

# PHILOSOPHICAL RETREAT : A CRITICISM OF JOHN FINNIS' THEORY OF NATURAL LAW

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## Abstract

The Philosopher rose early and having breakfasted, was carried down the hill to a place on the banks of the river. The eight men who carried his sedan chair set it down gently. He thanked them politely. They nodded deferentially.

Then each of the eight took an armalite rifle and a bag of hand grenades from the back of the sedan and formed a semi-circular guard from the river's diameter. Setting up his chair and easel, for it was his day of rest and he intended to spend it in painting the reflections on the river's surface, the Philosopher stood to attention as each guard unfurled a banner. The first banner carried the inscription LIFE, the second KNOWLEDGE, the third PLAY, the fourth AESTHETIC EXPERIENCE, the fifth FRIENDSHIP, the sixth PRACTICAL REASONABLENESS, the seventh RELIGION. The Philosopher's self portrait was on the eighth. He was no mean artist. It was well done.

As the day progressed, an aerial view of the riverbank showed that others too had formed arenas, with armed guards and fluttering banners. Between them a dense mass of people struggled to preserve a foothold against the crush of other bodies. With arms which must surely have ached, they held aloft placards reading POVERTY, MALNUTRITION, UNEMPLOYMENT, TORTURE, WAR, CORRUPTION, RACISM, HOMELESSNESS, STARVATION, OPPRESSION.

The Philosopher sighed as he saw these signs and turned away.

"Man is made in the image of God, and this implies, as St. John of Damascus said, that man is intelligent and free in judgment and master of himself," he murmured to himself.

The good thing about God is that, unlike everything else, He never changes. He can thus be called on to validate a theory of law and ethics which eschews both history and scientificity in social analysis. For that matter, as any Creationist knows, He can do the same for natural science.

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But whereas a student of natural science will not be called on to take serious note of Creationist theory, the publication of John Finnis' *Natural Law and Natural Rights*<sup>1</sup> in the prestigious Clarendon Law Series indicates that for ethics and jurisprudence, Francis Bacon lived in vain.

Certainly the abstract sterility of positivist jurisprudence and the rising tide of criticism of positivist philosophy even on its home ground of philosophy of science, demand that new directions be sought. Guiding that search by a re-examination of Aristotle's ethics and politics, and so encompassing the dialectical nature of moral and jurisprudential thought, is just as certainly a sound point of departure. But Finnis' classical scholarship is put to the service of updating Aquinas and the timeless, placeless truths of natural law theory. His philosophy, unlike Aristotle's, is not based on the historical or contemporary order of human society, but on the belief of man made in the image of God. So his dialectic moves backwards to God as the goal of human consciousness rather than forward with the human struggle against scarcity, ignorance and want.

The result is an apologia for private property, the family and the State, supported not by science and reason but by fideism and frequent appeals to the 'self evidence' of his premises, and mitigated only by a wishy-washy relativism arising from incorporation of a liberal theory of justice.

There are worthwhile sections in this book. His exposition of Hohfeldian analysis, of authority and of obligation is impressive. But these examples of analytic skill add nothing to the plausibility of his natural law theory. It is to the plausibility of this theory that this review article is directed.

Such plausibility is dependent on the strength of two arguments. First, that moral principles can be derived from a set of basic practical principles which indicate the basic forms of human flourishing, and a set of basic methodological requirements of practical reasonableness which guide practical thought. Second, that one such principle establishes the obligation to obey the law, and that law and legal systems must (logically) be explicated from the point of view of one who accepts this principle.

Criticism of both these arguments makes no quarrel with the syllogism of practical reasoning which Finnis adopts as the form of moral argument. This is:

Premise A : We need (or, it is good or right) that X be the case.

Premise B : The only way we can make X the case is by doing Y.

Conclusion: Therefore we ought to do Y.

1. John Finnis, *Natural Law and Natural Rights* (1980)

Argument in this form does avoid the illicit inference from 'is' to 'ought' without banishing facts from the sphere of moral judgment. But even assuming that premise B can be established with an appropriate degree of certainty, the conclusive force of the argument is dependent on establishing premise A beyond argument. The quarrel is with Finnis' claim that this can be done by reasoning, categorised by reference to the basic goods and in accordance with the methodological requirements of practical reasonableness.

Finnis' basic practical principles affirm that life, knowledge, play aesthetic experience, friendship, practical reasonableness and religion are basic goods (ends, purposes, values) of human life. They are established by the act of subjectively reflecting on our character as human beings. They are not known intuitively, but by an act of intellect which, proceeding from felt inclinations and aided by anthropological and psychological evidence of what all human societies value, grasps or discovers these categories of human purpose as self-evident. They are also indemonstrable.

They are not inferred from speculative principles. They are not inferred from facts. They are not inferred from metaphysical propositions about human nature, or about the nature of good and evil, or about 'the function of a human being', nor are they inferred from a teleological conception of nature or any other conception of nature. They are not inferred or derived from anything. They are underived (though not innate).<sup>2</sup>

And later:

Non-derivability in some cases amounts to lack of justification or lack of objectivity. But in other cases it betokens self-evidence; and these cases are to be found in every field of inquiry.<sup>3</sup>

To illustrate his conception of self-evidence, Finnis refers to the principles of rationality in theoretical inquiries.

