Cornell Law Review

Volume 68
Issue 3 *March 1983*

Article 4

Speech and Law in a Free Society

William H. Wilcox

BOOK REVIEWS

SPEECH AND LAW IN A FREE SOCIETY. *Franklyn S. Haiman.* Chicago: University of Chicago Press. 1981. Pp. 480. $22.50 (cloth).

SPEECH CATEGORIES AND THE FUTURE OF FREE SPEECH LAW

Ideas are the currency with which scholars trade. It is therefore no surprise that the law governing the free expression of ideas has been a source of elaborate attention from legal scholars. In this particular corner of the law, the dialectical process between justices and commentators has been an intriguing and important one.[1] Despite this ongoing and fruitful exchange, however, the general approaches to first amendment adjudication developed during the past half century have either been confined,[2] moved from adjudicative guide to slogan,[3] or have lacked the theoretical sweep and power sufficient to control the field.[4]

In particular, Professor Thomas Emerson's work,[5] which relied heavily upon the speech-action distinction as an analytic starting point, and which claimed Justices Black and Douglas as significant adherents, lost some of its influence in the confrontational speech problems of the late sixties and early seventies.[6] The most important successor to Emerson's approach appeared for a time to be the "two tracks" of "categorization" and "balancing" that Professor Ely[7] developed and that Professor Tribe[8] further elaborated. But that model has fallen on hard times.[9] Supplementing these general approaches are a barrage of first

---

1 *See, e.g.,* L. LEVY, LEGACY OF SUPPRESSION (1960), *cited in* New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964).

2 The "clear and present danger" test for speech restrictions was a long-touted general approach, but the test now seems confined to problems of incitement to illegal action, *see, e.g.,* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), threats to the fair administration of justice, *see, e.g.,* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), and perhaps to attempts to restrain the press prior to publication, *see, e.g.,* New York Times Co. v. United States, 403 U.S. 713, 726-27, 730 (1971) (Brennan & Stewart, J.J., concurring).

3 One hears little contemporary talk of "preferred position." *See* McKay, *The Preference for Freedom,* 34 N.Y.U. L. REV. 1182 (1959). Although preferred-position analysis originated as an adjudicative guide, it now serves only as a slogan.

4 I argue in Part II, *infra,* that Professor Ely's "categorization" and "balancing" appraoch is so lacking. *See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1481 (1974); *see also* Scanlon, *Freedom of Expression and Categories of Expression,* 40 U. PITT. L. REV. 519 (1979); Schauer, CATEGORIES AND THE FIRST AMENDMENT: A PLAY IN THREE ACTS, 34 VAND. L. REV. 265 (1981).

5 *See, e.g.,* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

6 *See, e.g.,* Cohen v. California, 403 U.S. 15 (1971).

7 Ely, *supra* note 4.

8 L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 580-84 (1978).

9 *See infra* text accompanying notes 55-68.

amendment constructs,[10] value orientations,[11] and suggested adjudicative methodologies.[12] Some rise and fall in scholarly importance, some for a time capture a few adherents on the bench, and many are valuable contributions to an evolving and important literature.

Into this already-crowded scholars' horn of plenty, Professor Franklyn S. Haiman has squeezed a lengthy work entitled *Speech and Law in a Free Society.*[13] The book attempts to chart a decidedly libertarian course through a variety of free speech problems, such as defamation, incitement, speech and national security. Professor Haiman borrows from several established categories of speech, and attempts to generate a few of his own. He offers a view of each of his chosen first amendment concerns, exposes some of the leading ideas in the literature in the field, and proposes his own recommended "solution" for each problem. As a brief-carrier for a libertarian perspective, Haiman is consistent in his advocated preferences. As an advance in thinking about "speech and law," however, Haiman's contribution is less evident. Part I of this review traces some defects which I perceive in the book's structure, analytical approach, and method of argument. Part II, drawing on several themes developed in Part I, argues that the current judicial approach to "categorization" is ultimately unstable and therefore unsatisfying as a general mode of first amendment adjudication.

I

In his introductory chapter, Professor Haiman discloses his civil-libertarian preference and sets forth, without attempt at defense or justification, "those ultimate values . . . on which [the] book is premised."[14] He then enumerates several judgments, all of which are intellectually controversial to some degree: social order is not an "end in itself," but "self-expression and self-fulfillment of the individuals who compose a society are [such] ends . . .";[15] the purpose of law is solely "to prevent people from aggrandizing against one another";[16] humans are capable of free choice and autonomous decision;[17] regimes of paternalism are suspect;[18] and a free marketplace of ideas is a mechanism on which we

10 *See, e.g.,* Note, *The Chilling Effect in Constitutional Law,* 69 COLUM. L. REV. 808 (1969).

11 *See, e.g.,* Baker, *Scope of the First Amendment Freedom of Speech,* 25 U.C.L.A. L. REV. 964 (1978); Blasi, *The Checking Value in First Amendment Theory,* 1977 AM. B. FOUND. RESEARCH J. 521; Karst, *Equality as a Central Principle in the First Amendment,* 43 U. CHI. L. REV. 20 (1975).

12 *See, e.g.,* Redish, *The Content Distinction in First Amendment Analysis,* 34 STAN. L. REV. 113 (1981).

13 F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY (1981).

14 *Id.* at 6.

15 *Id.*

16 *Id.*

17 *See id.* at 6-7.

18 *See id.* at 7.

can properly rely in our pursuit of truth.[19] Haiman states that these values generate a forceful preference for a regime of free expression and a concomitant burden of justification upon any claim that seeks to subordinate communicative values to other values. Most of the remaining chapters strive to apply this preference to a variety of discrete problems in the law of free speech.

What precedes that effort, however, is an attempt to define "speech" for constitutional purposes. Professor Haiman is a professor of communication studies, rather than of law. In the book's second chapter, running for twenty-five pages and entitled "What is Speech?"[20] one might expect his orientation and knowledge base to yield a unique contribution. Haiman emphasizes what it means "to communicate," focusing on the interactive aspects of communicative activities (i.e., speakers and listeners). The universe of activity to be classified, Professor Haiman tells us, is either "symbolic" behavior, which functions to communicate "ideas and feelings to other people,"[21] or nonsymbolic behavior. The use of words is always symbolic conduct, and hence can never be defined as "not speech." Nonlinguisitc behavior at times functions symbolically, however, and at such times should be viewed as "speech." Although terming behavior "speech" does not necessarily immunize it from legal regulation, Haiman believes that such a labeling of behavior instantly constitutionalizes the inquiry.

For analytic purposes, Haiman divides nonlinguistic behavior into three categories: (1) conduct that is exclusively symbolic and that "functions only to create meanings";[22] (2) conduct engaged in "for its own sake," totally without regard for "any possible effect upon an audience or witness";[23] and (3) conduct that ordinarily falls in category two, but that "may be endowed by the actor, perceiver, or observer with meaning . . . beyond the act itself," and hence made to create meanings "by the way in which it functions."[24] Haiman concludes that conduct in the first and third categories should be treated as "speech," while conduct in the second category should not.

None of this seems terribly helpful in resolving the problems raised in so-called symbolic speech cases,[25] or in the kinds of cases for which Professor Emerson elaborated his speech-action distinction. First, it is not evident that even linguistic behavior is *entirely* symbolic;[26] talking

---

19 *See id.*

20 *Id.* at 16-40.

21 *Id.* at 31.

22 *Id.*

23 *Id.* at 32.

24 *Id.* at 33.

25 *See, e.g.*, Street v. New York, 394 U.S. 576 (1969) (flag burning); United States v. O'Brien, 391 U.S. 367 (1968) (draft-card burning).

