

FINNIS AND THE POLITICS OF NATURAL LAW

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Borges quotes “a certain Chinese encyclopedia [in which it is written that] animals are divided into: (a) belonging to the Emperor; (b) embalmed; (c) tame; (d) sucking pigs; (e) sirens; (f) fabulous; (i) stray dogs; (h) included in the present classification; (i) frenzied; (j) innumerable; (k) drawn with a fine camelhair brush; (l) *etcetera*; (m) having just broken the water pitchers; (n) that from a long way off look like flies. In the wonderment of this taxonomy the thing we apprehend in one great leap, the thing that by means of the table is demonstrated as the exotic charm of another system of thought, is the limitation of our own, the stark impossibility of thinking *that*.”¹

Introduction

In his book, *Natural Law and Natural Rights* (“NLNR”),² John Finnis presents, in effect a critical elucidation of the nature, boundaries and inter-relations of legal and moral obligation. The contention of this paper is that Finnis’s critical project does not work. It does not, as seems to be intended, establish its own credentials to be objective — one has first to share certain assumptions with Finnis, and he provides no persuasive reasons why one should. Nor is NLNR particularly critical, since the ideas out of which it is con-

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1. M Foucault, *The Order of Things An Archaeology of the Human Sciences* (London: Tavistock, 1970) XV.
2. J Finnis *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980).

structed are merely variants of those in which the politics of the status quo are expressed.

Now it is, I maintain, always the case that one must share certain assumptions in order to understand, let alone find persuasive, any set of ideas and practices. Political and academic arguments, among others, can be seen as attempts to broaden, explore, or to change the nature of such assumptions, by intimidation, force, or dialogue and with greater or less formality. NLNR does not accept that this is the case at all, however, and after a few methodological precautions in the early chapters, it quickly turns into a demonstration of the Truth by means of a rationality crafted to prove its objectivity.

The failure of NLNR's attempt to establish itself as a piece of objective knowledge — or even the possibility of such a thing — returns us to its politics. Its general acceptance of the ideas in which the status quo is interpreted and explained places it within a kind of liberal democratic politics. There is, in principle, nothing wrong with this — on what grounds could in-principle argument be forbidden? But what it means is that responses to the politics of NLNR ought not to be foreclosed by disciplinary boundaries, especially since some disciplines seem constructed expressly for the purpose of denying that they encompass any political argument at all.³

My approach to NLNR, then, will see its claims to objectivity as doomed to failure and criticise its politics not for their existence, but for their nature. They can be much improved upon.

The basic goods

Finnis's first concern is to find and justify a site from which his ethical critique can be launched. "There are," he says, "human goods

3. See D E Smith *The Everyday World as Problematic: A Feminist Sociology* (Boston: Northeastern University Press, 1987); S Harding *The Science Question in Feminism* (Ithaca: Cornell University Press, 1986); S Harding and M B Hintikka (eds) *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science* (Boston: D Reidel, 1983); S Harding "Is there a feminist methodology?" in S Harding (ed) *Feminism and Methodology: Social Science Issues* (Milton Keynes: Open University Press, 1987); S Rose L J Kamin and R C Lewontin *Not in our Genes: Biology, Ideology and Human Nature* (Harmondsworth: Penguin, 1984); M Shaw *Marxism and Social Science: the Roots of Social Knowledge* (London: Pluto Press, 1975); K Salleh "Contribution to the Critique of Political Epistemology" (1984) 8 *Thesis Eleven* 23.

that can be secured only through the institutions of human law” and there are “requirements of practical reasonableness that only those institutions can satisfy.”⁴ Practical reasonableness is a means by which one may establish what are the basic human goods, and a method for choosing among them, since we cannot have all of them at once. It is the means of investigating legality, and the quality which the investigated legality must possess if it is to make moral claims upon the individual, since a moral claim is better seen as a claim of practical reasonableness.

To put it another way, if we are human, then according to Finnis there are good reasons why we should act in ways in which it is practically reasonable for humans to act. In order to do so, we have to try first of all to achieve a site from which to recognise and apply practical reasonableness. Second, since some aspects of practical reasonableness can be achieved only through human law, there must be law. But law enables us to achieve our objective only when it is itself practically reasonable.

So what is practical reasonableness, and in what direction does it point?

Among those who, from a practical viewpoint, treat law as an aspect of practical reasonableness, there will be some whose views about what practical reasonableness requires in this domain, are more reasonable than others.⁵

A society’s self-evaluations of what is required may fall into the category of less reasonable since they may “betray the influence of ideological myth.”⁶ In order to qualify for the more reasonable view, a “descriptive social science” must realise

that the point of reflective equilibrium...is attainable only by one in whom wide knowledge of the data and penetrating understanding of other men’s practical viewpoints and concerns, are allied to a sound judgment about all aspects of genuine human flourishing and authentic practical reasonableness.⁷

Of “reflective equilibrium in descriptive social science,” Finnis says: “The theorist who could attain this point would be one whose viewpoint systematically approximated the ‘universal viewpoint.’”⁸ Such a viewpoint, he cites I F Lonergan as remarking, “is univer-

4. *Supra* n 2, 3

5. *Ibid*, 15.

6. *Ibid*, 16.

7. *Ibid*, 18.

8. *Ibid*, 21.

sal not by abstractness but by potential completeness not by stripping objects of their peculiarities...but by envisaging subjects (ie persons) in their necessities.”⁹ The more reasonable theorist is a person who not only uses practical reasonableness, but who is

practically reasonable, that is to say: consistent; attentive to all aspects of human opportunity and flourishing and aware of their limited commensurability; concerned to remedy deficiencies and breakdowns and aware of their roots in the various aspects of human personality and in the economic and other material conditions of social interaction.¹⁰

Such a person would be a splendid companion and sparring partner for Hercules J or for Hegel’s *Geist*, coming to know itself.

What now remain unexplained are the conditions of human flourishing and in what direction the apparatus leads us once it has been set in motion. These are the substance of the book, *Natural Law and Natural Rights*.

Demonstrating the basic goods

The way in which these goods are revealed, and the specifics of what is revealed, need some attention. Knowledge is Finnis’s “demonstration” good. If he can convince the reader that the means by which it can be seen to be a good are appropriate, he suggests that there will be less difficulty over the remainder of goods on his list. His first effort is linked to a defence against the charge of breaching the is/ought divide. There is, he says, “no process of inference.”

One does not judge that I have [or everybody has] an inclination to find out about things and then infer that therefore “knowledge is a good to be pursued.” Rather, by a simple act of non-inferential understanding one grasps that the object of the inclination which one experiences is an instance of a general form of good for oneself (and others alike).¹¹

One wants to know more about this non-inferential understanding, because of the key role which it plays in NLNR. “Obvious, self-evident, flourishes (are) the key ideas which allow the text to

9. Ibid, 22.

10. Ibid, 15. At p 50 Finnis challenges his opponents to prove that his basic conditions of human flourishing and his basic requirements of practical reasonableness are historically conditioned — that at other times they would have been different. My response is that if one adopts Finnis’s assumptions he may be correct, but I have no interest in doing so. Generally, my view is that his propositions escape historical specificity by abandoning *any* specificity.

11. Supra n 1, 34.

make its claims.¹² ...[T]hrough the use of intelligence, in an unmediated flash, seven basic values are recognised from which all other forms of good can be derived...¹³

It is impossible, according to Finnis, to deny that knowledge is a human good, because in order to accomplish such a denial it would be necessary to deploy knowledge. A remark by Pascal is in the same vein: “to ridicule philosophy is to philosophise”.¹⁴ It sounds suspiciously neat.¹⁵ As with all kinds of neatness which rely upon definition, whether Euclidean geometry, mathematics, or tautology in philosophical discourse, it relies upon agreement that the statement with which one finishes “really” matches the preceding statements.

There has to be agreement: Euclidean geometry cannot pre-empt or foreclose non-Euclidean geometry, and mathematical theorems cannot generate their own truth — conditions.¹⁶ Agreement can, of course, be forced. As Grbich points out “.....the search for criteria of knowledge, the search for certainty, can be abandoned only when one occupies a position of social power.”¹⁷

What we notice with Finnis’ demonstration is a slippage to which he himself points in the meaning he gives to knowledge. He does not wish to assert the goodness of all kinds of knowledge. Thus some is merely instrumental: “ie as useful in the pursuit of some other object, such as survival, power, or a money-making cup of coffee.”¹⁸ The kind he wishes to see as self-evidentially good is: “the desire or inclination of felt want that we have just for the sake of knowing we want to find out something.”¹⁹ However, in defending or attacking the self-evident nature of the latter kind of knowledge,

12. C Douzinas & R Warrington “On the deconstruction of jurisprudence: Fin(n)is Philosophiae” in P Fitzpatrick and A Hunt (eds) *Critical Legal Studies* (Oxford: Blackwell, 1987) 36.