One such principle is that the principles of logic, for example the forms of deductive inference, are to be used and adhered to in all one's thinking, even though no non-circular proof of their validity is possible (since any proof would employ them). Another is that

2. *Id.* at 33-4

3. *Id.* at 70

an adequate reason why anything is so rather than otherwise is to be expected, unless one has reason not to expect such a reason. A third is that self-defeating theses are to be abandoned. A fourth is that phenomena are to be regarded as real unless there is some reason to distinguish between appearance and reality...<sup>4</sup>

The list continues.

Even allowing that Finnis is correct in saying that these principles are '— obvious — obviously valid — to anyone who has experience of inquiry into matters of fact or of theoretical (including historical and philosophical) judgment', it is not at all obvious that this same conception of self-evidence can be applied to principles establishing basic purposes of human life. For one thing, it can quite sensibly be denied that human life has any more purpose than animal life or vegetable life, whereas it cannot sensibly be denied that the concept of rationality and the pursuit of knowledge involve their own constitutive principles.

Secondly, even if we accept the metaphysical assumption that the essence of human (as distinct from other forms of) life is constituted by abstract categories of purpose, and so allow Finnis' basic practical principles to be *sui generis* with the principles of theoretical rationality; even if we concede that life, knowledge, play, friendship, etc., is a correct categorisation, *and* that these are all there are,<sup>5</sup> these categories of purpose are too broad to guide or even 'orient' our practical reasoning, unless each is understood in a more specific manner. And if the existence of the principle may be allowed to be self-evident its particular interpretation is certainly not.

The good of life, for example, might be interpreted either as the life of the species, including future generations, or as the life of an individual. Friendship or love might encompass individually disinterested benevolence to all of humanity or the limited egoism of relationships between individuals. Knowledge may be sought for its own sake or for enabling us (since whatever we are it is not lilies of the field) to survive and enrich our survival. Without acknowledging the existence of these antitheses or attempting to determine their relationship, Finnis simply opts for one.

His contention that, by reflection, directed now at the content of practical reasonableness, we can apprehend the basic methodological principles of practical reasonableness, and that these too are self-evident, raises similar problems. On this account, in order to be practically

<sup>4</sup> Id at 68

<sup>5</sup> However, the omission of productive and creative work from the list, should not pass without note

reasonable, our judgments must be based on a coherent plan of life, show no arbitrary preferences amongst persons, be qualified by detachment from particular goals but commitment to our life plan, give limited consideration to the consequences of our acts, show respect for every basic value in every act, take account of the requirements of the common good and be consistent with the dictates of our own conscience.

This list of requirements of practical reasonableness is a compilation of considerations thought to be central to moral reasoning by a wide, if not comprehensive, selection of Western idealist philosophers. Finnis' particular contribution is to stipulate that all of these considerations must be taken into account, and that to emphasise any one of them is to fall into error. Again, even if we accept Finnis' idea that practical reasonableness consists in reasoning in accordance with a set of principles, that these are what they are and all there are, reasoning thus will not yield determinate moral principles.

One difficulty is that there is conflict between the ninth principle and the others. To be enjoined to act as one 'feels all in all' one ought, is to be counselled to take into account non-rational considerations.

More seriously however, many of these principles, either because of their formality or generality, lack certainty. No arbitrary preferences among human beings — but what is to count as arbitrary? Self-preference, Finnis tells us is not arbitrary. It is 'reasonably the first claim on my interest, concern and effort' because '...through *my* self determined and self realising participation in the basic goods, I can do what reasonableness suggests and requires...'<sup>6</sup> But my self-preference must be kept within reasonable bounds and to do this I must adopt the standpoint of the 'ideal observer', of the 'one who sees the whole arena of human affairs and who has the interest of each participant in those affairs equally at heart and equally in mind.'<sup>7</sup>

But then, supposing I am capable of adopting this godlike view, at what point of time do I switch from being myself to being God? After I have acquired my first, second or third million dollars? After I have satisfied my needs? Perhaps, but do I need persian carpets? Do I need to drink fine wine at salon concerts given by select musicians? After all, according to Finnis, aesthetic experience is one of the basic goods of life; 'art really is better than trash', and presumably persian carpets really are better than nylon rugs and fine wine really is better than beer.

The extent of the 'limited' consideration to be given to consequences raises the same problem of indeterminacy. Formally, it would seem, these

6. Finnis *supra* n.1, at 107

7. *Id.* at 108

limits are set by the other principles of practical reasonableness and one which may be thought to cut a lot of ice is the principle that one must respect every basic value in every act. Thus although on an assessment of the consequences, it may be thought necessary to sacrifice one life in order to save another or others, according to Finnis, this ought not be done since the act of killing offends the basic value of life. The problem here however, is to individuate the relevant act. Have we saved ten or murdered one?

Primarily, Finnis, says, this is to be done in terms of 'those factors we gesture towards with the word "intention"'. On the other hand, there is also a material world with a certain structural causality which is not changed by the best intention.

