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Recommended Citation

Rev. Thomas A. Russman (1981) "Balancing Rights: The Modern Problem," *The Catholic Lawyer*: Vol. 26 : No. 4 , Article 6.
Available at: <https://scholarship.law.stjohns.edu/tcl/vol26/iss4/6>

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BALANCING RIGHTS: THE MODERN PROBLEM

REV. THOMAS A. RUSSMAN*

The rights of individuals in our complex society often conflict, or at least appear to conflict. Various solutions have been proposed in the hope of resolving these conflicts. Some proposed solutions have been attacked as oversimplifications because they contemplate resolution by attending to only one or two of the relevant aspects of the conflict situation. Others require the impossible calculation of all consequences of alternative courses of action over indefinite periods of time. Presently, I wish only to emphasize the desirability of avoiding both oversimplification and impossible calculation. Paradoxically, this would seem to require both *increased* and *reduced* complexity. To demonstrate how both objectives can be achieved, I will derive a great deal of assistance from John Finnis' *Natural Law and Natural Rights*.¹ I will develop his theories and apply them to the general problem of balancing rights.

RIGHT: CLASSICAL AND MODERN

Leo Strauss argues in *Natural Right and History*² that the use of the term "rights" to describe legal and moral relations among persons is a product of modern voluntarism and individualism as exemplified by such writers as Hobbes, Locke, and Adam Smith. This modern use of "right" to describe some prerogative possessed by an individual has had the effect, says Strauss, of setting individual against individual in a competition of right claims. The result is perhaps most clearly seen in Hobbes' description of the state of nature in which everyone has a right to everything and the resulting ferocious competition makes life "nasty, brutish,

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¹ J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) [hereinafter cited as FINNIS]. All references in the text are to this book unless otherwise noted.

² L. STRAUSS, *NATURAL RIGHT AND HISTORY* (1965).

and short.”³ Even in the somewhat mitigated individualism of Locke and Smith, Strauss foresees the same fundamental problem: elimination of effective concern for virtue or the common good resulting from the individual’s constant quest for the most advantageous position. It is this decay of concern for virtue—indeed, of any objective basis whatever for morality—that causes Strauss to have grave reservations about the capacity of “rights-talk” to express an adequate philosophical ground for modern man’s political life. The degree of subjective individualism implied by “rights-talk” renders our communal and national lives fragile and precarious.

The antidote Strauss prescribes is a return to the classical notion of “natural right.”⁴ This doctrine, as found in Plato, Aristotle, Cicero, Aquinas, and others, provides that right is not something possessed by one individual. It is a *state of affairs* that is fair, right, or just. A right is not, as in the modern notion, the amount of power an individual is acknowledged to have to satisfy his own desires within a legal or moral system. The classical notion sets forth a view of *human relationships* that are “right” and describes all desires that are contrary to such relationships as unvirtuous. The modern notion, according to Strauss, starts with individual desires and then proceeds to curtail gratification of these desires by enforcing rights claims against them. The classical view holds that certain human ends or goods can be discerned objectively. States of affairs that favor these goods are proper, while contrary desires cannot be pursued under any circumstance.

John Finnis has successfully combined the modern notion of rights as being the possession of individuals with the classical concern for objective human ends or goods and the need for communal, and not merely individual, dedication to these goods. Respect for individual rights is viewed as part of the common good and the rights themselves as “a usefully detailed listing of the various aspects of human flourishing and fundamental components of the way of life in community that tends to favor such flourishing in all.”⁵ Each individual is respected as a locus of such flourishing, not as an expendable means in the pursuit of further ends. I believe Finnis’ effort to accomplish this grafting of notions is quite promising, given the view of basic goods he offers as a background. It goes far toward recovering what Strauss informed us we had lost, while not sacrificing the considerable advantages of current terminology.

Finnis reveals the classical roots of his treatment of rights in his preference for the “benefit theory” rather than the “choice theory” of rights.

³ T. HOBBS, *LEVIATHAN* 62 (London 1651).

