phrase—can reasonably be brought about in many different ways and thus be elements of the flourishing of individuals in many different kinds of association. In each such association the actions of its members as members seeking to promote and benefit from it are actions envisaging a common good. A common good in this second sense of the phrase is in one way or another the benefit (whether as end or means or both) of so associating with other persons that their good purposes and one's own are advanced. The common good of a lecture audience is that by maintaining the conditions for undistracted audibility and so forth, the lecturer's immediate purposes in speaking and the audience's in listening (even if only to spot mistakes) are advanced. The common good of a political community (paradigmatically, a state) is vastly more ambitious and complex, and includes the upholding of the rights of all its members against threats of injustice from inside and outside the community.

Thus, this volume's essays on human rights and common good mark another step along the way from Volume I's explorations of practical reason's truth and normativity, via Volume II's studies of the persons at stake in intending and choosing, towards Volume IV's essays on law and the Rule of Law as normally vital conditions for the upholding of rights under threat, and Volume V's attention to the ultimate grounds for goodwill towards one's neighbours and oneself. Many of this volume's essays, beginning with the first, take our law and constitution as the frame for their pursuit of questions not about law but about what kinds of flourishing, and thus what kinds of rights, would appropriately be the object of legal protection, in our societies or, again, in any.

The headings for this volume's six parts mostly refer to justice. They do so because of an inter-definability acknowledged by Mill¹ as firmly as by the Roman jurists and Aquinas:² the object of the virtue of justice, and thus the source of the justness of just acts and arrangements, is that people all get what is theirs by right. Which is to say: that (to the extent measured by one's duties of justice) each person's *rights* are respected and promoted.

I. HUMAN RIGHTS AND COMMON GOOD: GENERAL THEORY

It is relatively easy to give a formal or conceptual account of human rights. Less easy, but vastly more important, is showing that human rights are not like unicorns, phlogiston, or taboos: of ethnographic interest only.

Human rights have the logic explored, in relation to legal rights, in essay IV.18 (1972b) and *NLNR* VIII.2–3, and in relation to moral rights, in essay 18. Though statements of them standardly take the two-term form '[Each person] has the [right to life]' or '[A, like everyone else] has the [right not to be tortured]', a specification of them that is sufficient to guide choice needs to be in three-term form. Such a specification will—to take the central case—identify not only the (classes of) persons who have the right, and the interest of theirs that they have the right to (respect for or promotion of), but also the persons who have that duty of respect or promotion of interest and the kind of choice (to act or forbear) that is required of them to fulfil that duty. ('Interest' is shorthand for an element in a person's well-being, in such persons' flourishing.) Thus: 'The state's government and legislature have the duty to prevent threats to the lives of persons within the state's jurisdiction', and so forth. The right may be that deleterious choices shall not be made, or that choices to assist shall be made, or both. It may require, as an ancillary aspect of its content, that officials or legislators exercise their constitutional powers to provide such assistance and to forestall and punish violations of the right whether by officials or others within the jurisdiction.

Equally straightforward is the conceptual mapping of *human rights*' place in modern discourse. It broadly tracks the conceptual map of what an earlier way of speaking called *natural right(s)*. Gaius in the second century AD taught that neither state law nor communal convention can do away with natural rights.³ Aquinas in the thirteenth century taught that

¹ e.g. *Utilitarianism*, ch. 5: 'Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right.'

² *ST* II–II q.58 a.1c quoting Justinian's *Digest* I.1.i.10 and *Institutes* I.1.1.

³ *Digest* 43.18.2: *civilis ratio corrumpere naturalia iura non potest*. Likewise Gaius, *Institutes* II.65.

positive law, even written, definite, and clear, cannot make just, morally binding, or properly enforceable what is inherently repugnant to natural right.⁴ So today Ronald Dworkin says that it is the mark of genuine rights that, morally, politically and (in well-ordered states) constitutionally, they prevail against legislation, executive authority, and judicial decisions erroneously failing to enforce them.⁵ And Joseph Raz accounts for human rights as interests of individuals such that, in the prevailing conditions of internal social and political arrangements and international relations, any state government not only has a duty to respect and/or promote those individual interests as rights but also, in the event of default in such respect or promotion, is legitimately subject to rectificatory interference by other states or entities in the international community.⁶

