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John Finnis's Natural Law Theory and a Critique of the Incommensurable Nature of Basic Goods

"All sciences are now under the obligation to prepare the ground for the future task of the philosopher, which is to solve the problem of value, to determine the true hierarchy of values."[1]

"I conceive that great part of the miseries of mankind are brought upon them by the false estimates they have made of the value of things . . . ."[2]

ALEX E. WALLIN*

INTRODUCTION

"Natural law." To some, combining these two words to describe one concept can elicit seemingly contradictory ideas. The word "natural" can evoke ideas of nature and the natural world, while the word "law" may initially conjure thoughts of the governments of man. One may, therefore, ask how these two potentially opposite worlds can be combined into one phrase. There is no singularly agreed upon answer to this potential conundrum, but the "essence of natural law may be said to lie in the constant assertion that there are objective moral principles which depend upon the nature of the universe . . . ."[3] Natural law has arguably been a part of the history of the United States since the adoption of the Declaration of Independence[4] and thus warrants some discussion, as it may have provided

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1. FRIEDRICH NIETZSCHE, THE BIRTH OF TRAGEDY & THE GENEALOGY OF MORALS 188 (Francis Golffing trans., 1956).

2. Benjamin Franklin, The Whistle (1779), *reprinted in* THE OXFORD BOOK OF AMERICAN ESSAYS 4, 6 (Brander Matthews ed., 1914).

3. MICHAEL D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 90 (7th ed. 2001).

4. *See* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("[T]he separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation."). The reference to the "Laws of Nature" has forever opened the door to the

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a foundation for the principles that led to the founding of our nation. Natural law can be considered a facially contradictory notion that is difficultly defined and understood, but the discussion of natural law and John Finnis's natural law theory must begin with a general idea of what the term "natural law" entails.[5]

Natural law can generically be described as "an unwritten law which is superior to and is the measure of man-made law."[6] Natural law scholars understand it to provide "a sort of *a priori*, intuitive knowledge of objective moral values"[7] and "an objective standard of right and wrong [that is] independent[] of the individual conscience."[8] Moral objectivity may seem to be a foreign concept to those that believe societies are composed of actors making decisions based solely on individual notions of morality rather than relying on overarching objective standards.[9] The term "moral relativism" may best describe the idea that there are no objective standards by which an actor can judge his or her choices and actions.[10] However, the bifurcation created by natural law theories and the notion of moral relativism is nothing new.

debate over whether the inclusion of this language was an invocation of natural law as a justification for the colonies' separation from Great Britain.

5. The scope of this paper is far too narrow to provide a full history of natural law and natural law theory. The author merely intends to provide some introductory information to provide a backdrop that should better allow an understanding of Finnis's work in this area.

6. MICHAEL BERTRAM CROWE, THE CHANGING PROFILE OF THE NATURAL LAW 6 (1977).

7. *Id*. at 12.

8. *Id*. at 17.

9. *See* ALASDAIR MACINTYRE, AFTER VIRTUE 6–8 (1981) (discussing conceptual incommensurability in rival arguments). MacIntyre addresses three contemporary refutations of the existence of objective moral principles within his argument that the failure of the enlightenment changed how moral questions are discussed and created the incommensurable nature of such arguments. *Id*.

10. *See* Chris Gowans, *Moral Relativism*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1, 5 (Edward N. Zalta ed., 2012), *available at* http://plato.stanford.edu/archives/spr2012/entries/moral-relativism/ (explaining this form of moral relativism as "*Metaethical Moral Relativism* (*MMR*)," in which "[t]he truth or falsity of moral judgments, or their justification, is not absolute or universal, but is relative to the traditions, convictions, or practices of a group of persons"); *see also* MACINTYRE, *supra* note 9, at 11–12 (discussing the term "emotivism, which he defines as "the doctrine that all evaluative judgments and more specifically all moral judgments are *nothing but* expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character").

The belief in the existence of natural law is not a creation of recent developments in jurisprudence.[11] Rather, the idea of the existence of natural law can be traced at least as far back as ancient Greece.[12] Attempts to describe the implications of the existence of natural law, what may be referred to as "natural law theory," are seen in Greek thought, which was "enriched with a variety of speculation about natural justice and a law of nature."[13] Some of the fundamental foundations of the multiple incarnations of natural law theory that have been espoused and discussed can be traced to the works of Plato and Aristotle,[14] and concepts relating to moral relativism can also be found during this period.[15] Although these concepts do not represent a new endeavor, natural law theory has seen a resurgence of interest[16] after a long period of dominance and a relegation to disfavor.[17]

If natural law can be said to provide objective moral principles, what exactly are we referring to when we discuss moral principles? The concept of a moral principle can generally be referred to as a principle that describes the right or wrong nature of behavior.[18] The proponents of the existence of natural law—and, by extension, natural law theories—believe that natural law provides an objective reference that allows us to determine whether our decisions and actions are right or wrong and thus moral.[19] This is contrasted with the advocates of moral relativism, who argue that morals are subjective and not based on knowable, objective standards.[20] The propositions that these two opposite schools of thought advance can also be seen in national debates analyzing morality and its place within a formalized state.[21]

11. *See* CROWE, *supra* note 6, at 4 (expounding upon the role of natural law in ancient Greece).

12. *Id*.

13. *Id*.

14. *Id*. at 14, 27.

15. *See* Gowans, *supra* note 10, at 2.

16. *See, e.g*., RUSSELL HITTINGER, A CRITIQUE OF THE NEW NATURAL LAW THEORY 1–7 (1987).