Perhaps the consequences of one's act seem likely to be very good and would themselves directly promote further basic human good. Still, these expected goods will be realized (if at all) not as aspects of one-and-the-same act, but as aspects or consequences of other acts (by another person, at another time and place, as the upshot of another free decision...). So, however 'certainly foreseeable' they may be, they cannot be used to characterize the act itself as, *in and of itself*, anything other than an intentional act of, say, man-killing. This is especially obvious when a blackmailer's price for sparing his hostages is 'killing that man'; the person who complies with the demand, in order to save the lives of the many, cannot deny that he is choosing an act which of itself does nothing but kill.<sup>8</sup>

The verbosity hardly conceals the lack of substance in the argument. Of course our description of human action will include a subjective and an objective element, but statement of that obvious truth goes nowhere toward provision of criteria for parcelling the continuous chain of human action and interaction. Reference to the act 'in and of itself' merely begs the question. What is it? The intentional, physical movement of loading, aiming, firing a gun? Clearly not. Clearly some consequences of this act (the bullet hitting the target, killing or maiming someone) are included. The question of individuation is the question of what consequences are to be included. The implication of the above passage is to draw the line at the intervention of another person's intentional, physical act. Yet this may be calculable with as much certainty as the consequences of pulling a trigger. For this reason, that criterion cannot be used for determining

<sup>8</sup> Id at 122-3

responsibility for the harmful effects of human action. If I offer the poisoned chalice, I don't escape responsibility because of the intervention of the 'separate' acts of acceptance and consumption of the wine.

As an accomplished legal theorist, Finnis had not only the ethical but also the extensive judicial and jurisprudential analyses of causation from which to draw, yet he dismisses these sources as doctrines of legal casuistry, insisting instead on the formulation of strict negative principles, such as 'those declaring wrongful any killing of the innocent'. And we are warned that 'recognition of the tragic implications of some circumstances and decisions is not a rational ground for undertaking the heroic but absurd burden self-imposed by consequentialism — the burden of being responsible for 'over-all net good'.<sup>9</sup>

Analysis of the limits of consequentialist reasoning thus reveals that in addition to the unsolved problem of individuation, Finnis' theory requires acceptance of two dubious contentions. First that there are certain moral principles which operate like rules in that they can never be broken. Second, that because overall, the common good is attained by each individual fulfilling his particular responsibilities to ascertained individuals, rather than by trying to estimate the needs of the common good 'at large', these universally categorical principles are strictly negative. There is thus a class of acts which are 'bad in themselves' and absolutely prohibited. But there is no corresponding class of acts which are 'good in themselves'. The moral necessity of affirmative action is a delusion of the misguided.

Perhaps the allowance that this second contention is a truth of wide rather than universal application,<sup>10</sup> saves from absurdity those reformers, revolutionaries and visionaries of history who, sacrificing the prudential ease of living 'one man of many men',<sup>11</sup> strove to awaken human consciousness to a species need for radical change. However it would appear that in Finnis' view, they have arrogated to themselves the role of God or the State. Which, and what the nature and function of

9. *Id.* at 124

10. *Id.* at 305

11. Hence, Euripedes was moved to represent a character as saying

"I prudent? I, that might have lived unvexed  
By public cares, one many of many men,  
And with the wisest shared the common lot,  
Yet do we rather honour the proud fool  
Pestered forever with a thousand cares"

J.A.K. Thomson, *The Ethics of Aristotle The Nichomachean Ethics Translated* (1955) 181. The verse is cited by Aristotle in the context of criticising the generally held view that it is the self-regarding man who is prudent. He concludes that a man cannot secure his self-interest without the aid of politics. Ethics is a branch of politics and it is the duty of the statesman to create the conditions under which the citizen can lead the best possible life. One of the structural defects of Finnis' theory is that he attempts to integrate law and ethics, but leaves politics out of account.

the latter is, are matters left out of account altogether or dealt with very summarily.

Returning to the contention that there are 'strict negative principles' which establish indefeasible moral duties, we find that this contention, based formally on the seventh requirement of practical reasonableness and substantially on the limitations Finnis places on consequentialist reasoning, leads to further problems of indeterminateness.

The corollary of indefeasible moral duties is absolute rights. Finnis argues that because the future consequences of present acts is unknown and unknowable, the criteria of acting so as to maximise good is irrational. Rather, we should act so as to acknowledge these absolute rights. The problem here, is that life has an awkward habit of throwing up conflicts between the absolute rights of different individuals. The question of specification of rights in concrete situations thus becomes crucially important.

For Finnis,

There is ..., no alternative but to hold in one's mind's eye some pattern, or range of patterns of human characters, conduct and interaction in community, and then to choose such specification of rights as tends to favour that pattern, or range of patterns.<sup>12</sup>

Such a pattern involves recognition that specified human goods are to be fostered.

So one will bear in mind, on the one hand, that art with all its (often competing) forms and canons really is better than trash, that culture really is better than ignorance, that reputation and privacy really are aspects of or important means to human well-being, that friendship and respect for human personality really are threatened by hatred, group bias, and anarchic sexuality...<sup>13</sup>

Where absolute human rights are in issue, it is *a fortiori* the case that specification should be made, not by any casuistry of duties in terms of 'direct' and 'indirect' choices, or 'means' and 'incidents', but by reasonable judgments.

