Natural Law without Metaphysics: The Case of John Finnis

Jeremy Shearmur

Institute for Humane Studies at George Mason University
NATURAL LAW WITHOUT METAPHYSICS?:
THE CASE OF JOHN FINNIS

JEREMY SHEARMUR*

John Finnis's Natural Law and Natural Rights is a remarkable book. Finnis offers a robust exposition and defence of natural law — but in terms that differ significantly from the way in which this tradition is often understood today, not least by its defenders. He does so by means of striking and powerful arguments; arguments that owe little, however, to the major philosophical traditions of this century. It is as if a new species of C.S. Lewis's "Old Western man" had appeared on the scene. Finnis interprets an old tradition in radically new ways. Moreover, he has moved from a restatement and defence of that tradition to go onto the attack against contemporary work in ethical theory and, most recently, has applied his ideas to the important issue of the morality of nuclear deterrence. In the paper that Finnis contributes to the present symposium, he presents interesting arguments against Ronald Dworkin, a writer whose views in legal philosophy might superficially seem close to his own. In particular, Finnis criticizes Dworkin's ideas about the determinate character of the law, using arguments drawn from his own interpretation of the natural law tradition.

It is clearly not possible, in one short paper, for me to do justice to the views of a writer whose work is as controversial as it is rich, and so I must be selective.

1. Finnis and the Problematic of Natural Law

For those outside the tradition of natural law, the problematic of natural law in our own century would typically be understood as it is presented in the work of a figure such as Henry Veatch. Natural law, in his view, is grounded on a view of the world in which different species have essences and natural ends; ends which are to be chosen in the case of mankind, who possess free will. Such natural ends and essences distin-

---

* Jeremy Shearmur, B.Sc.(Econ), M.Sc., Ph.D. (London School of Economics, University of London); Research Associate Professor, Institute for Humane Studies at George Mason University, 4400 University Drive, Fairfax, VA 22030.

I would like to thank my colleague Emilio Pacheco for useful discussion on the subject of this paper, which we had, initially, hoped to write jointly, and Bradford Hooker, Michael Krauss, and especially David Gordon for criticism and suggestions. I would, however, emphasize that they are not to blame in any way for such errors and confusions as remain.

1 J. Finnis, Natural Law and Natural Rights (1980) [hereinafter Natural Law].
guish different species and different kinds of things. With the exception of man if he makes incorrect choices, such essences must be understood if we are to be able to understand the way in which the world works: they play an explanatory role. On this view, we can in principle come to understand the content of natural law by means of empirical investigation of a certain kind. But corresponding to this external investigation there must also be, in the case of man, an "internal" investigation. The kind of conduct that can be discovered "externally" to represent the fullest development of human nature will also, when considered "internally", turn out to represent his moral completion. But—and this, presumably, is the point of natural law theory in such an interpretation—the connection between the essence of man and how we understand the world is required so that we may be assured that there is more to morality than that which we find subjectively appealing. It may also serve a role in helping us to decide between objects of moral choice about which we are, intuitively, indifferent.

The problematic of this tradition, however, stems in part from the relation between the internal and the external accounts. What is the relation between our explanatory understanding and what is important morally? What, in the case of man, is to play the required explanatory role, and can whatever plays such a role plausibly play the required moral role, too? Above all—as Leo Strauss argued in the Introduction to his Natural Right and History—it seems unclear what is supposed to happen to this tradition once, after the work of Galileo, Descartes, Newton (and also Darwin), the natural sciences abandoned teleology. While it is still possible for philosophers to defend scientific realism, it is not clear, even if this could be done successfully, that such a defence would have any relevance to issues of morality. And while those who believe in God might still think that He has imposed some kind of order onto the world, it is not clear that there is any obvious connection between such an order and the moral duties of man.