26 *See* Ely, *supra* note 4, at 1493-96.

involves the pure creation of noise from the vocal chords, writing the consumption of writing materials and surfaces, radio broadcasts the use of electricity and various materials, and so on. Of course the same could be said of Haiman's first category of nonlinguistic behavior—for example, wearing a black arm band requires placing a piece of black material over flesh or other fabric. Thus, Haiman's first category—"exclusively symbolic" behavior—is an empty one. Every remaining case must be either in the second category (conduct engaged in "for its own sake") or the third (conduct that "functions as communication"), but every category-two case becomes a prima facie category-three case simply by the actor claiming that the challenged conduct functioned as communication. Professor Haiman would permit a court to test the *bona fides* of a claim that nonlinguistic behavior so functioned, whether or not intended by the actor, but such a test would likely exclude only that behavior lacking an audience capable of cognition. Every plausible speech claim, whether linguistic or nonlinguistic in its expressive method, thus collapses into Professor Haiman's third category.

This collapsibility of Professor Haiman's categories debilitates his general framework for resolving the legal problems generated by speech cases of this variety. He recommends a seemingly ad hoc balancing process, in which harms generated to legitimate governmental interests by the nonsymbolic elements of the conduct would be weighed against the speech values advanced by the symbolic element of the challenged conduct.[27] This construct seems roughly equivalent to the "balancing" track of the two-track model. A major premise of the two-track method, however, is that cases can only be properly "tracked" for analytic purposes upon identification of governmental motivation for proscribing the challenged conduct.[28] Because Haiman's framework in effect considers all observed conduct as speech, the critical question becomes whether the government is interested in the symbolic or nonsymbolic qualities of the conduct. Yet Professor Haiman never focuses on how the nature of the government's interest is to be ascertained. Nor does he suggest or discuss the possible review standards that might follow such ascertainment. And without those critical steps, his general approach might well be less protective of symbolic speech than current law.

This analytic omission seems symptomatic of a larger failing of the book. In general, it fails to consider the world of adjudication and the conventions of adjudication tailored to free speech cases.[29] Haiman usually treats the problems as abstact exercises in the accommodation of

27 *See* F. HAIMAN, *supra* note 13, at 35-37.

28 *See* L. TRIBE, *supra* note 8, § 12-2, at 584-88.

29 No mention is made, for instance, of the overbreadth doctrine as a tool of first amendment problem-solving. *See generally* Monaghan, *Overbreadth,* 1981 SUP. CT. REV. 1; Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844 (1970).

competing substantive values, rather than as issues usually presented for authoritative resolution in the adjudicative process. It may well be that Haiman's primary audience, both in his mind and in fact, is composed of students of journalism and communications rather than law, and that this accounts for the de-emphasis on a lawyering perspective. The likelihood that Professor Haiman contemplated this sort of audience helps defend him against the charge, otherwise quite serious, that his book never addresses the critical and enduring first amendment problem of the "public forum."[30] Moreover, perspectives other than the lawyer's—for instance, those of journalists, philosophers,[31] or economists,[32]—surely are useful in the attempt to broaden insights into problems of speech regulation. Except for his general libertarian outlook, however, Haiman never quite manages to adopt any particular professional perspective on the issues that he discusses.

Haiman's unresolved focus interferes with the work in a variety of ways. First, the organization of the material into several discrete main parts—Communication About Other People (e.g., defamation, privacy), Communication to Other People (e.g., misrepresentations and obscene or violent speech), Communication and Social Order (e.g., incitement, conspiracy), and Government Involvement in the Communication Marketplace (e.g., government secrecy)—is never explained or justified. The titles of the various parts may be the major problem, for *every* chapter could be placed in a section called "Communication to Other People." The order of the material is likewise unexplained. Part one, for instance, primarily addresses speech that may injure some third party because of the listener's response, while Part two primarily concerns speech that may injure listeners themselves. Yet Professor Haiman does not advance these as organizing motifs and, indeed, the placement of various subject matters would have been problematic if he had done so. Does the vice of obscenity, for instance, lie in its capacity to debase its consumers,[33] in its tendency to stimulate acts of sexual violence,[34] or in its general assault on the ambience of public places in the community? Haiman's organizational structure limits his analytic vision, reducing the likelihood that alternative explanations will receive his full attention.

The content of the particularized, problem-focused chapters reflects

---

30 *See, e.g.,* Cass, *First Amendment Access to Government Facilities,* 64 VA. L. REV. 1287 (1977); sources cited *id.* at 1288 n.9.

31 *See, e.g.,* Scanlon, *A Theory of Freedom of Expression,* 1 PHIL. & PUB. AFF. 204 (1972).

32 *See, e.g.,* Coase, *The Market for Goods and the Market for Ideas,* 64 J. AM. ECON. ASS'N 384 (1974).

33 This is the only direct focus of Haiman's look at obscenity problems. *See* F. HAIMAN, *supra* note 13, at 164-65.

34 Professor Haiman briefly addresses this perspective on the problem in chapter 12, "Incitement to Illegal Action." *See id.*

Haiman's expansive faith in an open system of free expression. Each chapter outlines the contours of a particular legal problem involving speech considerations, trots through several leading cases considering the problem, explores in some detail the variety of academic commentary on the questions, and ultimately advances a particular view as the optimum solution—usually Haiman's own, but occasionally one originated by the American Civil Liberties Union,[35] or some particular, identified commentator.[36] Haiman proposes strict limitations on defamation suits, preferring retraction and opportunities to reply over litigation against the press.[37] On the ground that newsworthiness or decency standards are incompatible with a regime of free expression, he would limit privacy tort suits against publishers to instances of misappropriation of information.[38] He sees no justification under the first amendment for treating truthful commercial speech differently from other forms of speech.[39] He argues that police should always make substantial efforts to protect speakers against unruly or hostile crowds, rather than remove such speakers by arrest or otherwise from potentially violent situations.[40] True to his belief that individuals are autonomous agents responsible for their behavior and judgments, he would also confine the law of incitement-to-illegal-action to those situations in which speakers have taken "control over the will of other persons,"[41] resulting in the listeners losing "the capacity to resist the communicator's inducements."[42]

I agree intuitively with a great many of Professor Haiman's conclusions, although not all of them.[43] Intellectually, however, I remain troubled by his argument in several respects. First, the book is profoundly ahistorical. One could read it and never know, for example, of the existence of the Alien and Sedition Acts, the evolution of obscenity standards over this century, the political and historical setting of the World War I

---

35 *See, e.g., id.* at 380 (ACLU Policy No. 7, recommending a qualified "advice privilege" for Presidential Advisers, "is as careful a statement of [the appropriate] balance as we are likely to find").

36 *See, e.g., id.* at 196-99 (partial agreement with Professor Martin Redish on topic of commercial speech); *id.* at 259 (approval of *Michigan Law Review* Note on "standards for police conduct in hostile audience situations").

37 *See id.* at 43-60.

38 *See, e.g., id.* at 61-86. He rejects as inconsistent with a regime of free expression, tort liability for publication of truthful but embarrassing facts. *See, e.g.,* Sidis v. F-R Publishing Co., 113 F.2d 806 (2d Cir. 1940).

39 *See id.* at 182-202.

40 *See id.* at 252-60.

41 *Id.* at 277.

42 *Id.*

43 I would not, for instance, go so far as Haiman on the incitement standard quoted at the end of the preceding paragraph in text. Utter loss of will in the listeners would be difficult to substantiate, and I cannot see what is lost in prohibiting, or gained in protecting, speech intended to bring about imminent and serious lawlessness, and likely to do so.

free speech cases beginning with *Masses Publishing Co. v. Patten,*[44] or the influence of the civil rights movement of the fifties and sixties on the development of free speech law.[45] Whether or not one is committed to historical limitations on free expression, judicial pronouncements concerning the scope of the first amendment cannot be fairly evaluated without some sense of what has gone before.[46]

Second, and more generally, the author's method of argument contributes both the book's most significant strength and its most telling weakness. Without any pretense of value-neutrality, in conflict after conflict between free expression and competing concerns, Professor Haiman resolves issues by openly stating his preference for the speech values.[47] His preferences and mine frequently coincide, but ours do not always coincide with those of others. In the history of the law of free expression, it is the hard cases, the path-breaking cases, the paradigm cases that have involved difficult and controversial choices among competing values and differing conceptions of the individual's role in the community. On the basis of what sort of argument can one persuade or protect the regime of free expression against the judge whose values slide toward the *other* side of the scale?