Equally plainly, 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 *determinationes*, that is, specifications and delimitations which when reasonable could nonetheless reasonably have been different, in some or many respects: think of rules about anonymity of defendants, or complainants, or witnesses, in criminal trials, as specifications of the right to a fair trial and the right to free speech.⁷ Some rules—perhaps many—stand to the right they purport to enforce as more or less unsatisfactory would-be specifications which, on a better understanding of that or other rights, would be reversed or amended more or less extensively. Some fairly common features of declarations of human rights are juridically primitive, introducing deeply misleading concepts such as justified interferences with or violations of rights,⁸ and crude formulations of the principles of such justifications.⁹ Such infelicities are constantly magnified by more or less manifestly unreasonable judicial or legislative interpretations.¹⁰ In all these ways, at least, what can be true of certain elemental human rights accurately defined is more or less clearly not true of many rights constitutionally, legislatively, or judicially declared to be human: that they are properly enforceable against anyone and everyone's conceptions of common good or public interest. Unjustly established legal human rights are 'human rights', not human rights

⁴ *ST II-II* q.57 a.2c and ad 2; q.60 a.5.

⁵ See essay 1, secs II and VII.

⁶ Raz, 'Human Rights Without Foundations', secs 3 and 4.

⁷ See *NLNR* VIII.5, X.7; and essay I.1 (2005a) at n. 3.

⁸ See essay 1 at 40 and its endnote §.

⁹ Notably: 'necessary in a democratic society for the protection of ...'. See essay 1 at 40.

¹⁰ See essay 1 at 39; for an illustration see the analysis in 2009e, sec. 1, of *R (Begum) v Denbigh High School Governors* [2006] UKHL 15, [2007] 1 AC 100. The analysis concludes: 'The conceptual slackness of human rights law-in-action is impressive.'

(except for purposes of intra-systemic discourse within that legal system). And the same can be said for rights which are legally declared, in a given jurisdiction, to be human rights but which there and in other places could just as well be different in their content, force, and effect.

But all this conceptual mapping or accounting leaves unaddressed, and squarely in play, the question whether anyone *truly* has such rights, truly has interests such that other persons and groups who (with or without claiming justification) violate them act immorally by doing so. Or are they yet another conventional *taboo*, a way of speaking, thinking, and feeling—perhaps one that the weak or sentimental employ to chain in mythic guilt the strong who would otherwise, and fittingly, be their masters? Or is the very idea of human rights an immoral or rationally groundless *speciesism*, arbitrarily favouring some human beings who in value or moral status are below some non-human animals? In face of all the manifold inequalities between human beings, how can there possibly be sufficient, or any, grounding for the claim that all members of the human race are *equally* entitled to these or any rights?

Human 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. Take Anscombe's example (essay II.3, at p. 71). It was not about pointing, as such; some other animals perhaps do this. It was about the act of pointing to a figure to distinguish its shape from its colour (and perhaps, I add, to compare the former with a battleship at Trafalgar, and the latter with maps of the British Empire). And about the act of attending to the pointer to understand the precise point being made about the figure, and then perhaps about the comparison or analogy. Both are intentional acts whose intended objects are twofold: intelligibilities (shape and colour, as concepts; and as analogies; and as what the pointer intended and meant); and the communicating of these to an audience (so to speak). Or take again the example deployed in *Natural Law and Natural Rights*: the story of Nathan's rebuke to King David by the parable of the rich man's covetous and devious appropriation of the poor man's ewe has as its object the drawing and communicating of an analogy, and the articulation of a moral, and the suasive educating of the audience's heart (willingness) as well as mind (intellect). Or again: Socrates' recounting to his jurors the true story of his perilous refusal to participate in a politically motivated liquidation of a tyranny's opponent ('the others went off to Salamis [to arrest the opponent] and I went home') has a similarly complex spiritual object, meant for and available to the understanding and the informed goodwill, and the intellectual conversion, of those of his jurors willing

to make comprehending him one of their own objects; and Plato's objects in narrating that recounting share in some of Socrates' more ultimate purposes though not his immediate object, acquittal. A final example: 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.¹¹ 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, faith 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.