13. *Ibid.*, 34.

14. Quoted in J Ree *Philosophical Tales* (London: Methuen, 1987) 55.

15. “Is there not something distinctly fishy...?” Finnis asks at p 67. The answer is “yes”.

16. See the discussions of Godel’s Theorem in D R Hofstadter *Godel, Escher, Bach An Eternal Golden Braid* (Hassocks: Harvester Press, 1979) R L Gregory *Mind in Science A History of Explanations in Psychology and Physics* (Harmondsworth: Penguin, 1984); R Hofstadter *Metamagical Themas: Questing for the Essence of Mind and Pattern* (New York: Basic Books, 1985).

17. J E Grbich *The Body in Legal Theory* (1990) Wisconsin Women’s Law Journal (forthcoming).

18. *Supra* n 2, 59.

19. *Ibid.*, 60.

I would not be using it and therefore contradicting myself by, at the same time, condemning it, or denying it. I would be using instrumental knowledge, something "...useful in the pursuit of some other object," namely acceptance or repudiation of the idea that pure knowledge "just for the sake of knowing" was self-evidently good.

It is not an answer to this objection for Finnis to assure us that "knowledge is of truth...so one could speak of truth as the basic good with which we are here concerned, for one can as easily speak of truth for its own sake as of 'knowledge for its own sake'".²⁰ Why it is not an answer returns us to examination of more of the vagueness which characterises the arguments of NLNR. For what insight is gained from the proposition that "knowledge is of truth"? If I say the X is true because I know it, and that its being the truth is a guarantee that my relation to it is one of knowing, rather than of belief or delusion, almost nothing is explained beyond, perhaps, the low enrolments in a jurisprudence which contains such propositions.

If truth were a *test* of knowledge, there would have to be an independent way of discovering it, which would make knowledge a bit beside the point and provoke the question, "how *is* truth discovered?" If truth were the *product* of knowledge, on the other hand, then the proposition "knowledge is of truth" would become the proposition that "knowledge is of the product of knowledge," which would remind us of where we begin but take us no further.

One way forward is to understand knowledge as a process of social negotiation.²¹ As with language, so with other forms of knowledge, we learn conventions which enable us to form communities, groups condensed around mutually recognised notions of "how to go on". They make criticism and the extension and rejection of conventions possible.²² Apart from its other problems, from this last

20. Ibid, 59.

21. T S Kuhn *The Structure of Scientific Revolutions* 2nd edn (Chicago: University of Chicago Press, 1970). See also the discussion in P Hirst *Durkheim, Barnard and Epistemology* (London: Routledge and K Paul, 1975).

22. This is not to suggest that knowledge emerges unconstrained: see Foucault's comments in his essay "Truth and Power" in C Gordon (ed) *Michel Foucault Power/Knowledge: Selected Interviews and Other Writings 1972-77* (Brighton: Harvester Press, 1980) 113. Also P Dews *Logics of Disintegration: Post-structuralist thought and the claims of Critical Theory* (London: Verso, 1987) Ch 6.

perspective, Finnis's "knowledge as truth" obscures, while not necessarily rejecting, the social constitution of knowledge as practice.²³ In knowledge, worlds are constructed, and senses are made. Like trade, like language, knowledge is social.²⁴ It is also, from this point of view, plural and subject to change.

Lacking independent access to the truth — the real world as the realists call it — people constitute truths within communities of practical understanding. Where there are many such communities, one would expect to find many truths and many real worlds. We could locate choice and change at the intersections among them since people identify themselves within different and often non-complementary communities, and have access to many sources of information about how to go on.

Some of these may require nurture, further explanation and more dialogue. On this model it cannot be pretended that the truth, solitary and eternal, is apprehended by the wise man in reflective equilibrium.²⁵ The content of knowledge changes: Kant "knew" that time was constant and we now "know" that it cannot be. Classical physics saw knowledge and the knower as detached, but modern physics does not.²⁶

If we remove the possibility of occupying a universal position, we are left with the need to recognise and justify the position occupied. This can only be an exercise of evaluation or even politics. It is certainly — when one is reflexively aware, of where one is knowing from, and of what alternatives exist — a matter of choice.²⁷

To write history, for example, is not to reproduce everything that happened until now, since that is not possible, nor even to produce

23. S Woolgar *Science, the Very Idea* (London, Tavistock Publications, 1988); also A F Chalmers *What Is this Thing called Science? An Assessment of the Nature and Status of Science and its Methods* 2nd edn (St Lucia, University of Queensland Press, 1982) Finnis appears to believe that what knowledge is, as well as its goodness is self-evident.

24. The analogy with trade is Wittgenstein's. For an elucidation, see N Malcolm *Nothing is Hidden Wittgenstein's criticism of His Early Thought* (Oxford, Blackwell, 1986) 175. See also the chapter "On certainty."

25. R J Bernstein *Beyond Objectivism and Relativism Science, Hermeneutics and Praxis* (Oxford, Blackwell, 1983).

26. J Bronowski *The Common Sense of Science* (Cambridge: Harvard University Press, 1978); D R Oldroyd *The Arch of Knowledge An introduction to the Study of the History of the Philosophy and Methodology of science* (Kensington NSW: New South Wales University Press, 1986).

27. *Supra* n 25.

symbolic representations, writing, attempting total recall. “Imagine”, write Rorty, Schneewind, and Skinner, “a thousand volume work entitled *The Intellectual History of Europe*”.

The thought that descriptions of political discourse in twelfth century France, metaphysics in nineteenth century Germany and painting in fifteenth century Urbina might some day flow together to create the seamless tapestry which would be our ideal *Intellectual History of Europe* is an elevating one but it is the idea of a book written by no human hand.²⁸

E H Carr points out that:

...the names by which successive French historians have described the Parisian crowds which played so prominent a role in the French Revolution — les sans-culottes, le peuple, la canaille, les bras-nus — are all, for those who know the rules of the game, manifestos of a political affiliation and of a particular interpretation. Yet the historian is obliged to choose: the use of language forbids him to be neutral.²⁹

Principles of theoretical rationality

Finnis is not concerned with all this but rather seeks to provide objective grounds for his subsequent assertions. “It is obvious that a man who is well-informed etc simply *is* better off (other things being equal) than a man who is muddled, deluded and ignorant.”³⁰ Unless some unusual specification of word usage is given in a text, this would, of course, have to be the case since being well-informed means something better than being badly-informed.

Again, Finnis says that “knowledge is better than ignorance.....the principle that the truth is worth knowing and that ignorance is to be avoided is not itself a moral principle,” and so not caught by a skeptical observation that opinions differ about what is good and what is bad.³¹

It is impossible to gainsay assertions of this kind, as it is to deny that evil should be eschewed and good sought. But if the meaning of the terms is not clear, not only is denial impossible and assent compelled, but the substance escapes altogether. One is reacting to abstractions.

Finnis does offer some “principles of sound empirical judgment”, or more generally, of “rationality in theoretical enquiries,” which

28. R Rorty J B Schneewind and Q Skinner (eds) *Philosophy in History Essays on the Historiography of Philosophy* (Cambridge: Cambridge University Press, 1984) 1.

29. E H Carr *What is History?* (Harmondsworth: Penguin, 1964) 25.

30. *Supra* n 2, 72.

31. *Supra* n 2, 73.

might constitute methodological hints.³² Logic is one, although he warns that “no non-circular proof” of logical deduction is available. Adequate reasons why something should be so rather than otherwise is another, along with the advice that “self-defeating theses should be avoided.”

A fourth “is that phenomena are to be regarded as real unless there is some reason to distinguish between appearance and reality”³³ and this may be more problematic, especially if the investigator is “reflecting”, as Finnis at various points in his book recommends. For example, a complex series of equations may tell us what to make of a number of readings from various instruments. Something like a pulsar may exist as a complex of signals plotted on the readout from a radio telescope. There may be other ways in which it can exist for us as a consequence of other theories, or it may turn out to be an anomaly, or part of something else entirely.³⁴

In social science, class, capital, market forces, or the tendency of the rate of profit to decline, are real to the extent that theories use them and modify them when further theoretical work explains what counts as falsification, or indicates the need for change. The reality of a table, for example, is given not simply by its appearance but by its place in a set of social practices and values. If we were not familiar with the practices of sitting on chairs at tables to eat or to write, in our first encounter with a table we would try to fit it into our social system and its reality might be as a clumsy sort of raft, a piece of sculpture, a place on which to stand and speak, or, as simply a prestigious possession, valuable by means of its uniqueness.