17. THE OXFORD GUIDE TO PHILOSOPHY 642 (Ted Honderich ed., 2005).

18. MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/moral (last visited Nov. 5, 2012).

19. *See, e.g*., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 23 (1980) (supporting an objective standard of morality).

20. *See, e.g*., Gowans, *supra* note 10, at 4 ("[M]oral judgments lack the moral authority or normative force that moral objectivists usually contend these judgments may have.").

21. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003); Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992).

Why, then, is an inquiry into natural law and a natural law theory relevant in today's legal discourse? The answer should be abundantly apparent in an election year, especially during the 2012 presidential election cycle, which has seen a record number of political advertisements.[22] "Natural law is believed to be a rational foundation for moral judgment,"[23] and the nature and tone of our current national political conversation fundamentally revolves around disagreements over the role the United States government should play in its regulation and oversight of our everyday choices.

Not only is such a question highlighted in an election year, it was also inherently discussed in the United States Supreme Court's ruling on the constitutionality of the individual mandate in *National Federation of Independent Business v. Sebelius*.[24] A natural law theory attempts to describe how objective standards created by natural law provide a framework to determine the morality of the actions of individuals.[25] These theories can be consulted in a time when we are trying to decide not only what is moral, but also the extent to which we should allow government to define our collective morality and regulate or restrict our ability to make choices.

If a theory of natural law can be considered in the context of the discussion of the role of a centralized government, how do natural law and formalized, state mandated law interact? John Finnis defines natural law as "the set of principles of practical reasonableness in ordering human life and human community . . . ."[26] Finnis argues that the principles of natural law are "traced out not only in moral philosophy or ethics and 'individual' conduct, but also in political philosophy and jurisprudence, in political action, adjudication, and the life of the citizen."[27] He further asserts that "the principles of natural law explain the obligatory force . . . of positive laws, even when those laws cannot be deduced from [the principles of

22. *See generally* Reid Wilson, *2012 Campaign-Ad Spending Poised To Smash 2008 Record*, NATIONAL JOURNAL (Jun. 29, 2012, 4:56 PM), http://www.nationaljournal.com/2012-presidential-campaign/2012-campaign-ad-spending-poised-to-smash-2008-record-20120629 (discussing the volume of election television ads and the amount of money expected to be spent by both candidates during the 2012 presidential election).

23. FREEMAN, *supra* note 3, at 90.

24. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. ___, ___, 132 S. Ct. 2566, 2579–82 (2012) (discussing the constitutional restrictions on the federal government).

25. FINNIS, *supra* note 19, at 23.

26. *Id*. at 280.

27. *Id*. at 23.

natural law]."[28] Therefore, if Finnis is correct, then the principles of natural law have the ability to further enhance and educate our national discussion on the role of the federal government.

The theory that Finnis describes in *Natural Law and Natural Rights* has come to be considered "[t]he most authoritative modern statement of natural law."[29] Even the Supreme Court of the United States has directly addressed the issue of morality in cases such as *Lawrence v. Texas*[30] and *Planned Parenthood v. Casey*.[31] Therefore, the purportedly most authoritative theory on the interaction between law and morality deserves some attention.

Finnis invites scholars from many different disciplines to interpret and critique his system of natural law by making bold and sweeping assertions about law and morality.[32] In *A Critique of the New Natural Law Theory*, Russell Hittinger discusses Finnis's theory and offers a critique of the different aspects of the theory.[33] One of these criticisms addresses Finnis's argument that "certain propositions in normative ethics and political theory are self-evidently true."[34]

The goal of this Article is to identify some of the issues and problems created by Finnis's natural law theory. The Article begins by articulating Finnis's theory in an admittedly brief and broadly described overview.[35] Once the overall theory has been articulated, further explanation of his pre-moral self-evident seven basic goods is provided. A discussion of Finnis's theory, with a particular focus on the issues created by the basic goods, will be discussed in light of Hittinger's critique. Once Hittinger's criticisms have been identified the author will provide commentary on his critique and additional commentary on the theory.

28. *Id*. at 23–24.

29. FREEMAN, *supra* note 3, at 132.

30. *See* Lawrence v. Texas, 539 U.S. 558, 571–73 (2003) (discussing the historical condemnation of homosexuality as immoral).

31. *See* Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992) (acknowledging the moral implications of terminating a pregnancy).

32. *See generally* FINNIS, *supra* note 19.

33. *See generally* HITTINGER, *supra* note 16.

34. FREEMAN, *supra* note 3, at 132 (citation omitted).

35. The author fully admits that any overview of this natural law theory would necessarily be too conclusory. The theory Finnis sets out is extremely complicated and an entire book can, and has, been written in an attempt to describe Finnis's account of natural law. *See generally* HITTINGER, *supra* note 16. This overview is provided merely as a sketch in order to provide the reader with an understanding of where the focal point of the critique fits into the theory as a whole.

I. THE NEW NATURAL LAW THEORY[36]

A. *An Overview*

Finnis's natural law theory is divided into three distinct parts, each with its own purpose.[37] Finnis argues that there are, first, a set of notions that "indicate the basic forms of human flourishing as goods to be pursued and realized" and that are known to everyone who thinks about how they should act.[38] These principles are buttressed by "a set of basic methodological requirements of practical reasonableness . . . which distinguish sound from unsound practical thinking and . . . provide the criteria for distinguishing between [reasonable and unreasonable acts]."[39] Following these methodological requirements allows one to distinguish between acting morally right or morally wrong and "to formulate . . . a set of general moral standards."[40]

Finnis begins by discussing knowledge and describing his theory of the importance of basic goods.[41] Basic goods are irreducible, self-evident, "and even unquestionable."[42] To Finnis, every reasonable person would assent to the value of these basic goods as objects of human striving,[43] and these basic goods are "indemonstrable but self-evident principles [that shape] our practical reasoning."[44] By stating that something is a basic good, as he does in the first instance with knowledge, Finnis argues that "reference to the pursuit of knowledge makes intelligible . . . any particular instance of the human activity and commitment involved in such pursuit."[45]

There are seven of these basic goods. They are: (1) life, (2) knowledge, (3) play, (4) aesthetic experience, (5) sociability or friendship, (6) practical reasonableness, and (7) religion.[46] Finnis argues that the list of basic goods is exhaustive in that "other objectives and forms of good will be found . . . to be ways or combinations of ways of

36. This title is in reference to Hittinger's label to Finnis's theory as a new natural law theory. *See* HITTINGER, *supra* note 16.