II

Repeated incantations about "robust debate" or "preferred position" cannot solve the problem of choice among competing interests. Scholars have argued from time to time, however, that attention to methodology and adjudicative approach may help structure the inquiry to enhance consistent judicial treatment of speech values.

A relatively recent and significant example of this sort of scholarly strategy is the "categorization" and balancing model elaborated by Professor Ely in his *Flag Desecration* article.[48] Built upon a structure of inquiry initially formulated in *United States v. O'Brien,*[49] the model calls for different judicial treatment of "content-focused," as distinguished from "content-neutral," regulations that inhibit expression.[50] Professor Ely proposes that the constitutional validity of content-neutral regulations—those whose purpose is independent of the message being con-

---

44 244 F. 535 (S.D.N.Y.), *rev'd,* 246 F. 24 (2d Cir. 1917).

45 *See, e.g.,* Cox v. Louisiana, 379 U.S. 559 (1965).

46 *See* Rabban, *The First Amendment in Its Forgotten Years,* 90 YALE L.J. 514 (1980) (general discussion of the pre-1917 history of the first amendment).

47 *See* F. HAIMAN, *supra* note 13, at 127, 134, 147, 155-56, 181.

48 Ely, *supra* note 4.

49 391 U.S. 367 (1968).

50 For a general discussion and criticism of the content distinction, see Farber, *Content Regulation and the First Amendment: A Revisionist View,* 68 GEO. L.J. 727 (1980); Redish, *The Content Distinction in First Amendment Analysis,* 34 STAN. L. REV. 113 (1981); Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions,* 46 U. CHI. L. REV. 81 (1978).

veyed—be judged by a balancing test, in which the state's interest, including the costs of pursuing alternative methods of achieving that interest, is weighed against the speech values implicated by the regulation. Speech regulations focusing on the content of the message would be subject to the "categorization" approach in which several "rigorously defined" categories of speech would be excluded from protection, and all other forms of speech would be protected by an absolute, or near-absolute standard.

When originally formulated, this approach had substantial appeal. It helped to eradicate some long-standing confusion that the so-called expression-action distinction had generated,[51] and it resolved the flag-desecration problem,[52] the situation to which Professor Ely applied it. Some first amendment problems had been left off these tracks—most notably problems of the reporter's privilege[53] and press access to government facilities[54]—but no other scholar presented an overarching theory that neatly solved those problems. Soon, however, it became apparent that the Court's first amendment decisions could not be squared with the model's presuppositions. Several lines of cases reveal this. The obscenity decisions from 1965 to 1973,[55] together with a general loosening of inhibitions on public discussion and consumption of sexually oriented material, helped to generate a substantial, notorious, and to some quite revolting open market in sexually explicit entertainment . The Court tightened the definition of obscenity in 1973,[56] and in various ways reduced constraints on the government's ability to prosecute traffickers in obscenity.[57] Yet the criminal law probably seemed an inartful, substantively insufficient, and procedurally cumbersome tool with which to stage the entire fight. In *Young v. American Mini-Theatres,*[58] in which the Court upheld Detroit's "smut zoning" ordinance, and in *FCC v. Pacifica Foundation,*[59] in which the Court upheld the FCC's power to apply the statutory provision barring "indecency" in broadcasting to a radio transmission of George Carlin's "Seven Dirty Words" comic monologue, the Court stripped sexually oriented yet nonobscence speech of a meas-

---

51 *See* Ely, *supra* note 4, at 1493-96 (burning a draft card to express opposition to the Vietnam War is 100% speech and 100% action).

52 *See* Spence v. Washington, 418 U.S. 405 (1974); Street v. New York, 394 U.S. 576 (1969).

53 *See* Branzburg v. Hayes, 408 U.S. 665 (1972).

54 *See, e.g.,* Houchins v. KQED, Inc., 438 U.S. 1 (1978); Pell v. Procunier, 417 U.S. 817 (1974).

55 *See, e.g.,* Memoirs v. Massachusetts, 383 U.S. 413 (1966).

56 *See* Miller v. California, 413 U.S. 15 (1973).

57 *See* Smith v. United States, 431 U.S. 291 (1977) (federal statute prohibiting mailing of obscene materials incorporates local community standards for prurient appeal and offensiveness, rather than standards determined by state law); Hamling v. United States, 418 U.S. 87 (1974).

58 427 U.S. 50 (1976).

59 438 U.S. 726 (1978).

ure of its constitutional protection. The notion of "graded" speech—speech offered less protection than other varieties because of its undesirable character and its proximity to the edge of an unprotected category—gained a strong foothold in these two decisions.

Second, in *Virginia Pharmacy Board v. Virginia Consumer Council,*[60] the Court raised commercial speech from its previously unprotected status. The Court's uneasiness about the move, however, led it to assign a lower status to commercial speech than to political speech,[61] a development that lent force to the "graded" speech idea.

Third, the Court in *Buckley v. Valeo*[62] expressly acknowledged the first amendment interest in making political contributions and expenditures. Because the financial support standing behind political speech carries with it the risk of evils that are independent of the purchased message, however, the Court properly analyzed each campaign finance restriction and upheld those that met strict first amendment standards. Thus, *Buckley* permits suppression of a variant of categorically protected speech.

Finally, even before Professor Ely wrote, the Court had begun to draw unprincipled lines for first amendment purposes between print media and electronic-broadcast media. The tension between the *Red Lion* and *Tornillo* cases[63] is a glaring example, as is *Pacifica*'s upholding a sanction for broadcasting material that, on a printed page, would be immune from governmental proscription of distribution.[64]

Taken together, these developments have undermined the structure and coherency of the categorical approach. Ely's model had already invited a degree of judicial discretion but some discretion is inevitable in any sensible model of adjudication, first amendment or otherwise. The idea of "graded" speech takes categorizing two dangerous steps further. First, it adds layers of discretion in grading categories of *protected* speech in order to evaluate suppression justifications. Weighing the speech value of political comment as compared to commercial messages or erotic literature, for instance, reintroduces balancing of interests at a level that increases the likelihood of judicial subjectivity.[65] Second, it permits grading categories of *unprotected* speech for purposes of measur-

60 425 U.S. 748 (1976).

61 *See id.* at 771-72.

62 424 U.S. 1 (1976).

63 *Compare* Red Lion Broadcasting Co. v. FCC, 394 U.S. 367 (1969) (upholding constitutionality of FCC rules requiring broadcasters to permit opportunity to reply to personal attack and political editorials) *with* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating state law that required newspapers to afford opportunity to reply to attacks on political candidates).

64 *See* FCC v. Pacifica Found., Inc., 438 U.S. 726 (1978).

65 *See, e.g.,* Young v. American Mini-Theatres, 427 U.S. 50, 70 (1976) ("few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice") (Stevens, J., plurality opinion).

ing judicial tolerance for expansion of the boundaries of these categories. This threatens the notion of rigorous definition, one of the proposed strengths of categorization, and thus carries risks that substantive protection and predictability will diminish.

