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John Finnis
Notre Dame Law School, john.m.finnis.1@nd.edu

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A Response to Harel, Hope, and Schwartz

John Finnis*

It is a privilege to have this opportunity of responding to the thoughtful objections made by Alon Harel, Simon Hope, and Daniel Schwartz to theses I advance in my *Collected Essays,* Volume III, *Human Rights and Common Good.* I take up first the more or less political–institutional issues, and then the underlying issues concerning the pre-political content of a community's common good, and the basic elements in the flourishing and rights of its members as human persons facing the choices needed for worthwhile, just, and sustainable communities.

All these issues, institutional or not, are thoroughly normative. And so they involve a lot of non-normative facts and predictions—not because you can get an Ought from a sheer Is (or from a Was or a Will be), but because all practical reasoning has not only at least one normative premise but also at least one factual premise about circumstances and predictable causalities.

So, Section I considers Harel's thesis that judicial review can be defended because my "inauthenticity" critique of it applies *a fortiori* to the legislative articulation of human rights. Section II considers Harel's thesis that my account of punishment is a "consequentialism" of "harmony". Section III considers Schwartz's thesis that the principle of subsidiarity is an insufficient restraint on governmental action. Section IV considers Harel's and incidentally Hope's theses on sex ethics (particularly their thesis that same-sex relations and marriage are morally acceptable), an ethics of basic and great importance for socio-political life and theory, though conspicuously neglected in late-liberal *political* theory (unlike early liberal, say Thomist theory). Section V, finally, considers Hope's thesis that our understanding of basic human goods cannot be disentangled from the local morality or moralities in which we grew up—or at least, cannot be disentangled sufficiently to provide us with moral guidance.

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* University of Oxford, UK, and University of Notre Dame, Indiana, USA. Email: john.finnis@law.ox.ac.uk.
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I

Harel's attempt to turn against legislatures the inauthenticity argument I directed against courts seems to me to lack traction. By amendments to my "special insult" paragraph, he envisages legislators or a legislature acting precisely "in the name of rights," and claims that in so doing they give the appearance[1] of acting *not* to protect rights but instead to "exercise their discretion, represent their constituencies," etc.[2] Is this scenario coherent? When a legislature purports to be protecting rights (as legislatures often do), it so far forth denies that it is acting out of "good will" in its "discretion," or to advance voters' views rather than the legislators' best judgment about what the relevant rights require.

If one thus, like Harel, speaks of legislatures and their powers in standard hard-nosed "political science," external-observer terms—as exercising discretion, obeying the raw views of the voters, their whims, and so forth—and, on the other hand, speaks of courts in idealized, internal, self-interpretation terms—as enforcing duties that exist independently of their will, by judgments that are binding in virtue of their content, and so forth, one's purported comparisons are, I think, misleading and of no value as comparisons. There is, of course, room for a hard-nosed, external account of judicial decisions as exercises of the power of majorities among judges all appointed by the executive governments in power at the time of their respective appointments, and all maneuvering for support of favored outcomes in cases perhaps quite removed from the case at hand. There is room, too, for an account of legislation in the terms such as constitutions employ when they confer power on legislatures to make laws "for peace, order and good government" or "for the... public welfare." After all, sensible citizens hold that the legislature and its members owe their authority to the Constitution, written or unwritten, and (regardless of the presence or absence of judicial review) have a constitutional duty to uphold the historic rights of the people they represent—and act authentically when they try to do so. Sensible citizens also hold that the legislature should be dissolved and its members replaced when they defy or fail to respect those rights, or when they interpret or deal with them in ways that injure the common good of that people. That position is compatible with the accompanying thought that until a statute has been repealed or a constitutional provision amended, it presumptively imposes moral–political obligations of compliance that are defeasible only by *either* strong injustice *or* competing moral

[1] Not "potential appearance": in any given case there is either appearance or no appearance.

[2] I fail to see why to "make decisions in light of their convictions in the name of the polity" even appears to be inconsistent with acting for the sake of human or other rights; some convictions are convictions precisely about what rights people have, whether as human persons or as citizens of a polity with a proud tradition of protecting rights.

responsibilities of particular persons or classes of persons. Be all that as it may, the mode and type of account must be the same on both sides of the comparison.[3]

The "inauthenticity" objection to wide powers of judicial review on "Bill of Rights" grounds is an *internal* critique, independent of any "hard-nosed" account of judicial decisions such as was sketched in the preceding paragraph. Recall the passage quoted by Harel in setting up his argument about the inauthenticity of legislation about rights: "Here, perhaps, is the special insult added to the injury done when courts, in the name of rights, have overturned statutes and thereby sustained, abetted, or even imposed child labour..." and so forth. "Here" where? The preceding sentence reads (I add a few bracketed clarifications):

> ...when a judge has to determine, not what rights and principles have been established by the existing law as a whole, but whether existing laws measure up to the 'inspirational' terms of a novel constitutional instrument, may not his judgment, too [that is, like a legislator's], be deflected—say, [in the case of judges] by a narrow concern for precedent, the formulae of the text, the bounds of the pleadings and arguments addressed to it, and the parties' special circumstances, and by the political vices (more discreetly indulged [than is typical of *legislators*]), and mistaken political theories (such as utilitarianism, neutral liberalism, or social-cohesion conservatism), which enjoy a wider success amongst the sophisticated?

And the sentence following the passage quoted by Harel is:

> Only out of court will the judge say what Mr Justice Kenny of the Irish Supreme Court recently said, reflecting approvingly on twenty years of 'active' interpretation of the Irish bill of rights: 'Judges have become legislators and have the advantage that they do not have to face an opposition.'[4]

And my argument there concluded[5] by asking whether we truly need to "impose on our courts the task of confronting either legislation or common

[3] The essay under discussion already made that point: "The political scientist, from a relatively external viewpoint, will rightly identify ways in which the outcome of legislative deliberations is affected by factors the debaters would not advance as good reasons for choosing that outcome. But he will *do the same* for the higher judiciary, and for the process of choosing its members." *Human Rights and Their Enforcement*, in 3 COLLECTED ESSAYS OF JOHN FINNIS 26 (2011) [CEJF III] (emphasis added).

[4] John Kenny, *The Advantages of a Written Constitution Incorporating a Bill of Rights*, 30 NILQ 189–206, 196 (1979). As J. M. KELLY, THE IRISH CONSTITUTION 475, n. 29 (2d ed. 1984), points out, Kenny J's "have become" refers to the epoch inaugurated by his own judgment in Ryan v. A-G (1965) IR 294.