⁴ The classical use of the singular term “right” can be contrasted with the modern notion of “rights” in the plural.

⁵ FINNIS, *supra* note 1, at 221.

The choice theory embodies the individualism and voluntarism of the unregenerate modern theory of rights, while the benefit theory embodies an objective view of what rights really are and how they contribute to human ends and human goods. According to the choice theory, to say *A* has a right with respect to *X* is to say that *A*'s choice with respect to *X* is legally enforceable. Pursuant to the choice theory, an individual has no rights if he is not permitted to take steps to enforce his decisions. Accordingly, if a child's parent/guardian or the state was required to initiate an action on behalf of the child, the power of choice and hence the relevant rights would vest only in those parties, not in the child.

According to Finnis' benefit theory, a law designed to protect or promote the basic flourishing of the child bestows rights upon him even though he must depend on others to enforce those rights. Finnis speaks of children's rights in this manner because he is convinced that the factors which prevent or aid the child's flourishing are often objectively knowable. The child, therefore, has rights to those things which are stipulated in law *because they benefit* the child's flourishing. It is this benefit of individual flourishing that is the objective basis of rights. Conversely, the choice theory has no objective answer to the question: what benefits full flourishing? Such evaluations are purely a matter of personal choice. Thus, rights cannot be analyzed as benefits to such flourishing—they must be seen only as a power of enforceable choice. The choice theory, therefore, rules out the possibility of certain benefits being so fundamental that they should be enforced or maintained even if the individual does not or cannot choose to enforce them. Such benefits would correspond to rights more fundamental than the power to choose to enforce something concerning someone else. The power to choose enforcement can be seen as one of the benefits described by "rights-talk." Thus, as Finnis suggests, the choice theory can be incorporated into a benefits theory because the power of choice is itself a benefit. The benefit theory, however, cannot be incorporated into a choice theory without leaving aside all rights of minors, all rights more fundamental than the power to choose to enforce, and the entire objective ground of rights found in benefits to the full flourishing of the individual's participation in basic goods. The choice theory portends a sort of agnosticism as to what is really good or beneficial, leaving such evaluations to the choice of the right-holder. In so doing, the power to choose to enforce is itself acknowledged as a good or a benefit. Finnis points out that it is not the only good or benefit that the institution of rights can or should aim to preserve.

This last point is another application of Finnis' general attack upon the most well-known modern alternatives to his approach to ethics and the ethical foundations of law. He shows that the alternatives are narrow and inadequate and that they reduce all of ethics to one or the other of its parts. In classical utilitarianism all goods are reduced to pleasure. In

classical deontology all moral discernment is reduced to the rule of consistency: always act in such a manner that you are willing to have the principle of your action made into a universal law. Finnis argues that all goods cannot be reduced to pleasure and that goodness and reasonableness include more than consistency. Accordingly, he offers eight irreducibly basic goods⁶ and a list of principles of reasonableness to be applied in the ethical realm.⁷ The list includes, but goes well beyond, consistency.

Finally, Finnis attacks consequentialism, a theory which attempts to resolve moral issues by considering all long-term consequences of all alternatives as impossible to carry out. In principle, the consequentialist holds that one can kill ten innocent people if, when all consequences are considered, the good consequences outweigh the bad. There are at least three insurmountable problems in attempting to calculate such counterbalancing: (1) How does one calculate unknowables?—most of the indefinite long-term consequences of an action are unknowable. (2) How does one calculate things which are irreducibly different, such as the basic goods? One might as well add together lengths, weights, and velocities and claim that a significant number has been produced. (3) How does one take into account the infinite number of available complex alternatives?

Finnis does not deny that balancing alternative courses of action is necessary to adjudicate rights and duties. His aim is to keep such a procedure within rational limits. The distinction he draws between absolute and limited rights is designed to provide a method of balancing that is both possible to carry out and reasonable to require.

