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JUSTIFICATION IN FINNIS' NATURAL LAW THEORY

This essay examines Finnis' theory of natural law by addressing Finnis' solution to the problem of justification that besets any theory of law. It assesses the quality of Finnis' theory from its purported justification of self-evidence, and by asking if Finnis' theory adds anything of value to classical natural law discourse, the scholarship of which he purports to develop.

The stalk has no bud;
It shall never produce meal.
– Jewish prophet Hosea[1]

I. The Problem of Justification

THE words of Hosea, taken out of context, aptly sums up the problem that confronts any legal theorist who tries to formulate a concept of law – the problem of subjective bias (in the sense of a value choice) afflicting the theory from its very "bud." Be it Holmes' inarticulate major premise, Kant's categorical imperative, Kelsen's transcendental-logical presupposition, or Unger's anti-necessitarian stance, we all have a worldview – often unspoken – a lens through which we view the world and by which we make sense of its phenomena.[2] In philosophical discourse, some maintain everything is a mere opinion, that everything is subjective, but what then of their view that everything is subjective? It is either a subjective opinion without any more weight, or an objective statement, in which case the claim self-refutes.[3] The nihilist may believe that everything is meaningless, but he cannot claim

1 *Hosea 8:7b, The Holy Bible,* New International Version (NIV) (International Bible Society, 1984).

2 See for example, James W Sire, *The Universe Next Door: A Basic Worldview Catalog* (IVP, 1997).

3 This argument is one frequently made by apologists. See, for example, Ravi Zacharias, *Can Man Live Without God?* (Word Books, 1996).
Ronald Dworkin has also frequently made the argument that a position of external skepticism is impossible. One cannot, for example, criticise morality without necessarily taking up a moral point of view. There are no arguments in relation to an enterprise except arguments coming from within it. (See the chapter, "On Interpretation and Objectivity", in Ronald Dworkin, *A Matter of Principle* (Harvard, 1986) 167-177.) Further, it is inherently contradictory

he has no philosophy – that is his philosophy.[4] Referring to the epigraph, if there is meal from the stalk, there must be a bud somewhere. The quality of the meal is determined by, and reflects on the soundness of, its bud. In the context of law, Edward J Murphy has put it thus:

> Everyone has a "god", an ultimate whose word is final. This entity declares various "truths", which become the foundation, the premises, of one's legal philosophy. Hence all legal systems have a common structure. At the apex are the assumptions and basic values, which are, as it were, accepted on faith. From these are derived moral norms and ethical principles, and the law reflects this morality. For all law involves the imposition of someone's morality upon others.[5]

to say, for example, that "abortion is murder" and insist that this is one's personal opinion and the issue is one for which there is no right answer. The person so asserting either has to give up his own opinion, or give up his bad contradictory philosophy. (Ronald Dworkin, "Law, Philosophy and Interpretation" in (1994) 80 Archives for Philosophy of Law and Social Philosophy 463 at 475.) Dworkin argues that when a person claims that there is no right answer to the question of whether abortion is wicked, that involves a substantive moral claim: It presupposes a "counterfactual positive moral statement", for example, that there is no God and a supernatural will is the only source of morality. (Ronald Dworkin, "Objectivity and Truth: You'd Better Believe It" (1996) 25 Philosophy & Public Affairs 87 at 89-91.) A "global internal skeptic" cannot deny the counterfactual positive moral statement that is made, *ie,* he cannot be skeptical "all the way down". But global internal skepticism is unattractive precisely for this reason, as it seems horrendous to believe, for example, that racial discrimination is not at all morally objectionable as a matter of objective truth. It seems easier to be an archimedean external skeptic, one who believes that his statement about morality is just his "personal" subjective view without laying a claim to truth. Yet it is not possible to take such a position, and further, the fact that one cannot demonstrate an objective truth does not mean it does not exist. Indeterminacy ("abortion is neither right nor wrong"), as opposed to uncertainty, is in essence a positive claim that needs as much argument as the view that "abortion is right" or "abortion is wrong". *(Ibid,* at 130-139.)

The foregoing is not abstract or merely philosophical but impinges on substantive law. Academics have argued that various doctrines in substantive law embody or are justifiable by moral conceptions. See, for example, Andrew Phang, "Security of Contract and the Pursuit of Fairness" in (2000) 16 Journal of Contract Law 158 at 172-183.

4 Or, as one writer notes:

> We locate ourselves in the world by the philosophy of life we embrace. In a sense, we are all philosophers. Some of us may keep our head bent, our eyes on the ground and our thoughts on immediate things so we don't stumble and fall into a well, as did the philosopher Thales, but then this too is a way of life, a philosophy. What we need to see is that philosophy is a practical enterprise, an activity that is inevitable in everyday life, in making the choices that we cannot escape. (James R Elkins, "The Examined Life: A Mind in Search of Heart" in (1985) 30 American Journal of Jurisprudence 155 at 169.)

5 Edward J Murphy, "The Sign of the Cross" in (1994) 69 Notre Dame Law Review 1285 at 1289.

Starting from this (oft forgotten, and sometimes denied) premise that every theory has a starting point, the first aim of this article is to examine the sufficiency of Finnis' theory propounded in *Natural Law and Natural Rights*[6] in explaining the conception of law. Part II assesses Finnis' use of the concept of self-evidence to get around the problem of justification that besets the legal theorist. By "justification", one means the ideas of authority or legitimacy commonly discussed in relation to theories which seek to explain the binding nature of law. General justification is a term which will be used here to refer to the authority behind a general political theory or theory of society, while particular justification refers to the justification for a legal system. While the concern is with particular justification, a theorist like Finnis propounds a much wider theory before he moves on to legal theory. He states his aim of seeking a justification for the institutions of law, but in the following broad manner:

> There are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy. It is the object of this book to identify those goods, and those requirements of practical reasonableness, and thus to show how and on what conditions such institutions are justified and the ways in which they can be (and often are) defective.[7]

As Finnis' general justification is also his particular justification, both will be discussed in the context of law and legal systems:

> [T]he 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. For *those principles justify the exercise of authority in community... More particularly, the principles of natural law explain the obligatory force (in the fullest sense of 'obligation') of positive laws,* even when those laws cannot be deduced from those principles.[8] *(Emphasis mine)*

A further caveat: The concern of this article is not with Finnis' theory as a "test" for law as opposed to non-law. The test for law is the concern of the positivists, but Finnis is more concerned with answering the question avoided by legal thought:

6 John Finnis, *Natural Law and Natural Rights* (Clarendon, 1981). All references in the footnotes to "Finnis" are to this book unless otherwise stated.

7 Finnis, at 3.

8 Finnis, at 23-24.

> There is...a characteristically legal 'circle', a sense in which the system (as the interrelated rules and institutions are significantly but loosely called) 'lifts itself by its own bootstraps' – a sense captured by the more scientific but still literally paradoxical axiom that 'the law regulates its own creation'...(L)egal thought systematically avoids answering the question which I ...answered (in the context of custom-formation): how an authoritative rule can be generated without prior authorization.[9]

On closer analysis, the issue of the test for law in the positivistic sense is not Finnis' chief concern. Finnis explains the "Rule of Law" in terms of procedural requirements – non-retroactivity, promulgation, clarity, coherence, possibility of compliance, and the like[10] – which appear to add up to a "test" for law, but he prefaces his discussion of the Rule of Law with a statement that the Rule of Law is the name commonly given to the state of affairs in a legal system which is *legally in good shape.* This presumably means that even if the requirements are not satisfied, we still have a legal system, but one which is not in good shape. But read holistically, his concern is not that of the positivists. He claims he propounds a theory of natural law that seeks to explain the very authority for law:

> [T]he principal jurisprudential concern of a theory of natural law is thus to identify the principles and limits of the Rule of Law, and to trace the ways in which sound laws, in all their positivity and mutability, are to be derived from unchanging principles – principles that have their force from their reasonableness, not from any originating acts or circumstances.[11]

Part III compares Finnis' chosen justification with that of the Christian classical natural law theorist. As it may be impossible to find an incontrovertible justification, the purpose is to determine whether Finnis' theory provides a more convincing starting point and coherent theory than classical natural law, the scholarship of which he purports to develop.

9 Finnis, at 268.

10 Finnis, at 270-271. It may be noted that the requirements are similar to Lon Fuller's eight requirements of internal morality of law in *The Morality of Law* (Yale University Press, 1964).

