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What a Sensible Natural Lawyer and a Sensible Utilitarian Agree About and Disagree About: Comments on Finnis

Donald H. Regan

Before I start, let me say two things. First of all, to the extent that John Finnis is entering a plea for more attention to what is a relatively neglected tradition (in the narrow world of English-speaking law schools), I endorse his message a hundred percent. And you could not find a better way to start learning about the natural law tradition than by reading his book, *Natural Law and Natural Rights*.¹

My second introductory observation is that Finnis and I agree about many more things than you might expect if you just think of him as a natural law theorist and me as a utilitarian. I am very eccentric as a utilitarian. He is, if not eccentric, at least unusually advanced as a natural law theorist. And we actually agree about quite a lot (although of course we also disagree about some important things).

The first thing Finnis and I agree about is our response to skepticism. Finnis tends to lump together skepticism, relativism, subjectivism and a number of similar -isms, but in this context that is perfectly appropriate. There are distinctions sometimes not worth making. I would lump all these -isms together and reject them all myself. And my agreement with Finnis is not merely negative. There is a positive proposition we agree on against the skeptics, namely, the proposition that there is an objective good. It happens that for Finnis knowledge is a kind of paradigm case of an objective good, and I also regard knowledge as a paradigm case. It is objectively good that we pursue and achieve knowledge; and the goodness of knowledge is not simply a matter of our taking pleasure in it or anything like that. So, Finnis and I agree about the existence of objective good.

Furthermore (and this is a separate point which it is possible to overlook), the good is to be pursued by any moral agent. Some people appear to hold the view, which I can hardly understand, that although there is an objective good, it makes no necessary claim on a moral agent. But I am pretty certain Finnis agrees with me that the good makes a direct necessary claim on moral

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

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agents. The good *is to be pursued*, somehow. I am for pursuing the good by maximization and Finnis is for pursuing it by what he regards as practical reasonableness, but we agree that the good as such makes a necessary claim on moral agents. In thinking this we differ not only from all those skeptics, subjectivists, etc., but also from the flavor (at least) of contemporary liberal theory.

Now one difference between Finnis and me is that Finnis is inclined to talk about this objective good as a “human” good. I am not inclined to put much weight on “human,” either in the phrase “human good” or in deriving the content of the good from human nature. I am a Kantian in this respect: I believe the objective good appeals not just to humans but to all rational agents as such. There is nothing special about “human good,” unless we mean by that simply the portion of the good that we humans happen to be situated to realize. So here is an area of apparent disagreement, which I can do no more now than call attention to.

Finnis’s next major topic is the methodology of the social sciences. I am unable to say for certain whether I agree or disagree with his claims here, partly because I am not sure I understand his claims and partly because I have no well-worked out view of my own about these questions. As to what I fail to understand in Finnis’s position, Finnis says: “[N]atural law theory argues that the formation and selection of concepts for social descriptions and explanations is and (unless they are to remain parochial) must be guided by the evaluations which critical reflection on the human situation shows to be critically justified.”² But what are these evaluations evaluations of? If they are evaluations of our descriptive and explanatory concepts, what is it for such concepts to be “critically justified” except that they figure in true descriptions and explanations? And if they are evaluations of practices or behavior, which the phrase “critically justified” tends to suggest, then how should these evaluations of practices or behavior affect our choice of descriptive and explanatory concepts?

Subject to all this uncertainty, I can still imagine a significant point of agreement between Finnis and myself in this area. Finnis’s references to Aristotle suggest that perhaps what Finnis has in mind is something like the following two-part thesis: (1) the central descriptive and explanatory concepts relevant to an understanding of the law (for example) must somehow reflect the place of law in an ideal society; and (2) natural law has a better view than the various positivisms of what the place of law in an ideal society is. If this is Finnis’s position, then I may agree with the first part of the thesis (depending on how it is understood), and I do agree with the second part. Positivists tend to concentrate on law as organized force and as a necessary social response to anti-social tendencies which every society has to contend with. Despite the element of truth in this positivist picture (and although I am myself a positivist on many issues), I am inclined to agree with Finnis and Aristotle that forcible suppression of anti-social behavior is not the real essence of law. The real essence of law is revealed in its contribution to social

2. John Finnis, *The ‘Natural Tradition’*, 36 J. Legal Educ. 492 (1986).

cooperation among people of good will. It is only because this is true that law would have a place in a thoroughly ideal society.³ And (arguably) it is only because law would have a place in a thoroughly ideal society that the concept of law is as important as it is to understanding (or describing and explaining) certain widespread human practices and behaviors.

Now we come to Finnis's third topic—what he calls the “critique of aggregative theories of the right”—which contains the major area of disagreement between us. I will mention in a moment why I think the label “aggregative theories” may be unfortunate. But what Finnis is mainly objecting to is the idea that the good is to be pursued by attempting to *maximize* the good in the world. Finnis's contrary idea is the idea referred to in modern parlance as “the priority of right.” It is the same idea that animates the doctrine of double effect, the idea that one must not use bad means to a good end—the idea, say, that one should not kill one innocent person to save a hundred. For myself, I definitely believe that the end justifies the means—provided, of course, that you understand what will actually be accomplished by your means and that you are evaluating the ends correctly, including any intrinsic disvalue that the means themselves may have when evaluated by the same criteria by which ends are evaluated. (Complexities loom at every turn.) In short, I am a consequentialist.