The outcome of *Buckley v. Valeo,*[66] in which the Court upheld suppression of a form of "core" protected speech, threatened the categorical approach in a different manner. Professor Ely had recognized the possibility that speech outside the unprotected categories might constitutionally be proscribed, but he had suggested that a focus on audience reaction to the speech had historically been, and would likely continue to be, speech-threatening.[67] *Buckley* upheld campaign contribution limits on the basis of an "audience response"—popular perception of the undue influence of money on political campaigns. The approach elaborated in *Consolidated Edison Co. v. Public Service Commission*[68] may have strengthened the barrier against suppression of speech not in a defined, unprotected category, but the risks of manipulation and the vulnerability to political paranoia both seem high within this mode of adjudication.[69]

Finally, the cases that turn on the distinction between broadcast and print media cannot possibly be squared with categorization as proposed and defended. The type of medium does not alter the composition or justification for the categories: television broadcasts can defame, or incite to riot, or comment on presidential campaigns, and can do so as well as books, pamphlets, or films. The rigor of categorization collapses if boundary lines change as media evolve. Moreover, the electronic media's most significant characteristic is its effectiveness in reaching vast audiences. A system of free expression that handicaps the more effective means of communication violates our society's belief in the marketplace of ideas, making vulnerability to speech regulation turn on the likelihood of reaching and persuading the audience. Such a system reveals an utter lack of faith—a faith that the advocates of categorization demonstrate—in the commitment to enlightenment and rationality on which the entire system of speech protection is presumably based.

Several explanations may be offered for the splintering of the two-track approach. First, as suggested above, the approach was not comprehensive enough to handle all free speech problems.[70] In particular, its libertarian underpinnings aimed it at the traditional constitutional

---

66 424 U.S. 1 (1976).

67 Ely, *supra* note 4, at 1493 n.44, 1500-02.

68 447 U.S. 530 (1980) (permitting content-based suppression of speech not in an unprotected category only if the prohibition is a "narrowly tailored means of serving a compelling state interest").

69 *See infra* note 86 and accompanying text.

70 *See supra* notes 53-54 and accompanying text.

concern of the scope of "negative rights," rights to be "left alone" by the government. The approach thus predictably failed to generate a principled structure for the resolution of affirmative claims.[71] Moreover, the judicial response to affirmative claims may have affected more traditional claims. The rejection of press access to certain government-operated institutions, for example, might well have generated some of the momentum that led to *Herbert v. Lando,*[72] in which the Court sanctioned intrusive discovery practices in defamation cases.

Second, and far more fundamentally, the categorization approach could not survive for long in its present form, nor endure in any particular form, because of the way in which law develops. "Categories" are always, and should always be, vulnerable to the process of reordering, rerationaliztion, and value realignment.[73] Current first amendment categories are perfect candidates for this sort of evolution, and the developments in obscenity law suggest that the first steps in the process have begun.[74]

The potential for more wholesale reordering can be seen in the existing structure and analytical focus of the categories of defamation, obscenity, fighting words, and incitement. Constitutionally rooted defamation principles focus primarily on the speaker's state of mind and are designed to generate "breathing space" for press judgment on newsworthy matters. Under *New York Times Co. v. Sullivan,*[75] false and reputation-injuring speech, if uttered without either knowledge of its falsehood or reckless disregard of the truth, will not produce a recovery, even though the reputational harm to the defamed may be quite serious and indistinguishable from that caused by an intentional falsehood. The principles of accommodation between state defamation law and the first amendment thus permit concrete harm to individuals to go unremedied in order to enhance a dynamic and relatively fearless press.

By contrast, obscenity standards define a category of speech by its degree of explicitness, offensiveness, and lack of "value," independent of its power to arouse.[76] That any social or individual harm occurs from such speech is a matter of substantial controversy,[77] yet the existing doc-

---

71 *See, e.g.,* cases cited *supra* note 54. *But cf.* Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613 (1982) (invalidating state law barring access to portion of criminal trial); Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555 (1980) (overturning state court order to same effect).

72 441 U.S. 153 (1979); *see also* Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (refusing to carve out press exception to fourth amendment).

73 *Cf.* McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (rerationalizing earlier cases holding manufacturers liable to injured parties not in privity with manufacturers).

74 *See supra* text accompanying notes 55-59.

75 376 U.S. 255 (1964).

76 *See* Miller v. California, 413 U.S. 15 (1973).

77 *See* THE COMMISSION ON OBSCENITY AND PORNOGRAPHY, REPORT (1970).

trine tolerates a legislative presumption that such harm may occur. Thus, while admittedly harmful defamation may be protected speech, arguably harmless pornography is not.

By further contrast, the incitement and fighting-words categories are marked by the quality that illuminates Holmes's famous "Fire!" example:[78] all involve situations in which speech is highly likely to produce immediate and dangerous physical response, without time for reflection or opportunity for counter-speech. In other words, these latter two categories, unlike defamation or obscenity, are premised on a "marketplace-of-ideas" model of free expression, representing cases in which the speech seems designed to bring about action, market failure is highly likely and thus renders actual harm predictably imminent, and the costs of market failure are serious.

This variable treatment of harms across various categories of unprotected speech renders the present structure of categorical analysis insufficient. As new problems arise, the dissonance across the categories will impede the making of decisions that are consistent with the existing structure. For example, consider a hypothetical statute prohibiting the dissemination of material portraying or describing graphic and explicit violence to humans.[79] Should the constitutionality of such a statute, assuming that it meets standards of fair warning and specificity, be judged by analogy to obscenity on the ground that both sexually obscene and graphically violent portrayals are debasing and dehumanizing, and that both may lead in some undemonstrable way to acts of unlawful violence? If obscenity is the appropriate analogical category, the statute may well be constitutional because the government will not bear the risk of empirical uncertainty concerning the speech-harm nexus. If, on the other hand, such a statute must be evaluated by analogy to incitement, including its requirements of imminence of harm and intent to cause such harm,[80] the statute presumably fails on its face for drastic overbreadth.

The categorization approach generates these questions, but cannot answer them. Broader concerns about speech and social patterns must be addressed in order to solve the problem of the "no violence" statute. Analogously, as concern over sexual permissiveness increases and tolerance for sexually explicit material decreases, the boundary between the obscene and nonobscene begins to blur.[81] The deep and irreconcilable division within the Court in the past term's "book removal" case[82] is

78 *See generally* Schenck v. Unitcd States, 294 U.S. 47 (1919).

79 *See, e.g.,* Krattenmaker & Powe, *Televised Violence: First Amendment Principles and Social Science Theory,* 64 VA. L. REV. 1123 (1978).

80 *See, e.g.,* Brandenburg v. Ohio, 295 U.S. 444 (1969).

81 *See supra* text accompanying notes 55-59.

82 Board of Educ. v. Pico, 102 S. Ct. 2799 (1982).

powerful evidence of the influence of different judicial conceptions of individual freedom and community authority on first amendment litigation. Similarly, the "breathing space" for the press generated by *New York Times Co. v. Sullivan*[83] and its progeny has been pared,[84] indicating perhaps that the "checking value"[85] has lost some ground in its struggle with private, reputational values. The most telling objection to a categorical scheme of speech definition and protection, therefore, is that it is no more stable than the value alignment that lies beneath the categories.

To be fair to Professor Ely, his basic argument was not a defense of existing, judge-made categories, but rather a favoring of categorization as a general approach. His justification of this approach was the likelihood that categorization was more likely than ad hoc "balancing" to protect expressive freedom in times of political crisis and paranoia.[86] The durability of the regime of free expression in such times is a concern with which I am wholly sympathetic, and it may well be that, as between the two methods Professor Ely describes, categorization is the more speech protective when government seeks to regulate message content. That leaves us with the question of whether categorization, in its present general form, is the best that we can do.

Absent reformulation of some of the current categories, the answer must be no. In particular, a consistent and fully principled theory of free expression should have a unified view of the requirements of imminence, gravity, and causation of harm by the sanctioned speech.[87] At the least, some minimum requirements in this regard must be judicially set and maintained. Moreover, the electronic media should be fully integrated with other media for first amendment purposes. Whether the "press" is an interest group, an economic force, a trustee of the free-expression system,[88] or a beneficiary of the same, no principled justifications exist for a different set of rules for electronic as opposed to print journalism.