[5] The paragraph reads:

> Yet this was not mere usurpation. The constitutional text, by confusing education and inspiration with government, has required or at least invited judicial excursions beyond legal learning. The exigencies of federation virtually oblige the constitution-maker to impose extraordinary responsibilities on the courts who must supervise the distribution of powers between co-ordinate central and local legislatures. One must ask oneself whether some comparable exigency suggests that we should impose on our courts the task of confronting either legislation or common law with the uncharted "necessities of a democratic society."

law with the uncharted 'necessities of a democratic society'." That looked back to the argument's main formulation:

> What is "necessary in a democratic society for the protection of, say, morals" is, it seems to me, *an issue not to be mastered by legal learning or lawyerly skills.*[6]

This whole line of thought was given a potent exposition in a judgment of my former Oxford colleague, Justice Heydon, dissenting in Australia's highest court in *Momcilovic v R* (2011).[7] In Heydon J's opinion, the power to "interpret" the provisions of the Charter of Human Rights and Responsibilities (a statute of the State of Victoria) is an essentially legislative, not judicial power (and so, under the rigorous Australian doctrine of separation of judicial from executive and legislative power, cannot be validly conferred upon a court[8]). For the Charter sets out rights abstractly stated, and with a general provision that they may be "subject under law to such reasonable limits as can be justified in a free and democratic society based on human dignity, equality and freedom."[9] As Heydon J. found, this is a signal (or indeed statement) that the lawmakers of the Charter intend that other, subsequent *lawmakers*—the courts!—will resolve political conflict about which among the possible moral and legal meanings of "P has a right to X" *will be* favored in law. Such a delegation or transfer of law-making authority imposes on the judges a task which my essay argued is radically inappropriate for an institution purporting to *apply the law.*

Pace Harel, I do not think this inappropriateness is because "rights-based constitutional decisions made by courts distort and misconstrue the nature of the deliberation concerning fundamental rights," or because "fundamental rights are an issue of justice rather than justice according to the law." Rather, I think that, as Heydon J. also argues, almost all our existing law, laid down in legislation and the gradually developed and developing *common law* private and public law, exists to protect "fundamental rights" or "human rights." The point that Heydon J. and I each go on to make is that *declarations* of rights in the form of *Bills* or *Charters* of rights are abdications of the normal, appropriate domain of legislation (and of evolving common law)[10] to, in effect,

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[6] CEJF III: 42 (emphasis added).

[7] [2011] HCA 34 (High Court of Australia). In the background is GRÉGOIRE WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS (2009), and essays in RICHARD EKINS (ed.), MODERN CHALLENGES TO THE RULE OF LAW (2011).

[8] On the dubious origins of this doctrine in its application to the Constitution of the Commonwealth of Australia, see 4 COLLECTED ESSAYS OF JOHN FINNIS 12–13, 15–16 [CEJF IV]. Under the special application or extension of the doctrine made, equally questionably, in Kable v. Director of Public Prosecutions for NSW (1996) 189 CLR 51; [1996] HCA 24, the Supreme Courts of the States must comply with the doctrine in all their exercises of jurisdiction, because they are also invested with federal jurisdiction.

[9] The formula with its accompanying non-exhaustive list of five "relevant factors" is taken from the s. 36 of the South African Bill of Rights, Part II of the Constitution of 1997. For a review of limitation clauses since the Universal Declaration of Human Rights 1948, see Webber, *supra* note 7, 60–2.

[10] On the compatibility (in principle) of cautious judicial development of common law with the judicial task of applying the law, see my *Analogical Reasoning and Law*, CEJF IV essay 19, and *Adjudication and Legal Change*, *CEJF* IV essay 20 (originally *The Fairy Tale's Moral*, 115 L QUART. REV. 354–73 (1999)).

a superior legislator that then operates under the *mask of applying law* when in reality it is *making* law in a way partly distorted and degraded[11] by the inappropriate matrix of purported law-applying in which this law-*making* is performed.

Thus the absence of "ambivalence" which Harel counts as a merit of judicial decisions on broad abstract rights is *precisely* the inauthenticity that I am complaining of. Nor is he entitled to assume, as he does, that courts simply "identify what the pre-existing legislature's duties are" or that "courts' decisions concerning basic rights are binding independently of any will (including the will of the courts making these decisions); they are binding (and publicly understood to be binding) by virtue of their content." The point of my essay's and Heydon J's argument is that the indeterminacy of the provisions that are "interpreted" in judicial human rights decisions, provisions involving as they do—within an exceptionally wide, loose "frame" (in Kelsen's image) of determinacy—an almost infinite range[12] of sheer choices amounting to a real

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[11] In particular, the proper consideration of the issues of rights, justice and common good is liable to be distorted by appeals to "binding precedents" and/or to legalistic arguments that some prior decision (e.g. to permit homosexual adoption) *commits* the polity or the electorate or the law to a decision "consistent" with it (e.g. to permit same-sex marriage)—whereas a voter or a legislator could more rationally decide that the later decision should be inconsistent with the earlier *as a first step to reversing the earlier, unsound decision.*

[12] Heydon J at [432] quotes the analysis by THOMAS POOLE, *The Reformation of English Administrative Law*, 68 CAMBRIDGE L.J. 142, 146 (2009). Here is the context in paragraphs 428–30 and 432 of Heydon J's judgment:

> [428]...Section 7(2) gives a court power to...decide the legal extent of the limit to a human right. The limit is then the criterion against which a particular statutory provision is measured under s 32(1) to determine whether it can be interpreted "in a way that is compatible with human rights." The limit to a human right must be "reasonable". What is the relevant criterion of reason? What can be "justified" - and not only justified, but "demonstrably" justified? What is the difference between that which is "justified" and that which is "demonstrably justified"? The shrill, intensifying adverb merely highlights the vacuity of the verb. The next question asks what can be demonstrably justified in a "free and democratic society" - and not just any free and democratic society, but one "based on human dignity, equality and freedom". Section 7(2) then calls for the "taking into account [of] all relevant factors". The criteria for identifying the relevance of a particular factor are not defined. But a non-exhaustive list of five relevant factors then appears. The first (s 7(2)(a)) is the "nature of the right" (but not its "purpose" (cf s 7(2)(b)) or its "extent" (cf s 7(2)(c)). The second (s 7(2)(b)) is the importance "of the purpose of the limitation" - not the importance of the limitation itself. The third (s 7(2)(c)) is the "nature and extent of the limitation". The fourth (s 7(2)(d)) is the "relationship between the limitation and its purpose". The fifth (s 7(2)(e)) is "any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve."
>
> [429] The origins of s 7(2) may be illustrious. But its language is highly general, indeterminate, lofty, aspirational and abstract. It is nebulous, turbid and cloudy....
> [430] Section 7(2) depends in a number of respects on analysis by reference to "purpose" (s 7(2)(b), (d) and (e)). Does "purpose" refer only to the purpose revealed in the language, or something wider? Section 7(2) depends in two respects on an appeal to reasonableness (the opening words of s 7(2) and s 7(2)(e)). Although s 7(2) does not talk of "balancing", as the Explanatory Memorandum and the Second Reading Speech did, that is the process it involves. But the things to be balanced or weighed are not readily comparable - the nature of a right and various aspects of a limitation on it, the nature of a right and other rights, the nature of a right and "all relevant factors", which could include many matters of practical expediency of which courts know nothing, social interests about which it is dangerous for courts to speculate and considerations of morality on which the opinions of the governed may sharply differ from those of the courts. It is for legislatures to decide what is expedient in practice, what social claims must be accepted, and what moral outcomes are to be favoured - not courts....
> [432] Section 7(2) creates a kind of "proportionality" regime without comprehensible criteria. The regime operates as a method of determining what the formulation of the law is to be - ie the precise form a legislatively recognised human right is to take, which in turn is used as a factor relevant to determining the