Now for what it is worth, I tend to think this disagreement between Finnis and me is less important than the large agreement we have about the existence of an objective good; but that is something else that we disagree about, because Finnis says he thinks that this disagreement between us is more important than what we agree on. One reason I think our agreement is more important than our disagreement is that it leads us to agree quite definitely about the inadequacy of standard Kantian attempts to demonstrate the priority of right. We agree that Kantians need a good deal of help if they are to give an adequate account of rights—help of the type that Finnis is offering, a grounding in objective good. Now I do not think the precise help Finnis offers is going to be enough. But we agree that the Kantians need something like what he offers.

What Finnis and I really disagree about is this business of pursuing the net greatest good. He has not given his argument why we should not pursue the net greatest good, so I can hardly give an argument in response about why we should. I am, nonetheless, going to respond a little bit to some things he hints at in this talk, and to some things he may not even hint at in the talk but that he says in his book.

One claim Finnis makes is that the various basic human goods are incommensurable; and if they are incommensurable, you cannot weigh them against each other and talk about a net greatest good. Now I do not think the basic goods, or at least Finnis's basic goods, are incommensurable. For Finnis, the basic goods are seven: life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion.⁴ But this list

3. For further elaboration, see my “Law's Halo,” forthcoming in *Social Philosophy & Policy*.

4. Finnis, *supra* note 1, at 86-90.

seems to me at least five items too long. Neither life nor practical reasonableness strikes me as a basic good. And the remaining five goods I think can be subsumed under suitably general (but not merely ad hoc) conceptions of knowledge and friendship. Whether these two basic goods can be rolled into a single over-arching good is a trickier question. But in any event, as the list of basic goods gets shorter, the theoretical problem of commensurability becomes less pressing.

Also, and more important in the end, we should not require for commensurability anything like mechanical quantifiability. One place something like Finnis's practical reasonableness *does* come in (although not as a separate basic good) is in the process of deciding between bundles of different goods, which is something we think reasonable men can in fact do, and which I see no reason to doubt that all perfectly reasonable men would always do in the same way (that is, with the same results). One reason people tend to think these goods are incommensurable is that commensurating them is difficult. Weighing and choosing creates hard problems about which actual people disagree. But as Finnis has so eloquently pointed out, disagreement about the answer to some question does not prove there is no answer.

It may be that the best we can do for the time being is to think about these commensuration problems by the now popular technique of reflective equilibrium, which is not in the end a satisfactory meta-ethics, but which may well be a good way of muddling along. You can use the reflective-equilibrium technique on questions about the good quite as effectively, maybe even more effectively, than you can use it on questions about the right.

Finally, to the extent that someone defends the doctrine of double effect with the claim that we cannot tell what the consequences of various acts are and we cannot commensurate the consequences, a (logical) consequence of that is that we need never *refrain* from doing an act that is *good* in itself on the ground that it might have bad consequences. Exactly the same argument from practical uncertainty that is offered to show we should never do an act which is bad in itself, justifying it by its anticipated good consequences, suggests that we should not worry about "unjustifying" (as it were) an act good in itself because it might have bad consequences. But that entails, for example, that a scientist doing possibly militarily useful research in a war-mongering country, so long as he is concerned only to advance pure science, need not worry at all about the possible bad consequences of his research. That is surely false. (I am not now saying the scientist should not do the research. I am saying that the possible consequences are a relevant consideration.)

A different claim Finnis makes is that belief in a greatest good entails that there is no possibility for free choice.⁵ Finnis appears to be suggesting that you cannot be making a free choice unless you have some sort of "moral elbow room." If this is what Finnis is suggesting, then we disagree again. In

5. Finnis, *supra* note 2.

this respect also, I am a Kantian. Freedom is following the moral law. And that is true even if the moral law is completely determinate about what you should do in a particular case (or in all cases!). You can still be acting freely when you do what the moral law requires. So, I do not see how the existence of a greatest good would destroy freedom of choice.

Finally, it seems to me that Finnis's objection to aggregation is not solely an objection to maximization. It is in part a perfectly justified objection to what it is that most people have historically wanted to aggregate (to maximize). Most people who have been "aggregators" have either been hedonists or they have believed that the good was the satisfaction of preferences. Now in my opinion those are both thoroughly misguided theories of the good. And to the extent that that is what Finnis is objecting to, then once again, I could not agree more. But my view about what is good is quite different from the views of the traditional aggregators. One thing that I (like Finnis) regard as intrinsically good and to be pursued is friendship, or even more generally, appropriate sorts of community (Aristotelian civic friendship, or the like). There is no reason we cannot take something like friendship or a larger community as a value to be maximized, and that explains why I do not like the term "aggregative." The term "aggregative" suggests that aggregators necessarily assume what we might call "moral methodological individualism"—the idea that everything that is good comes in little packets entirely enclosed within the limits of individuals, and then you aggregate over individuals. But that is just not true. And, as I say, that is a suggestion of the word "aggregative" that I would like to avoid, which is why I referred to myself not as an aggregator but as a consequentialist.