Finnis, in Natural Law and Natural Right, sidesteps these problems by taking a largely internalist view of natural law. (In this respect there

---

6 See, e.g., the summary of such criticisms of natural law theories offered by J. Gray, Liberalism (1986).

7 L. Strauss, Introduction in Natural Right and History 8 (1953).


9 To be sure, some—such as those who delivered the Boyle Lectures (compare, A Defence of Natural and Revealed Religion: Being An Abridgement of the Sermons Preached at the Lecture Founded by the Honourable Robert Boyle, Esq., (G. Burnet ed. 1737))—tried to read moral and political lessons out of Newton, and there was a continuing tradition of natural theology. But it would seem to me that once one leaves teleology behind, the content of those lessons is very much up for grabs. (Compare the work of J.R. and M.C. Jacob, for example, as cited in the bibliography in Shapin, History of Science and its Sociological Reconstructions, 20 Hist. of Sci. 157-211 (1982). I do not necessarily endorse the sociological reading of this material offered in the Jacobs' work.)
might seem to be common ground with Dworkin.) Rather than trying, with Veatch, to defend an older cosmology or to engage with problems of supposed connections between fact and value, Finnis instead offers us what might be called a descriptive phenomenology of moral action (in an ordinary rather than a technical, Husserlian sense). From reflection upon this, he reads off various features which he claims to be undeniable moral truths. Finnis's approach—which he also defends as true to the great figures in the natural law tradition—is powerful, because it enables him to avoid problems that writers such as Veatch have found so difficult. It also offers him the means of fending off other challenges to natural law theory.

First, for Finnis there is no problem of moving from facts to values, because within his starting-point—the "internal" reflective analysis of action—values are already there to be found. (What is more, Finnis tells us a lot concerning those values, steering a course between those who maintain that anything could be valuable in the sense that it could represent a possible object of human choice, and those for whom there is no moral choice, because in one way or another all moral choices are fully determinate.) Second, Finnis suggests that what is today often cited as "the" statement of a fact/value problem, Hume's analysis, is in fact better understood as directed towards a different problem: one of the relation between truth and motivation. Here Finnis also offers a solution, suggesting that "one is motivated according to one's understanding of the goodness and desirability of [certain] human opportunities". In respect to both of these moves, Finnis seems to be essentially correct and also at one with some modern defenders of "moral realism" who lie outside the natural law tradition.

From all this, however, there emerge two issues which I will pursue in a little more depth: Finnis's specific account of an internalist realism (on which I must be extremely cursory); and some problems of internalist realism itself (and of Finnis's use of the cosmological argument). I will conclude by taking up a point that Finnis develops in his paper in this collection. I will, broadly, endorse his argument against Dworkin and agree that judicial decisions are not fully determinate. I will suggest, however, that this opens up an important practical issue in public policy; one which may demand a radical solution.

---

10 Veatch, for example, might seem able to score important points for a teleological cosmos by offering a Quinean account of science, such that it has no simple metaphysical import, and thus cannot play in truth the role that it played historically of undermining an Aristotelian cosmology. However, what is good for science—a sophisticated conventionalism—would also seem good for metaphysics. It is not clear, once Veatch has used Quine's arguments against the scientific realist, how he can avoid their use against his own realist, Aristotelian metaphysics.

11 Natural Law, supra note 1, at 47.

12 Compare, for example, the excellent survey of some of the issues involved in D. McNaughton, Moral Vision (1987).
2. Finnis as Philosopher

From what I have written above, the reader will understand that I appreciate the boldness of Finnis's ideas. I also think that in many important respects he is completely correct, and that where he is not right, he is challenging and interesting. However, while Finnis's points are boldly and strikingly put, they are often delivered in a "take-it-or-leave-it" manner, with little or no argument or anticipation of possible objections. Insofar as Finnis is giving us a descriptive account grounded in the phenomenology of his own moral world, I suppose that we must take his word for it. But insofar as his points are intended to be inter-subjectively acceptable, his method often falls short of what is required. In particular, he does not seem to consider whether our moral experience may be subject to different and competing interpretations, each of which may in itself be more or less coherent, but over the merits and adequacy of which argument may be possible: that the situation in ethics may thus closely parallel that in science or in other areas of knowledge. Instead, Finnis's approach seems to me largely descriptive. Where he offers arguments, they seem to involve the suggestion that anyone who espouses a view other than his own must hold a position that is in some way self-defeating.