discretion guidable only by political preferences and hunches, is an indeterminacy so far-reaching and deep-going that it would be thoroughly mistaken to say that the court's decision in such cases, when it is delivered, is binding by virtue of its content or identified anybody's pre-existing duties. If the public or "the polity" believes that such court decisions are binding by virtue only of their content, or are simply identifications of pre-existing duties, then the public or polity is deceiving itself. That again is my complaint about the inauthenticity of such court decisions: that such decisions are, with utter starkness, binding *by the will* of the (say) five judges who outnumber the (say) four dissenters—a brute fact that has nothing whatever to do with propositional content—and are decisions not identifying duties but imposing them, retroactively (of course), by virtue of the fiction that *here the judges are doing what judges ordinarily do.* In other words, Harel's descriptions of the judicial role simply assume all the very points in dispute.[13]

Dyson Heydon, like myself, grew up in a country, Australia, that has had the profound good fortune to have no judicial review of legislation on "fundamental rights" grounds, and whose citizens therefore, in Harel's view (fully expressed in his earlier draft and still insinuated now around cues 6–8), have lived this last century and more under the shadow of the legislature's "whims" and thus are deprived of "republican freedom." Well, that is what Australia's citizens chose open-eyed in 1898, precisely so that they would not have to live in the world of humiliating make-believe in which the future shape of their common good is announced to them by judges under the often phony description "applying the law." After all these years their great-grandchildren and their fellow citizens and lawfully resident non-citizens are still living as freely and well as any people in the world (though this can no longer be said of those in the State of Victoria and the Australian Capital Territory, where new "human rights" provisions and tribunals, as in Canada, now make sinister and oppressive inroads on important rights such as freedom of political speech on vital matters, and freedom of private association).[14] As to the rest of the world, I am

interpretation of other statutes. But it creates a type of proportionality which "is plastic and can in principle be applied almost infinitely forcefully or infinitely cautiously, **producing an area of discretionary judgement that can be massively broad or incredibly narrow – and anything else between**" (emphasis added).

[13] This is perhaps the place to mention that the reason why I said (to Harel's approval) that the claim or objection that "judicial review is undemocratic" is an "unimpressive objection" was, in the end, that "in a North American type of political order the free citizen's power over judicial appointments is not less than his influence over legislation" (*CEJF* III at 22). I went on to suggest (23) that this might make anyone uneasy, since it treats the judiciary as if it were a kind of legislature.

[14] This does not mean that the rights of free speech, free exercise of religion and so forth enjoyed by Australians before and after 1900 are matters, as Harel's final paragraph in this part supposes, of merely "statutory right." Whatever may be the statutory provisions for and regulation of them, they are conceived by Australians as moral, political and common-law rights (and no doubt, latterly, as human rights in the form enjoyed by Australians)—that is as rights that pre-exist and provide the rationale for their statutory embodiments and props (if any).

inclined to say: of all the now hundreds of cases in which a European or British tribunal has decided that British legislation was incompatible with European human rights, I can think of no case in which the decision was truly called for by human rights, properly understood, or by the European Convention on Human Rights and Freedoms as drafted, adopted, and intended. The ongoing humiliation of free peoples by *sections* of their own and other legal elites has amongst its many bad consequences for their common good the consequence that it tends to reduce their legislatures to the abject position, at once irresponsible (as exercisers of mere "discretion") and subordinate, entailed by Harel's (and many modern lawyers') conception of them.

II

Harel and I agree that punishment, precisely as such, can only be justly imposed by an officer as representative of the state and not by the victim or any other bystander.[15] And Harel's account of my view of retribution is entirely accurate, until he comes to apply to it a paraphrase and a label. The paraphrase has it that retribution is for the sake of restoring harmony, and the label is "consequentialist." True, my theory says that retribution looks forward to the time when the balance of advantages, disturbed by the offence as an act of ill-gotten freedom, is restored by the retributive act of subjecting the offender to a deprivation of freedom. But that is not a consequentialist theory: the restoration of balance (of fairness between the law-abiding and the offender) is accomplished *in* the act (however brief or extended) of punishment, not as a consequence of that act.[16] And it has nothing to do with restoring harmony as some empirical condition of people's attitudes to each other. Changes in attitudes as a consequence of punishment are one of the countless kinds of consequences of punishing or not punishing that the *retributive* (and defining) purpose of punishment is not concerned to achieve (or indeed, except in

[15] In the 1999 essay from which Harel quotes my statement that punishment cannot be imposed by or on behalf of the victim as such (CEJF III essay 12 at 178), I supply the premise two pages earlier (III: 198):

> In short, retribution is one element in the general function of government: to uphold the proportionate equality of a just distribution of advantages and disadvantages, benefits and burdens, among the members of (and sojourners within) a political community. The precise benefit or advantage whose fair distribution it is the primary and shaping purpose of punishment to uphold is the advantage of freedom, in one's choosing and acting, from external constraints including the constraints appropriately imposed by laws made for the common good.

[16] Of course, just as we should distinguish real change in something (say, my waking up) from "Cambridge change" "in" something (say, my subsequent "change" from being the only person awake in our apartment-building to being not the only person awake in the building [or: to being one of two people awake in our building]), so too we should distinguish real consequences (such as deterrence or reform or embittering and vengeful resolve of the offender) from "consequences" that are, rather, parts or entailments of the act (whatever its real *consequences*). (To make this distinction is not to deny the relevance (in other discussions) of, for example, the intransitive effects of choice and action (on which see *Commensuration and Public Reason*, in 1 Collected Essays of John Finnis 239–40 (2011) [CEJF I])

special circumstances,[17] to avoid). So I have not said, and never would say, that retribution is concerned to restore harmony.

It is in my 1987 essay on just war theory that I get around to saying, briefly, why punishment cannot be rightly imposed by or even on behalf, precisely, of the victim *qua* victim, or by any private person or body *qua* private. That essay was the occasion, because this long-recognized truth about retribution created a significant difficulty for the central tradition of just-war theorizing:

> ...Punishment is essentially the *restoration of a fair balance between the offender and the law-abiding,* a balance which the commission of an offence disturbs by enacting the offender's willingness to take the advantage of doing as one pleases when the law requires a common restraint; and persons who are not *responsible for upholding the balance of fairness in distribution of advantages and disadvantages in a community cannot* by "punitively" repressing wrongdoers accomplish that restoration of fairness which their act, by purporting to be punishment, pretends to accomplish (CEJF III essay 13 at 191).