11 Finnis, at 351.

II. Finnis' Solution to the Problem of Justification: The Concept of Self-evidence

As Finnis' theory hinges on the concept of self-evidence, the first issue is whether his justification is convincing, and the second is whether his theory coheres with his justification. Unlike Christian predecessors such as Aquinas and Blackstone who rooted their theories in the controversial basis of God, rendering their theories unacceptable to atheists and agnostics, Finnis claims his theory is comprehensible without referring to the question of God's existence. At the same time, a devout Catholic, Finnis states this does not mean that no further explanation is needed for the existence of objective standards, or no explanation is available, or that the existence of God is not the explanation.[12] But his primary difference from Christian predecessors is that God is his conclusion rather than his premise.

According to Finnis, the justification for law lies in the concept of self-evidence. Self-evidence is the methodology by which Finnis identifies seven basic goods necessary for human flourishing: Knowledge, life, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion. Finnis claims this method of identifying such goods, which the legal system can then be tailored to secure, avoids the problem of non-cognitivism which has plagued the other naturalists. It also avoids the Humean guillotine, which forbids the argument from an "is" to an "ought" on a rational level.[13] The object of a legal system is to provide a structure or framework that helps an individual secure the seven basic goods. One arrives at such a framework by employing, presumably in the formulation of law, a set of basic methodological requirements of practical reasonableness which, taken together, provide the criteria for distinguishing ways of acting that are morally right or wrong. These nine requirements structure our pursuits of the goods: A coherent plan of life; no arbitrary preferences amongst values; no arbitrary preferences amongst persons; detachment; commitment; efficiency within reason (distinguished from utilitarianism); respect for every basic value in every act; common good; and following one's conscience.

[12] Finnis, at 49.

[13] A normative statement cannot be inferred from a purely factual one as there is an unbridgeable gap between the "ought" and the "is". This is from Hume's famous passage in David Hume, *A Treatise of Human Nature* (Penguin, 1986), Book III. Hume further argues that reason is impotent to influence actions, whereas morality has an influence on actions, hence morality could not be derived from reason but was about feelings. Wrongness of an act lay not in the act but in our sentiments of guilt. Truth and falsehood, in contrast, consisted in agreement or disagreement either with regards to the real relation of ideas or the real existence and matter of fact. Reason could confirm only the relation of such ideas or the existence of facts.

The critique of Finnis' theory from the point of view of its chosen justification takes four main forms:

(1) The concept of self-evidence on which his whole theory hinges has been somewhat too arbitrarily wielded and is open to the same objections raised against the higher order arguments of the classical natural law theorists.

(2) He links his concepts rather unconvincingly, and falls into the trap of cross-categorization that he spoke against.[14] The existence of these tenuous links affects the persuasiveness of his theory as a conception of law.

(3) Finnis argues that rights provide a concretization of the requirements of practical reasonableness and the demands of justice, but it is questionable whether Finnis' theory can effectively be put into practice.

(4) Finnis devotes part of his book to questions of the existence of God and how that affects his theory, and an examination of his views raises questions of whether Finnis' chosen starting point smacks of minimalism in an attempt to gain the acceptance of atheists and agnostics.

A. *Finnis' Methodology: The Concept of Self-Evidence*

1. *The Methodology in General*

Finnis applies the methodology of self-evidence to come up with the first basic good of knowledge. There is no lengthy argument about where such a concept is derived from, though from a preceding discussion[15] about Aquinas' concept of *per se nota* or self-evidence, one assumes that Finnis is latching on the same idea. Something is "self-evident" or in Aquinas' words *per se nota,*[16] when it is "obvious" or "unquestionable":[17]

[14] Finnis, at 82.
[15] Finnis, at 33-36.
[16] Finnis, at 33.
[17] Finnis, at 59. Finnis writes more extensively about *Aquinas* in *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, 1998).

> [T]he important thing about a self-evident proposition is that people (with the relevant experience, and understanding of terms) *assent* to it without needing the proof of argument; it matters not at all whether they further recognize it as belonging to the relatively sophisticated philosophical category, 'self-evident'.[18]

Indeed, in speech, we often presuppose matters on which our conclusion rests, without stating our presuppositions. For example, Finnis notes that someone who says "Too late!" presupposes that time cannot be reversed, without stating it.[19] Yet it remained that "such presuppositions and principles can be disengaged and identified". Some of these are values that are non-demonstrable, *ie,* self-evident. In the context of the good of knowledge, Finnis says it "cannot be demonstrated, but equally it needs no demonstration". Self-evidence does not, however, equate with that which is innate or "inscribed on the mind at birth".[20] Rather, it is known through an awareness that emerges through one's personal experience of the urge to pursue the value:

> One does not judge that 'I have [or everybody has] an inclination to find out about things' and then infer that therefore 'knowledge is a good to be pursued'. Rather, *by a simple act of non-inferential understanding one grasps* that the object of the inclination which one experiences is an instance of a general form of good, for oneself (and others like one).[21] (*Emphasis mine)*

There is no argument from the "is" to the "ought" as one is not saying that knowledge "must be" valuable because great men value it – no inference whatsoever is made. Instead, we conclude, so Finnis argues, that a man is "great" precisely because of our "underived understanding" that what the person is doing is really good:

> [T]o say that knowledge *must* be a real value, because intelligent men, or great men, or mature men have regarded it as a value and as an aspect of their own flourishing, is not to make what could be called

[18] Finnis, at 31.
[19] Finnis, at 64.
[20] Finnis, at 65.
[21] Finnis, at 34. Finnis actually made this statement in the context of explaining Aquinas' "practical reasoning" technique. But as Finnis' criticism of Aquinas' theory does not attack Aquinas' concept of self-evidence or *per se nota,* I have used this statement to illustrate Finnis' own reasoning.

> an inference. For one's assessment of a person as flourishing, mature, great, or in the relevant respect, intelligent is made possible only by one's own underived understanding that what that person is and does is really good (in the relevant respects). The 'premiss' of the apparent inference thus rests on its 'conclusion'.[22]

Finnis himself questions whether there is something "fishy about (the) appeal to self-evidence", but decides that a proper discussion of the subject would be "embarrassingly complex".[23] He emphasizes that it is distinguished from a mere "feeling of certitude" about something, but humans in fact discount some feelings, however intense, as "irrational or unwarranted, misleading or delusive".[24] Thus, one decides to pursue a certain good not simply as a result of following one's feelings, but pursuant "to a conception that it would be good to have certain feelings or to satisfy certain desires which usually are appreciably felt; and in each case neither the entertaining of this conception nor the deciding to act and acting upon it need be accompanied (let alone constituted) by any state of feeling."[25]

To this, several criticisms may be levelled.

First, it is clear Finnis takes the absolutist position of the existence of objective truths in asserting that certain matters are "self-evident". His very discussion of knowledge, and the occasional reference to truth (instead of knowledge),[26] demonstrates his starting point.[27] The assumption of objectivity meets with the objections levelled against the natural law theories which allude to a higher order. Indeed, Finnis' choice of self-evidence as his starting point is perhaps more tenuous that the classical Christian naturalist's claim to objectivity being something that flows from the existence of God. While the latter can at least claim to demonstrate the existence of God on a probabilistic basis by referring to the wisdom of apologetics, Finnis' concept seems in comparison to be baldly asserted. However, insofar as this criticism derives its force from an argument of the diversity of moral opinions, Finnis' reply is that "we are assuming or asserting nothing about 'morality' or 'ethics', and are ascribing no 'moral' force to the value judgment under consideration" and "(p)roblems about morality and moralities are therefore beside the point".[28] The query is whether Finnis' reply to the moral skeptic

[22] Finnis, at 67.
[23] *Ibid*.
[24] Finnis, at 69.
[25] John Finnis, *Fundamentals of Ethics* (Georgetown University Press, 1983) at 33.
[26] Finnis, at 59, 65, and 69.
[27] See the introductory part of this article on "The Problem of Justification", especially footnote 3.
[28] Finnis, at 72-73.

is an adequate one. He raises it in the context of his discussion of knowledge as a basic good, arguing that the principle that "knowledge is a basic good" is not itself a moral principle[29] and hence the problems of moral skepticism do not come into the picture. This seems to be a rather bald assertion, as the statement that something is of value is arguably a moral statement.[30] Further, insofar as it lays claim to objectivity, the relativists and subjectivists would object. It is doubtful that Finnis has done better than the classical naturalist in meeting these arguments.