Take, for example, what he says about knowledge. Finnis tells us that knowledge is valuable in itself. But there is no attempt to meet arguments that might be offered by someone who challenges that proposition—for instance, by holding that knowledge is valuable only relative to human needs and concerns. Indeed, let us for a moment consider how someone who holds such a view might argue against Finnis's view. He might advance the claim that it is not clear that the world is a better place for someone's knowing how many letters there are in the full edition of the Oxford English Dictionary. The point of such an objection might be to suggest that it is not the case that knowledge is valuable in itself, but instead to affirm that it is valuable only in relation to certain human needs or concerns.

Now Finnis might reply that he has himself written that to "think of knowledge as a value is not to think that every true proposition is equally worth knowing". True enough. But what Finnis has not done is to offer an argument that all knowledge is of some value. Instead, Finnis offers the argument that the skeptic who claims "that knowledge is not a good" is operationally self-refuting. But it is not clear that someone who denies

---

13 I should perhaps stress here that my concern is not so much with the skeptic as with those who hold different substantive views from those of Finnis—from the pragmatists to a writer like Nicholas Maxwell who argues passionately that human knowledge is misunderstood in theory and perverted in practice unless we bear in mind its relation to human needs, including those for wisdom and intelligibility. See N. Maxwell, WHAT'S WRONG WITH SCIENCE? (1976).

14 NATURAL LAW, supra note 1, at 62.

15 Id. at 68.
that knowledge is a good *per se* must embrace the views which Finnis criticizes. Rather, he may take the view that much knowledge—including his own claim—is valuable, but maintain that how we should understand its value is at bottom as instrumental rather than as intrinsic. It is simply not the case that we are faced here—or elsewhere—with a choice between Finnis's views and views that are self-refuting.

It is striking that Finnis often seems to treat all theorists who hold views different from his own as people who are either denying the obvious or who fall prey to various fallacies. It is almost as if Finnis thought that his views (rather than simply being some—in his judgement, the best—among the various different, contending theories) are the only views that a reasonable person could hold. To this we will return.

Finnis also lays down a number of "principles of sound empirical judgement". He offers us a list of such principles and gives a brief account of his view of their status. But he does not discuss possible objections to his principles or alternative views as to their status. This is all the more striking as one of his principles would seem to be false in the form in which he states it. Finnis tells us that "an account or explanation of phenomena is not to be accepted if it requires or postulates something inconsistent with the data for which it is supposed to account."  

But it has been argued that this is precisely what occurred when Newton explained—and corrected—Kepler's laws.  

(As we shall see, this kind of "fact-correcting" explanation is of some significance in relation to Finnis's views about the epistemology of ethical claims.)

My point here is not to make a big fuss over the fact that one of Finnis's formulations may be incorrect. After all, this is the common fate of philosophers who try to say *anything* that is of interest. My concern, rather, is that there is an unfortunate tendency in Finnis's work to present his ideas as if he were reading them off the very fabric of the universe, rather than as something that emerges from, and has to be redeemed in, argument with his colleagues.

Things are much the same in Finnis's substantive account of ethics. While his presentation is refreshingly direct, he writes as if he had no idea of what others would find problematic about his views. For example, Finnis's account of things that are of value and of practical reasonableness veers from sometimes reading as if it were an account of the ground upon which all serious moral battles are to be fought out (i.e. that most moral problems would involve debates about the merits of choices between the things that he describes) to suddenly being the vehicle for specific, contentious but unargued judgements about highly controversial matters such as abortion and the moral status of animals. In addition, as a conscientious non-believer, I was surprised to discover a section of my moral concerns being kidnapped by Finnis, with virtually no argument, for the category of religion!

16 *Id.* at 74.