I suggested at the conclusion of Part I of this review that the greatest weakness in Professor Haiman's work might also be its most profound strength. Whether the free speech law of the future is or is not categorically focused, Professor Haiman's book contains an element crit-

---

83 376 U.S. 255 (1964).

84 *See, e.g.,* Herbert v. Lando, 441 U.S. 153 (1979) (permitting discovery inquiry into reportorial and editorial state of mind in defamation cases); *see also* Time, Inc. v. Firestone, 424 U.S. 448 (1976).

85 Blasi, *supra* note 11.

86 Ely, *supra* note 4, at 1493 n.55, 1501-02.

87 Professor William Van Alstyne has recently argued that virtually all free speech problems could be analyzed and resolved in these terms. *See* Van Alstyne, *A Graphic View of the Free Speech Clause,* 70 CALIF. L. REV. 107, 125-26 (1982). Whether the system of free expression could survive Learned Hand's "gravity of the evil" discount is a different question. *See id.* at 131-32.

88 *See* Lahav, *Trustees of Self-Interest,* 16 HARV. C.R.-C.L. L. REV. 5617 (1981).

ical to the survival of a healthy system of free expression. *Speech and Law in a Free Society* recognizes consistently that a speech-protective system is not cost-free, that its flourishing depends on other values being treated as secondary when matched against speech values, and that accepting these costs and so relegating nonspeech values will frequently be socially and politically controversial. History, stare decisis, and elaborate methodologies of decision are critically important tools of the judicial craft, but they are no substitute for commitment.

*Ira C. Lupu**

* Professor of Law, Boston University. A.B. 1968, Cornell University; J.D. 1971, Harvard University. My thanks to Peter Arenella, Ronald Cass, Pnina Lahav, and Henry Monaghan for their comments on earlier versions of this manuscript.

NATURAL LAW AND NATURAL RIGHTS. *John Finnis.* New York: Oxford University Press. 1980. Pp. xv, 425. $39.00 (cloth), $19.50 (paper).

The contemporary lawyer or philosopher of law is likely to think of natural law theory as a rather mysterious strain of legal theory maintaining that unjust law is not really law at all. From this view, natural law theory is principally concerned with the denial of legal positivism which, perhaps with equal mystery, denies any necessary connection between law and morality. When understood simply as the denial of legal positivism, the theory of natural law has found little favor in recent years; indeed, Lon Fuller, who often championed the theory, once claimed that the very term "natural law" "has about it a rich, deep odor of the witches' caldron, and the mere mention of it suffices to unloose a torrent of emotions and fears."[1]

One of John Finnis's principal aims in his *Natural Law and Natural Rights* is to combat this caricature by offering a "re-presentation and development of the main elements of the 'classical' or 'main stream' theories of natural law."[2] Such theories attempt to do much more than support a single claim within the theory of law; a complete theory of natural law seeks to discover the basic forms of human good, to show that these support the validity of a few basic practical principles (the "requirements of practical reasonableness"), and then to apply these principles to the problems of ethics, political philosophy, and jurisprudence. According to Finnis (and here he follows the classical proponents of natural law theory), there are objective values that human beings must promote in their own lives if those lives are to be worthwhile, and an understanding of these values allows us to formulate principles of action that help us to pursue the good. Furthermore, to promote objective values in their own lives, people will need to live in communities. By beginning with a concern for what constitutes a good life for the individual, therefore, we generate a need for principles of other-regarding morality, including principles of political morality. Only at this point does natural law theory claim anything about law: it attempts to show how law is required for the pursuit of the good. This is the outline that Finnis attempts to develop and flesh out.

To summarize the direction that this development takes, it is easiest to resort to lists. According to Finnis, there are exactly seven, equally fundamental, basic values (or basic forms of human good): knowledge, life, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion. Finnis maintains that it is self-evident that these

---

1 Fuller, *Reason and Fiat in Case Law,* 59 HARV. L. REV. 376, 379 (1946).

2 J. FINNIS, NATURAL LAW AND NATURAL RIGHTS v (1980).

are all equally and intrinsically valuable, and that the pursuit of these values exhausts the ultimate reasons one could have for action.

Finnis also enumerates nine requirements of practical reasonableness: to form a rational plan of life, to recognize the importance of each of the seven basic values, to show impartiality among persons, to maintain some detachment from one's specific projects, not to abandon one's commitments lightly, to pursue the good efficiently, not to choose directly against any basic value, to seek the good of one's communities, and to refrain from acting as one believes one ought not to act. In order to pursue one's own good successfully, one must satisfy these requirements. Finnis also explains how the attempt to satisfy them leads one to pursue the good of others. For example, the pursuit of the basic value of friendship naturally leads to the related requirement that one seek the good of one's communities. Hence, the requirements of practical reasonableness, which are themselves prior to morality, lead to moral requirements. As Finnis puts it, each is a "mode" of moral obligation.[3] Most important among the moral requirements is that individual moral rights be recognized and respected.

From moral theory, Finnis moves to a discussion of political theory, with chapters on justice, rights, and authority. Finally, Finnis presents the natural lawyer's conception of law and legal obligation and ends with a chapter meant to sketch the reasons for including theology in a natural law theory. As this attempt to summarize the topics discussed by Finnis suggests, even for a book of this length, it attempts to cover an enormous amount of territory. His aim is to provide a natural law theory of practical reasoning, ethics, political philosophy, and jurisprudence.

In the remainder of this review, I want to examine only the first stages of Finnis's theory—his account of the basic forms of good and of the fundamental requirements of practical reasonableness. There is much of interest in the later parts of his theory,[4] for example, his discussion of authority and obligation, but the most important claim made by Finnis (and by natural law theorists generally) is that an understanding of morality, justice, law, authority, and obligation must rest ultimately on a proper understanding of human good or well-being. A theory of value is supposed to provide the necessary support for moral, political, and legal theory. Although I find much with which I can agree in Finnis's discussion of moral, political, and legal theory, I do not believe that he succeeds in his attempt to base his substantive conclusions in these areas on his theory of value.

---

3 *Id.* at 126.

4 I discuss the later stages of the theory in a short review of Finnis's book that is forthcoming in *The Philosophical Review.* There, I focus on Finnis's claim that description and evaluation of law should not be treated as independent activities.

I
THE GOOD

As we have seen, Finnis claims that there are seven basic forms of objective intrinsic value. However, why should we believe that anything is objectively valuable? Furthermore, even if we are willing to accept that there are (or may be) objective values, why should we accept Finnis's list? Finnis's disconcerting answer is that the intrinsic value of the items on his list is self-evident. If his defense ended here, it would apparently be possible to reply merely by saying that Finnis's "goods" do not seem so good. Fortunately, Finnis says a good bit more. He is in an uncomfortable position, however, because if he were to end his defense with the bald claim of self-evidence, he would have nothing to say to anyone tempted to disagree—and many would disagree, since the denial of objective values has become a part of what might be thought of as contemporary folk philosophy. On the other hand, because he does believe his claims to be self-evident, he believes that it is neither necessary nor possible[5] to defend his claims about value. Nonetheless, Finnis at least seems to attempt the task he regards as impossible by discussing extensively his basic values. Perhaps he is merely explaining and not really defending his claims. Regardless of his purpose, let us see whether his defense, or explanation, is capable of supporting the view that there are exaetly seven basic values.