In doing so, one is enriching one's understanding of the basic elements in human flourishing, the basic goods that have made sense of one's reasonable actions since one first became able to understand them and the directiveness (normativity) they have for one's practical reasoning, deliberations, and choices. In each of these cases the good of knowledge and truth is instantiated and made more significant and directive, and in the three stories (each with stories within stories) truths about other basic human goods are conveyed—about friendship including political friendship, about practical reasonableness itself, and about marriage, for example. In every case one understands these goods as *good for me and anyone like me*. The at first indefinite extensional and intensional reference of 'anyone like me' is clarified, in reflection, as: 'any human person'.

For: reflection on the continuity of one's identity and life—through sleep, through traumatic unconsciousness, through the unrememberable eventfulness of one's infant life, through one's life in the womb and, as it may be, one's future life in senility and dementia (Shakespeare's 'second childishness')—makes evident that what is valuable for oneself is valuable and significant in a qualitatively similar way for any being with the same capacities as oneself. For all of us, those dynamic capacities were once only *radical*, and then by maturation and good health became active capacities, ready for actualization in actions made intelligible by their objects—mostly intended objects of the kinds just now recalled in exemplary

¹¹ See essay II.2 (2005c), sec. V; 2003e; essay I.1 (2005a), sec. V and Postscript.

form. So it is the sharing in radical dynamic capacities that is the basic unity of the human race or species and, by virtue of the true goodness and directiveness of the basic human goods, is the ground and foundation of the human rights which are specific objects of that directiveness in its interpersonal implications. What is fundamentally good (and bad) for me is fundamentally good (and bad) for you. 'You are the man.'¹² 'Go and do thou likewise.'¹³

Acts of meaning (say pointing, or poetic composition, or rigorous scientific reflection), like other intentional acts (say resolving to 'do likewise', or betraying, promising, or rescuing) are understood by those who choose to do them, and by intelligent participants and observers, as actions *of* an individual, a responsible person, author of and answerable for his or her conduct. They make manifest (even, though in an extended sense, when they are successful deceptions) the person, someone whose complete, non-fungible distinctness from other human persons the human baby begins to be aware of, and soon enough to understand, as the baby locks onto and follows *eyes* and learns to read them, that is to make inferences from them as if they were windows of the soul—intentionality, emotionality, sensitivity—of the person whose eyes they are. To that person his or her *own* individuality, responsibility (authorship), and subsisting identity is vastly more transparent. At the same time, the fact that other persons have the same *kind of*—and therefore thoroughly particular, non-replicably individual—transparent-to-self and partially self-shaped identity is as indubitable as if it were transparent rather than inferred. Despite their difference, each of these logically distinct kinds of knowledge of the person fits easily within our idea of the experienced and perceived. Together these ways of knowing oneself and others as not only intelligible but also intelligent, not only active but each a doer and maker, provide the stable factual basis for the practical norms centring on 'Do to others as you would wish them to do to you, and don't do to them...'. Such norms or principles, being about what is needed to instantiate the good of being reasonable and the good of friendship, are not inferred from their factual foundation, but rather take it as the matrix, so to speak, for the practical insight they articulate: that a way of relating personally and humanely to other persons is not only factually possible but also desirable, intelligent, and in itself incalculably superior to alternative ways of relating (such as sadistic harm-doing, or indifference to the baby

¹² The accusatory conclusion of Nathan's parable to the covetous royal killer, who acted against not only the good of life but also the good of marriage: 2 Samuel 12: 7; *NLNR* 106–7.

¹³ The conclusion of the parable of the Good Samaritan: Luke 10: 30–7, v. 37.

in the snow alongside one's path).¹⁴ So those principles' 'being about what is needed to instantiate the good of being reasonable ... etc.' turns out to mean: their being about what is needed to be a person who respects other persons, for their own sake, and sees the need to give to each of them their due, and indeed to (in ways involving all manner of prioritization and nothing merely sentimental) love—will the good of—these neighbours as oneself.