In his more detailed discussion, Finnis has important, interesting, and in my view, wise things to say about some aspects of human moral experience. But he seems not to recognize the full variety or the complexity and moral ambiguity of many of the objects of human moral experience and endeavor. Consider what some people reportedly experience when hunting game for pleasure or when exercising power; or the close links that some people experience existing between ecstasy and pain. Consider also the streak of fanaticism—and what one might call practical unreasonableness—that frequently seems to be a vital ingredient in many of the most important of human achievements.

I was also struck by the way in which, if one were to go by Finnis's account, one would have no conception of the very existence of people such as the "Walter" of My Secret Life. This author published, in his old age, what apparently we must take as a reflective account of a life given over to the all-consuming pursuit of sexual experience. While he had, to be sure, some qualms about how he had treated some people, and more than a usual degree of blindness about how his actions would have appeared in the eye of an impartial spectator, he seemed, nonetheless, able on reflection to take a positive view of his life. While the subject of his concerns, and the rigidity of his pursuit of them, are doubtless exceptional, many of us might be able to tell a similar story of our concern with philosophy, cats, cricket, music, or whatever. These stories, unlike those of people of exceptional achievement, will not be redeemed by our having achieved anything that anyone else will judge significant. But for those of us who are not religious believers, one of the endearing and truly human features of our species is our ability to care passionately about things that, in the end, are transient, just as are we.

All this is not to deny that Finnis might turn out to be right (although in my view our appreciation of human life would be diminished if he were). It is, rather, to express concern about the narrowness of Finnis's vision, and about his prima facie lack of concern about engaging with the arguments that he must realize would be brought against his ideas.

The features of Finnis's approach singled out in this section for critical attention are not, in my judgement, merely matters of his personal style. Rather, I believe them to be a consequence of his implicit epistemology of ethics. He takes our mature reflection upon experience as a source of moral knowledge in something akin to the understanding of the sources of knowledge held by empiricists and intellectualists in early modern

---

18 Cf. "WALTER", MY SECRET LIFE, (G. Grimley ed. 1972). He does, it is true, in his Second Preface refer to the way in which, in looking back on material that he wrote as a younger man, he is struck by the "monotony" of "the course he had pursued towards women." But might not a teacher, a salesman or a solicitor experience the same reaction on perusing journals kept, in some detail, about their earlier years?

If, as David Gordon has suggested to me, the appropriate response is 'But 'Walter' was merely pursuing one of Finnis's values,' this simply highlights the problem raised earlier in my text that these values may be the ground upon which moral battles are fought, as opposed to offering any substantial guidance on which choices are appropriate for people to make.
philosophy. This, I suspect, generates the "Moses striding down the mountain with the tablets of law"-like aspects of his philosophical style. In addition, this speculation explains why he treats those who disagree with him as either falling prey to fallacies or denying the obvious: for if, at a certain level, he takes his own views as self-evidently correct, what else can he say? If I am correct about all this, it points to a significant weakness in his views—and to something that is in no way a necessary feature of an internalist approach to ethics such as the one he takes. Finnis stands in need of an account of how disputes at the internal or practical level are to be resolved. But he also needs to appreciate that disputes can arise concerning the character of what we are discerning by such means—a point that I explore below.

One final point. It seems to me that we should be very careful about the status that we grant to our moral experience. How we experience the world, and our reflective understanding of that experience, may be affected not only by our substantive moral theories, but also by social conventions and various patterns of domination which we may well not recognize as such. People's moral experience of slavery, or of relations of class or status, or of the relations between men and women, are not something that can be uncritically used as data for the construction of ethical theory. It may only be in the light of theoretical reflection that we discern the ethical undesirability of things which we had hitherto taken simply as part of the furniture of our moral universe.

