

2001

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John M. Finnis, *Virtue and the Constitution of the United States*, 69 *Fordham L. Rev.* 1595 (2001).

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Available at: <http://ir.lawnet.fordham.edu/flr/vol69/iss5/3>

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VIRTUE AND THE CONSTITUTION OF THE UNITED STATES

*John Finnis**

The five questions put to our panel provide a suitable framework for my reflections.

1. Does the Constitution require or presuppose, or thwart or even forbid, a formative project of government inculcating in citizens the civic virtue necessary to promote and sustain a good society?

2. To what extent can the institutions of civil society support or even supplant government in inculcating civic virtue?

3. What is the content of the civic virtue that should be inculcated in circumstances of moral disagreement, and how does it relate to traditional moral virtue?

4. Does it include respect for and appreciation of diversity?

5. Should a formative project include cultivating attitudes that are critical of practices that deny liberty and equality?

I. CIVIC VIRTUES ARE MORAL VIRTUES

Since it is sensible to think about ends before considering the means to them, it may be best to start with the central question, the third: What is civic virtue? How does it “relate to traditional moral virtue?” How is its content affected by circumstances of diversity?

As Plato and Cicero make clear, civic virtue is a more “traditional” category than moral virtue. Just insofar as civic virtue is one’s practical horizon, the traditions of one’s *civitas*, one’s polity, bound one’s critical autonomy and one’s appropriation of practical reasonableness. If the traditions of one’s polity about what a decent person does are decent traditions, one will be encouraged in virtue. If not, not. If one has the misfortune to belong to a certain kind of traditional Southern Italian community, and cannot break with the pagan traditions alive under surface forms of Catholicism, one will make one’s own the ethos of vendetta and an honor which is steeped in murder and deceit. If one has the misfortune to belong to the leisured male upper classes of the brilliant commercial republic of fifth century Athens, and lives in its traditions, one will be a contented

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slave-owner, wise in the ways of seducing and masturbating on boys, with no thought of one's wife's true equality: that is how good citizens are, and affirm each other in being. And so forth.

When one breaks tradition's hold, by asking and pressing questions which we formalize as "philosophy," or by hearing and living by a new and true gospel, one gets clear that there is only one genuine kind of virtue. In our language, it is moral virtue, of which civic virtue is one aspect. For virtue is nothing other than the whole set of dispositions which fit one as an individual and responsible acting person to make authentically reasonable choices—morally good and right choices—in every context where one can choose and act. So civic virtue, coherently considered, is simply moral virtues insofar as they bear on one's participation in community which extends beyond family to the forms of civic and political association: schools; cities; shops and marketplaces; highway traveling; churches; charitable, sporting and other voluntary associations; firms; professional dealings and associations; and state governmental activities such as jury trials, elections, military service, public administration, judging, legislating, and so forth.

Relative to the distorted subordination of neighborliness to family in the vendetta, true civic virtue is morality's demand that justice be administered and wrongs righted by an impartial civic/political institution, the judge, and not by passionate *parti pris*. Relative to the private indulgence of classical Greek homosexual culture, and its Roman analogues, true civic virtue was located in morality's demand that one look with more egalitarian respect to one's wife, free one's slaves, and treat one's neighbors' sons as persons, still children, but to be fulfilled as spouses in loving marriage not as unequal and passive partners in one's own sensual indulgence, and so forth. All these reformations of "private" vices would tend, as Augustus to some extent perceived when enacting his *Leges Iuliae* against adultery and easy-going divorce, to benefit the city and the wider republic and empire—and not *simply* demographically.

Here are a few instances of key elements in civic virtue: the *impartial and zealous dutifulness* of, say, the doctor or fireman who treats and rescues all who need that help, even those who are abusers of themselves or others or are in loathsome condition or feeble-minded or unconscious; the *probity* of the lawyer who fearlessly upholds the traditions of the Bar and ethics of the profession against the pressures of unfair judges, importunate clients, unscrupulous opponents, and the constant temptation to make success in the present proceedings the overriding criterion of choice; the *honesty* of the scholar who refuses to join the teams of scholars who regularly pollute the marketplace of ideas by manufacturing false histories in order to promote legal and other social causes they value; the *fidelity* of those who honor their contracts, marital or commercial, carry out

their responsibilities as public or private trustees, and pay their debts, especially to needy creditors, rather than treat bankruptcy as wiping their own moral slate clean. And so on.