...arrived at by a steady determination to respect human goods in one's own existence and the equivalent humanity or human rights

<sup>12</sup> Finnis, *supra* n 1, at 219

<sup>13</sup> *Id* at 220



of others, when that human good and those human rights fall directly into one's care and disposal — rather than trade off that good and those rights against some vision of future 'net best consequences', consequences which overall, both logically and practically, one cannot know, cannot control or dispose of, and cannot evaluate.<sup>14</sup>

As with the treatment of individuation of acts, this gushing flow of words cannot conceal the fact that Finnis' natural law argument goes nowhere toward providing criteria for the specification of rights. Of course it is difficult to judge so as to maximise good(s). At any given point of time, a previous decision made in the best faith and after most careful consideration of available information, may bring disastrous consequences. But is it any less difficult to hold in one's mind's eye a pattern of human well being and judge in accordance with this pattern? This latter injunction supposes that the individual, having transcended the consciousness engendered by his own particular circumstances and conditioning, can take a panoramic view of the complex struggle and conflict of human life, and will find within that scene, and not as a result of his own projections, a determinate pattern of human well-being. Though history is against him on this issue, Finnis has God, the timeless veracity of natural law theory and its accidental bearer, the Roman Catholic Church on his side. The argument however, has moved from the arena of reason to that of faith.

In this broad context three points, all of which Finnis has ignored, must be noted. Firstly, the relationship between ethics and politics is structurally essential to Aristotle's *Nicomachean Ethics*. The individualist emphasis of the ethics is accompanied by the view that the State exists for the purpose of the good life and that a man cannot secure his self interest without the aid of politics.

Secondly, the reason Aristotle's ethics do not become bogged down in relativism and fideism, is that he attaches them quite explicitly to the practices of the elite of Greek society. Problems of individuation of acts and specification of rights do not render his theory impotent, because he avoids deontological analysis of obligation and ties his ethics to human character and disposition. Coupling these aspects of his theory by a teleological view of human function, his ethics achieve the coherence and intellectual force which continue to invite attention.

Thirdly, it is not the case that the only tools available for the resolution of problems of practical reason are, on the one hand the formulation of strict negative principles and the stipulation of absolute rights or,

14. Id at 226

on the other, a detailed casuistry of rights and obligations. Both the formulation of moral principles (to operate *as* principles, in a flexible manner) and recognition of the relevance of intention, direction and causation are important to moral reasoning. But over and above these tools of reason, we have the capacity to analyse the material circumstances of social life and psychological characteristics of human beings in order to determine the sources of moral dilemmas. Whether resolution of conflict is stipulated in terms of a determinate goal or in the pluralistic consequentialism of liberal utilitarian thought, it is this capacity to analyse antecedent causes which underpins judgment aimed at securing determinate consequences.

In summary then, it is contended that Finnis' basic practical principles and basic methodological principles neither yield determinate moral principles, nor guide practical judgment in any other way, to sound conclusions in particular cases. In relation to the argument that the obligation to obey the law can be established as one such moral principle however, Finnis adds considerably to the skeletal theory outlined and discussed so far.

Since both law and morality are primarily concerned with man as a social being, and since Finnis makes the individual the subject of all political philosophy and not only of ethics, his theory requires a conceptual apparatus of mediation between man as an individual and as a member of society. Broadly, this is provided by the eighth principle of practical reasonableness — to favour and foster the common good of one's communities. Chapter VI of the book fills this out with an exposition of community, communities and the common good.

Dealing first with the notion of community, not as a community but as ongoing association, Finnis explicates a view of friendship as its central, strongest case. Friendship is constituted by acting, in relation to a friend, for that friend's well-being. Being one of the basic goods of life it thus functions to enable individual egoism to be overcome at the level of relationships between individuals, because in order to flourish most fully as an individual, a person must go beyond self love. Other co-operative forms of work and play, achieve the economically and culturally necessary extension from the family (taken by Finnis as the paradigm of friendship) to a broader community, for which the common good is the situation which optimises every person's opportunity for individual flourishing.

Derivation of the requirements of justice and the rights which these requirements secure, justification and explanation of authority as the only practical alternative to unanimity in solving co-ordination problems, and analysis of obligation in terms of the necessity of reciprocity in individual

and social relations, are all hinged on this eighth requirement of practical reasonableness. Thus both law and justice are products of the exercise of practical reasonableness aimed at securing the common good. And since law exists for the sake of the common good, we need to be law abiding. Legal obligation is thus first generated as moral obligation.

The flaw in this argument is that, although the notion of friendship allows for the transcendence of individual egoism in relationships between individuals, the relationships of work and play which are the substance of association in the broader community do not, since in modern society they are primarily relationships between self-interested individuals. Nor does Finnis' notion of a community, (as an entity rather than as a form of association) fill this gap.