The second criticism relates to the difficulty of identifying the basic goods, though admittedly this does not mean the basic goods are not objective or do not exist. Finnis says that the basic good is known through an urge to pursue it; he also acknowledges the existence of intense irrational desires whilst claiming, rather arbitrarily, that these urges would not lead to the conclusion that the object desired was a basic good. This, undoubtedly and as Finnis himself acknowledges, would require the discounting of some feelings but not others. Finnis notes the confusion caused by the "Aristotelian tag that 'the good is what all things desire' – as if the goodness were consequential on the desires".[31] Finnis argues that contrary to what is suggested by the tag – that something is good because it is desired – the reality is that things are desired only because they are good. The conclusion that something is good thus precedes the desire for the particular thing. Thus, one first has to conclude some value is a basic good, before desiring it. Granted that a human being is capable of having desires, some stemming from the fact that the thing desired is a good and hence desired, and some stemming from irrationality, Finnis' answer disposes of the query only if one can distinguish one desire from another, or otherwise find some method of identifying the good apart from the question of desire. Finnis might say that the answer is obvious to one who is intellectually honest – it is simply "self-evident"! Finnis rejects the notion that the lack of derivation means the lack of objectivity – self-evidence necessarily carries with it a certain "obviousness" and "peremptoriness":[32]

> Non-derivability in some cases amounts to lack of justification and of objectivity. But in other cases it betokens self-evidence; and these cases are to be found in every field of inquiry. For in every field there is and must be, at some point or points, an end to derivation and inference. At that point or points we find ourselves in face of the self-evident, which makes possible all subsequent inferences in that field.[33]

[29] Finnis, at 72.
[30] See, again, the introductory part on "The Problem of Justification", especially footnote 3.
[31] Finnis, at 70.
[32] Finnis, at 71.
[33] Finnis, at 70.

The question is how one knows when one reaches the ultimate point of the end of derivation, *ie,* that of self-evidence, but the reply would presumably be that it is self-evident. One begins to see the impossibility of progress in an argument along these lines. Perhaps this shows a degree of ingenuity in the reliance on the justification by the concept of self-evidence – it admits of no further arguments outside itself. Finnis has delimited the boundaries of his enterprise and expects his reader to accept it. But the skeptic might venture three arguments.

First, the skeptic might argue that the fact that different persons could come up with different lists of basic goods debunks Finnis' concept of self-evidence. Finnis asserts that these supposedly different lists are really ways, or combinations of ways, of pursuing the values on his list, or combinations of the values themselves.[34]

Second, if a sufficient number of persons went further and overtly rejected a particular value on the list, would this debunk the idea of self-evidence? According to Finnis, the reference to the opinions of people is an evasion of the issue. Finnis claims he does not say the value is, or would be, universally affirmed. Rather, he contends that anyone who attended carefully and honestly to the pursuit of a particular good would understand that the "good" was basic and this understanding needed no further reasoning.[35] Thus, the usual arguments of skeptics in ethics lend no support to their denial of the objectivity of a particular value.[36]

Finally, if a critic argued that a value that was clearly not part of the list, for example, selfishness in one's pursuit, was self-evidently good, *Finnis* would reply that this stands in need of some explanation in a way which curiosity, friendliness, *etc,* do not. In the case of selfishness, it stems from the pursuit of a standard material means to sustaining a value, for example, food for life, in a way that produces selfish indifference to the inclusive realization of that same value in the lives of others. Finnis argues that "(i)n the absence of such explanations, and of psychosomatic disease, these urges are as baffling as persistent illogicality, as opaque and pointless as, say, a demand for a plate of mud for no reason at all."[37] Indeed, Finnis must be given credit for this argument, as selfish pursuit *per se* is not clearly good – it merely reveals that one is seeking in an exclusive manner something else that one perceives as good, and hence values like selfishness cannot

[34] Finnis, at 90-92.

[35] He says this more specifically of the basic good of pursuing truth or knowledge. I have phrased his argument more generally – Finnis, at 73.

[36] Finnis, at 73.

[37] Finnis, at 91.

be self-evidently good. That said, Finnis' inclusion of knowledge as something self-evidently and inherently good may be problematic because one could question if knowledge is useful only as a means to an end, and like selfishness, stems from the wish to sustain a value such as continued existence of mankind. If the urge to pursue knowledge is baffling in itself and in need of an explanation, then is its inclusion in the list dubious? Perhaps means and ends may not be as easily distinguishable as Finnis seems to claim they are.

2. *The Application of the Methodology to Arrive at the Basic Good of Knowledge*

As Finnis deals extensively with the basic good of knowledge, it is useful to examine the application of his concept of self-evidence to arrive at this basic good.[38] If one succeeds in debunking this good, one may have raised doubts about his methodology.

Finnis argues one cannot rationally make the argument that knowledge is not a basic good as that is "operationally self-refuting". The argument has "a type of performative inconsistency ... (it is) inconsistent with the facts that are given in and by any assertion of (it)". It "cannot be coherently asserted, for it contradicts either the proposition that someone is asserting it or some proposition entailed by the proposition that someone is asserting it":

> [O]ne who makes such an assertion (that knowledge is not a good), intending it as a serious contribution to rational discussion, is implicitly committed to the proposition that he believes his assertion is worth making, and worth making *qua* true; he thus is committed to the proposition that he believes that truth is a good worth pursuing or knowing. But the sense of his original assertion was precisely that truth is not a good worth pursuing or knowing. Thus he is implicitly committed to formally contradictory beliefs.[39]

Finnis emphasizes that he is not *demonstrating* in this argument that knowledge is self-evidently a good to be pursued for "that principle remains indemonstrable, self-evident", but only that "counter-arguments are invalid" as they are self-defeating, and that the principle "has as much title to be called 'objective' as any other proposition whose contradictory is inevitably

[38] Finnis devotes an entire chapter of his book to this, as compared with the others (apart from practical reasonableness). See Chapter III.

[39] Finnis, at 74-75.

[40] Finnis, at 73 and 75.

falsified by the act of asserting it".[40]

Four counter-arguments may be made.

First, it may be argued that it was self-evident that knowledge was bad (or ignorance was good) and thus one was not employing any reasoning or affirming implicitly that knowledge was worth pursuing. Quite certainly, Finnis would not accept this argument as he said that the concept of self-evidence could not be debunked by a difference of opinions.

Second, one may argue that one had no choice but to partake of knowledge since one was clothed with it and had no other option. Thus, in partaking of it, one is not necessarily affirming its goodness. It is unlikely Finnis would buy such an argument either as presumably he would argue that this shows precisely it must be good.

Third, perhaps the following argument may be ventured: Finnis argues that by asserting, even in one's cogitation, that knowledge is not a basic good suggests that it is. The argument is operationally self-refuting. Partaking in knowledge to arrive at the conclusion suggests that knowledge is a basic good because that partaking allows one to make such an assertion, and in choosing to make that assertion, one implicitly affirms the goodness of knowledge. Hence that partaking must be good. It is submitted that such argument would be self-refuting only in limited circumstances. Finnis' argument is in fact predicated on the assumption that the arrival at the conclusion is good, whereas in truth, oblivion may be better. Insofar as Finnis' rebuttal that the argument self-refutes is premised on the assumption that it was good for one to have arrived at the conclusion that knowledge was not a basic good, it fails because the assumption is not necessarily true, and may well be false. However, in defense of Finnis, it may be said that the fact of the matter is, one has been clothed with knowledge, whether one likes it or not. Disregarding hypothetical situations as all human beings are in this state, and being practical, what is good for us? Finnis' consideration is a valid one whereas the previous argument depends on the hypothetical possibility of choosing complete oblivion. The conclusion in a case where complete oblivion is not an option, it seems, would be that the pursuit of knowledge till one arrives at truth (complete knowledge) is good. Since one already knows a little, it is better to know completely than to remain at this imperfect stage of knowledge. But perhaps this suggests that truth is the real basic good.

Finally, one critic points out the activity of satisfying one's curiosity – one's seeking to know for the sake of knowing – is not necessarily an intelligible behavior. Imagine a man counting the number of leaves on a tree. If he was counting for the sake of winning a bet, for example, that makes his knowledge instrumentally valuable, but does not help Finnis' claim that knowledge is intrinsically valuable. If, however, he was counting

simply to satisfy his own curiosity, it still leaves one wondering why anyone would want to acquire such knowledge.[41] Perhaps a defense of Finnis is to say that instrumental goods may also be goods, and further, not all information constitutes "knowledge". It is plausible that Finnis did not intend the pursuit of senseless trivia through gossip, even if the conversation contained only facts and not comment, for the satisfaction of one's nosey character, to qualify as a pursuit of knowledge. Even so, it seems one has to distinguish between that which is "edifying" and that which is not, and insofar as reason, rather than self-evidence, is needed for making the distinction, then self-evidence alone does not enable us to realise what exactly "knowledge" is.