How is all this affected by circumstances of diversity? Obviously, many of the aspects of virtue which I have mentioned involve overcoming hostility to the unfamiliar or the despised, and reaching to the person in need. Getting and maintaining these virtues may be specially difficult when there are long-standing traditions of presuming that everyone of a certain category has certain vices or weaknesses. So one model of civic virtue is the courage and clear-headedness of the Northern Irish Catholic who, precisely in order to be a good citizen of the *res publica*, joins the Royal Ulster Constabulary and uses her talents to participate in the daily work of thwarting and rectifying the injustice of criminals and of a ruthless armed force engaged in obviously unjust war against that *res publica*, the polity. The dangers and harms she is willing to undergo include not only murderous reprisals but blinkered hostility from those who will not consider the common good of the present community as it really is but prefer to remain in the horizons of old struggles and the loyalties and patterns of exclusion and reaction they fostered.

II. CIVIC VIRTUE INCLUDES RESPECT FOR AND APPRECIATION OF PERSONS, HOWEVER DIVERSE

Our fourth question asks whether civic virtue includes respect for and appreciation of diversity? The answer is clear enough. Diversity is a blessing for any community just to the extent that many diverse gifts make for more resourceful and adequate mutual help, and richer authentic human fulfillment for all. Diversity is a tragedy, a cross, for any community just to the extent that diversity of opinions and dispositions about fundamental questions about right and wrong, virtue and vice, blocks that community's pursuit of and participation in decent ways of living and interacting, and its ability to reform and overcome unworthy ways of living together: slavery, wealth-accumulation without sharing with those in need, baby-farming, cultivation of demeaning stereotypes (Prods and Micks), the socially facilitated and approved choice to destroy a baby rather than accept motherhood or fatherhood, and so forth. John Stuart Mill's neo-Humboldtian affection for diversity¹ is little more than an aesthetic preference worthy of little admiration unless it extends to what is really at stake: not "diversity" but *persons* in and notwithstanding their diversity.

What civic virtue calls for is respect for people of every kind, and appreciation of their humanity and of whatever good use they have

1. See the epigram from Willhelm von Humboldt on or after the title page of John Stuart Mill, *On Liberty* (1859).

been able—if they have—to make of their gifts and talents, however diverse those good uses and talents. In season and out, the “more traditional forms of Roman Catholicism” hold before us models such as the Missionaries of Charity, works of charity, reconciliation, peace-making, and a humility which does not kneel before wrong opinions and dispositions, or teach anyone to be indifferent to their wrongness, but “respects and appreciates” wrongdoers (all of us in some measure). This is a model of civic virtue, as the non-Christian government and good citizens of Calcutta most readily acknowledge. There are many other models for combining respect for people in their diversity with refusal to accommodate their injustice. For injustice comes in very diverse and appealing forms. So, since the polity’s jurisdiction is to secure justice,² a culture of civic virtue needs to teach in deed as well as word that diversity merits no respect or appreciation where it is a manifestation of personal or group injustice. And to add, in word and deed, that the ending of respect and appreciation need not and often should not be the beginning of violent, particularly private, action against the injustice.

“Does civic virtue include respect for and appreciation of diversity?” If “diversity” here is code for, especially, willingness to engage in and promote homosexual conduct, as it is in various environments familiar to us, the answer, I suggest, is: No, indeed not. To respect such a willingness, or anybody’s willingness to engage in any other form of non-marital sex acts, is to endorse an important falsehood about what is good for human persons, and is to make a contribution towards the collapse of marriage as a civic institution and personal reality,³ and so to do one’s bit to harm, unjustly, all the people who will suffer as children and therefore also as adults by being raised in more or less non-marital environments.⁴ A civic virtue

2. See John Finnis, *Aquinas: Moral, Political, and Legal Theory* 217-52 (1998) [hereinafter *Finnis, Aquinas*].

3. See *id.* at 143-54; John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 *Am. J. Juris.* 97, 97-106 (1997). The core of the argument is a reflection, found already in Aquinas, on the pre-conditions for spouses to *actualise, experience, and express* their marriage in their acts of marital intercourse. See Finnis, *Aquinas, supra* note 2, at 143-47. Confused questions and interjections at the conference make it advisable to add that it is as intrinsic to the idea of marriage that it be between a man and woman as it is that it be between only two persons. It is absurd for “gay rights” advocates to claim that a commitment between two persons of the same sex can instantiate marriage—and this absurdity is made manifest as soon as one asks supporters of gay ideology why they keep talking about *couples*: the ideology offers no *reason* whatever for such a restriction, any more than it offers reason for fidelity and exclusiveness within “marriage.”