3. The Limits of Internalism

Let me turn, now, to what is perhaps the heart of Finnis's approach: his internalism (by which I mean his insistence on ethics as a practical rather than a theoretical discipline). For whether or not my objections to his elaboration of his theory are correct, his internalism has considerable attractions and merits very serious consideration. Of this internalism, however, we must ask: does a purely internalist natural law theory work? Can it stand without those links to metaphysics and an understanding of the world that were so much a feature of those approaches to natural law of which Finnis is critical?

Insofar as Finnis is an internalist (we must also bear in mind the final sections of his Natural Law and Natural Right and of his Fundamentals of Ethics, to which we will turn, later), he is, in fact, in broad agreement

---

20 Or, rather, what should be called his prima facie internalism; for as we shall see, at the heart of Finnis's views is in fact his version of the cosmological argument. In the end, rather than an internalism that rescues ethics from dependence on metaphysics, the whole structure rests upon metaphysics of the most traditional sort. He does not, as far as I can tell, explain how this relates to his emphasis, as opposed to Veatch and Adler, on a practical rather than a theoretical or metaphysical interpretation of natural law theory.
with Dworkin, the object of his criticism in the paper that Finnis has contributed to the present volume. Dworkin also takes an internalist view of ethics, arguing that there is no need for the proponent of such a view to answer what he calls "external skepticism".21

I wish to argue that internalism is not enough, and that for a natural law theory or a theory of ethics to be successful it must also be prepared to address "external" questions: ethics cannot avoid being a theoretical discipline. Finnis might well be incredulous at such a statement. Given his account of the phenomenology of moral life; given his ability to answer, in terms of his internalism, the kind of problems that led Veatch into externalism and its difficulties; and given his use of Wiggins22 to answer Mackie's23 worries about the "queerness" of objective values, he might wonder whether I am not beckoning him off the path of internalism in the hope that he will lose himself in the swamp of objectivist natural law theory. What possible reason could there be for him to take up the problematic of this tradition given his success at resolving the questions that he has addressed and the singular lack of success of those who have followed that other path?

My argument is that Finnis's appeals to the phenomena of our moral experience are insufficient to make his case. There may be more than one explanatory account that could be offered of the character of moral experience; there could, as it were, be more than one way in which the appearances could be saved. But certain such accounts, if accepted as correct, would lead us to take a different view of those things that present themselves to us as the demands of morality; we might judge their real character to be other than how these things present themselves to us. I will offer three examples to illustrate my point.

First, to argue successfully for the objectivity of some effect does not show that we are correct in our understanding of its character. For example, those who point to the occurrence of certain kinds of mystical experience in various different religious traditions certainly produce evidence that tells for the objectivity of the existence of these experiences. What such evidence does not do, of itself, is to show that these experiences are genuinely to be understood as religious in their character. This would be a matter for further argument. (And indeed, the occurrence of what seem to be similar experiences in different religious traditions might be at odds with what certain of these traditions had claimed about the religious character of those experiences.)

Second, Finnis makes much, against Mackie, of the Platonic theme of our desiring things because they seem good to us, rather than their seeming good to us because we desire them.24 Suppose that Finnis were correct

23 Compare, J.L. Mackie, Ethics: Inventing Right and Wrong 38 (1977) and Fundamentals, supra note 3, at 57.
24 Fundamentals, supra note 3, at 44.
concerning the phenomenology of these areas of our experience. This would not, on the face of it, prevent Mackie, or others in the Hobbesian tradition, from claiming that these things seem good to us simply in virtue of the nature that we happen to have. Consider, here, the character of Screwtape, as revealed at the end of C.S. Lewis's The Screwtape Letters. What had seemed, earlier in the story, to be the expressions of an avuncular affection are revealed as expressions of an obscene predatory lust by the older devil for the very being of his junior. Now imagine, further, that Screwtape had given us a more extended description of what there was to be appreciated about his junior, from such a perspective. One could—or so it would seem to me—give a Platonic account of the character of these qualities. But we would hardly be willing to judge that his account was an account of what was really good, despite the fact that it presented itself that way to him. (We might, say, take much the same view of the pederast's appreciation of a small child or a cannibal's appreciation of ourselves.) The point of this example, however, is to suggest that the kind of reality that we may get from a "Platonic" account of moral phenomenology, where this is understood as the product of our nature, is not necessarily something that we would wish to treat at face value.