There is, then, no essence of tableness, no ultimate reality outside the social processes of negotiation — that the dog should be kept off it, perhaps, or that feet should go under it rather than on it at mealtimes. We know things which are woven into the tapestry of our practices, where, of course, they change as do our practices.³⁵

Finnis’s fifth principle of “rationality in theoretical inquiries” is that internal inconsistency is to be avoided. Linked to this for no

32. *Supra* n 2, 68-69.

33. *Supra* n 2, 68.

34. *Supra* n 23.

35. D Smith *supra* n 3.

apparent reason is the requirement that a full rather than a partial description of the data is to be preferred. I shall treat this as a separate requirement because it merits further discussion. For instance, how does one know what the full data are in relation to a particular phenomenon? How does one know where one phenomenon finishes and another begins? The answer surely, is to be found in the particular theory one is using as means of investigation, and in the background assumptions and practices in which it is set — and which can, and one anticipates will, change.

Next, Finnis recommends “that a method of interpretation which is successful is to be relied upon in further similar cases until contrary reason appears.” Finally, “...theoretical accounts which are simple, predictively successful and explanatorily powerful are to be accepted in preference to other accounts.”³⁶

Enough has been said already to suggest some doubt about the requirement that theories operate predictively. The uncertainty principle, the effect of the observer upon the observed and the need to locate the observer operate to restrict the predictive capacity of any theory. Explanatory power, on the other hand, is precisely what one seeks.

Anthropological universals

It seems doubtful that Finnis’s principles of rational theoretical work do, or could do, what he asks of them. We can agree that it is better to be well-informed than not, but without an adequate criterion of what being well-informed is, this does not take us very far. We can agree upon his strictures on the usefulness and limitations of logic, upon the need for non-self-defeating argument and upon the value of powerful explanations which are as simple as possible.

But if he is to establish an indisputable ground for real as opposed to spurious knowledge he must do more than produce epistemological abstractions such as that “knowledge is of truth”, and procedural rules. For the reasons I have given, I do not think that the assertion that knowledge is a self-evident good works. Later on I will argue that the generation of plural knowledges is good because it empowers. It enables people who had no history to uncover one, often in the interstices of “official” pasts. It gives a voice

36. *Supra* n 2, 69.

to those who have been silenced and it enables people to work out who they are and what they could become.³⁷

As a result it permits people to participate in the governance of themselves. That result seems to me to be a good, and I agree with Finnis that one cannot expect to be able to demonstrate the goodness without succumbing to infinite regress. But self evidence will not do: all I would say is that the undoubtedly complex and lengthy process of political empowerment through the generation of many knowledges can be tried, and people can be asked. If they wish to return to the world as I and they with all our differences perceive it to be as I write, then it is unlikely that we shall have made things any worse from the point of view of the species generally.

How, then, should we characterise NLNR? Blueprints for human good, if they cannot be founded upon indubitable principles — and Finnis has not demonstrated that they can be — must be evaluated as social science texts, as explanations, critiques and arguments for change, depending on their nature.³⁸ NLNR operates in all three modes. Certain questions or themes recur in this inquiry: how adequate is Finnis's account of how social orders operate? Is he able — and is it possible — to find “common” goods, goods which are not merely good for some actors at particular spatial and temporal locations, without being so abstract, or so qualified in his specifications as to give us no information at all? The answer to both questions is, I think, negative in tone.

There is, in Finnis's social explanations, and there is almost bound to be with his sort of project, a tendency to produce a theorem rather than a theory at many levels. At the highest level, for example with Finnis's self-evidence postulates, it is intentional and overt. At lower levels it seems to recur unintentionally as circularity, as in his list of anthropological uniformities.

37 See, for example, S Rowbotham *Hidden From History 300 years of Women's Oppression and the Fight Against It* 3rd edn (London: Pluto, 1977); M Jackson “Pakeha definitions” *The Listener* (New Zealand) 8-14 July 1989, 55 reviewing I H Kawbur (ed) *Waitangi Maori and Pakeha Perspectives of the Treaty of the Waitangi* (Auckland: Oxford University Press, 1987); T McCreanor “Talking About Race” in H Yensen K Hague T McCreanor J Kelsey D Williams and M Nairn (eds) *Honouring the Treaty An introduction for Pakeha to the Treaty of Waitangi* (Auckland: Penguin, 1989).

38. And we ought, as Foucault suggests, to analyse their “regimes of truth”. Gordon supra n 22.

Witness the vagueness with which he makes “some rather confident assertions” about “all human societies.” They all, he says, value human life, thus accept self-preservation as a motive for action and condemn killing “without some fairly definite justification.”

All human societies regard the procreation of...human life as in itself a good thing unless there are special circumstances. No human society fails to restrict sexual activity; in all societies there is some prohibition of incest, some opposition to boundless promiscuity and to rape, some favor for stability and permanence in sexual relationships.³⁹

The list goes on to include the universality of practical and speculative education as indicators of “a concern for truth,” nurture, co-operation, friendship, property, recreation and respect for the dead bodies of members of the group.

Plainly, if we are talking about a “society,” if that is what, as anthropologists or social theorists, we are observing, we mean some self-consciously regulated structure of human relationships which generate knowledges about “how to go on”, what is appropriate for specific individuals to do and say and even to think and feel, on particular occasions.⁴⁰ Not merely external or public behaviour is regulated, but we take understandings of how things should be into the most intimate and private regions of our lives: sexual relations, private reflections, personal religious reactions and so forth. The society creates public and private, personal and social, sacred and profane, and its culture gives us our only ways — and by no means consistent or coherent ways — of knowing who we are.⁴¹

To say that societies regulate conduct, then, is merely to explain what the term “society” means. To say that all societies regulate conduct is to invite the commendation that one is using the term consistently. If some meaningful pattern is sought, capable of telling something about the human condition, the search would have to

39. *Supra* n 2, 83.

40. See A Giddens *Social Theory and Modern Sociology* (Cambridge: Polity Press, 1987); also A Giddens *The Constitution of Society Outline of a Theory of Structuration* (Cambridge: Polity Press, 1984)

41. J Henriques W Hollway C Urwin C Venn and V Walkerdene (eds) *Changing the Subject Psychology, Social Regulation and Subjectivity* (London: Methuen, 1984); P Hirst and P Woolley *Social Relations and Human Attributes* (London: Tavistock Publications, 1982), N Abercrombie S Hill and B S Turner *Sovereign Individuals of Capitalism* (London: Allen and Unwin, 1986); P Smith *Discerning the Subject* (Minneapolis: University of Minnesota Press, 1988).

be at an empirically detailed level. Thus it is of little use to say that incest is prohibited universally (and Finnis does not even want to be so detailed: he speaks of “some prohibition of incest” — well, how much is necessary to make one society similar to another?) Different societies mean different things by incest. Or rather, since the “incest taboo” is a construction from the standpoint of western anthropologists, it is better to say that societies regulate sexual relations in widely variant ways.⁴² Kinship patterns — hence definitions of incest — are about as varied as human biology permits.

If we follow Finnis through his list of what all societies do, the same problem reappears. He tells us that in no society “is the killing of other human beings permitted without some fairly definite justification.” Since we already have a definition of society, we know that Nazi Germany and Canada are both examples. Now we are able to discover that they have something else in common — the regulation of killing, specifically. Bizarreness of result does not, of course, rule out a social theory, but there seems a crucial lack of explanatory power here. If Germany under Hitler, Russia under Stalin and Kampuchea under the Khmer Rouge are on some analysis considered similar, in that they regulate killing, to Canada, Australia or Cuba, the analysis is surely too abstract to be of any use whatever.

On we go. It is simply not true that the procreation of human life is regarded by all societies as a good thing in itself. Contraception, abortion and the exposure of infants are all very widespread practices because procreation is valued according to circumstances and culture. They do not occur only in “special circumstances” — unless Finnis wants to argue circularly that all circumstances in which the procreation of human life is not regarded as good in itself are special.⁴³

“Boundless promiscuity” could scarcely not attract “some opposition” in a society which was satisfied that it knew what it was, since

42 E Leach *Social Anthropology* (New York: Oxford University Press, 1982). There is a summary of the incest topic in anthropological literature at 234. In Chapter 2 he remarks that zoological unity does not constitute human unity, since culture, which is what distinguishes humanity, is extraordinarily diverse.