RIGHTS: ABSOLUTE AND LIMITED

It is contended that John Finnis correctly asserts that the vast majority of what we call human rights are not absolute rights. Rather, "most human rights are subject to or limited by each other and by other *aspects* of the common good."⁸ Only through the mediation of this "weighing" process may a practical judgment be made as to the range of application of human rights. Finnis maintains that the right to own property, the right to have one's contracts fulfilled, the right of assembly, and the right of free speech are examples of limited, not absolute, rights. A brief survey of these rights and how they may be limited will clarify why absolute rights may not be curtailed.

The goods of the earth and universe are available to satisfy human needs. These needs include not only the physical requirements of food

⁶ *Id.* at 85-90.

⁷ *Id.* at 100-27.

⁸ *Id.* at 218 (emphasis in original).

and lodging, but all other aspects of full human flourishing—including health, play, friendship, aesthetic appreciation, responsible free choice, knowledge, religion, and active participation in life. According to Finnis, the right to own property is an aspect of distributive justice. It enables people to participate more fully in these basic goods—by earning money people provide these things for themselves and their loved ones. Moreover, they have directed their energies toward the objective of providing goods and have thereby promoted the values of life, health, and love. The private property purchased with earned money gives concrete focus and range to the individual's participation in these values. Private property has a similar effect upon the basic values of knowledge, aesthetic experience, responsible freedom, and religion. It enables people to apply themselves to these values by, for example, buying books, decorating their homes and contributing financially to church programs. By providing a unique domain for the exercise of one's initiative and creativity, the ownership of private property focuses, motivates, and facilitates participation in the basic goods of human life. Because the institution of private property is one of the conditions for human flourishing that constitutes the common good, its acceptance is therefore not only morally defensible, but in the vast majority of cases, morally obligatory.

Additionally, Finnis' analysis of the right to possess private property implicitly shows how the right should be limited. Because the institution is justified as a part of the common good, it may be curtailed when other aspects of the common good require such limitation. What if certain individuals acquire more property than they need to achieve a full level of flourishing as participants in basic human values? Finnis argues that this excessive wealth must be returned to the common stock where it can serve the general welfare. This can be done in many ways: redistributive taxation; risk-taking investment in enterprises likely to produce jobs and life-enhancing commodities; and, philanthropic, humanitarian, or artistic donation. Since the right to own property is not absolute, an individual who does not put his excess wealth to use so that it redounds to the common good may be subject to expropriation.

The rights of assembly and free speech are also not absolute. During periods of grave civil disorder the right of assembly can be justly denied, at least temporarily, for the sake of general safety. The right of free speech may likewise be limited when necessary to protect the rights of others. Finally, the right to have contracts fulfilled is limited by a number of larger concerns. Like private property, the institution of contractual obligation benefits the common good, for it provides an atmosphere of enforceable trust in transactions. For the sake of the same common good, however, contractual obligations can be abridged in the name of other aspects of justice—equity, for example. Bankruptcy laws generally abrogate the full effect of contracts and allow for the proportional distribution

of assets among creditors. These laws serve to prevent one creditor from receiving full payment according to contract, while other creditors receive nothing. Under such circumstances, concern for equity in the form of a proportional distribution of limited assets serves the common good more fully than does enforcement of contract rights.

Finnis tells us that all human rights are part of the common good for it is in the interest of all to live in an environment wherein such rights are dependably defended and enforced. While all rights can be construed as part of the common good, not all flow from consideration of the common good. Instead, some derive directly from the basic human goods. Since there can be no rational justification for acting directly against a basic good because such an action would require an impossible calculation, the right to life, for example, being founded on the basic good of human life is absolute. Property, on the other hand, is not one of the basic goods. It merely facilitates participation in those goods and, therefore, flows from consideration of the common good. Finnis defines the common good of a political community as "the securing of the whole ensemble of material and other conditions that tend to favour the realization, by each individual in the community, of his or her personal development."⁹ Private property is one of those conditions.