The idea of the relativity of the moral to our nature may pose a third problem. When we offer a practical account of our moral experience, are we in fact concerned with an experience of the moral at all?

Consider the kind of account of human morality that is suggested by Richard Dawkins' The Selfish Gene. Dawkins' intriguing idea is that we might see ourselves as, in effect, instruments that our genes use to perpetuate and multiply themselves. Our moral impulses and reactions, on such a view, are real enough; but the way in which their objects present themselves to us leads us to misunderstand their character. Rather than the categorical character that they may appear to possess, they are actually to be understood as hypothetical in their force, and with an antecedent that, should we understand it for what it is, we may well reject. Rather than imperatives that are intrinsically binding, and a panoply of goods that are intrinsically worthwhile and often to be preferred to our narrower self-interest, their true character, on such an account, is very different. Many aspects of morality turn out to be a set of responses that are (broadly) effective at their task of getting us to propagate, and then care for, the genes of which we, and those close to us, were until recently the unknowing carriers.

Such a theory is suggestive. It would offer us an account not only of the existence of "morality" and of our moral phenomenology as the product of such a "nature", but it would also offer some suggestive ideas about why human moral phenomenology takes some of the forms that it does. (For example, it explains why we should care so much more about people close to us than we do about other human beings—for those close, other things being equal, stand a better chance of carrying genes that are similar to ours.)

I should perhaps say a little more about this account, as there are different ways in which it might be understood. It might be interpreted as offering a naturalistic explanation of how we come to have the moral experience that Finnis describes. But such an account, it might be argued, does not invalidate the character of that experience as moral. Rather, it simply exhibits the mechanisms by means of which we have such experiences. I do not, personally, think that there can be a compatibility between a fully naturalistic explanation and something's having coherent, non-naturalistic properties. My argument against Finnis, however, does not rest upon this particular piece of unargued metaphysics. The Dawkins-inspired story that I have sketched above does not merely offer a naturalistic explanation of the existence of the phenomena with which Finnis is concerned; it gives a particular such account which calls Finnis's treatment of these phenomena into question.

There are at least two ways in which such a story might be understood to challenge Finnis's views. The first of these assumes Dawkins offers a competing explanation of the moral phenomenology offered by Finnis. The central idea here is that there can be more than one theory that is equally compatible with the same evidence. The evidence, in this case the moral phenomenology, does not in itself enable us to decide between them (although other evidence or arguments may tell in favor of one rather than the other theory). Consequently one cannot read the truth of one particular theory off from evidence that is compatible with it. But, it might be objected, how could our Dawkins-like account undermine Finnis's theory, given that Finnis spells out the way in which we naturally understand the experience in question?

To this one can respond that the situation may be similar to Richard Gregory's account, in his *Eye and Brain,* of experiments that led people to experience that they were looking at a chair when, in fact, they were looking at cleverly arranged pieces of wood. The wood was arranged such that it generated the same perceptual experiences as would a chair, seen from a particular perspective. And we are naturally disposed to interpret such experiences as perceptions of chairs rather than of groupings of disconnected pieces of wood. On a Dawkins-like account of the activities of our genes, they would have led us to experience something that presents itself to us as the moral, when, in fact, what we are experiencing is an "aura" that has been given to it so as to enhance behavior that promotes their survival. Just as—in Gregory's case—the disclosure of the particular mechanism that led us to have the experiences in question is incompatible with our continuing to interpret this experience of seeing a chair as, in fact, having been produced by a chair so the disclosure of a Dawkinsian mechanism as standing behind our moral experience would lead us to

---

27 I would like to thank David Gordon for insisting that this was necessary.
question whether we should take our experience of the moral quite as it presents itself to us. Thus, Dawkins is here understood as suggesting an explanation of the genesis of our moral phenomenology which is incompatible with our continuing to take it at its face value.