43. S Coontz *The Social Origins of Private Life* (London: Verso, 1988); O Harris and K Young “Engendered Structures. Some Problems in the Analysis of Reproduction” in J S Kahn and J R Llobera (eds) *The Anthropology of Pre-Capitalist Societies* (London: Macmillan Press, 1981).

the use of the word implies behaviour to which there is a lot of opposition in the society in question.⁴⁴ But that society X regards particular conduct as promiscuity whilst society Y regards other conduct as promiscuity is a mark of difference as much as of similarity. In Anglophone societies the boundaries of promiscuity are drawn differently for men and women, and for men among classes. Young upper class males in some societies are not promiscuous, they just “run wild” or “sow wild oats,” generally among females of a lower social class.⁴⁵

Rape is a notoriously problematic concept, even without the undefined nature of “some opposition” to it which Finnis detects in all societies. In marriage it has been condoned by most religions and most governments for centuries, and the opposition to it outside marriage is so weak in practice that Catherine Mackinnon has found startlingly high rates of it and other forms of sexual assault in the contemporary United States.⁴⁶

With property I want to leave Finnis’s list more or less where I began, with the realisation that “society” implies self-conscious regulation of formal and informal kinds. This means that activity within the environment and access to resources are managed, and that some forms of behaviour are considered appropriate and some are not. But this is as precise as one can be if one wishes to find property concepts in common among Kalihari Bushpeople, Aboriginal societies in Australia, feudal England, Scottish Highland clans and modern capitalism.⁴⁷

Confident though Finnis may be about his assertions, where he is not inaccurate he is again simply too vague for any conclusions to be drawn about human nature, and it is just as well that he is anxious, at least at this stage, not to be seen to be drawing inferences from the “is-world” of human nature to the “ought-world” of normativity and rules for the good life.

44. K Gough “The Origin of the Family” in R R Reiter (ed) *Toward an Anthropology of Women* (New York: Monthly Review Press, 1975).

45. F M L Thompson *The Rise of Respectable Society. A Social History of Victorian Britain 1830-1900* (London: Fontana Press, 1988) Chapters 3 and 7.

46. C McKinnon *Feminism Unmodified. Discourses on Life and the Law* (Cambridge: Harvard University Press, 1987): “The reality is that not only married women but also women men know or live with can be raped at will. Men know this. Rape is not illegal, it is regulated.”

47. J Keenan “The Concept of the Mode of Production in Hunter-Gatherer Societies” in Kahn and Llobera *supra* n 43.

Politics and practical reasonableness

When we appreciate where this leaves his critique we can understand more clearly what he was trying to avoid, namely the appearance of making political choices. Despite repeatedly denying that his argument was of a foundationalist kind, he is in fact attempting to construct a solid foundation for a set of principles designed to orient the individual in human society and perhaps beyond.

Practical reasonableness plays a double role. It is one of the basic values or conditions of human flourishing. We have noticed some of its qualities, and Finnis sums it up as:

complex, involving freedom and reason, integrity and authenticity... [It is] the basic good of being able to bring one's own intelligence to bear effectively (in practical reason that issues in action) on the problem of choosing one's action and life-style and shaping one's own character.⁴⁸

As one of the basic values it is, according to Finnis, self-evidently good, like knowledge, and in addition it is what enables one to appreciate the self-evident goodness for human flourishing of the other values, life, knowledge, play aesthetic experience, sociability and religion. The interlocking nature of the project becomes clearer.

There is a tendency in NLNR, when we come to what are at first sight common goods or conditions of human flourishing, to assert an abstract principle, to appear to flesh it out and render it specific, but then to qualify it again into ambiguity. The rabbit comes out of the hat, turns into a dove and flies away. At the end, as at the start, the hat is empty. What could have been a mammal may as easily have been a bird and has anyway escaped. The person on the stage smiles enigmatically. Is he an agent of discovery or a master of illusion, is he demonstrating or conjuring, teaching or entertaining? These are not mutually exclusive categories: from illusion and magic, paradox and ambiguity we can learn a good deal.

It is possible in this case to apprehend the politics of natural rights, but first I will exemplify the process of conjuring with a brief reference to Finnis's discussion of private property. As seventeenth century writers appreciated,⁴⁹ society and property are inex-

48. *Supra* n 2, 88.

49. In the century between Locke and Adam Smith, "property" was narrowed in meaning and came to refer only to the possession of title to goods or land. See J Tully *A Discourse on Property* (Cambridge: Cambridge University Press, 1980).

tricable, for the existence of society implies the regulation of access to resources. In most times, Finnis suggests that personal autonomy, a good which of course requires to be qualified in order to promote broader human flourishing, is served by some regime of private ownership, including ownership of the means of production.⁵⁰

This is a general and historically unspecific proposition, but then we are introduced to a "rule of experience" (which must by definition be historically very specific: individuals undergo experiences on particular occasions) that assets which are in private hands are managed better than assets in the care of officials or employees of public enterprises.⁵¹

This experience has generated a rule. We have learned from it. We can (not logically, but as a rule of thumb) use it. Can we not rebut it? An opponent wishes to offer the experience of (say) an indigent accident or cancer sufferer looking for hospital care in the United States. Another wants to compare Qantas or Singapore Airlines with Continental Airlines; another to query whether the Concorde, built by an Anglo-French consortium of nationalised industries was any more a publicly-produced commodity than the Boeing 747, built by a corporation massively funded by Pentagon cost-plus defence contracts, and supported by United States Government tariffs, subsidies and bilateral trade agreements.

It turns out that the rule of experience, empirical though it seemed, cannot be rebutted, for if it is, it simply "does not hold true." There is no guidance as to when or where it might, or might not hold true, it simply escapes, leaving, like the Cheshire cat, a smile and a quotation from Aristotle: "[P]roperty ought to be common in a sense, but private generally speaking...possessions should be privately owned but common in use; and to train citizens to this

50. Finnis's evident contempt for economics and economic history is obviously not bred of familiarity. For in all but a fragment of human history, private property was almost unknown: see M Mann *The Sources of Social Power* Vol 1 (New York: Cambridge University Press, 1986). In modern times legal concepts are relatively feeble tools for understanding the dynamics of large scale enterprise: see eg B Jesson *Behind the Mirror Glass The growth of wealth and power in New Zealand in the eighties* (Auckland: Penguin, 1987).

51. This is simply the repetition of propaganda. Arguments are available to support a number of positions, but none is referred to. Here vagueness predominates. What do public and private mean in this context? Is ICI public or private?

is the special task of the legislator.⁵² There is then a section telling us how variable property concepts are, how complex it all is, and how people ought to be able to own things but that officials ought to be able to ensure that the things are used productively for the common good. But this amounts to management by officials, which is what our rule of experience is supposed to have indicated led to bad management.⁵³ The magician's hat is empty once again.

Principles of practical reasonableness

The politics of Finnis's rights are not noisy indeterminate compromises, the stuff of hustings, committees, assemblies and debates, but the quiet reflections of the "wise man," a "statesman" sometimes, or a "father." Unobtrusively, perhaps, to one accustomed to the texts in which the stoic/christian tradition is expressed, gender slips in. Ungendered humans have needs, conditions of flourishing, but the process of understanding and securing those conditions is invariably in male hands. Children are entitled, in schemes drawn up for the common good, to maternal nurture and paternal wisdom.

As we have seen, the device used by the statesman, or the father, the "mature man" to realise the common good, is "practical reasonableness." The subject who is possessed of practical reasonableness is able to assess, justify or criticise the behaviour and the institutional arrangements he finds on his social travels. Only a practically reasonable person can calculate the requirements of natural law: or to put it another way, natural law unfolds in the reflections of such a person.

The tradition of natural law theorising is not concerned to minimise the range and determinacy of positive law or the general sufficiency of positive sources as solvents of legal problems.

Rather, the concern of the tradition...has been to show that the act of 'positing' law (whether judicially, legislatively or otherwise) is an act which can and should be guided by 'moral' principles and rules; that those moral norms are a matter of objective reasonableness not of whim, convention, or mere 'decision'; and that those same moral norms justify (a) the very institution of positive law, (b) the main institutions, techniques and modalities within that tradition (eg the separation of powers), and, (c) the main institutions regulated and sustained by law (e.g. government, con-

52. *Supra* n 2, 171.