37. FINNIS, *supra* note 19, at 23.

38. *Id*.

39. *Id*.

40. *Id*.

41. *See id*. at 59.

42. *Id*.

43. *See id*. at 83–84 (demonstrating "the universality of a few basic values").

44. *Id*. at 81.

45. *Id*. at 62.

46. *Id*. at 86–89.

pursuing . . . and realizing . . . one of the seven basic forms of good, or some combination of them."[47]

There is also no hierarchy within the list, and thus, the basic goods are considered incommensurable.[48] Finnis argues that the basic goods are "equally self-evidently a form of good."[49] None of the basic goods "can be analytically reduced to being merely an aspect of any of the others, or to being merely instrumental in the pursuit of any of the others," and "each one, when we focus on it, can reasonably be regarded as the most important."[50] These goods are also pre-moral, in that they do not "presuppose[] any moral judgment."[51]

After laying out his list of pre-moral basic goods, Finnis then must explain those "methodological requirements of practical reasonableness" that he claims allow one to make actual decisions.[52] The methodology will be enacted through the understanding of basic practical principles, and the basic good of practical reasonableness is the good that structures our pursuit of the other basic goods.[53]

"A basic practical principle serves to orient one's practical reasoning, and can be instantiated (rather than 'applied') in indefinitely many, more specific, practical principles and premisses [sic]."[54] The principles of practical reason are derivations of the first principle of practical reason ("FPPR"), which states, "*Good is to be done and pursued, and evil is to be avoided*."[55] The basic requirements of practical reasonableness, also referred to as basic practical principles, "are specifications of the FPPR"[56] and "express the 'natural law method' of working out the (moral) 'natural

47. *Id*. at 90.

48. *Id*. at 92–93.

49. *Id*. at 92.

50. *Id*.

51. *Id*. at 59.

52. *Id*. at 23.

53. *Id*. at 100.

54. *Id*. at 63.

55. Germain G. Grisez, *The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Question 94, Article 2*, 10 NAT. L.F. 168, 168 (1965). This is Grisez's interpretation of St. Thomas Acquinas's first principle of practical reason. *Id*. Grisez's natural law theory is the basis for John Finnis's chapters describing the formulation of his theory. *See* FINNIS, *supra* note 19, at vii (stating that the ethical theory in Chapters III–V are "squarely based on [his] understanding of [Grisez's] vigorous re-presentation and very substantial development of the classic arguments on these matters").

56. HITTINGER, *supra* note 16, at 39.

law' from the first (pre-moral) 'principles of natural law.'"[57] These principles show the reasons why, as well as the ways in which, "there are things that morally ought (not) to be done."[58]

Finnis describes nine principles of practical reason that follow the FPPR.[59] These principles are: (1) having "a coherent plan of life," (2) not having an arbitrary preference amongst the basic goods, (3) not having an arbitrary preference amongst persons, (4) having a sense of detachment from all the specific and limited projects one undertakes, (5) not abandoning general commitments lightly, (6) acting to bring about good with efficiency, (7) respecting every basic value in every act by never choosing against a basic good, (8) favoring and fostering the common good of one's communities, and (9) following one's conscience.[60]

In addition to the first principle of practical reason, Finnis describes a first moral principle.[61] The first principle of morality ("FPM") states: "In voluntarily acting for human goods and avoiding what is opposed to them, *one ought to choose and otherwise will those and only those possibilities whose willing is compatible with integral human fulfilment* [sic]."[62] Finnis's discussion of the good of persons and communities refers to "integral human fulfillment," and not an "individualistic self-fulfillment."[63] The FPM is "a guiding ideal rather than a realizable idea" because it operates as a basic good and is open-ended.[64] However, unlike a basic good, the FPM does not give reasons for acting; instead, "[i]t only moderates the interplay of [the] reasons" given by the basic goods and allows deliberation to be "thoroughly reasonable."[65]

57. FINNIS, *supra* note 19, at 103.

58. *Id*.

59. *Id*. at 103–26.

60. *See id*. Finnis admits that "[t]he ninth requirement might be regarded as a particular aspect of the seventh . . . , or even as a summary of all of the requirements." *Id*. at 125. Finnis argues that this requirement "is quite distinctive" and that "even the mistaken conscience is what is expressed in the ninth requirement." *Id*. at 125–26. He further states that, "practical reasonableness is not simply a mechanism for producing correct judgments, but an aspect of personal full-being, to be respected . . . in every act as 'over-all'—whatever the consequences." *Id*. at 126.

61. JOHN FINNIS, JOSEPH M. BOYLE, JR. & GERMAIN GRISEZ, NUCLEAR DETERRENCE, MORALITY, AND REALISM 281–87 (1987).

62. *Id*. at 283 (alteration in original).

63. *Id*.

64. *Id*. at 283–84.

65. *Id*. at 284.