The values are self-evident. Does this mean that upon reflection we will recognize them? Finnis does not think so. In fact, he tells us a good deal about what is *not* meant by saying that a principle is self-evident. It does not mean that each of us (even those guided by the principle) has formulated it, that each would assent to it if it were formulated, or that it is possible to arrive at it without experience (i.e., self-evident principles are not known innately).[6] Furthermore, self-evidence has nothing to do with feelings of certainty;[7] one can doubt the truth of self-evident principles. Self-evident principles also cannot be deduced or inferred from facts. For instance, the claim that knowledge is good cannot be deduced *or inferred* from the fact (if it is one) that everyone desires it.[8] One begins to fear that Finnis is using a ploy all too common in philosophy: making a claim that will seem informative and substantial to the reader, and then slowly taking away that substance and information by enumerating the things not meant, eventually reaching a point at which

---

5 J. FINNIS, *supra* note 2, at 33, 65. It would be consistent to hold that self-evident truths are susceptible to proof. Someone with such a view would hold that self-evident truths can be known in more than one way. Finnis rejects the possibility of proving self-evident truths because of assumptions about the nature of justification. *See infra* text accompanying notes 12-13.

6 *See* J. FINNIS, *supra* note 2, at 68.

7 *See id.* at 69.

8 *See id.* at 66.

the claim is immune to criticism but at which the reader, if he keeps track of what has been taken away, is left with nothing to grasp.

What does Finnis say in a positive light about self-evidence? Self-evident values, he says, will be recognized only by those who have experienced them; for example, the value of knowledge will be obvious only to those who have experienced "the urge to question."[9] This claim is in danger of begging the question, because it may seem to suggest that the value of knowledge is obvious only to those who have experienced knowledge as being valuable. Suppose that we have felt the urge to question but believe knowledge to be at most instrumentally valuable. Finnis would apparently argue that this belief would not undermine his claim that it is self-evidently of intrinsic value, because not everyone needs to recognize self-evident truths, even if their behavior is implicitly guided by them. Again, one begins to fear that Finnis has little to say about self-evidence that is positive.

Finnis ultimately rests his appeal to self-evidence on the view that there must be self-evident principles of justification (or reason) in both practical and theoretical thought, because justification must end somewhere.[10] If there were no self-evident principles not themselves in need of justification, the search for justification would be endless. The threat of an infinite regress in justification has motivated work in philosophy at least since Plato, and this fear has often been taken to show that there must be self-evident principles of justification. But there are other responses to the worry about the possibility of an infinite regress, as Finnis is apparently aware, because he says that the issue of self-evidence raises "almost every controverted question in epistemology."[11] One could respond by claiming that the threat of a regress shows that nothing is justified; that is, one could become a skeptic. If this were the only alternative, probably most of us would follow Finnis and choose to believe that some principles are self-evident. More plausible, perhaps, than either skepticism or an appeal to self-evidence would be the claim, now popular in epistemology, that while (any particular instance of) justification must end somewhere, it need not end in self-evident principles.[12] No principle of reason and no belief is immune to reasonable doubt. Any principle or belief can be justifiably revised. Generally those taking this line with respect to either factual beliefs or values adopt a coherence theory of justification. A belief is justified by showing that it coheres with the rest of our beliefs. As we acquire new beliefs, all of our beliefs, both old and new, are subject to revision in the attempt to achieve co-

---

9 *Id.* at 65.

10 *See id.* at 70.

11 *Id.* at 67.

12 *See, e.g.,* Williams, *Coherence, Justification, and Truth,* 34 REV. METAPHYSICS 243, 253 (1980). For an application of the coherence theory of justification to moral theory, see J. RAWLS, A THEORY OF JUSTICE (1971).

herence. The process of seeking coherence is the process of justification. The beliefs taken by some philosophers to be self-evident are simply those most firmly embedded in our system of belief (or most thoroughly entangled in our web of belief) and which, therefore, are unlikely to be revised in the search for coherence.

I do not wish to claim that coherence theories of justification are without difficulties,[13] but they do form a plausible alternative to the epistemological views which seek self-evident foundations on which justification can ultimately rest. While Finnis admits that his defense of self-evidence is controversial, he gives too little attention to explaining the substance of the controversy. As a result, any reader of the book unaware of work in recent epistemology may find his case stronger than it is.

So far, we have looked only at Finnis's claim that his values are self-evident. This is Finnis's official line of defense and, according to him, it precludes further defense. Nonetheless, a few further claims are made in support of his theory of value. First, Finnis claims that the values are connected with characteristic human activities and inclinations; for example, knowledge is connected to the activity of inquiry and the inclination of curiosity. I believe that the attempt to support claims about objective value by appeal to facts about human nature is more promising than the appeal to self-evidence, and Finnis makes some plausible claims suggesting that he is making such an appeal. But officially his appeal to human nature supplies absolutely no support for his views, because officially his view is that no inference can be made from facts to values.[14] Still, he suggests that facts about human nature do support conclusions about values by claiming that reflecting on value constitutes an attempt to understand one's own nature.[15] Again, Finnis seems to be using a standard philosophical ploy. He seems to support his view by a specific sort of argument that has appeal, but that also is open to well-known objections, and to avoid the objections he denies that he is depending on the argument in question. Those who use the ploy apparently hope that the reader will fail to notice that he is moved to agreement only by the officially discredited argument. It would be more satisfying if the author were to take on the objections to his real, but unacknowledged, arguments.

Finnis continues his discussion of values by claiming that they explain human behavior, in that a piece of conduct is made intelligible when it is seen as the pursuit of one of the basic values. In fact, he seems

13 Some philosophers, for instance, worry that coherence theories cut justification off from the world allowing for a perfectly coherent system of beliefs that largely fails to correspond to reality. *See* Williams, *supra* note 12.

14 *See* J. FINNIS, *supra* note 2, at 66.

15 *See id.* at 81.

to say that claiming something to be valuable simply is equivalent to claiming that reference to its pursuit makes behavior intelligible.[16] Furthermore, he claims that the pursuit of the seven basic values exhausts the basic purposes of human action.[17] Presumably, it follows from this that all intentional, intelligible action can be understood as the attempt to pursue some combination of the seven values.

Does this account of what makes something intrinsically and fundamentally valuable support his list of values? Consider knowledge, the value discussed most thoroughly by Finnis. Is it true that reference to the pursuit of knowledge always makes behavior intelligible? Suppose I see someone muttering to himself while sitting on a Washington Square bench with his head in the air. I ask what he is doing, and he says he is counting the leaves on a particular tree. When asked why, he says that he simply wants to know; he is curious. According to Finnis, this response makes his behavior intelligible. But does it? In a sense it does; I can understand what he is doing, but surely this cannot be all that Finnis has in mind when he talks of making behavior intelligible. I could understand what the person who sticks his hand in a fire is doing when he says he simply wants to feel pain. What calls for explanation is why anyone would want to feel pain. Similarly, the leaf-counter's behavior is unintelligible in the sense that I cannot understand why anyone would simply want to know how many leaves there are on a tree. Finnis, on the other hand, must maintain that such action is intelligible. While he does not claim that all knowledge is equally valuable, he does hold that all knowledge is intrinsically and fundamentally valuable, and he must be committed to the view that any pursuit of knowledge is intelligible behavior.

Of course, the leaf-counter's behavior could be explained by a continuation of the story. For example, he could go on to explain that he had made a large bet about the number of leaves. Such an explanation, however, fails to assist Finnis. This elaboration of the story only shows that even this bit of knowledge could have instrumental value, but Finnis's claim is that knowledge is intrinsically valuable. My reason for failing to understand the leaf-counter's behavior is not that he is wasting time by not pursuing more valuable forms of knowledge. Even if nothing of value is sacrificed by his counting, I cannot understand why anyone would want that particular piece of knowledge in itself.

A test for value by reference to intelligible behavior does not support Finnis's list very well.[18] It casts doubt on knowledge, and it sup-

16 *See id.* at 62.

17 *See id.* at 92.