Since there is no government of the world community, this thesis entails, for just war theory, that a state wronged by another state cannot go to war for retributive purposes, properly understood, since like all states it lacks any *public authority* in relation to the international domain. (It can, however, resort justly to warlike measures which many would call punitive, for example to forcibly exact reparations for wrongfully inflicted losses.) Where a government is lawfully and properly in place within a state, it will rightly appropriate to itself *all* such measures, including exaction of *civil* ("*private law*") compensation for victims of offences conceptualized in law as torts (or delicts).[18] Indeed, I hold that (i) the only function non-substitutably reserved to state government and law is that of adjudicating with a view to determining whether or not to impose irreparable measures of penalty, and (ii) the only *intrinsic* (basic) human good actualized by state action is the justice such action can retributively restore.[19]

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[17] That is not to say that consequences are irrelevant to a just decision to impose punishment:

> For although fairness is a component of the overall social good, it is only a component, and it would be silly to sacrifice important social goods simply to secure a scrupulously restored order of fairness. Indeed, if it is unfair to law-abiding citizens not to punish criminals, it is more unfair to them to punish criminals when it is clear that the punishment will lead to more crime, more unfairness by criminals and more danger and disadvantage to law-abiding citizens (CEJF III essay 11 (*Retribution: Punishment's Formative Aim*) at 165).

That way of phrasing the point is insufficiently precise to avoid a taint of seeming consequentialism, in which *fairness* is not a duty but a value to be traded off against other values. A better way of making the same point would say that restoring the balance of advantages and disadvantages that is necessarily disturbed by freely chosen crime is an affirmative responsibility of the state's government and law which, like all affirmative responsibilities, is subject to being overridden by countervailing moral responsibilities, such as the duty to protect the vulnerable against injuries that might (in some peculiar circumstances) be done to them by criminals as a result of retribution.

[18] See CEJF IV: 150–2 (against conceiving the law of torts as giving effect to the impulse of victims to "get even" with the tortfeasor).

[19] JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 246–51 (1998).

In short, I think there is not much to debate between us on this matter.[20]

III

Schwartz's explanation and thematizing of subsidiarity is very welcome, and repairs a deficiency in my own thinking about the bases of a sound political theory. For when I came to a change of view to which Schwartz does not draw attention, I failed (I now think) to attend *enough* to subsidiarity in explaining and exploring my changed view—partly, no doubt, because I came to the change of view in the context of working intensely on reconstructing Aquinas's political theory, and Aquinas does not get very close to articulating subsidiarity as a principle,[21] however implicit it may latently be in his working assumptions.

Let me explain. Many of Schwartz's quotations are from CEJF III, essay 5, on "Limited Government." That essay was published first in 1996, and—even if (as I say in the Introduction on p. 10) it "has the right distinctions in place" (which may be a bit generous to it)—it still "treats Aquinas as if his position resembled Aristotle's paternalism, whereas in truth" (and this is a truth I discovered only after writing essay 5) "that state paternalism is quite rejected, in principle, by Aquinas." For Aquinas, as I show in considerable detail in ch. VII of my *Aquinas*, holds that the coercive jurisdiction (as distinct from the aim) of state government and law is restricted to external, inter-personal actions, that is, to the domain that Aquinas calls "*public* good." In this respect, as my exegetical discussion of his theory concludes, his position is close to that of John Stuart Mill in *On Liberty*.[22] That is one important reason why some have called Aquinas the first Whig, and why I call his political theory early liberal. And in explaining and, as far as possible, justifying his thesis, I did not resort to subsidiarity, though it has some connection to the fundamental reason I was able to find to support the thesis about the limits of the coercive jurisdiction of state government and law, namely that individuals and families and the sorts of civil association that they can arrange by agreement or convention are prior to the state, so that state government and law must justify its claims to coercive jurisdiction, and cannot do so simply by showing (if it could) that its coercive measures could *succeed* in making people morally better in their private lives and activities.

[20] In the background are, of course, plenty of matters for debate. Harel (like Hart) holds, for example, that what characterizes criminal sanctions is that they involve "pain or other unpleasant consequences" (inflicted on an offender for his offence): *Why Only the State may Inflict Criminal Sanctions: the Case against Privately Inflicted Sanctions*, 14 Leg. Th. 113, 116 (2008). I hold that such a definition makes retribution (properly so called) virtually unintelligible: CEJF III essay 10 (1968) at 160, 162; essay 12 (1999) at 173, 177. And I do not consider (as Harel seems to) that the defining aim of punishment is the manifesting of public condemnation and disapprobation considered as a process that can be more or less "effective."

[21] For his nearest approach, see Finnis, *supra* note 19, 237 at n. 82.

[22] Finnis, *supra* note 19 at 228.

Beyond this, I have no reason to demur from Schwartz's helpful discussion. I add two side notes. (1) In very recent writing, I have expressed doubts about calling the state an instrumental association, or the political common good an instrumental good. Instead, I express some favor for the adjective "subsidiary" for use where I had been saying "instrumental."[23] So Schwartz's observations were doubly welcome. (2) In these recent writings I also address the point, and indeed the passage, that Schwartz draws to our attention from NLNR 169: state activity should not intend "to *take over* the formation, direction, or management of the lower-level personal initiatives and interpersonal associations." About this I say–

> Just as, for example, the privileges of the English Parliament exclude any management, direction, control, or takeover of either House by the courts or the executive, yet do not entail that the criminal law and its officers have no jurisdiction over acts and events within Parliament, so state government and law have some proper regulatory role in relation to even the internal affairs of families and religious associations. The limit excludes any aim to take over their formation, direction or management. [fn. . . . by 'direct(ion)' I [mean] the sort of things that the board of directors of a corporation does – the sort of things that someone who has *taken over* an enterprise as sole owner of it does in managing it.] 'Take over', like 'dignity' and 'equal protection', is vague, but like them, is not without content, especially when embedded in a course of argument that shows the worth of individual self-direction and marital equality in freedom, goods clearly basic and at least as important in living a human life as political community properly is.[24]

So Schwartz is entirely correct to note that "takeover" has nothing essentially to do with force, and can be effective, and a wrongful (and morally void) assumption of authority, even when welcome, invited or freely agreed to.