A group (which includes a community) is said by Finnis to exist

...wherever there is, over an appreciable span of time, a co-ordination of activity by a number of persons, in the form of interactions, and with a view to a shared objective.<sup>15</sup>

Since there may be any number of shared objectives, some of which could be held by the same person, communities may overlap. In relation to each community of which a person is voluntarily a member (e.g. a work community, religious community, residential community), pursuit of the shared objective may involve a transcendence of self-interest, but it is not the common goods of limited communities of this type which generate the general obligations of justice or the obligation to obey the law. The community relevant to these obligations is the political community, and the liberal notion of community which Finnis explicates is inadequate for this purpose.

As Finnis quite correctly points out, the form of community which lays claim to being a 'body politic' today is the territorial state. What originates and discriminates between such communities is the, at first *de facto*, exercise of authority to regulate all forms of human behaviour.

Authority in a community is to be exercised by those who can in fact effectively settle co-ordination problems for that community.<sup>16</sup>

But what community? Where are the shared objectives between the Australian Aborigines or the North American Indians and the British colonists, the West Bank Palestinians and the Israeli settlers? Finnis ad-

<sup>15</sup> Id at 153

<sup>16</sup> Id at 246

mits that the legal claims of the modern nation state are based on its 'self interpretation as complete and self sufficient community.'<sup>17</sup> Thus if a State interprets its area of authority as including territory occupied by two ethnically, economically and culturally dissimilar peoples, there is a 'political community'. But the only shared objective will be that imposed on at least one of the peoples, and possibly both, by the State.

This may seem innocuous where the 'shared objective', the 'common good' for that community, is

...the securing of a whole ensemble of material and other conditions that tend to favour the realisation, by each individual in the community, of his or her personal development.<sup>18</sup>

In fact however, the argument is an apology for arbitrary paternalism. It is arbitrary because, in the absence of a concept of political community which is qualitatively different from the quantitative aggregate of individuals in it, there is no sufficient reason why disparate groups within the community should favour optimum conditions for each individual's personal development, rather than those which favour maximisation of benefit for their own group. Whereas the shared objective of limited communities functions in both fact and reason as an apparatus for the transcendence of self-interest, the possible absence in fact of a shared objective in the political community entails its imposition as a necessity by those in authority. Furthermore, if the political community contains groups or limited communities whose economic and social practices are in conflict, there may be no set of conditions which favour the personal development of each individual consistently with existing cultural identities. Those in authority will then seek to secure conditions which favour individual well being in accordance with their own values, but not in accordance with those of all or even any of their citizens.

Finnis seeks to avoid these conclusions in two ways. Firstly by argument which incorporates the principle of subsidiarity into his notion of the common good. Secondly by elaboration of a concept of justice which yields specific substantive principles for the determination of conflict in social relations.

The principle of subsidiarity is that the proper function of association is to help the participants in the association to help themselves. In support of this principle, Finnis reworks Aristotle's argument against Plato's proposed sharing of women, children and all property, that the dissolu-

17. Id. at 149

18. Id. at 154

tion of family and property would water down human friendship. Friendship involves giving of one's things and one's self. If one has nothing to give apart from self, and if one gives of one's self to others in equal and impartial degree, this basic good of life is not fully attained.

Perhaps we are, alas, forever destined to transcend our own egoism only by more or less possessive love. Perhaps rich and powerful people have greater capacities in friendship because they have more to give. Or perhaps genetic engineering can take us out of this particular bind. Science fiction is as appropriate response as any to the myth of 'human nature'. But what has this to do with philosophical argument in support of the principle of subsidiarity against communism? Nothing at all and, more to the point, Aristotle's argument with Plato on this issue is made relevant only by selective distortion of his political philosophy as a whole, in tandem with the extraordinary assumption that contemporary communist political philosophy is adequately represented by Plato.

Aristotle begins his *Politics* with the statement,

Every state is a community of some kind and every community is established with a view to some good; for mankind always act in order to obtain that which they think good.<sup>19</sup>

According to Finnis

Aristotle had to begin his *Politics* with some reminders. Friendship is nothing if it is not willing the good of one's friend, committing oneself to helping him in his self-constituting participation in any or all of the basic aspects of human flourishing.<sup>20</sup>

This interpretation is so strained that it should be qualified by more than a floating end-note marked as pertinent to the previous section of the chapter.<sup>21</sup> So too, Finnis' rejection of Aristotle's 'fundamental assumption that the family is merely an association for the sake of life (survival and reproduction) (while the *polis* is an association for the sake of the good life)',<sup>22</sup> demands more than an end-note to textual argument which relies heavily on Aristotle's authority. Rejection of this fundamental assumption entails rejection of Aristotle's view that the political community, as the subject of political philosophy, is qualitatively different from

19. *Politica*, Aristotle, trans. by B. Jowett, (1921 ed.) I,1,1252a

20. Finnis, *supra* n.1, at 144

21. *Id.* at 157-8

22. *Id.* at 159

the quantitative aggregate of individuals comprising it and also from the family and village communities. There are arguments which support the principle of subsidiarity in Aristotle's rejection of Plato's views as to the form of political community best for those most able to realize their ideal in life, but there are also arguments in the *Politics* in support of slavery.<sup>23</sup> Can the philosophy of the Klu Klux Klan thus lay claim to being 'within the development of Aristotelian political science' and gain credence from such a claim? This is not just a silly quarrel about lineage. It is a question of whether philosophy demands a systematic and coherent exposition of thought or is satisfied by a clever concatenation of ideas and 'imaginative' interpretations of selected philosophical 'authorities'.