What is the value of Finnis' theory from the perspective of his starting point of self-evidence? The positivists who rely on some artificial penultimate presupposition cannot tell us why we should stop there and hence their theories appear evasive. The classical naturalists who state more emphatically that God is the starting point for Law end up having to prove God's existence, or having to state that it is self-evident that God exists. If it is impossible to argue about starting points since words to support the bud of a theory always come from within an accepted enterprise itself, then the concept of self-evidence may be attractive in that it presupposes that certain things are obvious and we simply state the obvious things without any further argument. But it is not exempt from objections.[42] Further, it appears Finnis is being somewhat evasive and minimalistic, and trying to avoid any theological debate. He states the effect (self-evidence leading to his theory of law) as the premise and the cause (the existence of God) as the conclusion.[43]

[41] William H Wilcox, "Book Review: Natural Law and Natural Rights" in (1982/1983) 68 Cornell L Rev 408 at 413.

[42] But not everyone takes the view that Finnis' enterprise is the better for his starting point. Philip Soper argues that it would have been better for Finnis to go straight to the goods without attempting to present his methodology. This, however, would not confer upon his enterprise at least the façade of objectivity it has with the elaboration of the methodology. Indeed, as Soper writes, it leaves us with "a valuable discussion of the good, though perhaps with less distinction between the pulpit and the philosopher as source of wisdom than we are wont to acknowledge." (Philip Soper, "Legal Theory and the Problem of Definition" in (1983) 50 U Chi L Rev 1170 at 1180.)

[43] If Finnis is asked about the inspiration for his theory, he would probably attribute it to godly wisdom, rather than worldly wisdom. Harold Berman discusses the difference between the two kinds of wisdom:

> The wisdom of the world assumes that God's existence is irrelevant to knowledge, and that truth is discoverable by the human mind unaided by the Holy Spirit. Jewish and Christian wisdom, on the other hand, seeks God's guidance, the guidance of the Holy Spirit, in order to discover the relationship between what we know and what God intends for us. ("Judaic-Christian versus Pagan Scholarship" in Harold J Berman, *Faith and Order: The Reconciliation of Law and Religion* (Scholars Press, 1993) 319 at 320.)

But his theory, he argues, may be understood without reference to God. The Christian naturalists stated the existence of God as the premise for law overtly and ran into the problems associated with the proof of God. Finnis, on the other hand, provides us with a justification for law outside the enterprise of law, depending on a concept which identifies what enables human nature to flourish.

B. *The Link between Finnis' Methodology and his Substantive Theory*

Finnis agrees with O'Connor's main objection to Aquinas' theory of natural law – that Aquinas fails to explain "how the specific moral rules which we need to guide our conduct can be shown to be connected with allegedly self-evident principles".[44] In propounding a theory of natural law from self-evidence, Finnis presumably aims to address this flaw in Aquinas' theory. It is submitted that Finnis' theory does not adequately link the principles to the starting point of self-evidence.

1. *Whether the goods are truly underived*

Like Aquinas, Finnis starts out by identifying the goods which the justified legal system must secure: life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness and religion.[45] Unlike his treatment of knowledge,[46] Finnis does not similarly explain how his "practical reflection"[47] leads to the other basic goods, though this may not of itself undermine his argument as he relies on the self-evident nature of the goods. Yet, his reliance on facts and anthropological evidence, while these are not crucial to "demonstrate" the basic nature of the good, seems "fishy"! The question arises as to the role of factual evidence in arriving at the list of goods, and whether, if factual evidence is cited, it means that the basic goods are "demonstrated" and "derived" as opposed to being "self-evident", "inde-

In fact, Finnis' concept of self-evidence probably finds its biblical equivalent in the form of the "Law written in their hearts" mentioned in *Romans* 2:15 and *Jeremiah* 31:33. With regard to the Gentiles, it is written:

> For when Gentiles who do not have the Law do instinctively the things of the Law, these, not having the Law, are a law to themselves, in that they show the work of the Law written in their hearts, their conscience bearing witness, and their thoughts alternately accusing or else defending them ... *(Romans* 2: 14-15, *New American Standard Bible* (NASB), (World Bible Publishers, 1977).)

44 Finnis, at 34.
45 Finnis, at 86-90.
46 Finnis, at 75.
47 Finnis, at 85.

monstrable", "non-derivable" and "underived". In writing of "life" as the first basic value, for example, Finnis states that it includes "bodily (including cerebral) health, and freedom from the pain that betokens organic malfunctioning or injury". He then lists various examples to illustrate the "recognition, pursuit, and realization of this basic human purpose":

> [T]he crafty struggle and prayer of a man overboard seeking to stay afloat until his ship turns back for him; the teamwork of surgeons and the whole network of supporting staff, ancillary services, medical schools, *etc,* road safety laws and programmes; famine relief expeditions; farming and rearing and fishing; food marketing; the resuscitation of suicides; watching out as one steps off the kerb.[48]

The question arises as to the role of these illustrations in his conclusion that life is the first basic value. If they are cited to reveal an "urge" to preserve life, they are irrelevant since Finnis states that self-evidence is distinguished from feelings. If they are cited to *demonstrate* that life is a basic good, then Finnis falls into his own guillotine, which is that the principles are indemonstrable, though interpreted more charitably, they may be cited to show the "conclusions" of self-evidence at work in the past. Nonetheless, if they are pertinent to show that the principle that life is a basic good is self-evident, what does one make of the recent trend for the legalization of euthanasia and abortion? In defense of Finnis, one could perhaps argue that the very fact that there are occasional deviations only reinforces the core, and that these two issues are so hotly debated shows an intrinsic respect for life, though the alternative is simply that it does not, and it in fact shows a waning respect for life. Finnis does include in his definition of life the freedom from bodily pain, and that would address the issue of euthanasia though not of abortion in most instances. Similarly, in the case of the basic value of play, Finnis states that "an anthropologist will not fail to observe this large and irreducible element in human culture".[49] The resort to anthropological evidence seems to go against Finnis' intents.

2. *The problem with the reliance on practical reasonableness*

Even if one accepts Finnis' list, the link of the principles of natural law to these goods may not be tighter than Aquinas'. Finnis' elaboration of the basic good of practical reasonableness is most pertinent to his structuring of the system of human law:

[48] Finnis, at 86.
[49] Finnis, at 87.

> [T]here is the basic good of being able to bring one's own intelligence to bear effectively (in practical reasoning that issues in action) on the problems of choosing one's actions and lifestyle and shaping one's own character. Negatively, this involves that one has a measure of effective freedom; positively, it involves that one seeks to bring an intelligent and reasonable order into one's own actions and habits and practical attitudes. This order in turn has (i) an internal aspect, as when one strives to bring one's emotions and dispositions into the harmony of an inner peace of mind that is not merely the product of drugs or indoctrination nor merely passive in its orientation; and (ii) an external aspect, as when one strives to make one's actions (which are external in that they change states of affairs in the world and often enough affect the relations between persons) authentic, that is to say, genuine realizations of one's own freely ordered evaluations, preferences, hopes, and self-determination. This value is thus complex, involving freedom and reason, integrity and authenticity.[50]

This good is "participated in precisely by shaping one's participation in the other basic goods, by guiding one's commitments, one's selection of projects, and what one does in carrying them out".[51] Practical reasonableness is both an aspect of a human's well-being, and hence its ranking as a basic good, and also concerns one's participation in the basic goods.[52] This presumably does not meet with the problem of cross-categorization Finnis is critical of. According to Finnis, it is made up of nine requirements: A coherent plan of life, no arbitrary preferences amongst values, no arbitrary preferences amongst persons, detachment, commitment, efficiency within reason, respect for every basic value in every act, requirements of the common good, and following one's conscience. "Each of these requirements concerns what one *must* do, or think, or be if one is to participate in the basic value of practical reasonableness."[53] Elaborated in an entire chapter,[54] they "express the 'natural law method' of working out the (moral) 'natural law' from the first (pre-moral) 'principles of natural law'."[55] If indeed the requirements

[50] Finnis, at 88.
[51] Finnis, at 100.
[52] Finnis, at 102-103.
[53] Finnis, at 102.
[54] Finnis, Chapter V: The basic requirements of practical reasonableness.
[55] Finnis, at 103. As stated, the first principles of natural law are the principles enjoining one to participate in the basic goods.

are a method for deriving the rules for structuring a legal system, the question of how one arrives at the requirement is of primary importance. Before moving on to that, one notes that later in the chapter, Finnis states that "*everything* required by virtue of *any* of the requirements discussed in this chapter is required by natural law." This seems to muddy the theory. Are the nine requirements a methodology for arriving at principles for structuring a legal system, or are they in themselves the principles for structuring a legal system, or both? But perhaps this is of little practical significance. This is addressed later in relation to the steps Finnis takes to derive human laws.