The comments that Schwartz has added as the final paragraphs of part 6 of his essay raise fair questions about the matters I have briefly set out in this response. The answers lie in the direction he indicates: there can be more than one ground for the conception of just and good social order that includes both the principle of subsidiarity and the restriction of state governmental jurisdiction to public good and external acts. If we ask why the largely instrumental character of state government limits or tends to limit its jurisdiction over non-instrumental associations and the persons who are their members and the fundamental component of the state, the answer at least in large part will take the form of reversing the challenge. It is for the state's government and law to prove that its jurisdiction rightly reaches so far into the lives of those persons and associations whose good is more intrinsic than its.[25]

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[23] *Reflections and Responses* in ROBERT GEORGE & JOHN KEOWN (eds), REASON, MORALITY AND LAW: THE PHILOSOPHY OF JOHN FINNIS 514 (2013).
[24] *Id.* at 515.
[25] See Finnis, *supra* note 19 at 242ff.

IV

Harel holds that "the legal system ought to give its stamp of approval" to sexual relationships of a kind (or kinds—he restricts his attention to same-sex couples but not to trans-species couples or hetero- or same-sex threesomes, foursomes, etc.) that, he grants (without conceding) "cannot fully realize the relevant goods" of genuine marriage and inherently involve delusions of meaningfulness in their sexual intimacies. Here are four reasons why such a stamp of approval would be, and where already given is, a serious injustice and a long-term wound—very likely to be crippling—to the common good.[26]

(1) Stamping same-sex partnerships as marital gives the state's approval to—indeed, colludes in—the shocking injustice of deliberately bringing into existence children *with a view to* their each living, in every case and by design, without knowledge of or relationship with, or the care of his or her father, or alternatively his or her mother, or perhaps either, and being instead attended to by a woman somehow imitating a father, or by a man somehow imitating a mother, or else without even the pretence of having a mother, or a father (as the case may be). I do not say that the adoption of children by homosexual couples is intrinsically evil in the sense that it should never be considered permissible, but it should be reserved to the last resort where the only alternative is abandonment or its near equivalents. But encouraging homosexual couples to deliberately bring children into existence for the purposes of such a defective form of parenting is unjust, and is an immediate and ineluctable implication of everything savoring of same-sex *marriage*. I am not arguing that the immorality and injustice of such generation of fatherless or motherless children exceeds, necessarily and *per se*,[27] the immorality and injustice of casual sex generating fatherless children (a phenomenon that in its scale and dire consequences is characteristic of decadent late-liberal states such as ours); but no one is out there in the public square arguing that the state should put its stamp of approval on casual sex and illegitimacy. Nor am I discriminating against homosexual generation of unfathered or unmothered children; I hold that it is similarly immoral and unjust, and should be a criminal offence,

[26] These reasons do not apply to state recognition of domestic partnerships on a basis that in law and in public understanding and acceptance has nothing to do with the presence or absence of sexual intimacy between the partners and therefore neither legally nor socially imitates or gives the appearance of marriage. But, of course, this is *not* the basis on which legal status (beyond mere ad hoc contracts) has been given to civil partnerships in all (so far as I know) the states that in recent years have enacted such a status. And given the resources of the law of contracts and trusts, I see no sufficient reason for creating a legal status-category of domestic or "civil" partnerships. And their approximation in public perception (and in the motivation of those who have pressed for their introduction) to marriage is strong reason not to introduce such a status.

[27] But in fact there is an overwhelmingly probable *consequence* of being raised by a same-sex sex-partnership ("marriage"), viz. that one will have great difficulty in getting clear about the nature and good of marriage, and so will tend to be severely obstructed in participating in that basic human good. In this respect, there is an injustice in same-sex parenting that is absent, in most cases, from casual illegitimacy and single-parent rearing (for all the injustice of the latter).

to arrange for generation of children by *in vitro* fertilization for single men or women, whether or not they are involved in sexual relationship with anyone.

(2) The stamp of state approval Harel supports is also, in late-liberal societies like ours, the stamp of disapproval of every kind of "discrimination against" such pseudo-marriages and against the anti-marital view of sex that these parodic imitations of marriage embody.[28] And here we see the other face of state "stamping": the stamping out, in the name of equality and non-harassment, of all save secret or deeply private forms of "hetero-normativity" or "heterosexism" or "gender stereotyping" such as is implicit in such complementarity-laden terms as "mother" and "father," "husband and wife," "maternal" and "paternal,"[29] "manly" and "womanly," "feminine" and "masculine," indeed "men" and "women." Parents who think legal same-sex marriage will not affect their own marriage will learn otherwise when their children come home from school aged five or six having been subjected to the first stages of a decade-long program of social conditioning and state stamping designed to "gender mainstream" them, that is, to impose on them the ideology according to which there is no naturally or intrinsically reasonable and normative sex/gender distinction (as between male and female) or sex role (as in father and mother, husband and wife) but instead an ever more finely variegated spectrum of so-called gender identities, to be "discerned" or rather adopted after agonies of pseudo-discernment and choice: lesbian, gay, straight, bi-sexual, transgender, intersex, queer, questioning, and so on all the way, in due course, to sexual orientations such as to paedophilia and incest perhaps, and certainly to bestiality in line with Harel's paradigmatically late-liberal dictum "I do not see why the orifices used for sexual gratification matter." (Objection: Harel said nothing about anti-discrimination coercion of those who object to the flaunting of homosexual activity. Response: The stamp of state approval that he supports is inherently coercive; in all our polities all homosexual couples are free right now to stage a wedding with all their friends, negotiate whatever recognition they like with employers, make contracts and wills entitling them to whatever mutual rights and privileges they please; what they lack, in the absence of state approval, is the right to coerce other persons and their associations to approve and collaborate.) Anyway, the bad effects on children of this deeply erroneous,

[28] Simon Hope, at cue 21 in his essay, says that the success of political demands for legal recognition of homosexual marriage "coincides neatly with" the thesis that marriage is a basic good (a good that everyone has reason to pursue). Not so. The successful purloining or misappropriation of the term "marriage" by same-sex couples and the homosexual cultural-political movement has no greater capacity to make such couplings instantiations of the good of marriage than the (mis)appropriation of the term by polygamists or by Shia practitioners of *nikhar mut'ah* (a.k.a. prostitution).

[29] Already, at the very dawn of the unfolding bad times, we see Hope saying that there is "no reason why gendered identities of 'mother' and 'father' are needed" for meeting children's needs, and that anyone who thinks otherwise is "guilty of an arbitrarily narrowed focus." Such high-handedness about the millennially experienced judgment of our own and many other civilizations, to be set aside after a couple of decades' breezy Zeitgeist, bodes very ill for our societies and first of all for their children.

coercively imposed[30] politico-ethical ideology will be profound and in many cases prompt—increases in suicide, anomie, listlessness and loneliness, and then, later, more failed marriages, divorces and damaged children, as the true complementarity of the two real sexes is constantly downgraded if not derided and defied.