Very arguably, there is as much binding the political philosophies of Plato and Aristotle in their view of the State, as divides them in their view of the ideal form of political community,<sup>24</sup> but the supposition that Plato and Aristotle stand at the head of two separate streams of Western political philosophy, quite certainly rests on at least two misinterpretation of communist philosophy, and probably more.

The first is that it is a fundamental principle of communism that the needs of the individual are to be subordinate to the needs of the society. The second is that the communist call for the abolition of private property remains the Platonic call for universal private property. Both these fallacies rest on a perverse refusal to acknowledge that Marx's thought incorporated the dynamic Hegelian dialectic, in which antitheses are grasped in their active connection and move toward resolution, not the static Kantian dialectic in which the contradictory moments of thought stand in intractable opposition.<sup>25</sup> They further neglect the fact that Marx's analysis of economic history was analysis of the dialectical movement of society, involving the development of private property from primitive communism to capitalism and the emergence of the fully developed contradiction between capital and labour. In his view, the social corollary of the emergence of private property was the alienation of humans from their essence as social beings. The abolition of private property is the resolution of the contradiction of capital and labour and, at the same time, the transcendence of human self-estrangement.<sup>26</sup>

The principle that the needs of the individual are to be subordinated to the needs of society, which assumes that the two sets of needs have a disjunctive and mutually exclusive relationship, can thus be seen as

23. Aristotle, *supra* n.19, at I,5,1254b

24. See, e.g. F. Copleston, *A History of Philosophy*, (1962) v.I. Part II, 93

25. This contrast between the Kantian and Hegelian dialectic is clearly explained by E.V. Ilyenkov, *Dialectical Logic Essays on its History and Theory* (1977); see, in particular Essay 5.

26. K. Marx, *The Economic and Philosophic Manuscript of 1844*, ed. by D.J. Struik (1964) 132 ff.

a vulgarisation of developed communist thought. It is moreover a misinterpretation which Marx anticipated.

Above all we must avoid postulating "Society" again as an abstraction *vis a vis* the individual. The individual is *the social being*. His life, even if it may not appear in the direct form of a *communal* life in association with others — is therefore an expression and confirmation of *social* life. Man's individual and species life are not *different*, however much — and this is inevitable — the mode of existence of the individual is a more *particular*, or more *general* mode of life of the species, or the life of the species is a more *particular* or more *general* individual life.<sup>27</sup>

The point of all this is not to 'prove' Finnis wrong by citing Marx. It is to show that Finnis' argument for the principle of subsidiarity, consists in major part, of setting up a man of straw in order to knock it down and so establish a supposedly opposing principle.

The basic requirement of practical reasonableness that one is to favour and foster the common good of one's communities, yields the requirements of justice. Finnis' discussion of justice is thus an attempt to show how determinate moral principles are derived within his natural law theory. As a theory of justice it is unremarkable. He discusses general justice as the virtue appropriate to social relations and sub-divides it into distributive justice (concerning the allocation of benefits and burdens which are essentially common) and commutative justice (all other problems of social relations). A distribution is distributively just if it is reasonable, having regard to the essential categories relevant to questions of justice (needs, merits, works, function, etc).

Becoming more specific, Finnis argues 'for some form of private ownership, including of means of production, (as) in most times and places a requirement of justice.'<sup>28</sup> The argument is based, in the first place, on the principle of subsidiarity.

It is therefore a fundamental aspect of general justice that common enterprises should be regarded, and practically conducted, not as ends in themselves but as means of assistance and ways of helping individuals to 'help themselves' or, more precisely, to constitute themselves. And in all those fields of activity, including economic activity, where individuals or families, or other relatively small

27. Id. at 137-8

28. Finnis, *supra* n.1, at 169

groups, can help themselves by their own private efforts and without thereby injuring (either by act or omission) the common good, they are entitled in justice to be allowed to do so, and it is unjust to require them to sacrifice their private initiative by demanding that they participate instead in a public enterprise; it remains unjust even if the material dividend they receive from the public enterprise is as great as or even somewhat greater than the material product of their own private efforts would have been. The principle of subsidiarity is a principle of justice.<sup>29</sup>

The argument is circular. The concept of the common good does not yield the principle of subsidiarity and in turn the institution of private property. Rather subsidiarity and private ownership are fed into the notion of the common good to give it specific content.

The argument for the principle of subsidiarity has already been dealt with, but Finnis is not content to allow his plea for private ownership to rest on these inadequate foundations. As an alternative basis, he adds a 'rule of human experience';

Natural resources, and the capital resources and consumer durables derivable therefrom, are more productively exploited and more carefully maintained by private enterprise, management, husbandry and housekeeping than by the 'officials' (including all employees) of public enterprises.