Finnis poses the question of how one arrives at the requirements somewhere at the start of the chapter: "How does one tell that a decision is practically reasonable?" Finnis does not answer the question directly but instead says that it is the "subject matter" of the chapter. He elaborates on Aquinas' derivation of a set of practical principles which Aquinas considered as self-evident, and on Aristotle's conclusion that ethics can only be expounded by those who are wise and experienced.[56] Finnis then moves on straight into what these nine requirements are. Arguably, he has not directly answered his question and one ends up with nine crucial requirements of practical reasonableness, rather arbitrarily stated, which aids the structuring of a framework in the legal system to enable anyone to pursue seven self-evident goods. An example is the way Finnis arrives at his first requirement of a coherent plan of life:

> First, then, we should recall that, though they correspond to urges and inclinations which can make themselves felt prior to any intelligent consideration of what is worth pursuing, the basic aspects of human well-being are discernible only to one who thinks about his opportunities, and thus are realizable only by one who intelligently directs, focuses, and controls his urges, inclinations and impulses... In its fullest form, therefore, the first requirement of practical reasonableness is what John Rawls calls a rational plan of life. Implicitly or explicitly one must have a harmonious set of purposes and orientations, not as 'plans' or 'blueprints' of a pipe-dream, but as effective commitments... we should 'see our life as one whole, the activities of one rational subject spread out in time...' But since human life is in fact subject to all manner of unforeseeable contingencies, this effort to 'see' our life as one whole is a rational effort only if it remains on the level of general commitments, and the harmonizing of them.[57]

[56] Finnis, at 101-103.
[57] Finnis, at 103-104.

Finnis' reasoning shows there is no overt resort to the concept of self-evidence to arrive at the first requirement. Is this a resort to common sense? Or is it rational reasoning involving an argument from an "is" to an "ought", namely that "there are seven self-evident basic goods which we want to pursue" and therefore first, we "ought" to have a rational plan of life to guide us to pursue it. If so, it should be criticized for violating the Humean guillotine.

It seems self-evidence goes only so far as to identify the goods which a legal framework should enable a person to pursue, but it does not identify the principles the framework should comply with. It merely tells one rather obliquely that human nature will flourish if one can partake in certain self-evident goods. There seems to be an indirect link between self-evidence and the structuring of the legal system. On the other hand, one could argue that implicit in Finnis' argument is the idea that self-evidence supplies one with the nine requirements: Law has to conform with these nine requirements because they are self-evident. He suggests that it is self-evidence that allows him to arrive at the requirements when he writes of the seventh requirement of "respect for every basic value in every act":

> Once we have excluded consequentialist reasoning, with its humanly understandable but in truth naively arbitrary limitation of focus to the purported calculus 'one life versus many', the seventh requirement is self-evident. (The following paragraphs, therefore, seek not to demonstrate, but to clarify the sense of this requirement; on self evidence...)[58]

The criticism remains, however, that Finnis' claim that self-evidence enables him to come up with the requirements is too arbitrary. Second, if the reasoning in the paragraph cited means that self-evidence is predicated on the rejection of consequentialist reasoning, one wonders if the requisite rejection is self-evident or arrived at by some other reasoned argumentation. If it is the latter, it may impinge on the persuasiveness of the concept of self-evidence because if something is self-evident, it should be self-evident independent of any theory. To read the paragraph more charitably in Finnis' favor, one could argue that Finnis did not mean that the acceptance of the concept of self-evidence hinged on a prior rejection of consequentialism, but rather that the conclusions were simultaneous, necessitated by self-evidence. But another argument that Finnis makes suggests he is not relying

[58] Finnis, at 119.

on a "pure" concept of self-evidence. Finnis discusses the views of Aristotle and Aquinas as such: "Someone who lives up to these requirements is thus Aristotle's *phronimos;*[59] he has Aquinas' *prudentia;* they are requirements of reasonableness or practical wisdom and to fail to live up to them is irrational."[60] It seems that not everyone, but only the morally upright or wise or prudent, could decipher the requirements. This seems to go against the concept of self-evidence which suggests a more universal recognition of values. If, as argued earlier, Finnis can be given credit for his ingenuity in cutting off all further arguments by making it impossible for one to argue with him because his methodology of self-evidence is one that permits no argument, he has perhaps made a mistake by referring to Aquinas and Aristotle. If the merit of his theory over natural law was its relative acceptability because of its minimalism, then that merit is in a sense lost as his statements on Aristotle and Aquinas have led one critic to write:

> When one realizes how much this response is like some standard religious explanations – only those who have prepared themselves, through study, *etc*, can expect 'revelation' – one begins to suspect that the unsavory natural law connotations have been severed only to be reintroduced in another guise. Presumably, it is more compatible with modern notions to be told that one's failure to judge soundly results from a kind of immaturity, rather than from a lack of Grace.[61]

Further, Finnis seems to vacillate on his method for arriving at the requirements. In the same discussion on the seventh requirement, Finnis writes: "Reason requires that every basic value be at least respected in each and every action."[62] Bearing in mind that Finnis is listing the requirements of practical *reasonableness,* it does seem indeed that *reason* rather than self-evidence leads to the derivation of the nine requirements, or does it? In defense of Finnis, one could say that the "reason" he refers to is really practical reasonableness. But if in substance that refers to "reason", Finnis may have fallen into the Humean trap.[63]

Insofar as the above is relevant to the structuring of a legal system, the steps are:

[59] A right-minded and morally good person. Finnis, at 102.
[60] *Ibid.*
[61] *Supra,* footnote 42, at 1178.
[62] Finnis, at 120.
[63] Hume defined reason as being about discovery of truth and falsehood, which consisted in turn of agreement or disagreement either to the real relation of ideas or to the real existence and matter of fact. See footnote 13.

1. Harmony of purposes/recognition of goods/absence of arbitrariness between persons/detachment from particular realizations of good/fidelity to commitments/efficiency in the technical sphere/respect in act for every basic value /community/authenticity in following one's reason...are (all) aspects of the real basic good of freedom and reason;

2. That harmony of purposes, or ..., can in such-and-such circumstances be achieved/done/expressed/*etc,* only (or best, or more fittingly) by (not) doing act ø; so

3. Act ø should (not)/must (not)/ought (not) to ... be done.[64]

Finnis illustrates the use of this methodology in arriving at the law of murder. The requirement not to deliberately kill the innocent is derived from the basic principle that life is a good, in combination with the seventh of the nine basic requirements of practical reason, *ie,* that there must be a respect for every basic value in every act.[65] In contrast, Aquinas simply states that "this sort of law is derived from natural law by a process analogous to deduction of demonstrative conclusions from general principles"[66] and Finnis argues that this is too "vaguely stated and seriously underdeveloped".[67] Analyzing Finnis' methodology, there seems to be an argument from an "is" to an "ought" from Step 2 to Step 3. Some critics are of the view that Finnis should have skipped his methodology and gone straight to a simple assertion of the goods that ought to be pursued. This would at least avoid the problems of an unconvincing methodology or of an argument from an "is" to an "ought".[68] In Finnis' defense, it may be argued that the

64 Finnis, at 126-127.
65 Finnis, at 281.
66 *Ibid.*
67 Finnis, at 282.
68 See, for example, Philip Soper, *supra* footnote 42. Also, Michael J Perry, "Moral Knowledge, Moral Reasoning, Moral Relativism: A "Naturalist" Perspective in (1986) 20 Ga L Rev 995 at 1006:

> Rather than saying, with Finnis, that the good or value of flourishing is self-evident, we should say that the value of flourishing is not at issue for most of us. The sense in which the value of flourishing is underived as Finnis puts it, is that the value is foundational. Finnis says that the "non-derivability" of the value of flourishing does not "amount to lack of justification," but merely "betokens self-evidence." It would be better to say that the value of flourishing lacks justification, but that it no more requires justification than does the value of rationality.

