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JURISPRUDENCE AS PRACTICAL REASON: A CELEBRATION OF THE COLLECTED ESSAYS OF JOHN FINNIS

EDITED BY MARK SAYERS AND ALADIN RAHEMTULA
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John Finnis attended Oxford University (University College) as a Rhodes Scholar for South Australia from 1962 to 1965 where his doctoral thesis supervisor was H L A Hart whose highly influential *The Concept of Law* had been published the previous year.[1] Finnis' thesis topic was an examination of judicial power with particular reference to Australian federal constitutional law.

Finnis taught briefly in other institutions including at University of California, Berkeley, and later as Head of Law at the University of Malawi on secondment from Oxford from 1976 to 1978. But he was, essentially, an Oxford man. He progressed from law tutor at University College from 1966 to Rhodes Reader in the Laws of the British Commonwealth and the United States from 1972 to 1989 and was elected Professor of Law and Legal Philosophy in 1989, holding that chair until his recent retirement.

In 2011 Oxford University honoured Finnis with a five volume collection of selected essays and other of his papers covering 50 years in both academic and public forums. The Supreme Court of Queensland has marked this important event with a small volume of essays and recollections, edited by Mark Sayers, a legal philosopher and barrister in practice in Queensland and Aladin Rahemtula OAM, former Queensland Supreme Court Librarian, deep thinker and long-time admirer of Finnis' work. The editors hope that this celebration will rekindle a more systemic interest in legal philosophy in this country and a recognition of the usefulness of natural law thinking in the resolution of the big and difficult questions, such as end-of-life decisions, abortion and same-sex marriage.

The essays and reflections have been contributed by Australian former students of Finnis (with the exception of Sayers whose doctoral thesis, however, was on

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1 (Oxford University Press, 1961).

natural law theory in jurisprudence). Lest it be suggested that there are no links with Queensland to support this publication (if links be thought necessary) Finnis provided important constitutional law advice to the Queensland government in the late 1970s and early 1980s when it was contemplating certain constitutional ventures. These are discussed by Anne Twomey in *The Chameleon Crown: The Queen and Her Australian Governors*[2] and *The Australia Acts 1986: Australia's Statutes of Independence*.[3]

Each of the five essayists has written on one of the five Oxford volumes which are arranged thematically. Sayers has provided a useful overview in his synopsis as well as an essay on the papers in Volume I, *The Foundation of Public Reason: Jurisprudence as Practical Reason*. There are two shorter reflections by former doctoral students: Bishop Anthony Fisher OP of Parramatta (recently appointed Archbishop of Sydney) and Justice Susan Kenny of the Federal Court of Australia. The book concludes with a sweetmeat by Finnis: *Rethinking Shakespeare*. He has contributed (with Patrick Martin) much valuable scholarly research and thinking on recusant Elizabethan history over the past decade or so. This essay revisits an article that he and Martin wrote for *The Times Literary Supplement* in April 2003 under the title *Another Turn for the Turtle: Shakespeare's Intercession for Love's Martyr* (the first part of the title Finnis describes as esoterically clever – not a fault from which he suffers – which was added by the editors). An untitled poem by Shakespeare appeared in 1601 in the collection *Love's Martyr* and has generated a considerable literature speculating about its underlying meaning and the audience to whom it was addressed. This essay serves as an introduction to those unfamiliar with Finnis' writing and demonstrates his accessibility and that new factual discoveries can lead to important fresh insights into what might be thought to have been a thoroughly ploughed paddock.

Finnis is regarded as one of the most influential legal philosophers of the 20th century together with H L A Hart, John Rawls and Ronald Dworkin. His *Natural Law and Natural Rights* published by Oxford in 1980 (revised in 2011) set the stage for a priori thinking as a basis for the resolution of practical ethical questions. While grounded in the natural law thinking of Aristotle and Aquinas, it is, in truth, based on the deployment of practical reason quite independent of any particular, or any, religious content. Although an important part of his life, it would be facile to pigeonhole him as a Catholic philosopher, his adopted faith. Finnis has engaged in widely watched public debates with other contemporary philosophers, such as Peter Singer, from both sides of the Atlantic. Some can be accessed on YouTube, as can some of his public lectures.

Justice J G Santamaria of the Victorian Court of Appeal attended Oxford University in the middle 1970s and writes of the prevailing philosophical milieu of moral scepticism and moral relativism and the unfriendly soil upon which any attempt to

2 (Federation Press, 2006).