53. *Ibid*, 173.

tract, property, marriage and criminal liability). What truly characterizes the tradition is that it is not content merely to observe the historical or sociological fact that 'morality' thus affects 'law', but instead seeks to determine what the requirements of practical reasonableness really are, so as to afford a rational basis for the activities of legislators, judges, and citizens.⁵⁴

How, then, does one become a practically reasonable person, or recognise another as such? Finnis provides a list of the basic requirements:

- 1 A person must have a rational plan of life.
- 2 There must be no arbitrary preferences amongst values.
- 3 There must be no arbitrary preferences amongst persons.
- 4 Detachment.
- 5 Commitment.
- 6 Efficiency within reason.
- 7 Respect for all the above.
- 8 "...favoring and fostering the common good of one's communities."
- 9 Following one's conscience.

The centrality of practical reasonableness for Finnis's project makes it necessary to examine this list more carefully.

The point of the first rule, of having a rational life plan, is to establish harmony "of purpose and orientations," so as not to drift or live "from moment to moment, following immediate cravings."⁵⁵ One should, according to Finnis, see one's life as a whole and oneself as a continuous rational agent.

With this proposition there are a number of problems and Finnis's solution is not entirely successful. It is true that people experience psychological discomfort as a consequence of various forms of dissonance. When a person's labour-power is alienated and the product belongs to someone else, and especially when the work process itself seems meaningless, as it often does on a production line, a part of life often appears without point. People cope by bracketing it off sometimes, or by treating work as much as they can as a matter of socialising, or of trying to put one over on the boss.

Political action to change the system of economic relations may not be practical, in which case it may seem eminently reasonable

54. *Ibid.*, 290. This is crucial passage for understanding NLNR.

55. *Ibid.*, 103 and 104.

to live from moment to moment and seek relief in what might, from another point of view, be irrational. Seeing life as a whole may indeed be an overwhelmingly dismaying possibility, to be avoided at all cost.

Equally, as insights from biography and psychoanalysis suggest, a social actor may not, at times when decisions must be taken, be in the best position to gauge their aptness from an imaginary global position. There is a strong political case that people should enjoy as wide bounds as possible to make decisions about their lives. But they will make mistakes, both about what it is best to do, and about who they are. People do change and become different, because the circumstances in which they live, the places from which they see, may change.

Finnis's diagnosis is not altogether persuasive: "...since human life is in fact subject to all manner of unforeseeable contingencies, this effort to see "our" life as one whole is a rational effort only if it remains on the level of general commitments and the harmonising of them."⁵⁶ Changes in self-perception, even of a radical kind, are probably foreseeable and everyone experiences considerable lack of control over their life. The level of generality necessary in order to perceive eighty or ninety years as a whole may be so high as to make little sense, and give scant guidance to the individual. It may even be psychologically damaging to be urged to deny what seems to be patent discontinuity.

Says Finnis: "...in every age, wise men have counselled in whatever you do remember your last days." (Ecclesiasticus 7:36).⁵⁷ Finnis is in effect asking us to adopt the vantage point of hindsight without actually enjoying the benefits of it. He does not ask us to act in such a way that if we were to die now we could in our last seconds find an essential unity and meaning in life up until now. That would be a rather curious standard to apply to one's actions, although doubtless one of which insurance companies would approve. Instead, he accepts that we do not usually know when we will die, and most of us wish to postpone the event as long as possible. But "...from the imagined and heuristically postulated standpoint of the

56. *Supra* n 2, 104. Could anyone but a white middle class male with no insight into other lives believe this?

57. *Ibid.*

still unknown time of one's death one can see that many sorts of choices would be irrational, a waste of opportunities, meaningless, a failure, a shame."⁵⁸ This assumes something which is presumably meant to be part of the proof, namely that rationality does not change, that standpoints are not crucial in determining it. Suppose I were now twenty-five and spent the next twelve years designing, building and provisioning a fall-out shelter for myself and my friends, instead of practising the violin. Whether my analysis of the world situation is correct is something I cannot know in advance, so I can envisage two contradictory outcomes.

In one I have acted rationally because it was clear that the end was nigh and my foresight has saved humanity. In another I have been an idiot whose irrational obsession diverted time and money from exercising my gift for music, which would have been an enormous benefit to millions of lovers of Bach partitas.

All I can do conscientiously to contribute to the general good is my best given what I know now. Imagining myself in a future state, and trying to work out what I should conclude if I were there in that state instead of where I am in my present state is a waste of time. But more importantly it deflects attention from historical uncertainty and substitutes a conflation of the present with the future in order to create the illusion of eternity as a standpoint for judgment.

The second and third requirements of practical reasonableness are concerned to limit arbitrariness. Where liberals insist that everyone must determine the good life for themselves, Finnis argues that a practically reasonable father or statesman will recognise, whilst not legislating, that some things, like poetry, are better than others — like push pin. There is a lack of clarity about the implications and a question about whether one requires Finnis's elaborate apparatus of objective excellence in order to achieve the goals he seems to have in sight, some of which one might share.

His detector of excellence and the good, the man of practical reasonableness, has all the potential, when translated into institutional terms, to become yet another guardian of expertise and mystique, another priest or bureaucrat to alert the skepticism of ordinary

58. *Supra* n 2, 105.

people. If ordinary people are indeed in need of reminding about the value and the rewards of intellectual and aesthetic experiment and inquiry, it is because these areas of activity, when translated into institutional terms have long been used as means of exclusion, discrimination and exploitation. To be practical it is not necessary to establish what seem to me to be extremely dubious foundations for circular arguments and imprecise abstractions, or to revive either stoic or christian traditions of reflective contemplation in an era when few can engage in them; when some of those few can be silenced more effectively than Galileo and others co-opted more completely than Doctor Faustus.

The solution is to open up opportunities for inquiry and experiment to the many. It is relatively easy, because it is politically harmless to those who exercise power, to anticipate correctness of results by formulating esoteric etiquettes of reasoning through which alone correctness may be achieved. Such etiquettes will be accessible to a few, with the leisure to learn. They reinforce, despite sincere intentions, domination by those with power.⁵⁹

There may not be many defenders of arbitrary preferences among values, but there are many ways of not being arbitrary, some more exclusionary, some more participatory. If, once again, we are being practical, it seems likely that the temptation to propaganda, to deception and self-deception, will be greater the smaller the number of people involved in the selection of criteria of excellence.

Broad access to intellectual resources to expand the capacity of people to challenge the boundaries within which they are confined has, as its practical precondition, material changes to which concerned intellectuals can contribute only by supporting democratic processes, although this may leave them open to personally threatening and often violently expressed hostility to their actions; and they must learn to be tolerant to what they will often feel are conceptual errors. Such prerequisite material changes in turn can result only from solid analysis of structures of power and the courage often to abandon careerist ambitions, to court ostracism and the denial of support from colleagues. It is to trust the people, an orientation

59. It is even virtuous for the powerful to maintain an opposition. The clever fool is familiar to Shakespeare audiences.

not dissimilar to faith; it is, for men, to undertake real dialogue with the long-term goals of feminists, it is for whites to engage with the aspirations of the Aboriginal people.

It means perpetual uncertainty structured by openness to the dialectic, the controversy and the endless asymmetry with which human survival is blessed and cursed and made possible. It means the abandonment of cleverness which is the social explanation of privilege, the euphemism for conformity and the guarantee of both successful oppression and the possibility of annihilation. It means patience with strangeness, tolerance with paradox and understanding among people.⁶⁰

Linked to "...the requirement of the fundamental impartiality of each of the basic forms of good (is) a third requirement: of fundamental impartiality among the human subjects who are partakers of those goods."⁶¹ There are two procedures for avoiding bias in distribution. One procedure is to remove the responsibility for making decisions about who is to "partake" from anyone who might have any personal stake in the outcome. Arbitrators and judges fulfill this function, although in the case of judges who are public servants in the broad sense, they cannot be impartial when what is in dispute is the structural impartiality of the administration of which they form part.

A second method is by the construction of "dialogical communities" as Bernstein calls them;⁶² that is, by enabling the parties among whom goods are to be distributed to discuss the issues involved on an equal footing, with an awareness of the constraints and as much information as is available about the possible consequences of any decisions which might be arrived at. How to evaluate those consequences should of course form part of the agenda for dialogue.