18 Finnis would not really regard it as a test, for he believes that values are self-evident and that it is impossible to prove what is self-evident. Presumably, it follows that there are no tests for self-evident truths.

ports the inclusion of something that Finnis omits—pleasure. The pursuit of pleasure, it seems to me, always makes behavior intelligible. Suppose the man in Washington Square is sitting with his hand in an oddly shaped box. When asked what he is doing, he replies that the box generates an electrical field capable of producing physical pleasure. I now understand his behavior, and any such reference to pleasure would produce that understanding. If my intuition about what constitutes intelligible behavior is correct, it would seem that Finnis should say that pleasure is a basic form of human good.

This does not imply that one must approve of the pleasure-seeker's action. Perhaps, one could get so attached to the box that things of yet greater value are neglected. This, however, implies at most that the pleasure produced by the box is not the only or most important value. (For instance, there may be greater pleasures.) It does not imply that the pleasure is not an intrinsic, fundamental value. I could not understand the leaf-counter's behavior even if it did not require sacrificing anything else of value; I could understand the behavior of the pleasure-seeker under the same condition.

Finnis does not ignore pleasure altogether. He uses Nozick's example[19] of an experience machine to show correctly that we place value on more than our own subjective states, including pleasure.[20] But this can show only that we value things other than pleasure, not that pleasure is not included among the things that we value. Similarly, Finnis echoes Butler's point that many pleasures depend on valuing things other than pleasure.[21] (For instance, I would not have been pleased to learn that Northwestern had finally won a football game after its long losing streak if I had not independently desired that outcome.) But the point of Butler's argument must be restricted (something Butler apparently failed to notice). While some pleasures are parasitic on independent values, not all are. In general, most physical pleasure is not so dependent. For instance, were someone to slip boiled lobster meat into my mouth, I would most certainly experience pleasure, even if I were so unfortunate as to never have heard of lobster before. Butler's argument, like Nozick's, shows only that we value things other than pleasure, not that pleasure is not among the things we value intrinsically.

On the whole, Finnis's list of values is plausible. I value most of the items on his list, and I suspect if anything is objectively valuable, then most of these are. This degree of agreement, however, does not commit one to agreeing with Finnis's very strong claims about value. He claims that his list is exhaustive and self-evident. While his claims about what is valuable may well be correct, I find little to agree with in his argn-

19 *See* R. NOZICK, ANARCHY, STATE, AND UTOPIA 42-45 (1974).

20 *See* J. FINNIS, *supra* note 2, at 95-96.

21 *See* J. BUTLER, FIVE SERMONS 14, 51 (1950).

ments as to why this is true.[22]

II
THE RIGHT

From his account of objective value, Finnis proceeds to outline nine requirements of practical reasonableness. These are very abstract, fundamental, practical principles. They are said to be requirements of method,[23] because the nature of value makes them a necessary part of any pursuit of value. The fact that there are seven, separate, irreducible, and equally fundamental values is primarily responsible for the necessity of these requirements. Were there a single fundamental value, its pursuit would require a different and, presumably, simpler method. The diverse sources of value, for instance, account for the first requirement, that we form a coherent plan of life. Because there are several values, because we can participate in each value in an infinite number of ways, and because our lives are finite, we must make choices about the values to which we form our primary commitment(s), and about the specific projects through which we pursue those values. Such a plan and such commitment are said to be necessary for any significant participation in the forms of good.

According to Finnis, the most striking and controversial implication of the diversity of value for the method of value promotion is that all consequentialist moral theories turn out to be worse than false; they turn out to be literally senseless or incoherent.[24]

Finnis admits a limited role for consequentialist reasoning with his sixth requirement of practical reasonableness that good be brought about efficiently. Little is said in a general way about the cases that admit to consequentialist reasoning, except: "Where one way of participating in a human good includes *both* all the good aspects and effects of its alternative, *and* more, it is reasonable to prefer that way: a remedy that both relieves pain and heals is to be preferred to the one that merely relieves pain."[25] Therefore, if I am considering one plan of action that will promote knowledge and another that promotes knowledge to the same degree but also involves play, then, presumably, the second is preferable.

---

22 Finnis offers one further argument for the value of knowledge: anyone denying that knowledge is valuable has uttered an "operationally self-refuting" proposition, because, by asserting that knowledge has no value, one implicitly commits oneself to holding that it is valuable to make the assertion, that it is valuable to convey a particular truth and, hence, that it is valuable to know that knowledge has no value. *See* J. FINNIS, *supra* note 2, at 74-75. At best, this argument shows less than Finnis wants, because the value of knowledge (if any) to which the spcaker commits himself may be instrumental rather than intrinsic. Denying the intrinsic value of knowledge would not be operationally self-refuting.

23 *See* J. FINNIS, *supra* note 2, at 102.

24 *See id.* at 112.

25 *Id.* at 111 (emphasis in original).

But consequentialist reasoning has very little application, because each of the seven values is equally basic and fundamental. That is, there is no objective priority of moral importance among the values and none can be reduced to any of the others. This implies that the different values are incommensurable. Given one situation in which the value of life is represented to a particular degree and another in which the value of knowledge is represented to a particular degree, it simply makes no sense to ask which situation holds the most value. There is no common measure of value capable of allowing us to compare the value of a given amount of life with a given amount of knowledge. As a result, consequentialist moral theories are inapplicable in most cases; we cannot choose how to act by seeing which act produces consequences containing more value than its alternatives.

Suppose that Finnis is right about the incommensurability of values and the incoherence of consequentialism: those of us who wish to act rightly cannot do so simply by seeking to promote value to the greatest possible extent. What are we to do? What are the guidelines for morally correct conduct? To some extent, Finnis would say that we can simply choose how to act. While there is no objective priority among values, we are permitted to choose to treat some of them as being more important in our own lives. Indeed, the brevity of life makes this necessary for significant participation in any value. In order to pursue one value siguificantly, we must forgo many opportunities for participation in others.

There are limits, however, in how far we can go to promote the values that we have chosen. While we may choose to place primary importance on a single value, the second requirement of practical reasonableness is that we recognize the objective value of all seven values. This leads to the more substantive seventh requirement that "one should not choose to do any act which *of itself does nothing but* damage or impede a realization or participation of any one or more of the basic forms of human good."[26] In order to make this requirement compatible with the necessity of committing ourselves to particular values and the resulting failure to perform acts that would promote the realization of other values, Finnis distinguishes between directly and indirectly damaging basic goods.[27] Failing to promote a basic good because of the effort to seek another good is a case of indirect damage and is permissible.[28] The seventh requirement applies to all acts; it is always wrong to

---

26 *Id.* at 118 (emphasis in original).

27 *See id.* at 120.

28 I shall not attempt to explain how this distinction could be sharply drawn. It is meant to play a role in Finnis's moral theory that is similar, but not identical, to the roles played within other moral theories by the distinctions between harming and failing to benefit, and between intending an outcome and bringing an outcome about as a foreseen but unintended consequence.

perform an action that of itself does nothing but directly damage any of the basic goods. This requirement, Finnis says, justifies the "strict inviolability of basic human rights."[29]

It is important to understand the connections between Finnis's theory of value and this theory of right action. There are seven basic values among which there is no objective priority. Hence, these values are incommensurable, and consequentialism is ruled out as a fundamental general theory of morally correct action. Because we must reject consequentialism, Finnis argues that it is always wrong to perform an action that directly damages a basic value. The argument for this conclusion is that such conduct could only be justified by claiming that the damage is outweighed by the value being protected or promoted. But values are incommensurable, so the only possible justification for directly damaging a basic value fails. The outline of this argument is interesting, and I am sympathetic with both the claim that values are irreducibly diverse and the rejection of consequentialism.[30] Nonetheless, the details of Finnis's argument are incapable of supporting the conclusions he draws.