One further point should perhaps be added. It might seem that such an account requires, in each case, that there be a genuine something there (a chair; morality) which is then imitated. I do not see why this has to be the case in the particular circumstances which we are considering. For there seems to me no reason why an entire way of experiencing things may not be manufactured. For our genes, in the kind of view that we are discussing, are not like parasites that opportunistically take advantage of an existing pattern in our behavior in order to exploit it for their own purposes—as does a cuckoo the behavior of some other bird. Rather, we are their creation.

The other way of interpreting Dawkins' account as challenging Finnis's views would be to see him as having offered us a “fact-correcting” explanation. That is to say, what his theory would here offer is not—as in our previous interpretation—something that completely replicates our moral phenomenology but, rather, something that explains it and, at the same time, corrects it. If it were to do this, it would lead us to discern features of our moral phenomenology that differed slightly from the character that we had imputed to it up to this point. We would, as it were, be left with a better picture of our “moral” experience, and a new explanation of its character which fitted our new account, but which was not completely compatible with the account that we had accepted up to that point.

Our new account, however, would have to represent a good approximation to our older account, which was being corrected, so that we could understand how we had earlier accepted our previous view of what was going on. (A Dawkins-like reinterpretation of the moral would fit this particularly well, just because we are, on that account, disposed to interpret this experience in just the kind of way that Finnis describes.)

Such ideas about the correction of what we had previously taken as statements of plain matters of observable fact are not as far-fetched as they might seem: there is ample documentation of the way in which our theoretical interpretation of phenomena shapes the way in which we experience them. It is often only when our previous theories are challenged that we are led to a new, more accurate descriptive account of what we were observing.30

Should we come to accept a theory such as Dawkins' as correct, we might well come to treat moral constraints upon our behavior rather differently than we do now. Our moral phenomenology might well stay pretty much the same (just as, say, we may well continue to experience visual illusions as illusions, even when we understand that they are illusory). But we may not accord it the same weight when moral consid-

erations clash with our individual interests, or with other things that we care about, as we did in the past. While we may still, on reflection, prefer the higher pleasures to the lower—on eudaemonistic grounds—it is not clear that we would have reason to defer to what presented itself as moral when it was clearly against our wider personal interests to do so.

I am not suggesting that a theory such as Dawkins’ is true; only that if it were, it would call Finnis’s account of natural law into question. Furthermore, in order to answer such an argument, it would be necessary for Finnis—and Dworkin—to emerge from their internalism and engage in metaphysical and scientific argument.

This might, on the face of it, seem no major issue. As someone sympathetic to moral realism, I face precisely the same problem. It seems to me, however, that to make this move into science and metaphysics is of no small significance for Finnis’s views, given the way in which—contrary to the views of Veatch and of Adler—he has placed emphasis on natural law as being practical rather than theoretical in its character. My argument is that, while the challenge posed by a view like that of Dawkins may be one that Finnis is able to meet—perhaps with ease—the argument that he must use in so doing cannot be purely practical in its character.

I am here using Dawkins to put an older point in a modern form. The critical reader perusing the work of Bishop Butler might have been led to ask: Is the voice of conscience the voice of God? And the reader of Adam Smith’s *Theory of Moral Sentiments* might wonder if there is more to human conscience than a tidied-up version of the judgements of various “significant others”—something which on the face of it need have no moral significance at all. The links for which Veatch and others were seeking were surely something that, if they could be found, would provide a measure of reassurance that what presents itself to us as morally binding should, indeed, be taken as such.

However, the reader who recalls the final section of either *Natural Law and Natural Rights*, or *Fundamentals of Ethics* will know that Finnis does in fact discuss metaphysics; indeed, metaphysics of a most traditional kind. For it turns out that he wishes to go, with St. Augustine, beyond the internalist “athleticism” of the Stoics. In order to do this, he offers us a version of the cosmological argument. But this move is less than adequate, for two reasons.