Finnis does not discuss this second possibility. In view of the limitations of the first method, some political conclusions may be drawn from his silence. The limitation of the first method is that there can be no impartial judge for we are all involved in the out-

60. S Benhabib *Critique, Norm and Utopia A Study of the foundations of Critical Theory* (New York. Columbia University Press, 1986) ch 8, Bernstein supra n 25.

61. Supra n 2, 107.

62. Supra n 25

come. Self-preference and the preference for one's friends are, as he admits, dangers against which we have to take precautions. How is this to be done?

He reverts, once again, to invention, encouraged by "Greek, Roman and Christian traditions." We are to imagine an "ideal observer," one who would, if one existed "see the whole arena of human affairs and who has the interests of each participant in those affairs equally at heart and equally in mind."⁶³ Lawyers, too, are used to imaginary "reasonable men", "men on Clapham omnibuses" and "officious bystanders." But the decisive scripts for them are written by people whose self-interest is supposed not to be in question. That is what confers upon them their authority on disputed matters. Different versions of what the pretend person would say if he existed are put up in some cases, by each party, but the only version which is authoritative is the one put up by the judge or arbitrator who is already the disinterested authority.⁶⁴

Finnis's ideal observer is ideal precisely because he or she does not exist. Since he or she does not exist, what reason has anyone to think that his or her perspectives and the conclusions premised on them exist either. Once again there is a conflation, this time of the ideal and the realised, in order to establish what is in doubt, namely the existence of a universal perspective, a universal rationality. But imagined people reach imagined conclusions and they are persuasive only if we are antecedently committed to them. It is a commitment to them which Finnis is attempting to induce.⁶⁵

The requirement that we should not abandon our commitments lightly does not need much comment. If there were basic values, and it was important that they be deployed consistently, which is what Finnis has argued, it would indeed follow that they should not be lightly abandoned.

The sixth and most exhaustively argued requirement of practicable reasonableness Finnis expresses as "[t]he (limited) relevance

63. Ibid, 108.

64. Lawyers' histories see the imposition of centralised jurisdictions as progress. Doubtless the owners of those jurisdictions favored the development, but it was not always universally acclaimed. See I Duncanson "The Politics of Common Law in Theory and History" (1989) *Osgoode Hall L J* (forthcoming).

65. *Supra* n 2, 111.

of consequences: efficiency within reason... [T]his is the requirement that one bring about good in the world...by actions that are efficient for their (reasonable) purpose(s)⁶⁶ and it is subject to a number of provisos. Some goods are not goods at all — for example the pleasure of a sadist in a victim's suffering. Cost-benefit analysis may be appropriate in some circumstances for "[o]ne can in many cases reasonably measure the benefits and disadvantages of alternatives (consider a man who has decided to become a scholar, or a society that has decided to go to war)."⁶⁷ He dismisses utilitarianism on the familiar ground that there is no universal calibration available with which to measure the greatest good of the greatest number. Consequentialism, both under this heading, and pursuant to the requirement that "one should not choose to do any act which of itself does nothing but impede or damage a realisation or participation of any of the basic forms of human good," invites the criticism that means and ends cannot rationally be separated. "A genuine consequentialist assessment of alternative possibilities could never end, and could begin anywhere."⁶⁸

This circumvents tiresome questions about whether evil means can ever be justified ethically when they produce good ends. Nonetheless some way of choosing which way to go must be found and circumstances may constrain that choice. If Finnis successfully demonstrates that consequentialist calculi are always bogus, and that what happens is that we simply choose and rationalise, his injunction that practicable reasonableness provides criteria of proper choice is not helpful in light of the indeterminacy we have seen to characterise it.

Finnis wants to say that it is never justifiable to abort a foetus in order to avoid a woman's having to carry and give birth to a child she does not want, to put "an end to that young woman's suffering," since life is a basic good. Odd, after a remark about the possibility of a society's calculating the benefits and disadvantages of going to war.

Neither Finnis nor anyone else considers life to be unconditionally sacrosanct. "Where damage is inevitable it is reasonable to prefer

66. *Ibid*

67. *Ibid*

68. *Ibid*, 117.

stunning to wounding, wounding to maiming, maiming to death — lesser rather than greater to one-and-the-same basic good in one-and-the-same instantiation.⁶⁹ But if a society *decides* to go to war, as it may, it presumably has a choice, and Finnis does not restrict this to situations where extermination is the alternative. Suppose I sit in my hiding place as the enemy soldiers approach. They are ill-educated peasant lads with no reason to doubt where their duty lies. If I surrender they will simply take me prisoner. Nevertheless, I raise my AK47 and prepare to defend my country's position.

In what way is killing to preserve one's political autonomy more practically reasonable than aborting a foetus to preserve one's personal autonomy from a child one has no wish to have? The one-and-the-same basic good argument seems as malleable as the others. Its conviction depends upon the content we choose to give it, and once again if we look to Finnis we find only uncertainty and indeterminacy — even arbitrariness.

Much the same is to be said of his requirement “of favoring and fostering the common good of one's communities.”⁷⁰ For “common good” turns out to be the basic values whose vagueness we have noticed already. The argument for their self-evidence does not work, nor is there any identifiable universality of practice or value shared by “all human societies” and capable of shedding light on them. The practical reasonableness of favouring the common good is further to be illuminated by the articulation of the basic values according to the requirements of practical reasonableness.

There seems to be an element of redundancy here, and the illumination is feeble. Why should Finnis need a distinct requirement of practical reasonableness that the basic values be articulated according to the principles of practical reasonableness?

His portrayal of community as forms of collaborative enterprises, or forms of life, perhaps, is more suggestive than, say Dworkin's,⁷¹ although he still, like Dworkin, wishes to see the state as ‘a’ community, albeit a community of communities, rather than as an aggregate.

69 Ibid, 111.

70. Ibid, 125.

71. R M Dworkin *Law's Empire* (Glasgow: Fontana, 1986) Cf M Taylor *Community, Anarchy and Liberty* (New York: Cambridge University Press, 1982) I Duncanson “Power, Interpretation and Ronald Dworkin” (1989) 9 *Tasmania LR* 278.

I will return to the issues of community and common good in the next section after noticing the final requirement of practical reasonableness, namely that one should act according to one's conscience.⁷² This is subject to the proviso that it is unreasonable to act according to one's conscience if it requires one to do something of the unreasonableness of which one is aware. The nature of one's conscience, in other words, seems rather a test of whether one is reasonable than a guidance to reason, although the obscurity of the prose and the remote and alien nature of the thought process at work, here, as in other places, leave me struggling with apparent enigma.

Reason and optics

The structure of practical reasonableness makes the remainder of the enterprise politically more intelligible. It seems, after all, to be a perceptual device, like Galileo's theory of optics, if more polished.

Galileo, from wherever he obtained it, worked with the idea that if two lenses with particular characteristics were arranged in a certain configuration, a magnifying effect could be produced. Things which one could already see, (had differently generated knowledge of) would appear bigger, and things which one could not see unaided would be visible. If the Pope's agents did not share the optical theory, then they might be expected to explain the newly visible objects in the terms their views of the world suggested to them.

Both the natural and the social scientific world have developed greater sophistication since Galileo's time. As social beings, both kinds of investigators approach their work with certain expectations, certain structures of ideas of which they hope their respective audiences will become persuaded. Of course, like Robinson Crusoe, we take our audiences and their discursive responses to what we do into our loneliest and most intimate moments, and modify what we do accordingly. In the end there may not be much qualitative difference between rhetoric, poetry, sociology and physics. An unhappy love affair, an encounter with a hard object, irradiation, all mean what they mean to us through the mediation of the struc-

72. *Supra* n 2, 125.

ture of a social discourse of some kind, however esoteric or mundane. A line from Andrew Marvell or John Lennon, or the wave pattern in the ocean, may open up a whole area of meaning which we try to integrate with the articulated or constructed skepticism or acceptance of others.

Muddle, chaos and ignorance, banished to the nether regions of Finnis's world, are the fertile soil from which efforts to produce systematic theories and models originate, and into which they disintegrate again in the course of deconstruction, argument and reconstruction. If the process may at times appear tidier and more certain, this may be merely because of the way in which we describe our proceedings.

Scientists and social scientists, no less than legal advocates, set out with a rough idea of what they expect to see and their project is that of demonstration and refinement. They may not succeed and that in itself may be suggestive and fruitful. In training for courtroom situations, lawyers are advised never to ask questions to which they do not already know the answer. An unexpected answer, or even an unexpected aspect of an answer that was anticipated, can form part of the opponent's discourse.