The purpose of the FPM is to give explicit force to the good implicit in the FPPR,[66] and the purpose of the FPPR is to dictate that goods are to be pursued and privations of those goods to be avoided.[67] With the introduction of the FPM, Finnis provides a morally perceptive rule that choices be compatible with "integral human fulfillment."[68] The FPM and the principles of practical reason present more specific moral norms to be derived, thus fulfilling the third aspect of Finnis's theory.[69]

With Finnis's theory now in place, this Article will shift its focus to a particular aspect of this natural law theory, his notion of basic goods.

B. The Basic Forms of Human Good

Understanding and critiquing Finnis's theory requires a recitation of Finnis's concept of basic goods and how they interrelate. First, what Finnis describes as a basic good will be explored. Next, this Article will examine each good and what Finnis finds as its basis, and in so doing will further develop Finnis's list of the basic goods. Finally, this Article will explain how the basic goods are to be considered in relation to one another.

1. What is a Basic Good?

Basic goods are the basic aspects of one's well-being and the "first principles of one's own practical reasoning."[70] An inquiry into the basic goods is a critical and practical discipline where one asks: "What *are* the basic aspects of my well-being?"[71] The basic forms of good are things "to-be-pursued."[72] This understanding permits one to see the point of actions and cultures that one would not choose for oneself, and this speculative knowledge affects the practical understanding of the forms of good that are available to choice.[73] This is not a process of inferring from fact to a

66. *See id*. (explaining that while "[n]o specific moral norm can be derived *immediately* from the first principle," it does "imply intermediate principles from which specific norms can be deduced").

67. See *id*. at 285–87.

68. *Id*. at 283.

69. HITTINGER, *supra* note 16, at 59.

70. FINNIS, *supra* note 19, at 85. Finnis reminds the reader that when discussing the terms "good," "basic good," "value," and "well-being" he is not yet discussing anything in terms of a "moral good." *Id*. at 86. For the purposes of this Section of the Article, the author adopts the interchangeability of terms that Finnis employs.

71. *Id*. at 85 (emphasis original).

72. *Id*.

73. *Id*.

value[74] for "[n]o value can be deduced or otherwise inferred from a fact or set of facts."[75] The proper question for Finnis is whether something is a good in and of itself.[76]

The basic goods are goods sought for their own sake.[77] These goods are "properly called 'ends'" and are not those goods which are instrumental and thus considered "means."[78] These ends are to be considered "final ends" but not in the sense of an objective and determinate final end.[79] Rather, the basic human goods are final ends in that "they are 'definite possibilities' intuited independent of any other sort of knowledge."[80]

Finnis's basic goods are: (1) life, (2) knowledge, (3) play, (4) aesthetic experience, (5) sociability (friendship), (6) practical reasonableness, and (7) religion.[81] Again, these basic goods are not to be confused with moral goods.[82] Basic goods are broken into two categories: substantive and reflexive.[83] Life, knowledge, and play are substantive goods, whereas aesthetic experience, sociability, practical reasonableness, and religion are reflexive goods.[84] Reflexive goods must be "defined in terms of human choice," and substantive goods provide reasons for making choices that stand by themselves.[85]

Finnis makes clear that these basic goods are not to be thought of as moral values.[86] Stating that knowledge is good, or thinking of knowledge as a value, is not the same as saying that knowledge is a moral value.[87] By saying knowledge is to be pursued—since it is a good, and the FRRP says that goods are to be pursued—Finnis is not saying that a moral obligation

74. *Id*.

75. *Id*. at 66.

76. *Id*. at 86.

77. HITTINGER, *supra* note 16, at 40.

78. *Id*.

79. *Id*.

80. *Id*. at 40–41.

81. FINNIS, *supra* note 19, at 86–89.

82. *Id*. at 86. Finnis here reminds the reader that when discussing the terms "good," "basic good," "value," and "well-being" he is not yet discussing anything in terms of a "moral good." *Id*.

83. HITTINGER, *supra* note 16, at 41–42.

84. *Id*.

85. *Id*. at 41.

86. *See* FINNIS, *supra* note 19, at 62 (using the example of knowledge to dispel the misunderstanding that basic goods are moral values).

87. *Id*.

has been created.[88] Finnis's basic goods are to be thought of as intrinsically good in that all of these values should be considered good for their own sake and not for an instrumental purpose.[89]

2. The List

Finnis actually begins his discussion of the basic goods by describing the second basic good, knowledge.[90] He does this because "the materials for an analysis were so readily available, in a form substantially common to each reader, in the shape of his own commitment to understanding . . . ."[91] But this has drawn criticism.[92] His lengthy discussion and method of analysis for this good and the lack of similar treatment for the rest of his self-evident, basic goods raises an issue for critics of the theory.[93]

Finnis more particularly describes the good of knowledge as that of speculative knowledge, explaining that this good is the good of knowledge being "sought for its own sake."[94] This reference to knowledge can also be articulated as truth—so that one can say that this is truth sought for its own sake in the same manner as knowledge.[95] Here, Finnis is not describing an instrumental use of knowledge, but rather "the pure desire to know" merely out of curiosity and "an interest in or concern for truth and a desire to avoid ignorance or error . . . ."[96]

Though Finnis starts his discussion with knowledge, his list of the basic goods actually begins with the basic value of life.[97] For Finnis, life

88. *Id*.

89. *Id*. at 59, 62.

90. *Id*. at 59–75.

91. *Id*. at 81.

92. *See*, *e.g*., HITTINGER, *supra* note 16.