3 (Federation Press, 2010).

revive 'natural law' thinking would then fall. The papal encyclical *Humanae Vitae*[4] had concluded against the compatibility of artificial contraception and Christian marriage. In that year Finnis had published an article in the *Law Quarterly Review* analysing the role of reason in the definition and evaluation of human action as it related to the natural law basis of the encyclical.[5] This had captured Santamaria as a student in Melbourne and he went on to study legal philosophy with Finnis at Oxford. His essay looks at the development of Finnis' ideas about practical reason in the context of the Hart/Fuller and Hart/Devlin debates, so stimulating for those studying law and jurisprudence in the 1960s, about the proper province of law, and its intersection with morality. There is much here to inform the discussion about the law's role in contemporary society today.

Ray Campbell, Director of the Queensland Bioethics Centre and the John Paul II Centre for Family and Life, was guided privately by Finnis in his studies at Oxford after he had completed his licentiate at the Gregorian University in Rome. He discusses Finnis' action theory in the context of the abortion/craniotomy cases and aspects of human identity.

Sayer's essay concerns the distinction between practical reason as used by citizens seeking a manner of living 'amidst the diversity of life in the public forum' where Finnis' natural law theory operates and the popular understanding of morals where it does not, or at least, not necessarily.

It is likely that the reader not trained in philosophy will find Bryan Horrigan's contribution the most accessible of the essays. He is presently the Dean of Monash Law School. His lengthy essay is an important contribution to practical jurisprudence in this country. After a synopsis of Volume III of the Collected Essays (*Human Rights and Common Good*) he applies Finnis' theory to the 'everyday work of Australian courts and lawyers' discussing the philosophical grounding of human rights, for example, for refugees, abortion, euthanasia and voluntary suicide. Horrigan adds to the debate on the usefulness of a bill or charter of rights referring to Finnis' Maccabean Lecture in Jurisprudence in the mid 1980s, the lead essay in Volume III. His inclusion of Finnis' thinking repays replication here for it gives a flavour of his elegant and measured style:

> Foregoing a justiciable bill of rights means accepting some real risks of injustices. But adopting a bill of rights, in any form now practicable, means accepting a time-bound text which downgrades some human rights by its flawed craftsmanship and its failure to envisage more recent challenges to justice – flaws magnified by the [European Court of Human Rights'] interpretative methods. It also means accepting into our country's institutional play of practical reasoning and choice a new, or greatly expanded, element of make-believe, and new or ample grounds for alienation from the rule of law.[6]

4 Pope Paul VI, *Humanae Vitae* (25 July 1968).

5 John Finnis, 'Natural Law in Humanae Vitae' (1968) 84 *Law Quarterly Review* 467.

6 Mark Sayers and Aladin Rahemtula (eds), *Jurisprudence as Practical Reason: A Celebration of the Collected Essays of John Finnis* (Supreme Court Library, 2013) 78.

In this context, Horrigan discusses the High Court decision in *Momcilovic v The Queen*[7] and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Jonathan Crowe, Associate Professor in the TC Beirne School of Law, University of Queensland, has reviewed Volume IV of the Collected Essays drawing out themes and emphasising some of the distinctive features of Finnis' contribution to the philosophy of law, writing under the title *Normativity, Coordination and Authority.* In his essay he compares the work of Michael Detmold and Finnis, both graduates of the University of Adelaide, the former some four or so years later and a foremost natural law writer. This contribution will be of particular interest to readers familiar with contemporary legal philosophy literature and debate.

The final essay has been contributed by Justin Gleeson SC, Solicitor General of the Commonwealth of Australia, and a student at Oxford in the mid-1980s. Volume V is assembled under the heading *Religion and Public Reason*. Gleeson reflects upon Finnis' Catholicism and its importance to his writing, teaching, thinking and living. He emphasises Finnis' devotion to reasoned discourse. In Australia where much of public debate is strident, far from respectful of other points of view and quite trivial, Gleeson writes:

> [T]here is a persistent resonance and clarity of thought which comes through a sustained reading of these essays of Finnis, one that brings back to mind the brilliant, dedicated, generous and insightful mind that snared but never forced his vision on his students and colleagues in Oxford. Finnis took and still takes, as seriously as one can, the command of the Aristotelian Thomistic tradition that, within a community of right – thinking and well intentioned persons, there should be scope for argument, debate and persuasion; there should be recognition that there are differences between right and wrong no matter what difficulty in discerning those differences; and that it is by adhering to the discerned path of right ... that something fundamentally human is played out.[8]

Above all, Finnis emerges from these pages as an exemplar to which all teachers might aspire:

> [C]lear, precise and critical thinking was what Finnis sought to inspire and did inspire. Never was his guidance narrow or dogmatic ... this was [his] gift ... to ... [his] students ...[9]

I have no doubt that those who read this elegant collection will be drawn to look at Finnis' contribution to philosophy even if it is no more than listening and watching him lecture on YouTube. And will be the better for it.

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7 (2011) 245 CLR 1.

8 Sayers and Rahemtula, above n 6, 107.

9 Ibid 104.