Rules of evidence, forensic and scientific — themselves always open for review of course — create the possibility for both welcome and unwelcome answers, but define some as irrelevant, either not to the point, or as unintelligible. What Galileo saw in his telescope was not what modern astronomers would see.⁷³ Knowledge, as I have suggested before, is not constituted by some quintessential quality called truth. We accept a conclusion when it fits in with the meaning we have learned to give to experiences of various kinds — reading, argument, spectroscopic analysis or whatever — and perhaps because we accept the demonstration which it is claimed leads to it, which, by a dialectical process of adjustment and refinement, also justifies it.⁷⁴ If the conclusion is of sufficient importance, maybe when it jars with conclusions we have reached ourselves using different demonstrations, we examine the grounds upon which

73. Bronowski *supra* n 26.

74. In "On certainty," Wittgenstein wrote: "If I wanted to doubt the existence of the earth long before my birth, I should have to doubt all sorts of things that stand fast for me." Quoted in Malcolm *supra* n 24, 214.

it is claimed to rest. In the remainder of this article, I shall consider Finnis's project in this way.

Underdetermination and alternative rationalities

Below a certain level of generality it is hard to discern many firm propositions in NLNR. At times Finnis seems to mislead himself, as with his list of anthropological universals. At times he seems so anxious to achieve precision and to render his propositions indubitable that he refines and qualifies them into invisibility. At times there is bald assertion, underdetermined by explanation. Abortion, for example, is wrong because it involves taking an innocent life without the justification of self-preservation. Yet in his own terms this is inadequate, for he is not a pacifist and wars are not always and only about the preservation of life. He does not condemn the use of machinery, although it is clear that even without culpable negligence there will be deaths on the road, in factories and on building sites and farms. Aware that there are people who are not, in his terms, practically reasonable, he unequivocally supports the exercise of curiosity and the accumulation of knowledge, which, as we are all painfully conscious, can be put to deadly use by such people.

There is underdetermination or, if one will, insufficiency of demonstration, of a larger kind in Finnis's account of the common good. This is to be discoverable by means of practicable reasonableness. The appropriate action to take, or mode of evaluation or critique to adopt, is evident when one adopts the standpoint of the practically reasonable man, yet the directions for gaining that standpoint are, as we have seen, both odd and imprecise. The existence and the nature of common good remain open to doubt and controversy. There are, in my view, good reasons for supposing that no such thing exists.

A small community may be sufficiently homogeneous in its structure and membership for there to be an identifiable set of goals, standards and relationships around which people might orient themselves as goods in common to all. This possibility may indeed be what prompts us to see a particular association as a community. A democratically organised trade union could be an example, as opposed, say, to an army division.⁷⁵ But Finnis, in his vision of

75. Taylor *supra* n 71.

humanity as a community, fails to notice that our equality in the sight of his god is not reflected in our social organisation.

Of course, social re-organisation is possible. It is something Finnis has in contemplation — his is in part a critical project, after all. But what he supposes is that where we have gone wrong is by not thinking clearly enough (although his own thought is far from clear). He supposes, too, that we all have, at bottom, by virtue of our common humanity, a similar rational interest in discovering the rationality of our common good, in trying patiently to untangle the knotted skein of social order.

Thinking alone, however does not produce unity of outcome if people begin from different places, because the regimes of truth, to use Foucault's phrase, cannot be separated from regimes of choice; somebody's choice, and somebody's power. Notions like common humanity and common citizenship — to which one could add social justice, liberty, and a number of other concepts — do not amount to qualities which transcend other practices and knowledges, for they are themselves socially constructed and their meanings are bound to be socially contested.

We cannot haul particular meanings above the fray by abstraction, or by reason framed on a particular social site, any more than the Prussian Baron Munchausen could pull himself out of the marsh by his own bootstraps. If we try to abolish social structures supporting differentials of power and wealth, we will encounter resistance, and if we insist on the irrationality of that resistance instead of engaging in an analysis of its aetiology and the source of its power, we shall fail.

Not only shall we fail in the encounter, we shall fail long before. For the power to sustain differential distributions of resources is manifested and articulated in terms of rationality and truth, even if those are not the words used. Slave revolts and peasant revolts in the past usually aimed at demonstrating the failure of rulers to apply their stated principles and duties to their practice. Many of the strands of civil libertarian practice in our own time have that purpose.⁷⁶ To contest the truths upon which a particular social

76. I Duncanson "Some Categories of Civil Libertarian Thought" (1985) 8 *UNSWLJ* 401; I Duncanson and V Kerruish "The Reclamation of Civil Liberty" (1986) 6 *Windsor Yearbook of Access to Justice* 3.

organisation rests is a much more difficult task intellectually and the conditions of its political success are narrow.

However there will often be ambiguity built into the rationality used to think about a social order by historical processes and social experience. Thus liberal capitalist forms of order in the past burst through the restraints imposed upon bourgeois practices with the assistance of radical artisans, servants, apprentices and peasants, who had hopes of social justice and equality which were subsequently not realised.⁷⁷

The spectres of these hopes linger on to haunt such social orders. But the hopes are more than ghosts, for the people whose hopes they were did not go away, and in changed environments their own cultural rationalities have not, purely one-sidedly, been suppressed. They have been enriched, too. Early modern radicalism, which informed the thinking of many of the poorer of "the industrious sort of people" in the English, French and American Revolutions, has been creatively altered through working class and women's experiences into socialism and feminism.

The existence of alternative rationalities can be seen in relation to the term "equality," which appeared only on the radical margins of the English revolution, was a little less insignificant in America and boldly central in France in 1789. It is a grave embarrassment to any bourgeois regime, not because its meaning is unclear but for exactly the opposite reason. It means that the resources of any regime in which equality can be said to be an important part of its practice, are available to all on the same basis.⁷⁸

In the absence of any form of regulated interaction equality might mean, as Hobbes argued,⁷⁹ that everyone is entitled to everything and thus nobody can claim anything with any security. Plainly though, when an egalitarian form of government is being discussed it does not mean this. Early christianity was familiar with the idea, and it surfaced again in the middle ages in "the battle-cry of

77. F Dow *Radicalism in the English Revolution 1640-1660* (Oxford: Blackwell, 1985); C Hill *The World Turned Upside Down Radical ideas during the English Revolution* (Harmondsworth: Penguin, 1975).

78. F Cunningham *Democratic Theory and Socialism* (Cambridge: Cambridge University Press, 1987) ch. 5.

79. This is a recurring theme in his *Leviathan* (London: Collins, 1972); see also *De Cive and De Homine* (New York: Humanities Press, 1972).

a return to primitive christianity and apostolic poverty.”⁸⁰ Needless to say, these heretics, like the Anabaptists of Munster who later seized an opportunity to apply egalitarian forms of government in their city, were ferociously dealt with. There are a few other examples: the Diggers, or ‘True Levellers’ on St Georges’s Hill in 1649, the Paris Commune of 1871, Jewish *Kibbutzim* in the early days after Israel’s independence.

In the seventeenth century Cromwell was quite clear where egalitarian claims could lead politically, and he resisted them in a characteristically vigorous and straightforward way.⁸¹ In later centuries it has become more difficult to send the troops in whenever egalitarianism has manifested itself, partly, no doubt, due to the fact that the troops themselves have entertained the idea, and may even have been mobilised under the pretence that, some version of it might be on the agenda.⁸²

Intellectual denial has been forced into similarly circumspect patterns. Equality has come to seem puzzling, although few people have any problems when the discussion is of particular contexts: equality before the law; or equal rights to vote. It is when we enter the area of what is now termed economic equality that bafflement engulfs liberal thinkers. They invent preconditions which seem not to apply anywhere else.⁸³ Economic equality is impossible, they argue, because we are all different. Or, since we are all different we all have an urge to be economically different and to deny us that urge is dictatorial and inhuman. It implies that we are identical, it would require draconian laws, undermine the rule of law, and provoke disorder.⁸⁴

80. F Heer *The Medieval World Europe 1100-1350* (New York: New American Library, 1961) 226.

81. I Roots & A Woodhouse (eds) *Puritanism and Liberty, Being the Army Debates 1647-9 from the Clarke Manuscripts* (London: Dent, 1986) Part 1 The Putney Debates.

82. N Grant “Citizen Soldiers: Army Education in World War II” in *Formations of a Nation and People* (London: Routledge and Kegan Paul, 1984).