4. It does not follow that engaging in such acts, with full adult consent and in total privacy, should be criminalized, and I have long held that it should not be. See John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 *Notre Dame L. Rev.* 1049, 1076 (1994); with additions John M. Finnis, 9 *Notre Dame J.L. Ethics & Pub. Pol’y* 11, 38-39 (1995). Nor do I raise the question of homosexual conduct out of any

of some importance at this time is having the resolution to think this matter through, analyze and assess the self-indulgent and unjust claims to equality of treatment, tell the truth about this matter in uncomfortable contexts, and act on it in legitimate contexts such as national, state, and local elections, or school government—while maintaining proper civility and respect for all persons involved.

III. PROJECTS FOR INCULCATING CIVIC VIRTUES SHOULD CRITIQUE PRACTICES DENYING JUST LIBERTY AND AUTHENTIC EQUALITY.

The fifth question seems to insinuate that fostering “liberty and equality” should have a kind of priority in projects of encouraging civic virtue. In their obvious political meaning, these are great goods rightly emphasized in the aftermath of empire and slavery, so in the Constitution of the United States and its Fourteenth Amendment. But though, for the same reason, they head up the Gettysburg address, the political thought of the address comes to rest in the proposition that government by the people is both of and for the people. Government of people entails restriction of their liberties, even if it is intended to preserve the liberties of others; and government for people implies that it is for the benefit of all aspects of people’s needs and well-being, not simply their freedom and equality of status.

So liberty and equality have their place in the project, but the priority must go to encouraging people to distinguish between just liberty and the unjust liberty of the snake oil merchant, the child abuser, the monopolist, the lying advocate, and so forth; and between equality in fundamentals, such as was unjustly denied in slavery and is today denied in the right of the strong to abort the weak, and equality wrongly claimed for people whose actions and dispositions are rightly regarded as unjust or causes of injustice. The Supreme Court has rightly denied that there is a constitutional liberty-right to be killed (by euthanasia or assistance in suicide), and an important premise in the argument was that this liberty of a few would (i) endanger the liberty of many to live free from the terror of being killed because their life has been judged by someone to be not worth living, and (ii) equally endanger the equality of those too poor to escape being

hostility to people disposed to engage in such conduct, or any special hostility to that kind of conduct. My concern in this area is with all kinds of disposition and conduct opposed to marriage (e.g., fornication, adultery, the dissemination of pornography, etc.). I had researched and published in the area for decades before the accidents of the Colorado Amendment 2 litigation in 1993 occasioned my first research and publication on homosexual conduct and “orientation.” Still, there is a case for giving attention to the “gay” ideology: it is a particularly shameless assault on the idea of marriage, even—and to some extent especially—when it claims for same-sex couples, triples, quadruples, etc., a “right to marry.” And true marriage is really important for justice to children, i.e. to everyone in their early years.

treated in institutions, public or private, which have great economic incentives to secure their early death.⁵ But there are many ways of harming the welfare, especially of children, which should not be forced into the straitjacket of violations of the children's liberty or equality, rather than what they are: ways of harming their formation in generosity, self-control, fair-mindedness, the chastity which supports and informs good marriage, and so forth.

Looking at questions 4 and 5 together, one seems to detect an insinuation: there should be more endorsement of the anti-life and anti-marital practices that Christian culture always opposed, and less tolerance of those persons and organizations (such as the Catholic Church) that are critical of those practices. If that is indeed the suggestion, my reply is twofold: (1) broadly speaking, it has the truth exactly backward; but (2) one can say little useful for or against the suggestion without doing what self-styled liberal theorists, with honorable exceptions such as Macedo, are usually reluctant to do—consider the merits of the practices and critiques in question.

IV. THE CONSTITUTION OF THE UNITED STATES PERMITS GOVERNMENTAL ENCOURAGEMENT TO VIRTUE

With emphasis, the Constitution proclaims that the powers of the United States are only a fraction of the proper powers and responsibilities of government, and that all such governmental powers not delegated to the United States or prohibited by it to the States are retained by ("reserved to") each of the States. Those retained powers include that general residual power to legislate for the common good, which bears an unfortunate historical label "police power," where police has nothing to do with "police" in the modern sense of law-enforcement agent, and everything to do with the well-being of the polity. It is the inherent authority of a government to impose restrictions on private conduct and holdings, for the sake of the public goods of justice, order, peace, security and welfare. That general power includes the power to legislate for and in other ways make provision for the preservation of public morality, which certainly includes the protection of children from moral corruption of every kind that bears on their fitness for living. "Public morality" is a category in some danger of withering away; unlike "rights" and "liberties" it does not confer on any individual or private group a standing to sue. But it is greatly important for the common good, the well-being of persons.