(3) Meanwhile, the same children will get the message: official parity of esteem—that is, their parents' marital acts, and their own if they choose marriage, are *no more expressive* of a chaste and wholesome, honorable commitment to a lifelong friendship open to procreation and the upbringing of good sons and daughters *than sodomy is*. ("What does it matter what orifices are used for sexual gratification?") This ongoing devaluation and hollowing-out of marriage will be the ongoing inbuilt consequence of officially calling homosexual coupling *marriage* and marital. *For the very first time, the state and its law will be ratifying and commending and holding out as good a form of sexual relationship and activity that is inherently anti-marital* (and therefore immoral).

Fornication (sex by the unmarried), masturbation, adultery (including consensual adultery), polygamous sex, are all bad sex because one's approving them (for oneself or anyone) is necessarily incompatible with one's engaging in, or *coherently* approving, non-corrupt forms of marital sex between husband and wife. None of these are now given the stamp of the state's approval. Why are all these, like same-sex or inter-species sex acts, immoral, in ways that ought to be of concern to the citizens and government of states even though the truly private consensual immoral acts of adults should not as such be treated as criminal offences? The core argument can be summarized thus:

> *approval* of *any of the many kinds of non-marital sex act* – including the sex acts of "married" same-sex couples – entails a kind of conditional willingness to engage in sexual activity in a way that is in truth non-marital, that is, in a way that does not allow the parties to the act to thereby actualise, express and experience their marriage as a committed, permanent, exclusive friendship open to procreation. And such willingness, while it endures, is incompatible with genuinely marital acts, and thus wounds the marriage of those couples one or both of whom has such a willingness, however remote and conditional.[31]

In other words, maintaining the integrity, meaningfulness and stability of marriage—as an institution vital to society and to justice for children, and as a personal and inter-personal act that should last a lifetime[32] and is very

[30] I refer to the relevant laws' execution, child by child and parent by parent, not to the laws' enactment/introduction, which will in some cases have been democratic and have had the relevant parents' (all too often mistaken) assent.

[31] For much fuller articulation and defense of this line of thought, see CEJF III essays 20, 21 (especially the last section) and 22, and CEJF IV: 135–8.

[32] On a marriage as an *act*, see CEJF III: 317; the thought is not to be confused with the notion of marital acts, sex acts of the kind that express, actualize and enable the spouses to experience their marriage. The act of committing to and living out a marriage has at its centre the agreement to engage together, with full mutuality, in such acts: *Id.* at 319.

demanding—requires that anyone who (whether from inside or outside) values that institution must disapprove any choice to obtain sexual satisfaction by a sex act outside proper marriage or in a non-marital way inside marriage.

(4) So sex ethics matters to political philosophy because such a wound is not only an injustice to the other spouse, and to the children impaired by consequently limping or failed marriages and to those later injured by those children. It also is contrary to the political common good in the additional and fundamental respect that it makes vanishingly unlikely the sustainability, long- or even medium-term, of the societies, the peoples, that have wounded their institution of marriage by encouraging and endorsing such false and harmful ideas. The wounding of marriage so as to bring it into line with the contraceptive, abortifacient, feminist, and other marriage-dissolving demands and practices of many heterosexuals has already put all our peoples on an ever-steepening path to wreckage if not extinction.

To Hope it seems that my arguments are merely expressions of "a particular social morality in the Christian tradition" which, he suspects, is traceable to "the remarkable attempts in early Christian thought at making sexuality rather than death the centre of human frailty." But this is just a mistake. If one wishes to look at Christian thought, one can find the entire substance of the concept of marriage (the concept that I am defending with philosophical considerations) in the relevant verses, few but decisive,[33] of Gospels that are definitive for the Christian tradition and entirely free from any attempt to "make sexuality rather than death the centre of human frailty." And in pointing to Christianity, Hope fails to take real account of the texts I have cited to show[34] that both the ethics I defend and the judgment that it matters to political theory are in essentials taught by the best philosophers and reporters of philosophical argument who none of them knew anything of Christianity: Plato, Aristotle, Musonius Rufus, and Plutarch,[35] along with the Kant who, like the Hegel I did not cite but could and should have, considered himself a

[33] *Matthew* 19: 4–6; *Mark* 10: 5–9.

[34] See CEJF III: 100, 338–40.

[35] Hope, n. 24, says that Plato, Aristotle, Plutarch and Musonius Rufus are enemies, rather than friends, of the sex ethics I defend, because

> their views are fundamentally shaped by outlooks in which women are necessarily both socially and naturally, inferior to men, and in which upright behaviour between the sexes reflects this fact. *The mutual respect of Finnis's account is nowhere to be found in such outlooks.* For the Roman writers, see Part I of Peter Brown, *The Body and Society* (Columbia University Press, 1988)... (emphasis added)

But though Peter Brown says nothing false about Musonius Rufus (and at 23 and 91 gives some evidence to contradict Hope's claim about the latter), it is as much a mistake to rely on his book for an account of what Musonius thinks as it is to rely on his best-selling *Augustine of Hippo* for a philosophically or theologically helpful account of Augustine's ideas and arguments. Brown, with supreme skill, pursues a deconstructive agenda firmly tied to late-twentieth century, late-liberal tropes; for all his learning, he actually muffles or silences the *arguments* of the thinkers he divertingly cinematises. Any reader of the passages of Musonius and Plutarch I cite can see that "the mutual respect of Finnis's account" is finely articulated by those Roman thinkers. The pages cited by Hope from Bernard Williams, *Shame and Necessity* get nowhere near the texts I have cited (or even the issues in dispute) and constantly divert, like Hope's footnote 24, onto the question of women's place in political society.

philosopher big enough to make his own entirely free judgments about matters on which Christianity has a teaching. They all hold, in substance, that sex is for marriage and marriage, being about not only friendship but also and definingly the procreation and nurture of children, is of fundamental importance for the sustainability and justice of a society. They are right, and late-liberal political theory, in its silent trashing of sex ethics, is the mere apologetical mirror of decadent societies that, having done a vast deal of injustice to children along the way, will also, before very long I believe, be—at least in many cases—the *late* late-liberal polities, whose colonisers will dominate them with little interest in either the theory or the practices of liberalism, whether late, unjust and unreasonable or early and (in these matters) just and reasonable.

That is the most abrupt version of the conclusions from a line of enquiry pursued in the essays I have mentioned on sex and marriage, where you will find more of the necessary premises than I have offered here.