93. *Id*. at 46. To Finnis, it is "operationally self-refuting" to say that knowledge is not a basic good because by merely making that statement, the person making the assertion is "implicitly committed to the proposition that he believes his assertion is worth making, and worth making *qua* true; he is thus committed to the proposition that he believes that truth is a good worth pursuing or knowing." *Id*. at 46 (citation omitted) (internal quotation marks omitted). Hittinger criticizes Finnis's justification for the list of goods because of the lengthy discussion of knowledge and the lack of the similar attention given to the remainder of the list. *Id*. Hittinger agrees that the self-referential method of proof makes sense, but notes that this method of justification is not employed as easily with the other basic goods, and he finds it problematic that Finnis makes no attempt to prove the other goods in this same fashion. *Id*.

94. FINNIS, *supra* note 19, at 59.

95. *Id*.

96. *Id*. at 60.

97. *Id*. at 86.

entails "every aspect of the vitality . . . which puts a human being in good shape for self-determination."[98] The basic good of life includes not only physical and mental health, but also freedom from pain caused by illness or injury.[99] Finnis also asserts that the procreation of children is included in the basic good of life because procreation is the transmission of life.[100]

After life and knowledge, Finnis moves to his third basic good, play.[101] Play is a "large and irreducible element in human culture" that is easy to conceptualize as being self-evident, in that one can easily "see the point of engaging in performances which have no point beyond the performance itself, enjoyed for its own sake."[102] An act can be purely considered for the purpose of play, but an act can also have its own, independent play value even when that act has a more serious context.[103] The fourth basic good, aesthetic experience, is similar but distinguishable from the basic good of play.[104] Play may be the occasion for aesthetic experience, but aesthetic experience does not necessarily need an action.[105] The good that is sought may be beauty outside oneself or the internal appreciation of that beauty.[106]

Sociability is the fifth basic good in Finnis's natural law theory.[107] In its weakest form, it is realized "by a minimum of peace and harmony amongst men," and its strongest manifestation is the creation of a full friendship.[108] Many collaborations between persons are for the realization of each one's own personal purposes, but friendship also involves acting for another's purposes or well-being.[109] "To be in a relationship of friendship with at least one other person is a fundamental form of good."[110]

The sixth basic good—the ability "to bring one's own intelligence to bear effectively . . . on the problems of choosing one's actions and lifestyle and shaping one's own character"—is the good of practical

98. *Id*.
99. *Id*.
100. *Id*. at 86–87.
101. *Id*. at 87.
102. *Id*.
103. *Id*.
104. *Id*.
105. *Id*.
106. *Id*. at 88.
107. *Id*.
108. *Id*.
109. *Id*.
110. *Id*.

reasonableness.[111] This involves having effective freedom and "seek[ing] to bring an intelligent and reasonable order into one's actions . . . ."[112] Internally, this is the ordering of emotions and dispositions, and externally, this is the "genuine realization[] of one's own freely ordered evaluations, preferences, hopes, and self-determination."[113] This value involves freedom, reason, integrity and authenticity, but despite this complexity, Finnis believes that there is a unity to this value and thus treats these issues all under the basic good of practical reasonableness.[114]

Finnis's final basic good is religion.[115] The basic good of religion encompasses the recognition of a concern for "an irreducibly distinct form of order."[116] This good addresses a person's individual sense of responsibility in choosing what he is to be and do and the realization that this sense cannot be reduced to the concepts addressed by the other basic goods.[117] Religion concludes Finnis's list, and with his list in place, he invites speculation and discussion on the implications of having attempted to list all of the basic goods.

3. Now that we have a list, what do we do with it?

By creating a list of seven basic goods, Finnis has invited, but also anticipated, the question of whether this is an exclusive list, or whether there are other objectives and forms of good.[118] Finnis directly addresses this issue by stating that other objectives and forms of good will be found to be ways or combinations of ways to pursue one of the seven basic forms of good," or a combination of multiple basic goods.[119] He argues that an acknowledgment that other goods are modes of pursuing basic values allows one to deconstruct "conventions, norms, institutions, and orders of preference."[120] Finnis summarizes the point by stating, "those seven purposes are all of the basic purposes of human action, and that any other

111. *Id*.
112. *Id*.
113. *Id*.
114. *Id*. at 88–89.
115. *Id*. at 89.
116. *Id*. at 90.
117. *Id*.
118. *See id*.
119. *Id*.
120. *Id*. at 91.

purpose which you or I might recognize and pursue will turn out to represent, or be constituted of, some aspect(s) of some or all of them."[121]

Finnis further asserts that the list of basic goods is exhaustive and lacks any notion of internal hierarchy.[122] Each one of the seven basic goods is equally self-evident.[123] None of these goods is reducible to an aspect of one of the other goods, nor can any individual basic good be regarded as the most important.[124] While it is true that a person can choose to treat one of these goods as superior to the others, each good is still fundamental, and these goods have no objective priority of value.[125] These choices constitute a life plan that subjectively orders the basic goods for the individual, but the fundamental nature of the goods and the subjective ordering do not change the intrinsic value of the goods themselves.[126] Finnis's notion of a life plan and its relationship to the ordering of goods proves to be an important part of the critique of his theory.

Finnis has argued that there are seven basic, self-evident, and incommensurable goods.[127] With his list and his theory of the relationship among the goods Finnis has provided fuel for one of the critiques of his theory—the charge that the list of basic goods lacks an internal hierarchy.[128] This Article now shifts its focus from Finnis's system of natural law to a critique offered on some of the theory's assertions.

II. A CRITIQUE OF THE INCOMMENSURABLE NATURE OF THE BASIC GOODS

In *A Critique of the New Natural Law Theory*, Hittinger describes what he terms the Grisez-Finnis "new natural law theory."[129] Hittinger argues that Finnis's *Natural Law and Natural Rights* has done as much to bring the topic of natural law back into scholarly discourse as any other work.[130] Hittinger's concern in reviewing this theory was to determine

121. *Id*. at 92.