As we have seen, Finnis does leave some room for consequentialist reasoning, but that room may be greater than his discussion of the seventh requirement implies. In particular, just as the justified use of consequentialism is limited, the scope of the seventh requirement should be limited by the area within which values can be compared. Finnis, however, renders absolute the requirement that we not directly damage a basic value, and his argument cannot support a position this strong. The only argument given for the seventh requirement is that it is made necessary by the incommensurability of values and the subsequent incoherence of consequentialism. Finnis's strategy, therefore, implies that when the values of different outcomes can be compared, it is permissible to use consequentialist reasoning and to act on the basis of that reasoning. Because the impossibility of consequentialist reasoning results from the existence of diverse values, it would seem that when only differences in a single value are at stake in the choice among alternative actions, the value of alternative outcomes can be compared. In such cases, for all Finnis says, it ought to be permissible to choose the act with the best consequences. In fact, doing so ought to be required as a case of bringing about the good efficiently under the sixth requirement.

---

29 J. FINNIS, *supra* note 2, at 121.

30 Although Finnis rejects consequentialism, it is interesting to note that he shares a major assumption about moral theory with the consequentialists: namely, that a theory of what is valuable (or good) must determine the correct theory of permissible (or right) action. This assumption can be challenged and typically is within "liberal" political theories, which tend to view principles concerning permissible action as the result of a compromise among agents with conflicting theories of value, none of which can legitimately claim superiority to any of the others. For a recent example of this liberal approach, see B.A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

In explaining his seventh requirement of practical reasonableness, Finnis offers the following example of its application:

> [I]f consequentialist reasoning were reasonable, one might sometimes reasonably kill some innocent person to save the lives of some hostages. But consequentialist reasoning is arbitrary and senseless. . . . So we are left with the fact that such a killing is an act which of itself does nothing but damage the basic value of life.[31]

Given the nature of Finnis's argument, this is a poor example. Assuming that the trade-off really is one in which one action will result in one death and another action in many, this ought to be a case in which consequentialist reasoning is not "senseless." According to his description of the example, there is no need to attempt to compare the magnitude of different values. It is simply a choice between more or less life. Only the magnitude of a single basic value rests on one's decision, so the value of the alternative outcomes are commensurable. Because Finnis's only argument against consequentialism rests on the incommensurability of the value of outcomes, and because he permits (indeed requires) consequentialist reasoning when the values of outcomes can be compared, he has no argument against killing the innocent person to save hostages.

I am not advocating killing innocent persons for consequentialist reasons, but it should be apparent that Finnis's strong rejection of consequentialism and his subsequent acceptance of the rigid seventh requirement of practical reasonableness, cannot be supported by his argument from incommensurability. No doubt, there are ways in which one might try to meet my objection. For instance, it might be argued that there are never (or at most are very rarely) real cases of important moral decisions where only the magnitude of a single basic value is at stake. Such a claim is at least initially plausible, but initial plausibility often misleads, and I would want to see this claim defended before accepting it. At any rate, the arguments actually offered by Finnis do not support his blanket rejection of consequentialism and his absolute prescription not to damage a basic good directly.

There are other worries that one might have about accepting the seventh requirement as being absolute. Suppose Sam, who is deaf, is about to be hit by a bus running a red light, and I have time to push him out of the bus's path. Unfortunately, I can only reach Sam in time by a route requiring me to knock over a small table at which people are playing chess. If I save Sam, will I not have directly damaged the basic good of play? Finnis might not be compelled to accept this example as one proscribed by the seventh requirement. Perhaps, he could argue that saving Sam and disrupting the game are both part of a single act,

---

31 J. FINNIS, *supra* note 2, at 119.

so that one is not performing an act that does *nothing but* damage a basic value. But it is easy to change the example to meet such replies. Suppose that I am too far from Sam to save him, but I can shout to Ralph, one of the chess players, who could then save him. Here the saving would be the result of a subsequent act. My act of shouting, of itself, does nothing but directly damage the basic value of play. Finnis should say that it would be impermissible for me to shout; yet surely this should be permissible.

If these observations are correct, they probably raise doubts about Finnis's claim that play is as basic a value as life. Even if Finnis is correct about there being several basic values, none of which is reducible to any of the others, we need not agree that there is no objective priority among them;[32] indeed, I believe that we have good reason not to agree. Accepting his claims about value leads to the seventh requirement of practical reasonableness, which in turn makes it impermissible to damage (directly) any good in order to promote another. Because values are incommensurable, the magnitude of damage and promotion is irrelevant. Therefore, it will often be impermissible to prevent two minutes of chess or movie watching (aesthetic experience) in order to save a life. Suppose we are asked to destroy a painting to have hostages released rather than killed. Would it be impermissible? Finnis should say it is. Suppose an entire city is being held hostage. Still, he should say it would be wrong. It would be easy to multiply examples. I cannot accept these implications of Finnis's theory of value for this theory of right conduct.

The lack of objective priority among values leads to further worries, because we are permitted (indeed required) to set a subjective priority among values through our commitments and projects. Let us return to Ralph, one of the chess players in the previous example. He notices that Sam is about to be killed and realizes that it is possible to save him. Unfortunately, this would require him to interrupt his concentration on the game, and the physical exertion required would so upset him that he would be unable to play well for several days. Ralph has made his primary commitment to the good of play and specifically to the game of chess. Ralph is morally conscientious, and he recognizes the objective value of life, so he would never perform an action that of itself did nothing but directly damage life. But by continuing the game (continuing to pursue the good of play) and allowing Sam to die, he damages life only indirectly, so he continues.

According to Finnis's account of value, Ralph's inaction is not wrong. Indeed, he is not even a bad person, for he recognizes all the

---

32 For an example of a philosopher who believes that it is possible to choose correctly even when irreducibly distinct values are in conflict, see T. NAGEL, *The Fragmentation of Value,* in MORTAL QUESTIONS 128-41 (1979).

values and has committed himself to their pursuit in a reasonable manner. But were Ralph to reason and act in the manner described, clearly he would be an objectionable person. It is simply not true that a commitment to any of Finnis's values is as good as a commitment to any of the others.

Finnis addresses this type of objection by claiming that it is clearly permissible to commit oneself to scholarship even though this requires one to fail to save lives by becoming a physician.[33] This seems plausible, but I believe its plausibility results largely from living in a community with a system of economic rewards that ensures an adequate supply of physicians. Were there many scholars and too few physicians, and if I had the ability to be a physician, then I would be a worse person were I to become a scholar rather than a physician.

Finnis's claim that each of his seven values has equal objective importance seems one of the book's most implausible claims. Furthermore, this claim leads to implausible implications in his theory of right action. I do not know how to show that there is an objective priority of importance among values, but then I also do not know how to show that anything is objectively valuable or to show what, if anything, has such value. Finnis believes that it is self-evident that certain things are objectively valuable. The claim that these values are of unequal objective importance is as evident to me as the claim that they are objectively valuable at all.

CONCLUSION

I have chosen to discuss only the fundamental elements of Finnis's theory of natural law: the basic principles of value and right action. As with most natural law theories, these fundamental elements are more interesting than what follows, because they are supposed to be capable of supporting fairly traditional beliefs in moral and political theory, for example, that we have reason to be just. I have argued that whatever the merit of the later stages of Finnis's theory, his fundamental claims about value are substantially flawed and, hence, cannot serve as the foundation for moral, political, and legal theory. Therefore, as a sustained argument for a theory of natural law, the book fails. Nevertheless, his efforts in political and legal theory may deserve more attention than I have been able to give them here, even though they cannot rest securely on the theory of value that Finnis develops.

*William H. Wilcox**

---

33 *See* J. FINNIS, *supra* note 2, at 120.

* Assistant Professor of Philosophy, New York University. The author is grateful to John Richardson and William Ruddick for reading and commenting on an earlier draft of this review.