"ought" is actually a predictive or factual "ought" rather than the prohibited normative "ought". He may be saying that if one attaches value to certain things (Step 1), one can best achieve those goods by doing or not doing certain acts (Steps 2 and 3). There remains, however, another problem: The requirements of practical reasonableness, even if arrived at by self-evidence, are arguably too vague and confusing to lead to any realistic formulation of human laws or even the laws forming the framework of the legal system! The illustration of the derivation of "positive" from "natural" law where the law of murder is concerned is not a good one as it concerns a clear case.

3. *The Problem with the Eighth Requirement of the "Common Good"*

Finnis states that the eighth requirement – that of favoring and fostering the common good of one's communities[69] – is the basis of many or most of our concrete moral responsibilities, obligations and duties. *Ex facie,* this sounds rather utilitarian. But this cannot be what Finnis means as he had, in his discussion on the requirement of efficiency within reason, argued against consequentialism and utilitarianism.[70] Finnis claims utilitarianism is "senseless". The "common good" he refers to is really an "ensemble of conditions which would enable each to pursue his own objective", that is, the basic goods in whatever priority the person wished. It refers to:

> the factor or set of factors (whether a value, a concrete operational objective, or the conditions for realizing a value or attaining an objective) which, as considerations in someone's practical reasoning, would make sense of or give reason for his collaboration with others and would likewise, from their point of view, give reason for their collaboration with each other and with him.[71]

The definition that Finnis offers of a "community" is also a rather other-directed one,[72] and this suggests that the "common good" of the community cannot refer to utilitarianism. There is a "community in a full sense" when:

> (i) A makes B's well-being and self-constituting participation in human goods one of his (A's) own self-constituting commitments, and (ii) B makes A's well-being likewise one of his (B's) basic commitments, and (iii) A and B collaborate in pursuance of these commitments.[73]

69 Finnis, at 125.
70 Finnis, at 111-118.
71 Finnis, at 154.
72 Interestingly, the words "common good" appear in the Bible in 1 *Corinthians* 12:7 as a reference to the good of the community of believers.
73 Finnis, at 144.

In the context of the political community, Finnis submits that though there is not "one reasonable life-plan or determinable set of reasonable life-plans, which the state should seek to get its citizens to commit themselves to", there is a common good "definite enough to exclude a considerable number of types of political arrangement, laws, *etc.*"[74] Though there is no elaboration, it presumably excludes a political community founded on communist ideals, for example, which does not permit an individual to choose the preferred type of basic value for human flourishing. But Finnis also qualifies that his definition of the common good "neither asserts nor entails that the members of a community must all have the same values or objectives (or set of values or objectives); it implies only that there be some set (or set of sets) of conditions which needs to obtain if each of the members is to attain his own objectives."[75] And such a set of conditions is made possible only if the human beings have a "common good" in the sense that the basic values are good for any and every person.[76]

From the definition of the common good as a set of conditions that enables each person to pursue the basic goods prioritized as he wishes, there arises the problem that this set of conditions is not exhaustively defined. If the requirement of the common good is in addition to the other eight requirements of practical reasonableness, then for the completeness of Finnis' theory, it should be exhaustively stated; if, on the other hand, it refers really to the other eight requirements and adds nothing, it seems redundant to state it.

The importance of clarity in stating the conditions that favor the pursuit of the common good is all the greater as the existence of the conditions is also the justification for authority. Where a constitutional government is concerned, there is a "relationship of reciprocity" between the rulers and the citizens in which "claims of authority are respected on the condition that authority respects the claims of the common good."[77] How clear is Finnis? Finnis writes that in a "complete community", the "ensemble of conditions *includes* some co-ordination (at least the negative coordination of establishing restraints against interferences) of any and every individual

74 Finnis, at 155.
75 Finnis, at 156.
76 Reasoning from 155-156. This is the first sense of the meaning of common good. The second sense is that each of the human values is itself a "common good" inasmuch as it can be participated in by an inexhaustible number of persons in an inexhaustible variety of ways or an inexhaustible variety of occasions. The third sense of common good is one used more commonly in the book – the ensemble of conditions referred to.
77 Finnis, at 272-273.
78 Finnis, at 147-148.

life-plan and any and every form of association."[78] *(Emphasis mine)* The word "includes" suggests the statement of the "ensemble of conditions" is non-exhaustive. If so, we end up with: It is self-evident that we need a framework that allows us to pursue self-evident goods; the conditions of such a framework cannot be stated exhaustively nor can they be arrived at by self-evidence.

Finnis does say that these conditions are perhaps embodied in the idea of "justice", which in turn embraces the three elements of other-directedness, duty and equality.[79] The requirement of justice is "an ensemble of requirements of practical reasonableness that hold because the human person must seek to realize and respect human goods not merely in himself and for his own sake but also in common, in community."[80] This is similar to the definition of the requirement of the common good. Indeed, Finnis writes that these requirements of justice are the "concrete implications" of the basic requirement of practical reasonableness which tells us to favor and foster the common good of one's community.[81] Though Finnis elaborates extensively on the three elements of justice and the types of justice, and treats the three elements as "necessary and sufficient for an assessment to be an assessment of justice" for the purpose of giving the concept of justice sufficient precision to be useful in his analysis of practical reasonableness,[82] the essence is that justice provides the framework for pursuing the goods. Finnis had initially stated that seven basic goods are self-evident, and nine requirements of practical reasonableness provide us with principles to structure a legal system. Yet "justice" is ultimately either an ensemble of sorts of the nine requirements, or the essence of all that is required to pursue the "common good", or the "common good" itself. The last is most likely,[83] as Finnis discusses briefly "the problems of realizing the common good through a co-ordinated ensemble of conditions for individual well-being in a community",[84] and says these are issues of what "justice" means in practice.

The first is the problem of "distributive justice":

> [T]here are problems of distributing resources, opportunities, profits

[79] Finnis, at 161-163. "Other-directedness" refers to one's interpersonal relations. "Duty" is that which is owed to another or that which the other has a corresponding right to. "Equality" means the proportionality in relation to the need of the individual rather than strict mathematical equality.

[80] Finnis, at 161.

[81] Finnis, at 164.

[82] Finnis, at 163.

[83] That is, bearing in mind his definition of the eighth requirement of the common good as a set of conditions.

[84] Finnis, at 166.

> and advantages, roles and offices, responsibilities, taxes and burdens – in general the common stock and incidents of communal enterprise, which do not serve the common good unless and until they are appropriated to particular individuals. The theory of distributive justice outlines the range of reasonable responses to these problems.[85]

The second problem is that answered by a range of reasonable responses outlined in his theory of "commutative justice":

> [T]here are all the other problems, concerning what is required for individual well-being in community, which arise in relations and dealings between individuals and/or groups, where the common stock and what is required for communal enterprise are not directly in question.[86]

Finnis goes on to examine what distributive and commutative justice requires. His propositions of what each type of justice requires resolves the problem of realizing the common good, or the problem of justice. To complicate matters, he later includes the Rule of Law,[87] understood in the sense of formal or procedural safeguards, as one of the requirements of justice or fairness, even though it does not *per se* "guarantee every aspect of the common good, and sometimes it does not secure even the substance of the common good."[88] It is a necessary but not sufficient aspect of the ensemble of conditions.

One cannot understand why Finnis initially used the phrase "common good" in lieu of "justice". Perhaps the word "justice" had long been associated with libertarian traditions of Rawls and Nozick and acquired a certain connotation Finnis did not wish his concept to be associated with. But if

[85] *Ibid.*

[86] *Ibid.*

[87] Finnis, at 273. The eight desiderata of the Rule of Law are that the rules must be:

(i) Prospective;
(ii) Not impossible to comply with;
(iii) Promulgated;
(iv) Clear;
(v) Coherent with one another;
(vi) Sufficiently stable to allow people to be guided by the knowledge of the rules;
(vii) that the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and
(viii) that those people who have authority to make, administer and apply the rules in an official capacity are accountable for their compliance with rules applicable to their performance and do actually administer the law consistently and in accordance with its tenor. (At 270-271.)