There is a third category of rights which is an extension and combination of the first two categories. These rights flow from authoritative specification of the rights in the other two categories. For instance, the right to property within a legal system can be specified in various ways, all equally effective in securing the common good. It is therefore the duty of the appropriate authorities, legislators, and judges to determine which of these specifications is to have the authority of law within a jurisdiction.¹⁰ It is important to emphasize that rights of this third category imply a moral as well as a legal obligation. This moral duty flows from the general obligation to act in accordance with the common good. Since authoritative specifications of the sort we have been discussing are required for the common good, they are morally binding.¹¹

Rights of the second and third category flow from considerations of the common good and hence are not absolute. They are limited by rights of the first category, by other rights of the second and third categories, and by aspects of the common good. The only rights which are absolute

⁹ *Id.* at 154.

¹⁰ Specific rights flow from authoritative specifications. For instance, following a certain procedure described in law may entitle an individual to certain benefits as a matter of right. In another jurisdiction, the law may bestow little or nothing on a citizen who followed the same procedure.

¹¹ Because the specifications are morally binding, there can be no such thing as what has been called a "purely penal law," a perfectly good law that has legal but no moral force.

are those which flow directly from the basic goods themselves. They are absolute because there can never be a justification for performing an act, the sole purpose of which is to attack a basic good. Any such justification must allege that the long-range good outweighs the attack upon the basic value. Such calculations, as we have seen, are impossible to carry out and irrational to suppose. This means that capital punishment cannot be justified by claiming that it will deter others from taking human lives. Killing an innocent person is a direct attack upon a basic good—life—and an unjustifiable violation of that person's right to life.¹²

The elusive concept of absolute rights may be better understood through a closer examination of the rights Finnis labels "absolute rights": (1) the right not to have one's life taken as a means to further an end; (2) the right not to be deceived in any situation in which factual communication is reasonably expected; (3) the right not to be condemned on charges known to be false; (4) the right not to be deprived or be required to deprive oneself of one's procreative capacity; and (5) the right to be taken into respectful consideration in any assessment of what the common good requires. It should be noted that none of these rights flow from considerations of the common good as such. The last right indicates that the common good should be determined by considering the flourishing requirements of each individual. That right flows from the basic goods taken as a whole. The other aforementioned absolute rights involve direct attacks upon two basic values: life and knowledge. It seems safe to state that almost all absolute rights are connected with one of these two basic values. Summarily stated, they amount to the right not to be killed, injured, or deceived.

The doctrine of absolute rights applies only when there can be no reasonable justification for intentionally performing an action which *is in itself nothing but* an attack upon a basic value. This, however, does not imply that it is never morally justifiable to act against a basic value such as human life. Killing in self-defense, for example, is an act which is *more than just an attack* upon the basic value of that other person's life. It is a defense of one's own life by warding off an attack upon it. The attacker's right to life is not violated if he is killed in self-defense, for his right to life protects him only against acts which are *nothing but* attacks upon his own life. It does not protect him from *his attack* on others' lives. This is why the right to life is more accurately described as "an *innocent person's* right to life." Note that the case of self-defense is different from the aforementioned case wherein a question of killing someone to dissuade others from taking human life was discussed. If the person to be killed is

¹² The individual's right to life is in no way voided by the presence of gangsters who may attempt to implicate others in the atrocity of their own deeds by playing games in which they (the gangsters) write the rules.

innocent and he is not threatening to attack a basic value, then killing that person is an attack upon the good of life. Such action is a violation of the innocent person's absolute right to life.

Even those who agree with Finnis' distinctions have difficulty determining when absolute rights are in effect. The issue to be resolved is whether a particular action is *in itself nothing but* an attack upon a basic value and therefore a violation of absolute rights, or whether the action is *at the same time* a defense of basic values and therefore *not* a violation of absolute rights. The potential subtlety of this question can be seen in a discussion of punishment for crime.