One's identity (as a person with interests that are truly intelligible goods) all the way back to one's beginning as a pre-implantation embryo¹⁵ (with the radical capacities whose ultimate objects—those same intelligible goods—one now participates in and deliberately intends) is the ontological foundation of one's human rights, because it is the foundation of one's judgment that 'I matter' and of one's duties to respect and promote one's own good, and therefore of one's judgment that 'others matter' and of one's duties to other persons to respect and promote their good. For they too have such identities (all the way back, and all the way forward to the end of their lifetimes), such radical capacities, and intelligible forms of flourishing (and harm) of just the same kind as one's own. Just as immaturity and impairment do not, in one's own existence, extinguish the radical capacities dynamically oriented towards self-development and healing, so they do not in the lives of other human persons. *There* is the ontological unity of the human race, and radical equality of human persons which, taken with the truths about basic human goods, grounds the duties whose correlatives are human rights—duties *to*, responsibilities *for*, persons.

Where these duties are negative duties of respect (duties *not* to intentionally damage or destroy persons in basic aspects of their flourishing) they can be unconditional and exceptionless: 'absolute rights'. Where they are affirmative responsibilities to promote well-being, they must inevitably be conditional, relative, defeasible, and prioritized by rational criteria of responsibility such as parenthood, promise, inter-dependence, compensation and restitution, and so forth. Such criteria of priority in responsibility, in combination with other conditions of securing common good, are in play in shaping the reasonable specification of the obligations of membership in one or other of the communities, political and non-political, of which one is non-voluntarily or voluntarily a member. And many such obligations are correlative to rights. Thus, for example, the obligations of parents to their children are correlative to rights of those children to support, nurture, education, protection, and so forth, rights which in their

¹⁴ On the character and reliability of our understanding of first practical (normative) principles, see e.g. essay I.1 (2005a), secs IV and V; essay I.9 (1987a); *NLNR* chs III and IV.

¹⁵ See essay II.16 (1993a).

basic aspects, at least, can reasonably be called human. (On gross parental default, such obligations pass to surrogates specified by or under law, against whom the rights avail thereafter.) A legally tolerated practice of infanticide or incest might reasonably, in appropriate circumstances (now perhaps rare), be grounds for international intervention and regime change (even, perhaps, by force).

Understood as grounded in the truths about human make-up and well-being recalled briefly in the preceding five paragraphs, human rights are vindicated against general moral scepticism, and against the charge of speciesism. For they are predicated of all human persons not as members of the class 'our race/species', nor out of an emotional or arbitrary sympathy of like with like, but as beings each and all of whom have the *dignity* of having the at least radical capacity of participating in the human goods that are picked out in practical reason's first principles (first and foremost the good of human existence/life) and that make sense of all human intending. 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, participate in them (even the bodily and earthy goods) in the remarkable way I earlier called spiritual, and so when flourishing maturely participate in them intentionally and with intent that others of the same rank share such participation and flourishing. And the 'each' and 'all' in the preceding sentences demarcate the sense in which we all are basically equal and entitled to the concern and respect appropriate for human persons, and to the substantive human rights applicable to our state of maturity, health, and activated capacities. Differences of intelligence that are properly relevant to the distribution of educational opportunities and of occupational responsibilities are quite irrelevant to this dignity of the human over all that is subhuman, and to the human rights to equal concern and respect, life, and so forth.

It would in principle be reasonable to go no further in this sketch of answers to the challenges to the very idea of human rights. Any further questions about the foundations of the foundations I have pointed to might properly—and prudently—be remitted to Volume V. But without straying even momentarily beyond philosophy's bounds, it can be observed that ascribing the manifold intelligibilities of nature to sheer chance is a hypothesis far less plausible than the judgment (or if you like, the hypothesis) that they are to be ascribed to intelligence. Not to an intelligence immanent within nature, but to an intelligence transcending the nature that lies open to our experience and empirical investigation. But if to an intelligence, then also to a will capable of freely choosing *this* vast universal order of intelligible natures and laws-of-nature governed events rather than any of