And continues:

At least for the times and places and the classes of resources for which this rule of experience holds true, a regime of private ownership will be a requirement of justice, provided that the increased stock of goods yielded by such a regime is not hoarded by a class of successful owners but is made available by appropriate mechanisms (e.g. profit sharing; trade under competitive market conditions; redistributive taxation; full employment through productive investment; etc.) to all members of the community, in due measure. Of course, *if* the active members of the community were more detached from considerations of private advantage, from love of 'their own', etc, then common ownership and enterprise *would* be more productive of benefits for all. But a theory of justice is to establish what is due to a person

29. Id.



in the circumstances in which he is, not in the circumstances of some other, 'ideal' world.<sup>30</sup>

No evidence is offered in support of Finnis' rule of human experience. It must just be something which every intelligent and informed person knows. Somewhat startling perhaps for conservationists, but there we are. It doesn't matter anyway, because the rule is then used as a hypothetical. If, when, and where it is true, then justice requires private ownership in production, so long as there is re-distribution of the product. This is not because private ownership and public distribution is an ideal mode for the production and enjoyment of wealth, but because it is necessitated by human greed. Why are humans greedy? Well again, never mind. In this context, ours is not to reason why. We are to be saved from the consequences of our vice by 'mechanisms of redistribution' operated by the State.

Thus ultimately, human greed is posited as the category of (im)moral necessity which justifies private ownership and the State becomes the moral guardian which avoids the ill consequences which will flow from this institutionalised vice. It does this, not as representative of the community as a whole, but on behalf of the individuals to whom the requirements of distributive justice are primarily applicable. What gives the State this capacity is not explained.

Though Finnis fails to mark the distinction, he is no doubt aware that the argument about the justice of private ownership is not directed to property which an individual uses to satisfy his personal needs, but to property which is part of the means of production. It is precisely private ownership of the means of production which deprives some, but not others, of self-determination in the production and distribution of goods. But apparently, and at this point one begins to understand why Finnis left productive and creative work *off* the list of basic human goods, this is justified by the consequences — a greater gross national product.

There are however, more salient consequences, notably the emergence, as economic categories, of the two great classes of capitalist society, the working class and the bourgeoisie, whose material and social needs are in conflict. Even supposing that the State mystically transcends this division in society, and that civil servants are the Universal Class,<sup>31</sup> the redistribution of wealth and conservation of natural resources for the enjoyment of the whole community, including future generations, must stop short of giving to each and every individual the choice of selling his labour

30. *Id.* at 170

31 See *Hegel's Philosophy of Right*, trans. T.M. Knox (1967) Para. 303, 197-8.

for less than the value of the goods he helps to produce, and achieving the same standard of living by working for himself. It is only this choice which would satisfy Finnis' ideal of a society in which each and every individual has the opportunity to realise himself fully as a human being.

Furthermore, Finnis makes no attempt to answer the formidable problems of cross-categorical argument raised by his account of distributive justice. Even if we can agree on essential categories relevant to questions of justice, how do we reconcile their conflicting recommendations? How do we decide the size of the pay-packets of the worker with a sick spouse and eight children, the single worker who puts in an average day's work but possesses a skill without which the enterprise could not continue, and the single worker whose productivity is twice that of anybody else?

It's all very well to cite Aristotle's over-worked remark about not looking for more certainty than the subject matter is capable of yielding and retreat to the abstract category of what is reasonable, but the question is what is reasonable. Finnis is content to allow the contingencies of birth, opportunity and talent to determine the selection of owners of the means of production, and argues that a redistribution of wealth must be justified in terms of the common good. So a redistribution which deprives the wealthy few of the enjoyment of drinking fine wine at salon concerts given by select musicians in order to enable the common herd to drink beer in front of their television sets is not required by justice. Such a redistribution is required only if the funds released are to be set to some worthy account. Education of the common herd in the appreciation of fine wine and chamber music perhaps? Or would education in the subtleties of cricket and good beer suffice?

The eighth principle of practical reasonableness then, does not in its 'concrete implications', yield the requirements of justice. Finnis gives no adequate account of the State, no plausible justification of private ownership of the means of production, and assumes a fictitious homogeneity in the political community. Therefore all that is left to generate the obligation to obey the law is the assumption that any order is better than none. And this, as the experiences of Nazi Germany, Stalinist Russia or South Africa illustrate, is not true.

Nor can Finnis save his theory from the force of this conclusion by arguing that, in these exceptional cases, practical reasonableness will demand that the moral obligation to seek general justice outweighs the obligation to obey the law. This argument is dependent on Finnis' contention that the focal point of view for the analysis of law is that of the 'good man', i.e. the practically reasonable man who accepts the legal order because he understands it as necessary for the common good. From such a point of view, authority which is asserted for the benefit of those asser-

ting it rather than the common good, and a legal system which ignores the Rule of Law, fails as authority and as a legal system and so will not be accepted by the good man. The dictates of other moral principles will then determine his actions.