[88] Finnis, at 274.

it is for this reason only, the idea of "common good" has likewise been associated with utilitarianism which Finnis distances himself from. Also, one must ask whether Finnis prescribes for more than a procedural framework (though it is conceded that the distinction between procedure and substance is not clear). Perhaps the reason has to do with his starting point of self-evidence. Indeed, what Finnis is really saying is that it is self-evident that justice (as he defines) is one requirement of a legal system that enables a person to pursue the basic goods. His justification for a legal system is thus possibly simply "justice" and this is supported by a statement in a later part of his book where he says that the "authority of the law depends...on its justice or at least its ability to secure justice."[89] But if he had said this outright, he would have met with objections, as the question of what constitutes justice has always been controversial. Finnis' theory hinges too heavily on the concept of self-evidence, from which justice (and every *controversial* legal principle) emanates.

C. *Finnis' Theory in Practice: The Relevance of the Rights Discourse*?

Finnis entitles his book *Natural Law and Natural Rights,* believing that "the modern grammar of rights provides a way of expressing virtually all the requirements of practical reasonableness."[90]

It is submitted that the rights discourse does not add any specificity to Finnis' thesis. The argument for this submission is as follow: Finnis intends the language of rights to be used as a concretization of the requirements of practical reasonableness. He recognizes the uncertainty involved in the balancing process, and thus the need for a decision-maker and the reason for having authority. "Authority" of the decision-maker is justified in the

[89] Finnis, at 260.

[90] Finnis, at 198.

[91] Finnis, Chapter IX. Finnis recognizes that somebody must decide how to reconcile the rights with such other matters as the requirements of public health, public order and the like. The balancing process is termed a problem of co-ordination, and the reason for having authority is to solve such problems. Unanimity is the only alternative way of co-ordinating action to the common good of any group, but it cannot in practice be achieved in a community with a complex common good and an intelligent and interested membership, where intelligence, skill and dedication only "multiply the problems of co-ordination, by giving the group more possible orientations, commitments, projects, 'priorities', and procedures to choose from", and also because "intelligence and dedication to the common good are mixed with selfishness and folly". Finnis sees authority as the only feasible way of co-ordinating action, rejecting consent theories of society, which justify government on the grounds of consent of the governed. Rather, his view is that authority is precisely the substitute for unanimity.

eyes of the practically reasonable subject, in the natural law sense, when it is being exercised for the common good.[91] Yet, one is reminded that the co-ordination problems in a community to arrive at a structure that serves the common good are the issues addressed by the questions of justice. The framing of rights was to provide a concretization of the demands of justice.[92] The "practically reasonable" subject is left to decide whether "authority" is legitimately exercised in the natural law sense by questioning whether it is being exercised for the somewhat abstract "common good",[93] despite the fact that the very development of Finnis' ideas from the "common good" to "co-ordination problems" to the "demands of justice" to the "concretization of rights" was aimed at making the common good less abstract.

For example, Article 29(2) of the Universal Declaration of Human Rights states that everyone, in his exercise of the rights and freedoms, shall be subject to limitations as determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others, and of meeting the just requirements of morality, public order and general welfare in a democratic society. Where the freedom of speech (a right) is concerned, though cultural and political debate is to be encouraged (presumably since knowledge is a basic good and debate furthers the pursuit of truth), hate speech is prohibited by the limitation as it threatens respect for the human personality.[94] Such balancing is the concretization of the requirements of practical reasonableness and justice, which in turn enables one to solve the coordination problems in a community. Such balancing must, however, be done by the legitimate authority. If one has to decide whether authority is legitimately exercised, one examines whether authority is being exercised for the common good. Yet, if one has to examine whether authority is exercised for the common good, and acting for the common good is achieved by the set of conditions that solve the coordination problems, the problem of lack of specificity does not seem to be solved. Indeed, insofar as the concretization from common good to rights depends on the finding of an authority that is justified when it acts for the common good, then because the common good is itself a set of non-exhaustive conditions needing to be concretized by this very authority, the argument seems circular. It seems that Finnis is arguing that the balance of the rights of individuals in the framework – a set of conditions that favor the common good – is to be

[92] Finnis, at 210.

[93] Ideally, a man's stipulations have authority when a practically reasonable subject, with the common good in view, would think he *ought* to consent to them (Finnis, at 251).

[94] See the reasoning in Finnis, at 220.

done by persons who are acting for the common good, which is a set of non-exhaustive conditions.

Perhaps the rights discourse serves only a limited purpose. It emphasizes equality, undercuts the attraction of consequentialist reasoning, and "amplifies the undifferentiated reference to 'the common good' by providing a usefully detailed listing of the various aspects of human flourishing and fundamental components of the way of life in community that tends to favour such flourishing in all".[95] Certain institutional structures and formulation of rights are recognized as contrary to his theory: First, paternalistic formulation of rights and emphasis on duties might lead to a failure of commutative justice in not allowing some basic values to be pursued as the individual wishes;[96] second, the formulation of rights allows the rejection of any basic value, which is wrong, to be immediately apparent.[97] The value of the rights discourse lies in cutting out certain substantive worldviews.

D. *God, Objectivity, and Morality as Finnis' "Conclusion"?*

It seems from the preceding discussion that objectivity is the premise of Finnis' theory. One gathers, however, from the use of the words like "knowledge" instead of "truth", and the concept of self-evidence instead of some higher order argument, that Finnis attempts to be somewhat minimalistic so that his theory gains acceptance amongst atheists and agnostics. Yet Finnis is also absolutist in that, whilst suggesting that his theory is acceptable to non-believers, he makes five other claims: First, he rejects cultural relativism;[98] second, he suggests that knowledge really is "of truth";[99] third, he claims that the product of the nine requirements of practical reasonableness is "morality";[100] fourth, (implicitly at least) that "natural rights" are not, to use Bentham's famous phrase, "nonsense upon stilts"; finally, he concludes there is a God and explores the question of how God's existence affects the substance of his theory.[101] As part of his assumptions, these claims form his starting point, even if that is called "self-evidence" rather than "God's law". At the very least, the fact that he acknowledges the relevance of the existence of God shows his attempt to avoid the quandary faced by the classical natural law theorist. Such an attempt, while perhaps making his theory attractive to more people, arguably leaves his explanation of law

[95] *Ibid.*
[96] Finnis, at 223.
[97] I have reasoned this from Finnis, at 225.
[98] Finnis, at 83.
[99] Finnis, at 59.
[100] Finnis, at 126-127.
[101] Finnis, Chapter XIII.

less complete than it can be.

1. *Finnis' Rejection of Cultural Relativism*

The rejection of cultural relativism – which denies the existence of timeless and universal principles – forms the basis of Finnis' concept of self-evidence. Finnis writes:

> Students of ethics and of human cultures very commonly assume that cultures manifest preferences, motivations, and evaluations so wide and chaotic in their variety that no values or practical principles can be said to be self-evident to human beings, since no value or practical principle is recognized in all times and all places...But those philosophers who have recently sought to test this assumption, by surveying the anthropological literature (including the similar general surveys made by professional anthropologists), have found with striking unanimity that this assumption is unwarranted.[102]

Finnis argues that the surveys entitle us to make assertions as to what human societies in general value before he embarks on his "practical reflection" to come up with the seven basic goods that are self-evident:

> It is now time to revert, from the descriptive or 'speculative' findings of anthropology and psychology, to the critical and essentially practical discipline in which each reader must ask himself: What are the basic aspects of my well-being? Here each one of us, however extensive his knowledge of the interests of other people and other cultures, is alone with his own intelligent grasp of the indemonstrable (because self-evident) first principles of his own practical reasoning...(T)here is no inference from fact to value.[103]

The primary objection to Finnis' process of arriving at the seven basic goods is that while he insists that his non-inferential methodology of practical reflection leads to self-evidently basic goods, the whole concept of self-

[102] Finnis, at 83. Finnis cites various authorities for his assertion at 97.
[103] Finnis, at 85.
[104] This, Finnis does not deny. Finnis writes of his inquiry into ethics:
> [E]verything I have been saying supposes that the judgments about human good(s) and the truly worthwhile objects of human existence are objective judgments, judgments capable of being true regardless of our decisions or the conventions of our language or the customs of our communities. *Supra,* footnote 25, at 22-23.)

evidence is premised on a rejection of cultural relativism or subjectivity.[104] No doubt he cites authoritative anthropological sources for the rejection of cultural relativism, but in so doing he engages in the debate between the absolutists and the subjectivists by taking a position in a time when "the denial of objective values has become a part of what might be thought of as contemporary folk philosophy."[105] While he seemingly avoids arguing from an "is" to an "ought", he does so not by showing how one can argue from an "is" to an "ought", *etc*, but by a bald assertion as to the methodology of self-evidence. To such a bald assertion one can raise no further argument. Even by employing the concept of self-evidence, Finnis only apparently avoids the quandary of the natural law theorist because ultimately that concept hinges on a rejection of relativism and subjectivism.