122. *Id*.

123. *Id*.

124. *Id*.

125. *Id*. at 93.

126. *Id*. at 93–94.

127. *Id*. at 81–95.

128. *See* HITTINGER, *supra* note 16, at 75–79 (discussing the problems with the proposition that there is a lack of hierarchy within the basic goods).

129. *Id*. at 5.

130. *Id*.

whether Grisez and Finnis had actually created an "authentically natural law method."[131]

Hittinger concludes that, as a whole, the system fails.[132] The problem with this theory is that it fails to "interrelate systematically practical reason with a philosophy of nature."[133] For Hittinger, a natural law theory "obviously requires a commitment to law as in some way 'natural,' and nature as in some way normative . . . ."[134] This Part of the Article will focus on Hittinger's critique and his argument against the validity of Finnis's assertion of the incommensurable nature of the basic goods.

A. Incommensurable Goods?

Hittinger begins by recognizing that the Grisez-Finnis natural law theory postulates that each basic good is essential and that no hierarchy exists.[135] When a person must make a choice, according to this natural law theory, there is no objective means of saying that any of the basic human goods inherent in a "particular intelligible possibility is definitely a greater good than another."[136] This irreducible quality makes finding a standard by which to commensurate impossible.[137]

Hittinger recounts one of Germain Grisez's examples to better articulate this problem.[138] Grisez attempts to defend his—and necessarily Finnis's—natural law theory and the incommensurability of the basic goods by way of a practical example.[139] Imagine a person on a Sunday morning that is faced with the choice between going to church, playing golf, or reading the Sunday paper.[140] Each one of these options possesses certain values. Choosing one does not reflect negatively on the others, but

131. *Id*. at 7.

132. *Id*. at 8.

133. *Id*.

134. *Id*.

135. *Id*. at 75. Hittinger's critique uses quotations from Grisez to illustrate his points about the problems with this theory of natural law. *Id*. at 75–77. The reader should note that where Finnis and Grisez vary, Hittinger explicitly notes their difference in views or particular vernacular. *Id*. at 8. If there is no such distinction, it is Hittinger's intention that the criticism be applicable to both articulations of this natural law theory. *See id*.

136. *Id*. at 75 (quoting GERMAIN GRISEZ, CHRISTIAN MORAL PRINCIPLES 156 (1983)).

137. *Id*.

138. *Id*.

139. *Id*.

140. *Id*. Hittinger takes this hypothetical from one of Grisez's works entitled *Beyond the New Morality*. GERMAIN GRISEZ & RUSSELL SHAW, BEYOND THE NEW MORALITY 94–97 (1980) [hereinafter BEYOND THE NEW MORALITY].

rather indicates the impossibility of performing all three acts simultaneously.[141]

In Finnis's theory, the morally upright choice is determined by a person acting as if the choice to play golf is not made in a way that disrespects the other two goods.[142] The morality of the choice is not, therefore, determined by an intrinsic or objective difference of rank between the different goods.[143] Hittinger says that this is problematic, because:

> one can remain consistent with this scheme and say that a person who decides to go to church because she thinks that the worship of God has objective priority over playing golf, chooses in a way that is not in accord with the FPM; whereas a person who decides to read the papers, but who remains vaguely open to the possibility of going to church, makes a morally upright choice. Similarly, a person who chooses to develop his physical health, but who remains "open" to developing his intellect, chooses in a morally upright way that cannot be met by someone who chooses to develop his intellect because this value is grasped as having an intrinsic superiority.[144]

Hittinger admits that this reasoning enables morality to place a check on fanaticism, but notes that it also makes the person that hierarchically orders his values a "virtual fanatic."[145]

This position is counterintuitive, according to Hittinger, because moral goodness is especially identified with a commitment to superior values.[146] Referencing Aristotle, he argues that "right reason urges toward what is best."[147] Therefore, this theory requires some evidence to help this "common prejudice."[148] This argument has been rejected as being an issue that is merely the result of "subjective choice and temperament."[149]

Finnis insists that, since each basic good has its own irreducible nature and, when focused upon, each good "can reasonably be regarded as the most important," no objective hierarchy exists.[150] To further illustrate the point, Finnis uses an example where a person's child has died right after

141. HITTINGER, *supra* note 16, at 75.
142. *Id*.
143. *Id*.
144. *Id*. at 75–76.
145. *Id*. at 76.
146. *Id*.
147. *Id*.
148. *Id*.
149. *Id*. (quoting BEYOND THE NEW MORALITY, *supra* note 140, at 74).
150. FINNIS, *supra* note 19, at 92.

birth, and the person's attention is shifted to the basic good of life.[151] In this instance, Finnis argues that life is not being regarded as a "mere pre-condition of anything else."[152] Instead, the other basic goods such as play and knowledge in this scenario will seem "secondary, even rather optional extras."[153]

In response to this hypothetical, Hittinger argues that the logic is deceptive because what Finnis is positing is that because a person "*can*, in a given experience, regard this or that good as 'the most important,' it follows that there is no objective order of importance among them."[154] Hittinger elaborates:

> It begs the question, for the first part of the proposition (if it be true) is only a conditional necessity; viz., *if* I happen to be drowning, *then* life seems to be the greatest value. It does not follow that we can straightaway conclude that *therefore* there is no objective difference in rank of value between life, for example, and the integrity of one's own practical rationality, or that it is impossible, prior to choice, to determine that one way of life (a way of life representing a specific organization of the goods) is better than another.[155]

The problem with Finnis's argument, therefore, is that there are hierarchies amongst the basic goods, and the logic used to support the lack of their commensuration fails to adequately prevent valuation prior to choice.