V

Hope's main argument is an interesting, sophisticated form of moral relativism (with a last-minute, scarcely integrated escape clause). At its root—or, at any rate, at the root of the argument Hope here develops—is a notion that "practical reason is to set standards for a plurality of agents." Call that his basic premise. In this premise the Kantian notion of practical reason as one's giving (moral) law for oneself is extended or taken by Hope to entail that practical reason is also a matter of giving law (setting moral standards) for, and with the assent of, many or all persons. Hope "do[es] not think that Finnis... would dispute the schematic claim" that, by reason of that basic premise, moral standards "must be vindicated by reasons that all *can* find accessible": his emphasizing of the "can" seems (though I'm not sure) to denote some sort of *hic et nunc* disposition of addressees to agree to a proferred reason as compatible with their existing beliefs. From there Hope's argument proceeds smoothly: the practical and moral reflections of all (or at least very many) of us are shaped by "constellations of thick ethical concepts and categories"; therefore, any consideration claimed to be a moral reason needs—since by virtue of the basic premise it must be accessible to the possessors of such thick concepts and categories—to "establish a connection" with all those constellations of thick concepts and categories, or at least with all the constellations possessed/borne by someone actually "addressed by" a moral claim. In the absence of such a "connection," the practical or specifically moral reasoning "addressed to" addressees "will appear arbitrary" and "becomes at best mere bluff and bluster and at worst takes on a high-handed tone." (What could be worse?) The required "connection" is just that the reason advanced is "not silenced," that is, that "it is deemed by the bearer of a different social morality to be morally relevant."

Like, I believe, the whole mainstream philosophical tradition at least down to Kant, if not Kant himself, I accept neither the basic premise, nor any of the conclusions Hope draws from it. There is no reason to assume that every culture accepts or understands the categories "social morality" or "morally relevant." More important, there is no reason to sieve out of one's moral opinions all those that, taken as they stand, are or would be "silenced" in the minds, as they stand, of some persons or culture somewhere to whom they might (why?) be addressed. Moral thought is nothing like legislating, either for oneself or, still less, for others. (In that respect it is not "lawlike.") Commitment to practical reason and moral thought is *not* a "commitment to justification" to other people as they stand. Indeed, it has nothing, essentially, to do with "addressing" others.[36] It is not a device for winning their cooperation.[37] It conscientiously seeks the truth about the human goods that are at once (1) the constituents of human flourishing in oneself and other human persons, and (2) the foundations for one's reasoning about one's responsibilities to oneself and to others (whether or not those others happen to realize that these are their entitlements). It proceeds on the basis that, if true, any proposition about the good(s) and the right will be accessible to *anyone* (everyone) under ideal epistemic conditions.[38] So moral thought is (so to speak)

[36] See CEJF I: 52 for a comment on Habermas's slide from noticing a "monological" aspect in Dworkin's thought to accusing Dworkin of "solipsism."

[37] Hope cites CEJF III: 318 when stating that "For Finnis...one cannot grasp [the] goodness [of basic human goods] without accepting that they are good for all human beings, and *one depends on cooperation with others in order to attain them*." While there is some truth in the proposition I have here italicized, it is not among the propositions at III: 318, where the passage quoted in the next footnote concludes by referring, not to one's need for cooperation with others at large, but to one's dependence upon one's *parents* to sustain one until one can contribute to *their* own or others' wellbeing.

[38] Thus III essay 20 ("Marriage: a Basic and Exigent Good") at 318:

> Moral thinking, in its central critical-practical form, begins with an understanding of the desirability and worth of such basic human goods as life and health, knowledge, friendship, marriage, and so forth, and terminates in judgments about what kinds of act it is not unreasonable to choose. The understanding of basic forms of human opportunity parallels the findings of empirical sociology about the basic aspects of human social existence, but does not depend upon or, typically, begin from such findings. [fn. See CEJF IV essay 1 at nn. 2-12.] The eventual moral judgments are exercises of the judging person's conscience, framed in the first person singular – about what I ought to be respecting and realizing in what I chose and do – not exercises in praising or blaming the conduct or worthiness of other persons or societies. Yet, since they aspire to be rational and, indeed, reasonable, they cannot fail to be exercises of public reason in its most fundamental sense. That is, *they aspire to be judgments such as anyone else could and should make, and free from the dispositional and other sources of error which render judgment "subjective"*. They aspire to be correct, objective judgments, judgments in which, under ideal epistemic conditions, everyone would concur [fn. See *Fundamentals of Ethics* 62–6.].
>
> Moreover, basic human goods are not intelligible in an essentially individualistic way. They are understood as aspects of human wellbeing that are good not only for me but for anyone "like me" – a qualifier than turns out to include any human person. They are good as realized in the life of a stranger in the same way, in principle, as in my life. Moreover, my own participation in these goods is radically dependent upon the various other persons by whose actions and forbearances I came into being and have begun and continued, more or less, to flourish and be able, for my own part, to contribute to *their* or others' wellbeing (emphasis added).

epistemologically untroubled[39] by the knowledge that, in the non-ideal epistemic conditions prevailing, there are many people and cultures such that nothing short of thoroughgoing cultural transformation would render a given, particular moral opinion acceptable (or perhaps even intelligible) to an addressee or class of addressees. Knowledge of that fact is of course of great practical importance, given that many goods may depend for their realization on cooperation or at least abstention from violent opposition. But neither that nor the consequent need for pragmatic (I do not say morally unregulated!) modes of persuasion and dissuasion has any bearing on the warrant for the foundational truths of practical reason.

Hope's report that "the anthropological evidence is compelling that there exists no substantive core of moral values shared across all social moralities"[40] is entirely compatible with my report, in *Natural Law and Natural Rights*, that the anthropological evidence is compelling that, in a pre-morally thin sense of "value" and "practical principle," there are some values (basic human goods) and practical principles more or less self-evident to all adults of more or less normal experience and intelligence, anywhere and anytime.[41] Fundamental to the account of practical reason developed in that book and all my subsequent writings is the thesis that the first practical principles, identifying and directing us to basic human goods, are *not* moral principles, and that the basic human goods are thin enough to lend point to and make intelligible even morally *evil* actions. These principles and the goods they direct to are *foundations* for moral principles, and only acquire specificity and moral force (and in both those respects "thickness")[42] by way of an engagement of practical reason[43]—with the implications of (a) their multiplicity, (b) the multiplicity of persons in whom they can be realized, and (c) their open-endedness in contrast with the finitude of each acting person's lifetime, capacities and opportunities.

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[39] This is by no means to say that one need not acquaint oneself with the moral beliefs and culture of others, and is entitled to be complacent about one's moral beliefs, or unwilling to debate about or reconsider them. See the sentence I have emphasized in the passage just quoted from CEJF III: 318, and the whole of CEJF I essay 2 on the significance of discourse, a significance compatible with the truth that there is at the heart of any worthwhile dialogue a "monologue": I: 52.

Another aspect of the matter: as Hope remarks in n. 30, "there is no practical point in reasoning with those who would respond to reasoning with either silence or violence" or, one might add, with mere ridicule or sophistry, or with legal repression of "offensive" speech.

[40] My way of making the same point in John Finnis, Natural Law and Natural Rights 84 (1980, 2011) [NLNR], was:

> Certainly, there seems to be no practical principle which has the specificity we expect of a 'moral rule' and which is accepted, even 'in principle' or 'in theory', amongst all human beings.