The substitution of the point of view of the practically reasonable man for the non-moral 'internal point of view' which is involved in this argument, is the essential difference between Finnis' account of law and Hart's.<sup>32</sup> Hart does not deny that law and morality are related with intimacy and complexity. Conceding the propriety of teleological argument from broadly ascertainable human purposes, and that the very process of ordering by rules involves minimal standards of formal justice, Hart formulates a minimum content of natural law as characteristic of legal systems, and allows for the operation of those basic principles of morality summarised as the Rule of Law. His conclusion as to the import of the latter fact applies equally to the former. 'It is unfortunately compatible with very great iniquity.'<sup>33</sup>

This conclusion can be avoided only by 'moralising' the internal point of view. In Hart's account the internal point of view is that of the man who, taking a critical and reflective attitude to given norms, regards them as standards of proper behaviour. It is a disposition of the intellect to which motive is irrelevant. It may be determined by calculations of self-interest, or altruism, or environmental or genetic conditions. Its significance lies not in why it is, but in that it is.<sup>34</sup>

Finnis argues that this is 'obviously inadequate'. The internal point of view, though adequate to explain the continuity and persistence of law, is inadequate *vis a vis* the transition from the pre-legal social order of custom to a legal order. Only the point of view which sees in law the answer to real social problems can 'bring about' this transition. Assuming that Finnis' argument is not historical but conceptual — that it is that he puts forward this criticism from the premise that elucidation of the focal meaning of a concept must account for all its essential characteristics, and that a full account of its existence must explain its becoming as well as its continuity and persistence — this is a valid argument against positivist jurisprudence. However, in filling the gap by reference to the subjective attitudes of individuals, Finnis makes a mistake of the same type, though of the opposite nature, as Holmes.

Finnis describes the 'central case of the legal view-point' as one 'in which legal obligation is treated as at least presumptively a moral obligation.'<sup>35</sup>

32 See H.L.A. Hart, *The Concept of Law* (1961)

33. *Id.* at 202

34. *Id.* at 198

35. Finnis, *supra* n.1, at 14

Unpacked by reference to his subsequent argument, this is the point of view of one who regards legal rules as setting standards of correct behaviour *because* he considers it necessary for the common good that such rules exist and be observed, both by himself and others. This use of the subjective motive loses the advantage of Hart's perception of the internal attitude.

Law, like morality, is concerned with the regulation of social relations but is distinguished from morality in that its normativity derives from a quite particular notion of validity — that a rule is valid if it is made according to a procedure laid down by another rule. The grundnorm or ultimate rule of recognition which stands at the apex of this hierarchical structure of rules may be a product of political fact or practical reason or some inter-active combination of the two. That does not matter for the purpose of this argument. What matters is that this non-moral notion of normativity is an important characteristic of the legal form, and is recognised as such by Finnis.<sup>36</sup> The explanatory value of the internal point of view is that it facilitates understanding of legal normativity.

Holmes insisted that law be viewed from the bad man's point of view, and this insistence, illuminating as it may be of some aspects of law, has been properly criticised for missing the point that the imposition of sanctions not only regularly follows breach, but is justified by breach.<sup>37</sup> By insisting that law must logically be explicated from the good man's point of view, Finnis obscures the point that the justice of the rule breached is irrelevant to this justification.

Finnis argues that the notion of legal validity is a technical device to achieve the decisional certainty necessary in a legal system. The conception of a legal system as a set of valid rules is appropriate for use within the legal process but he declares, it is a 'philosophical mistake' in discourse concerning the role of legal process within the ordering of human life in society, 'that a social order or set of legal concepts must be either law or not be law, be legal or not legal'.<sup>38</sup> That may be so, but Finnis' philosophical mistake is glaring. Having argued that the internal point of view is inadequate because it fails to account for law's becoming, he substitutes a point of view which is inadequate for the understanding of a formal characteristic of law, which on his own account is accorded the primary place.

Finally, after 368 pages of flowing loquacity, Finnis tells us that after all, what he has said won't quite do. There are problems of human

<sup>36</sup> Id. at 268

<sup>37</sup> Hart, *supra* n 32, at 132 ff

<sup>38</sup> Finnis, *supra* n.1, at 280

finiteness, of conflicts between individual goods, of why we should seek the common good, and thus

In the absence of any answer to such questions, the basic human values will seem, to any thoughtful person, to be weakened in their attractiveness to reasonableness, by a certain relativity or subjectivity – not so much the ‘subjectivity’ of arbitrary opining, but rather the ‘subjectivity’ of the ‘*merely* relative to us’ (where ‘us’ has an uncertain but restricted reference.)<sup>39</sup>

Finnis needs God. He needs him because he has attempted to construct a theory of law and ethics without reference to the actualities of human society. So, trotting out a potted version of Germain Grisez’, *Beyond the New Theism : A Philosophy of Religion*, he gives us ‘proof’ of the actuality his philosophy has sought to penetrate; God as the Uncaused Causer who not only makes possible ‘whatever well-being of persons there can be and actually is, but also positively favours (though in ways often unintelligible to us)’ – the buildup of the world’s lethal arsenal of nuclear weapons perhaps? – ‘that common good’.<sup>40</sup>

If Finnis’ *Natural Law and Natural Rights* is, as one enthusiastic reviewer<sup>41</sup> would have it, ‘seminal’, it can only be so of a new dark age in which philosophers, far from seeking to change the world, have abdicated even the attempt to understand it.

39. *Id.* at 373

40. *Id.* at 406

41. Bankowski, (1982) 98 *L.Q.R.* 473 at 475