Finnis addresses the practical necessity of a hierarchy of goods with the principle of a coherent life plan.[156] Finnis states that "[i]mplicitly or explicitly one must have a harmonious set of purposes and orientations . . . as effective commitments" which are not to be confused with a process of choosing basic values.[157] The coherent life plan introduces the idea of ordering the goods so that a person can make morally appropriate choices.[158] This is an obligation that is found in Finnis's basic principles of practical reason (it is the first principle of morality stemming

151. *Id*.

152. *Id*.

153. *Id*. at 92–93.

154. HITTINGER, *supra* note 16, at 77 (quoting BEYOND THE NEW MORALITY, *supra* note 140, at 74).

155. *Id*.

156. FINNIS, *supra* note 19, at 103–05.

157. *Id*. at 103–04.

158. HITTINGER, *supra* note 16, at 79–80.

from the FPPR)[159] and requires being responsible with regard to the goods, but does not require specificity of content.[160]

This is a necessary aspect of Finnis's natural law theory because, according to Hittinger, if a person "begins with an obligation to all of the goods—both individually and in terms of their collateral realization—then it is crucial that some principle of order be introduced."[161] This principle of ordering becomes "even more crucial" when the basic goods are "incommensurable and irreducible" from their lack of an inherent internal hierarchy.[162] This life plan also implicates the FPM, which further obligates one to act for the sake of integral human fulfillment in the adoption of a personal ordering of the basic goods.[163]

Hittinger directly confronts the problems associated with Finnis's requirement of adopting a coherent life plan.[164] Finnis insists that adopting a coherent life plan is the the first mode of moral responsibility, which means that moral action can only begin after one adopts such a plan and that moral action changes with the adoption of a different life plan.[165] This is initially problematic to Hittinger because Finnis seems to "presuppose[] a notion of finality" that is not readily noticeable from the use of the term "life plan."[166] The idea of finality with regard to pursuing goods is a facet of prior natural law theories that Finnis has attempted to reject by arguing that the basic goods create possibilities of fulfillment, rather than final ends.[167] Therefore, according to Hittinger, Finnis's use of the obligation of choosing a life plan essentially achieves the same result as requiring an ultimate end rather than a multitude of possibilities.[168]

Hittinger notes a second problem with the coherent life plan.[169] He argues that "Finnis is compelled to make the choice of a life plan a fundamental moral obligation . . . ."[170] This is so even though the plan has no determinate content and must contemplate goods that have "no specific moral norms" because basic goods are considered pre-moral and self-

159. FINNIS, *supra* note 19, at 103–04.
160. HITTINGER, *supra* note 16, at 83.
161. *Id*.
162. *Id*.
163. *Id*.
164. *Id*. at 83–85.
165. *Id*. at 84.
166. *Id*. at 84 n.92.
167. FINNIS, *supra* note 19, at 85.
168. HITTINGER, *supra* note 16, at 84.
169. *Id*.
170. *Id*.

evident in Finnis's theory and are the subject of disagreement among people.[171] Thus, Finnis asserts that the choice of a life plan is "a matter of moral obligation" but does not provide any criteria for judging whether the moral obligation is met in a particular scenario.[172]

Having laid out arguments by Hittinger criticizing certain aspects of Finnis's theory pertaining to the incommensurability of the basic goods, this Article now shifts its focus to a discussion of the validity of Hittinger's commentary. The following Parts will discuss Hittinger's most valid critique as well as comment on areas of concern regarding the basic goods and their lack of an internal order.

III. COMMENTS ON HITTINGER'S CRITIQUE AND ADDITIONAL INQUIRIES

The critique of Finnis's theory that deserves the most attention is Hittinger's discussion of the act of choosing life plans. Hittinger argues that Finnis's system has created an obligation to act without providing a practical way of judging whether the required act of choosing a life plan is morally right or wrong.[173] This is of particular concern when attempting to provide a system of morality that asserts that the system can be the basis of a moral obligatory force justifying positive law.

Hittinger's point is valid in that if we are morally obligated to choose a life plan and are only bound by the requirement to pursue goods through the lens of the principle of practical reasonableness, with the FPM further guiding us to seek integral human fulfillment, how is any actor to judge whether he has chosen morally by engaging in one life plan? How is a person who is morally obligated to choose a life plan to decide between multiple life plans that equally follow the course and requirements of Finnis's theory? At best, this scenario would lead to the person required to make a choice thinking that multiple life plans are possible. This is a conclusion that Finnis would likely not only concede, but also argue as a benefit of his theory; however, it provides no actual guidance. The "chooser" would never have a practical tool to use to make his choice. Rather, he would be faced with an infinite number of possibilities with no real guidance in actually choosing a life plan.

The above problem with Finnis's system also applies to the issue of changing a life plan. If it is impossible to practically come to a decision on what life plan would be moral, how can we account for individuals who

171. *Id*.

172. *Id*. at 84 n.93.

173. *Id*.

have made life plans, but change them? People's lives can dictate changes that require differing life plans. The basic good of play may dictate the actions of an eighteen-year-old the summer before he goes to college, but that same man, in twenty years, may have shifted his focus to a career or having a family. The life plan that regarded play as the dominant good to be pursued will no longer be appropriate; rather, that life plan will have been replaced by a life plan where the goods of knowledge or life prevail over the good of play (without disrespecting the good of play).