[41] The listing of these takes up a long paragraph on NLNR 83.

[42] But, though thin, the basic human goods in their "pre-moral" abstractness still satisfy Hope's criterion of thickness: that in them "the evaluative and descriptive elements are inextricably intertwined so that to identify with the concept *just is* to see certain reasons for action".

[43] This is one's reason in pursuit of that one among the basic human goods which consists in being not just intelligent but practically *reasonable*. It is the *bonum rationis* (which when attained is *prudentia*) so central to Aquinas' ethical theory and so neglected by neo-scholastic simplifiers. Kant tried to do his own ethics with *just* this good, to the neglect of all the other basic, intelligible human goods.

This engagement with practical reasonableness[44] results not only in moral principles and norms (rules) but also in an understanding of each of the basic human goods in a more specified and thicker form—a specification and deepening (via elaboration of practical reasonableness's principles and criteria of sound judgment) which cannot at all be captured with the binary contrast between *type* and *token*.[45]

True enough, the specification (making-more-specific) of basic forms of human flourishing in more and more specific, thicker, conceptions of flourishing and of justice, and corresponding forms of life, proceeds through the matrices of particular cultures, traditions and social moralities. But these are all, always, open—in principle—to critical reflection and reform at least in the mind and judgment of intelligent and spiritually alert individuals or groups (who may be more, or less, "prophetic", whether "philosophically" or otherwise). None of the social moralities is rationally entitled to the blocking or silencing role attributed to – surprisingly – each and all of them by Hope.[46] We can study the process of reformative respecification across the history of, for example, marriage as it takes on a more fittingly thick, accurately specified central-case form which, on grounds of the kind I pointed towards in the preceding section—in which justice to children is central[47]—includes the structuring norms/criteria of fidelity, commitment, exclusiveness, and openness to procreation, and excludes incest, polygamy and polygyny, and late-liberal serial polygyny/polygamy, as well as harmful parodies such as same-sex couplings, marriage of man (or woman) with child, sheep or dog, and so forth. The capacity of reformers to point to basic human goods in a configuration/specification better adapted to their multiplicity and the conditions of human existence, and by so pointing to initiate and carry through reform and a measure of intellectual conversion, is a capacity that depends upon and vindicates the accessibility of the basic human goods to everyone, in the only sense of "accessible to all" that "we need."[48] Whether or not their "tone" might be

[44] Since "practical reasonableness" is my translation of Aquinas' *prudentia* and Aristotle's *phronesis*, see my "Prudence about Ends" (in debate with Terence Irwin) in CEJF I, essay 11.

[45] Still, even with its inappropriate conceptual apparatus of type and token, Hope's attempt to show that the basic goods are too abstract to give any accessible guidance seems to me unsuccessful. *Pace* Hope on Nussbaum: to "see the value in" worshipping a particular deity in a particular way is also to understand how others could see value in worshipping another deity in another way, an understanding *not* blocked by one's judgment that *their* conception of deity and of fitting worship is riddled with metaphysical falsehood and repellent moral perversions. Hope, here as elsewhere, seems to me to be overlooking the fact that practical reasoning towards judgment about the choiceworthy *always* has both evaluative and factual premises—at least one of each type.

[46] The limits to such silencing tentatively indicated at cue 32 of Hope's essay do not detract from the universality with which he seems to attribute to each and every social morality the power to silence sound moral judgment—the universality, that is to say, of his *moral* relativism.

[47] It is central in Aquinas' sex ethics, which also looks to justice to (equality with) women as the biologically more vulnerable (in many ways) of sex couples: see *Summa contra Gentiles* III cc. 122–5.

[48] So I deny both limbs of Hope's dilemma: "Finnis either downplays the diversity and contingency of social moralities, or he builds into the conditions for accessibility an identification with one substantive, thick understanding of the human good." Again: I deny that "actualization [of capacities for reasoning] is always a process of habituation into a particular social morality, the deliverances of which are historically contingent." Sometimes the actualization of practical reason's capacities is by way of exiting from a particular social morality into a genuinely

judged "high-handed" by conservatives, such reformers do not accomplish authentic reforms by bluff and bluster.

At the last moment, so to speak, Hope sees a crack in the door of the prison of his social moralities—sees the outline of some considerations that are *not* to be silenced. I agree with him that the idea of "basic needs and vulnerabilities" is indeed relevant and liberating, though "finitude" seems to me too negative, passive, late-liberal a master-category. But what are these needs? Hunger, *pace* Hope in fn 32, is not a need in the relevant sense; the need thereabouts is nourishment in the sense of being nourished, that is, sufficiently well-fed to be fit—alive and well—for choice and action. Other needs include having children to carry on the race, and understanding the world and our place in it, while other vulnerabilities include—but it is obvious how the story carries on: we are rejoining the list of *basic human goods* that I found articulated in masterworks of the philosophical tradition and have ventured to explore, develop, and defend as what practical reason's first principles direct us to, and as the source, when specified, of moral criteria for reforming any social morality.

For reasonableness in specification of the basic human goods quickly involves the thickness of morally responsible conceptions such as (to put another, different example alongside that of marriage) the specification of *sociability* to political association and society, with its structuring norms of legislative justice, citizens' allegiance, authority, Rule of Law, and so forth. (The relevant tokens are then "*our* marriage," "*my* polity," and so forth, each being measured in conscience for its moral correspondence to the rationally *appropriate* specification of the basic human good at stake.)

In sum: this process is not fundamentally a matter of "addressing" others, as lawgivers do, but of reasoning quietly in a heart one tries to keep honest. *Conversion from social moralities is possible*—intellectual conversion, which may or may not be also religious. Philosophy itself is worthless unless such conversion from the inferior to the superior is possible. (Some purported reforms are not authentic improvements, but forms of decadence.) Plato's and Aristotle's sex ethics represent a kind of (not fully complete) conversion from the corrupt social morality of the elites of their day (a morality which itself had decadently reformed a traditional morality so far forth its superior). Plato's great reflection on philosophical conversion as such is the Myth of the Cave, but "conversion" means no more than a fresh understanding of possibilities and relationships one had not adequately understood, together with willingness to follow these new insights to the conscientious judgments and choices to which they guide one. In a good and well-formed conscience, even the framework modals of social moralities (say "is obligatory") are given a new, *purified*, fully internal

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new, reformed morality which, while no doubt in some senses historically contingent, is *superior* to the social morality it reformed or replaced.

understanding or interpretation or meaningfulness as requirements both of truth—especially the truth (fertile in potential for specifications) that the basic forms of good are common goods because each is good for you as well as for me—and of love of neighbor as oneself.[49]

[49] *Leviticus* 19: 18; cf. *Matthew* 22: 39 (= *Mark* 12: 31); *Romans* 13: 9.