When someone is punished according to law for violating the rights of others, harm is inflicted upon him which, if inflicted upon an innocent person, would constitute a violation of the innocent person's rights. Yet in the case of the convicted criminal, punishment is not regarded as a violation of the criminal's rights. Why is this so? Finnis answers that the common good requires that criminals be punished:¹³ (1) so that such punishment may vividly teach citizens the requirements of the law; (2) so that the actual or potential recalcitrant may be given incentives to abide by the law; (3) to demonstrate to the law abiding that they are not being grossly disadvantaged by criminals so the law abiding will continue their cooperation with and support of the authorities; and (4) "to restore the distributively just balance of advantages between the criminal and the law abiding, so that, over the span of time which extends from before the crime until after the punishment, no one should actually have been disadvantaged . . . by choosing to remain within the confines of the law."¹⁴ These justifications of criminal punishment flow from considerations of certain aspects of the common good. Such considerations can justify abridgment of the limited rights of the criminal: property rights, freedom of movement, freedom of speech. They cannot, however, justify abridgment of a criminal's absolute rights, because by definition such absolute rights are not subject to limitation by anything other than defense of other absolute rights. There is nothing, therefore, in Finnis' justifications of criminal punishment that could be employed to justify capital punishment. In fact, Finnis never mentions capital punishment in his discussion of the penal system. Is capital punishment ever justifiable? The answer to this question will clarify what we mean when we speak of an absolute right to life.

It seems clear that under certain circumstances capital punishment is justifiable, although not based upon reasons derived from the common

¹³ FINNIS, *supra* note 1, at 262-63.

¹⁴ *Id.* at 263. In effect, this fourth proposition is the balancing of the advantages to the criminal of his abuse of freedom by the disadvantages to him of some proportionate loss of freedom—whether by incarceration, fine or other restriction.

good as presented by Finnis. Such reasons justify only the restriction of various freedoms, they do not show how the death penalty would avoid violating the criminal's right to life. The only way to show that the death penalty does not violate the criminal's rights is to show that it is, in itself, something more than an attack upon the basic good of life. It must also be a defense of other basic values that cannot be adequately defended in any other way. Suppose the criminal in question is a murderer who has killed many times and who, according to prudent judgment, will kill again if given the freedom to do so. Suppose also that this killer has shown that none of our prisons can contain him and that he will inevitably escape and kill again. The death penalty in such a situation is not merely an attack upon the killer's life, but is also a defense of potential innocent victims. I conclude that in such a case the death penalty is justified and is not a violation of the murderer's right to life.

The defense of capital punishment is similar to that of self-defense but there are important differences. Self-defense usually justifies a violent response against an *actual* attack upon a basic good. Capital punishment is a defense against *potential* attacks upon basic goods, the potentiality being the attitudes and dispositions already displayed in the criminal's behavior. These attitudes and dispositions comprise the threat to the basic right to life of others. The threat of harm in capital punishment cases is as real as in cases of self-defense, although possibly more remote. It is the presence of this real threat and the inadequacy of alternative protective measures that justify the use of the death penalty. For similar reasons, other forms of punishment which may be viewed as particularly primitive, such as castration for rapists, can be justified under appropriate circumstances. Such punishments, while they attack basic goods, also defend basic goods and therefore are justified when no other adequate means of defense is available.

Similar points can be made concerning the basic good of truth and the right not to be deceived. It is conceivable that someone's request for information could be an attack upon basic values: for example, the murderer at the door who asks if the person he intends to kill is in the house. This request for information is part of a larger plan, the objective of which is the violation of someone's right to life. Deceiving this would-be murderer is more than just an attack upon the basic good of truth, it also defends against an attack upon life. Deceit in this situation does not violate the would-be murderer's right to truth. Similarly, a request for information can be an attack upon the basic value of friendship, if fulfilling the request requires a breach of confidentiality. When possible, such attacks should be repelled by means other than deceit. When it appears that friendship can be preserved only through a lie, however, such an action would not violate anyone's right to the truth.