Finnis directly addresses this issue by stating that a morally right actor can change his priorities without changing the relationship of the basic goods to each other.[174] He argues that while changes in life plans alter the status of a value to that person, such changes do not affect the relationship of the values to each other, and "one's reasons for choosing the particular ranking that one does choose are reasons that properly relate to one's temperament, upbringing, capacities, and opportunities, not to differences of rank of intrinsic value between the basic values."[175]

Finnis adequately addresses the issue of the *ability* to change life plans, but he fails to account for the practical *implementation* of this possibility. Similar to the problem of actually knowing whether one's choice in life plan is correct, the decision about a change in life plan can never actually be determined to be a morally correct one. While this issue illustrates Finnis's requirement that a morally good actor actually make decisions, it also creates additional problems.[176]

Finnis's list creates another issue involving actions taken by individuals where no true choice is made. Take, for instance, a person that sees another drowning in a river and immediately jumps in and saves the person. This Good Samaritan has not made any "choice" based on a coherent life plan; rather, she has instinctively acted without consciously making a choice to pursue the good of life. Can this person be said to not have acted morally because she did not go through a process of filtering a chosen life plan through the FPM of integral human fulfillment?

In this regard, Finnis would most likely argue that this action is a further extension of the actor's adoption of a coherent life plan that has ranked life as the highest good. By saving the drowning victim, the pursuit of the good of life is being realized, and other goods—say, perhaps, of play, if the actor was on the way to a golf course—have been subordinated

174. FINNIS, *supra* note 19, at 93.

175. *Id*. at 93–94.

176. *See id*. at 93 (requiring that one choose which of the basic values has more importance in *his* life).

to the good of life. Thus, the actor can be considered moral because his pursuit of the good of life comports with the FPPR and the FPM.

The flaw in Finnis's argument is that, as with the problems associated with adopting a life plan, the argument assumes that a life plan could be and was chosen, and that the actor was pursuing that plan. However, this does not account for the lack of any choice made by the Good Samaritan in the hypothetical. The hero has simply acted, no more, and therefore cannot be said to have chosen an action in accord with a life plan.

The hypothetical illuminates a fundamental flaw of having a system of morality where morality is only introduced at the stage of choosing a life plan. Under Finnis's system, the hypothetical actor cannot truly be said to have acted morally in saving the person's life because she has not *chosen* to act in accord with the FPPR as filtered through the FPM. Any actor that merely acts without consciously making a choice cannot be considered a morally good actor. This author dares to say that, regardless of reason or motivation, the Good Samaritan in the hypothetical acting to save the life of another should be considered a morally good actor and doubts that such a conclusion would be controversial.

Finnis's theory may contain an additional response to the criticism that it provides no mechanism that allows an actor to determine the morality of his choice of a life plan. The eighth requirement of practical reasonableness requires an actor to favor and foster the common good of one's community.[177] The common good referred to here is defined as "a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community."[178] In referring to the common good, Finnis is not asserting that the members of a community must all have the same values, but rather that there is "some set (or set of sets) of conditions which needs to obtain if each of the members is to attain his own objectives."[179] So, does the eighth principle of practical reasonableness save Finnis's theory from the above critique?

If an actor is required to foster this common good, then Finnis may argue that the choice of, or decision to change, a life plan should be discussed in the context of fostering the common good, which allows the actor to obtain his/her objectives. Alasdair MacIntyre has also discussed the role of morality and its connection to what we have defined as a

177. *Id*. at 125.
178. *Id*. at 155.
179. *Id*. at 156.

community.[180] MacIntyre states, "all morality is always to some degree tied to the socially local and particular . . . ."[181] This statement comes from MacIntyre's elaboration on the virtues in Heroic Societies and helps form his argument for a return to and reliance on a theory of morality based on Aristotelian teleology.[182] We now have two theorists who state the importance of community, but does the necessity of considering the common good eradicate the previous criticisms regarding choosing a life plan?

Unfortunately for Finnis, a reliance on considerations of the common good does not resolve the issues created by the insistence on the existence of a pre-moral, non-hierarchical list of basic goods. If an actor chooses to change his life plan, it seems that Finnis would require the actor to consider the common good when making this decision. Without the basic goods being subjected to a hierarchal order, there exists a potential for the common good to create a hierarchy of goods. If no inherent order of the goods exists, and the common good or community always values life over all other goods, then the actor's requirement to foster the common good will necessitate that each change in life plan always values life over other goods. The actor who uses the common good as the mechanism for choosing between life plans subjects himself to an imposed *de facto* hierarchy of goods, which does not allow the actor a true choice in considering the choice or change of a life plan.

CONCLUSION

Finnis's natural law theory and his assertion that the basic goods are incommensurable are problematic. Fundamental problems are created when morality is divorced from values. Finnis requires choosing a coherent life plan that hierarchically ranks the seven basic goods but fails to provide a practical approach for making that decision or the decision to change one's life plan. Finnis therefore places an individual attempting to be a morally right actor in quite the bind—the actor will try to do as Finnis suggests, but he will never be able to achieve the desired result.

Despite the flaws in Finnis's theory discussed above, natural law can still be an appropriate topic of discussion in relation to what role government should play in our daily lives. As MacIntyre discusses in *After Virtue*, our discussion of morality changed in a fundamental way as a result

180. MACINTYRE, *supra* note 9, at 119.

181. *Id*.

182. *Id*. at 114–22.

of the failure of the Enlightenment, thus creating the modern problem of intractable moral disputes. This may explain why many people argue about the morality of issues like abortion and, by extension, laws passed in relation to abortion. However, by discussing theories advanced by natural law theorists such as John Finnis and Alasdair MacIntyre, our national debate is enriched, and morality may one day have the ability to return to objective considerations and be removed from the relativistic relegation it has seen in the modern era.