83. A Arblaster *The Rise and Decline of Western Liberalism* (Oxford: Blackwell, 1984).

84. L A Selby-Bigge (ed) D Hume *An Enquiry Concerning the Principles of Morals* (1777) (Oxford: Oxford University Press, 1902) 193-4; also, generally L A Selby-Bigge (ed) D Hume *A Treatise of Human Nature* (Oxford: Oxford University Press, 1978) Bk III Sec II; N MacCormick *Legal Right and Social Democracy Essays in Legal Philosophy* (Oxford: Oxford University Press, 1982), ch 1. Marx’s response is found in K Marx & F Engels *The German Ideology*, in *Marx and Engels Collected Works* V 5 (London: Lawrence & Wishart, 1976) 229.

Another perspective

If we engage in historical and social analysis, we notice some interesting developments, largely in thinking but also, importantly, in practice, in the early modern and modern eras. Arguments about political equality began when the full implications were realised of the proposition that government could be a purposive device for achieving chosen ends.⁸⁵

Before that there was, of course, a good deal of discussion about just government, good lordship and the place of god. But the reason why Hobbes and Locke placed such significance, in their different ways, upon the state of nature was that they conceived government as artificial, discrete and instrumental. They reconnected government with nature in order to outline some desirable features in their design, but they had broken the tradition of the state of nature as a golden age of bliss, just as they had broken the idea of government from any supra-human plan of transcendental imperative.

Before the seventeenth century people seeking legitimacy for their ideas about government were searching in the bible, in the medieval interpretations of Aristotle, or in the mists of Anglo-Saxon freedoms. By the end of that century they were writing of reasons. The shape of government was to be in terms of what someone chose as its end and purpose.

A century or so later the same sort of shift is evident in discussions about law. The civil war radicals had certainly conceived law as entirely an instrument of somebody's ends,⁸⁶ but their ideas did not achieve any established position until the last quarter of the eighteenth century in England and slightly earlier in Europe. Until then the dominant view of legality was that, especially as manifested in common law, it took its legitimacy and its value from the wisdom its longevity had enabled it to incorporate.⁸⁷ Deliberate and instrumental change — changes of course, rather than delicate adjustments of the rudder — were, until then, dismaying possibilities.

The work of Lord Mansfield in commercial litigation, and Blackstone's monumental reconstruction of law as reason, were

85. Q Skinner *The Foundations of Modern Political Theory* (Cambridge: Cambridge University Press, 1980) clearly documents this.

86. C Hill (ed) G Winstanley *The Law of Freedom* (Harmondsworth. Penguin, 1973).

87. J G A Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge: Cambridge University Press, 1957).

precursors of Bentham's ruthless instrumentalism and the whig reform programme of the 1830s. As an insight, utilitarianism is historically important, not least because Bentham himself followed what he took to be its logic to advocate a form of democracy quite radical for its time.

In the case neither of political nor of legal practice does instrumentalism lead directly to complete equality, but it has led to the universal adult franchise and into due process and legal aid. The vocabularies of both areas have taken most societies a step or two towards a situation in which people have a say in the construction and administration of the rules under which they live, which was the Leveller demand. Few would argue that people have an equal say in substance, but the rhetorics of political and legal equality before the law are seldom explicitly disapproved and they have at least ruled out the explicit justification of political and legal outcomes in terms of the deserts of status or the fruits of wealth.

If we move on a century we find a not dissimilar process at work in the uncoupling and recoupling of the concept of political economy. During the uncoupling phase "the economy" gradually came to seem to be "the market," a mysterious force which could not be subject to instrumental control and should not be interfered with, except, again, for fine adjustments to the rudder. The constituents of markets, labor and capital, supply and demand, were thought to be natural forces, every bit as organic in their accretion of wisdom and their occasional lovable errors as Coke's common law or Edmund Burke's English government.

It was not until the mid-Victorian era that, alongside accounts of the natural mysteries of the market, instrumentalist heresies began to emerge, although moral critiques of gross inequalities of resources have a long history. In the half-century bounded by the impact of Marx's ideas and those of Keynes, "the market" continued to be castigated for its inequity, but the inefficiency of uncontrolled capitalism itself, after its initial promethean achievements, was analysed. The economy, in the new view, might not only happen to benefit people (or not) in its enigmatic way, it might be consciously structured and directed to particular goals.⁸⁸ Once again the idea

88 There is a modern version of this argument in L. Thurow, *The Zero Sum Solution* (New York: Simon & Schuster, 1985).

is made possible that people need not be subject to a regime in which they do not have a say.

In a way, neither Coke nor Burke nor the disciplines of one strand of Adam Smith's thought have ever disagreed with this. Coke conceived common law as the embodiment of the spirit of the freeborn Englishman. Burke shared his contemporaries' notion of virtual representation, which meant in effect that good (that is, English) government was an organic response in the best interests of the subject. And supply and demand are meant to represent people voting with their dollars.

What the traditionalists, as they became, in all three areas, objected to was the abrupt and rude laying of common hands upon their orreries, the refusal to recognise that the aesthetic elegance of those devices would, unaided, produce desirable ends.⁸⁹ Traditionalists objected to the insistence that there was nothing natural about the institutions in question, that they existed artificially in order to serve particular ends and might thus be openly and popularly modified to serve democratically chosen ends.

Conclusion

All three of these debates are interconnected. We can return to the unease of bourgeois intellectuals with equality. They are at home, by and large, with equal access and equal treatment in the legal and political systems, but outraged and baffled by the idea of equal access to other resources. They offer us, at the progressive end of the spectrum, "equality of opportunity" instead, which merely seems to compound the problem. For it means retaining possibly large differentials of wealth, but allowing all to compete on equal terms for it. For an egalitarian that is unsatisfactory because it retains for occupation plenty of space for poverty — indeed it is predicated upon it. For progressive bourgeois theorists it creates the need for the very draconian measures they imagine equality would necessitate. How, otherwise, are the rich to be prevented from transmitting their privilege across generations?

89. G Hodgson, *The Democratic Economy A New Look at Planning, Markets, and Power*. (Harmondsworth: Penguin; 1984). The abrupt revelation of lost United States economic dominance has produced a rash of *dirigist* proposals and analyses: See supra n 88; J Laxer *Decline of the Superpowers* (Toronto: Lorimer, 1987); C Gonick *The Great Economic Debate Failed Economics and a Future for Canada* (Toronto: Lorimer, 1987).

But bourgeois theory is correct to be evasive when the discussion turns to equality, and to bring in the monsters (totalitarianism; equality-of-wealth-equals-the-abolition-of individual-difference) to frighten us all away. This is because the social relations of modern capitalist production require inequality.⁹⁰

These relations are not now, in their specific form, as they were in the nineteenth century, or earlier decades of this century. Prudent risk management may be our most helpful key in understanding contemporary capitalism.⁹¹

Finnis's equivocation about the meaning and implications of equality however, rests on his evasion of specificities of inequality. Throughout the work critique and explanation operate at so high a level of abstraction that often they cannot help but be correct in their own terms, as for example with his list of anthropological universals. All societies indeed manifest some opposition to behaviour to which there is some opposition.

The corpus of the work fits together at the level of practical explanation and concrete recommendation only if it is assumed that the abstractions are abstractions from understandings we all have in common — something he purports to be demonstrating. There is a common humanity only within a particular determinate political discourse of theory and practice, and what it amounts to will vary with the location from which it is constituted.

From the perspective adopted here, Finnis commits two, related errors. His account does not even consider the possibility of there being structural divisions of a fundamental kind in a social order, productive of opposed interests and opposed conceptions of, among other things, common good.

This error of omission is also an error of commission if one accepts Marx's view that "the ideas of the ruling class are in every age the ruling ideas — ie the class which is the ruling material force

90. Which supplies a major flaw in Dahl's argument: See R A Dahl *A Preface to Economic Democracy* (Berkeley: University of California Press, 1985).

91. Thus the maxims of successful capitalism include: do not own when you can lease, lend only multinationally and on the highest security; never hire labour when you can subcontract; casualise whenever you can. D Harvey *The Limits to Capital* (Oxford: Basil Blackwell, 1982); A Lipietz "Disorder in the World Economy" (1989) *New Left Rev* 37. In the Anglophone world we could add: seek not to be a hero of the financial press.

of society is at the same time its ruling intellectual force...” and that each ruling class is compelled “to present its interest as the common interest of all members of society.”⁹² In presuming the inferability of a common interest from current modes of social organisation, and from currently dominant modes of thinking about “all societies”, Finnis offers not a critique but a refinement of the age’s “ruling ideas”.

92. Marx and Engels *supra* n 83, 59.