5. See *Washington v. Glucksberg*, 521 U.S. 702 *passim* (1997); *Vacco v. Quill*, 521 U.S. 793, 808-09 n.11 (1997) (especially the references to the Report of the New York State Task Force on Life and the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* (1994)). See generally John Finnis, *Euthanasia, Morality, and Law*, 31 *Loy. L.A. L. Rev.* 1123 (1998).

So the Constitution does not “require or presuppose, or thwart or even forbid” a governmental project of encouraging civic virtue. The organizers’ four candidate verbs manage to miss the mark. The right verbs are “permits” and in the long run “depends upon.” Some Supreme Court decisions purporting to apply the Fourteenth Amendment against the States, on the basis that what the State or States deem a vice harmful to others is in the Court’s view not harmful, have certainly had the effect of thwarting sound projects of encouraging civic virtue. But there has not been, and is no constitutional basis for, a general prohibition on State laws advancing or supporting such projects.

V. PRIMARY RESPONSIBILITY FOR INCULCATING CIVIC VIRTUE RESTS WITH FAMILIES, SCHOOLS, AND OTHER INSTITUTIONS OF CIVIC SOCIETY—GOVERNMENTS’ ROLE IS SUBSIDIARY

Question 2, which I have left until last, seems significantly skewed: “To what extent can the institutions of civil society support or even supplant government in inculcating civic virtue?” That is, it seems to presuppose the top-down statism characteristic of much thought and practice commonly but complacently called “liberal,” such as the assumption that schooling of children should be “public” in the sense that it is owned, managed, conducted, and administered from top to bottom by a governmental agency; and the accompanying presumption that “private” schooling is an anomalous and civically unfortunate side-effect of the constitutional guarantees of religious and associational freedom.

The people of the Soviet Union had to learn the hard way—and at huge and continuing cost to their civic virtue at every level—that the principle of subsidiarity articulated by the Popes in the face of socialism is a true principle of justice, and that putting services like schooling into the hands of state monopolists made irresponsible by making their product free at the point of supply not only has devastatingly bad side effects but is a serious injustice to the parents and children who could otherwise have been helped, where necessary, to organize their own institutions for schooling children in truth, honesty, generosity, courage, respect for others as individuals, and concern for wider circles including, but in a subsidiary way, the state, its government, and its political, legal, and international life. Personal life, the real life of individuals, became in radically socialist countries intensely *privatized*: that is, at every level civic virtue as a personal disposition became stunted to the point of withering away, as I could observe when visiting an underground “university” in late-Communist Bratislava, and a Russian-speaking child of mine could often observe in late-Soviet Leningrad and contemporary Moscow.

Less dramatically, and *mutatis mutandis*, similar phenomena can be observed in America. Even when differences in education, income,

race, age, family structure, region, and hours per week worked by parents were all controlled for, the American families whose children attended public schools were found in 1996 to be *more privatized* than the families whose children attended Catholic or other private schools or were home schooled—that is to say, they were *less* likely to be involved in civic activities on each and all of the nine dimensions of involvement used by the 1996 Household Education Survey conducted by the U.S. Department of Education's National Center for Education Statistics.⁶

That is anecdotal evidence, though more to the point than the anecdotal evidence Steve Macedo kindly retailed to us from Southern Italy.⁷ The answer to the question is supplied by a sound analysis of the foundations of politics:⁸ Governments do have a primary role in cultivating *some* elements of civic virtue—those that pertain to the performance of political roles and responsibilities, such as fair competition in elections for public offices, doing one's duty if called for service on a jury, refusing bribes as a citizen to vote for certain candidates or, as a legislator, for certain bills, etc. As to the many other important elements of civic virtue, however, government can and must support, but should not supplant, the ongoing educative project of the civic institutions (families, schools, churches, etc.) which rightly have primary responsibility for inculcating these elements.

6. Christian Smith & David Sikkink, *Is Private Schooling Privatizing?*, *First Things: A Journal of Religion and Public Life*, Apr. 1999, at 16.

7. One of the most striking and sustained manifestations of civic virtue in my lifetime was the rescue of many Australian trade unions from the grip of Communists by Catholic activists led by the Southern Italian "traditional Catholic" intellectual and activist Bob Santamaria, at a time (1949-1952) when the secular and Protestant national government was concentrating futilely on top-down state measures such as dissolving the Communist Party.

8. See, e.g., John Finnis, *Natural Law & Natural Rights* 146, 159, 169, 233 (1980) (definition of subsidiarity).