First, the cosmological argument cuts no ice other than with those who are already committed to certain kinds of metaphysical theory. While there may be something interesting that can be said to those outside this tradition on the question why there is something rather than nothing, it hardly seems a question to which someone must think that there has to be an answer at all (for example, if they hold a theory that explanation is inescapably relative because it always consists of explaining one thing

31 *Cf.*, *Fundamentals*, supra note 3, ch. 1.
in terms of something else). If someone could already make anything of the idea of something's being necessary in itself (as opposed to necessary relative to something else), they might find the cosmological argument attractive. But it seems to me that such metaphysics are, to say the least, less than compelling. However, as Finnis indicates that his views here rest upon those of another writer, and we have already strayed far from ideas in which the reader of this Review is likely to be interested, I will not engage further in this argument here.

The second reason, however, is of more immediate concern. In my view, there is a mismatch between what would be needed to meet an external challenge of the kind that I have described, and the kind of argument that Finnis offers, should that be presented as such. For what is needed, I have suggested, is an argument that tells us that moral experience is genuinely moral. But Finnis’s argument is too general for this. On the face of it, the bare existence of a First Cause is compatible with a Dawkins-style account of morality, while the links that Finnis offers between his metaphysical argument and anything that pertains to morality are extremely tenuous. To firm up those links, and to make the connections to issues of morality that would meet the threat posed by my interpretation of the significance of Dawkins’ argument, would seem to lead Finnis back to just the kind of exercise in theoretical metaphysics from which he has taken such pains to dissociate himself.

4. The Consequences of Indeterminacy

So much for the more grandly philosophical aspects of Finnis’s approach. But what of the specific concerns of the paper that he offers in the present volume?

Here, I am broadly sympathetic to his argument, against Dworkin, that precedent and moral principle cannot fully determine legal decisions. However, if Finnis is correct about this, he opens up an important problem. For if there is an indeterminacy in legal decision-making of this kind, we may well ask: on what basis will decisions, then, be made? If Finnis’s argument is correct, has he not shown where interest may enter into legal decision-making? And if this is the case, do we not face problems like those to which we have been alerted by public choice theorists, especially when legal decisions are enforced with the power of the state? If there is anything in all this, we may face a genuine problem of whether the decisions of the courts will in fact be in the interest of their clients

34 See Natural Law, supra note 1, at 382.
35 By this I mean problems of the kind that have been raised in the work of James Buchanan, Gordon Tullock, and other members of the Virginia School of political economy. I should perhaps explain that my concern here is with their point that we cannot presume that government—or indeed judges—act in the public interest, like a benevolent despot. I do not wish to claim that those making such decisions are necessarily self-interested or that they are motivated by a desire for pecuniary gain.
and more broadly in the general interest. (The problem seems to be acute precisely because decisions can be called to account only to the extent that they are determinate on the basis of principle and precedent.)

What we might do in the face of such problems, if they are real, would take me beyond the scope of the present paper. But it is perhaps worth considering whether, in the face of these concerns, we should look again at the radical idea of competing legal jurisdictions, initial compliance with which is a matter of voluntary agreement, as a mechanism that could keep a check upon the courts' ability to use their discretion against the public interest. Such an idea might seem absurdly radical until one bears in mind the way in which our own early legal history was a story of pluralistic and sometimes competing jurisdictions. Indeed the very unthinkable of such an idea could itself be the mark of successful exploitation—just as, on Dawkins' account, we would be that much more effective as vehicles for the interests of our genes if we did not even suspect that morality may not be all that it appears to be! But here I approach ideas that are, in their way, even more radical than those which Finnis sets out in the concluding sections of his books, and which it would not be appropriate to explore now. I must, in consequence, conclude my account with a final tribute to the stimulation that Finnis's work has given to those of us who care about the problems with which he has been concerned, even when we may not agree fully with him on his suggested solutions to those problems.

---

26 Cf., e.g., H.J. Berman, Law and Revolution (1983).