Although Finnis discusses neither capital punishment nor the cir-

cumstances that would justify deceit, I believe that my statements are consistent with the ethical assumptions both he and I share. Now we shall examine a moral situation: the warlike attitudes of fully armed modern nations, with respect to which Finnis concludes that absolute rights are not currently being respected. He hypothesizes the consequences of the following words if spoken by a modern government to potential adversaries:

'If you attack us and threaten to defeat us, we will kill all the hostages we hold; that is to say, we will incinerate or dismember as many of your old men and women and children, and poison as many of your mothers and their unborn offspring, as it takes to persuade you to desist; we do not regard as decisive the fact that they are themselves no threat to us; nor do we propose to destroy them merely incidentally, as an unsought-after side-effect of efforts to stop your armed forces in their attack on us; no, we will destroy your non-combatants precisely because you value them, and in order to *persuade* you to desist.'¹⁵

Such words do express a willingness to violate absolute rights to life and health in order to persuade others from doing wrong. Finnis claims that taking the lives of civilians in war is the same as the killing of a hostage who is no threat to basic values. Taking the lives of the civilians, therefore, must be nothing other than an attack upon the basic good of life and hence a violation of their absolute rights.

This conclusion depends upon a clear distinction between combatants and noncombatants. The combatants are those who are attacking and who can be repelled by force without violating their right of life. The noncombatants are nonparticipants in the attack. Killing them does not repel an attack and therefore violates their absolute right to life. It is problematic as to who are combatants and who are noncombatants in this age of intercontinental warfare.

Suppose different words are spoken when the modern government addresses its potential adversaries:

If you attack us and threaten to defeat us, we will repel the attack by destroying your war machine at every level of its operation. A large majority of your civilian population constitutes part of the mechanism of your war machine by performing tasks that contribute to and make possible your all-out effort to defeat us. In this and other ways, they support, encourage, and intensify the efforts of your military and its leaders. Therefore, if our situation is sufficiently desperate, we will not hesitate to attack your civilian population, not only to persuade you to desist from your attack, but also to prevent them from making their substantial and necessary contribution to that attack. We realize, however, that a large segment of your civilian population, your young children, for example, is truly innocent. We regard their

¹⁵ *Id.* at 224 (emphasis in original).

deaths as a most unfortunate by-product of our justified attack upon the larger number of your civilians who are contributing to our destruction.

Such words do not imply a denial of the absolute right to life. They construe an attack upon the civilian population as more than an affront upon the basic good of life. The words are a defense of basic values and therefore not a violation of rights. To the extent that governments act on these principles rather than on the ones attributed to them by Finnis, their behavior seems defensible on moral grounds which are acceptable to Finnis.

CONCLUSION

The issue raised in this article concerned the balancing of rights in cases of apparent conflict. Alternative schemes of balancing were found to be either oversimplifications or impossibilities. In their place, I offer a distinction between absolute and limited rights, and methods to balance them against each other.

The crucial element is that neither the balancing of absolute rights nor the balancing of limited rights described above involves impossible consequentialist calculations. Regarding absolute rights, the question is simply whether an act is, in itself, nothing but an attack upon a basic good. The answer to this question can be subtle and difficult, but in principle, not impossible to formulate. The doctrine of limited rights requires a determination as to which conditions favor participation in human goods and which do not. The process often results in an analysis of many difficult courses of action which may be equally defensible. The task is to choose one of the alternatives. Undoubtedly, limited rights which generally serve the common good should not be tampered with frivolously, but only when broader aspects of the common good are clearly at stake. Nevertheless, although the process of balancing limited rights often is difficult, it is neither impossible nor irrational. When we inquire as to what conditions favor human flourishing, we have confined our question sufficiently so that experience and wisdom can often provide plausible answers. When we ask what the net advantages and disadvantages of indefinite pursuit of each of an infinite number of avenues of action will be, we have made our answer dependent upon the arbitrary calculation of unknowables. This consequentialist question cannot in principle be answered.

John Finnis has offered us an eminently workable alternative to most of our contemporary rights theories. He has accomplished this by bringing into the mainstream of modern rights talk the classical concern for objective human ends or goods. He has done more than recover ancient virtues, he has given us a way to more successfully address the distinctively *modern problem* of balancing rights.