2. *Finnis' Claim to the Existence of "Truth"*

The second absolutist claim that Finnis (passingly) makes is that of the existence of "truth". Finnis writes that "knowledge is of truth"[106] and at various points, uses the two words interchangeably.[107] What then is "truth" as opposed to knowledge? Finnis hints:

> Now 'knowledge', unlike 'belief', is an achievement-word; there are true beliefs and false beliefs, but knowledge is of truth. So one could speak of truth as the basic good with which we are here concerned, for one can just as easily speak of 'truth for its own sake' as of 'knowledge for its own sake'. In any event, truth is not a mysterious abstract entity; we want the truth when we want the judgments in which we affirm or deny propositions to be true judgments, or (what comes to the same) want the propositions affirmed or denied, or to be affirmed or denied, to be true propositions...This chapter, then, is an invitation to reflect on one form of human activity, the activity of trying to find out, to understand, and to judge matters correctly.[108]

The "chapter" Finnis refers to is entitled *A Basic Form of Good: Knowledge*.[109] There are two interpretations of what Finnis means by "truth" as opposed to knowledge. First, knowledge is an imperfect version of truth: Knowledge

[105] *Supra*, footnote 41, at 410.
[106] Finnis, at 59.
[107] Finnis, at 65 and 69.
[108] Finnis, at 59-60.
[109] Finnis, Chapter III.

is a process; truth is the achievement. Second, the two words are used interchangeably, but Finnis avoids the word "truth" as it carries with it absolutist connotations which subjectivists reject. On either interpretation, the word that Finnis, a Catholic, may prefer is "truth", as it slips in despite the chapter's title.[110]

The ways in which "knowledge" and "truth" have been used in the Christian Bible may shed some light on the intended meanings, second-guessing from the fact that Finnis is a Catholic. Jesus says that He is the way and the truth and the life,[111] a verse that leads critics of Christianity to reject the religion as an intolerant one. While other religions can co-exist with other religions, Christianity, while at the same time offering the free gift of life to all who accept Jesus Christ as Lord and Savior,[112] also lays the absolute claim to Truth. The reference to "truth", assuming Finnis was thinking holistically (though admittedly this is not entirely clear from his writing), would seem to bring us back to the truth stated in the Word of God. "Knowledge", on the other hand, seems to refer to the imperfect attainment of truth: "For we know in part, and we prophesy in part; but when the perfect comes, the partial will be done away...For now we see in a mirror dimly, but then face to face; now I know in part, but then I shall know fully just as I also have been fully known."[113] Also noteworthy is the fact that the devil, in the form of the serpent, used the word "know" when he tricked Eve into eating the forbidden fruit: "(Y)ou will be like God, knowing good and evil."[114] Knowledge is a "secular" word, with relativistic connotations, acceptable by humanistic standards. Finnis may not have intended this sense, for he writes of the word as an "achievement-word",[115] suggesting it represents the result of a pursuit. One wonders if Finnis was evasive in choosing to name the good "knowledge" instead of "truth". Further, if Finnis meant "truth", then this meets with the same objections of the relativists.

In defense of Finnis, he may have chosen "knowledge" simply because he was arguing that participation in the "activity of trying to find out, to understand, and to judge matters correctly"[116] – his definition of the process of "knowing" – is itself the good, whether or not one finally attains truth.

[110] In another book, Finnis uses the word "truth" interchangeaby with "knowledge just as such or "for its own sake": "[T]o engage in ethical inquiry and reflection is to be concerned with truth, with the right answer to one's questions, with knowledge just as such or 'for its own sake'." *Supra*, footnote 25, at 2.
[111] *John* 14: 6, NIV.
[112] *John* 3: 16, NIV.
[113] 1 *Corinthians* 13: 9-10, 12, NASB.
[114] *Genesis* 3: 5, NASB.
[115] Finnis, at 59.
[116] Finnis, at 60.

This seems reasonable as he writes:

> The good of knowledge was not for (the person engaging in a particular project) an 'end' external to the 'means' by which he 'pursued' it or sought to 'attain' it. Rather, it was a good in which, we may say, he *participated,* through or in those of his commitments, projects, and actions which are explicable by reference to that basic practical principle, that basic form of good.[117] (emphasis in original)

3. *Finnis' Product of "Morality"*

Finnis writes that the nine requirements of practical reasonableness represent the natural law method of working out moral natural law from the first pre-moral principles of natural law (*ie,* the principle that the self-evident goods are goods). Every moral judgment is the result of the employment of one or more of the basic requirements in one's reasoning, which is to say that the nine requirements lead to morality.[118] The question is whether the "product" of the nine requirements is really morality or whether an additional step in one's reasoning is required. This question is crucial as Finnis employs the methodology of self-evidence precisely to avoid engaging in moral reasoning. If the product is naturally morality, and there is no additional step in the reasoning process, Finnis succeeds in avoiding moral reasoning which meets with the objection of the subjectivists. But we concluded that Finnis deduces that an act ought or ought not be done in Step 3 of the reasoning process.[119] As argued above, self-evidence leads us to the seven basic goods and the nine requirements of practical reasonableness, but is not involved in Step 3. Step 3 arguably involves a moral conclusion whereas prior to that, the statements were factual.

Finnis elaborates on the "genesis of moral principles" from the idea of basic goods and practical reasonableness in his later work:

> The basic goods, taken with factual possibilities, delimit the range of *intelligent* action; anything one does which does not somehow instantiate one of those goods is pointless. But one does not go wrong by limiting one's actions to the intelligent, nor by choosing here and now to pursue only one or a few of the basic goods, and not others; that too is a limitation which, so far from being unreasonable, is actually

[117] Finnis, at 64.
[118] Finnis, at 126.
[119] See text accompanying footnote 64.

> required by reason. Where one does go wrong is by choosing options whose shaping has been dominated by *feelings,* not feelings which support or are in line with reasons (as *every* reasonable action must be somehow emotionally supported), but are calling the tune...fettering one's reason, limiting its directiveness, and harnessing it as feelings ingenious servant...Thus we begin to see the genesis of moral principles. They identify, and direct one away from, ways of cutting back on being fully reasonable. But reason, here, does not mean some formal structure of the mind, but rather one's practical knowledge of the intelligible basic human goods, understanding of which affords the starting point for all deliberation and action which is not pointless.[120]

The reasoning here is more persuasive. Self-evidence enables one to arrive at seven basic goods. Deciding these are basic goods that one would pursue means that one should practically not pursue action that leads otherwise. But is there an argument from an "is" to an "ought"? Finnis defines reason as "practical knowledge" that is the "starting point for all deliberation and action which is not pointless", but is this a matter of semantics? Is "practical knowledge" really an argument from an "is" to an "ought"? But in support of Finnis, what exactly is objectionable about such an argument anyway? Supposing that Finnis' argument that the "rationale of moral action" is "the ideal of integral human fulfilment" is right,[121] the fact that one ends up with a moral conclusion whilst acting in a manner that is in line with the requirements of practical reasonableness (that lead one closer to the basic goods) is merely incidental. In other words, the moral conclusion is not the guideline to action, but rather, the requirements of practical reasonableness (which are morally neutral and hence do not offend the relativists) stipulate for certain actions which "happen" to be moral as well.

4. *Finnis' Implicit Claim that Natural Rights are Not "Nonsense Upon Stilts"*

Finnis' title, as well as his reliance on rights as the concretisation of his general principles, involve at the very least an implicit belief in the existence of natural rights or rights which one has by virtue of one's nature.[122] Finnis has used controversial terminology, rejected by Bentham and others

[120] John Finnis, *Moral Abnolutes: Tradition, Revision and Truth* (Catholic University of America Press, 1991) at 43-45.

[121] *Ibid,* at 106.

[122] The purpose here is not to engage in any debate on the meaning of "natural rights". Hence I offer only a simplistic interpretation of "natural rights" as meaning rights which one had by virtue of one's nature.

as "nonsense upon stilts". More recently, Smith writes in another context that "nonsense" is always relative to one's worldview and as such, in the present secular academic context, any discourse that is dependent on the notion of natural law and natural rights is nonsense. While within a human legal order one can speak of positive law and of legal rights, and even make moral or policy arguments that human governments ought to protect particular interests by *creating* legal rights, "it is difficult to give an account of just what we mean when we say that something should be recognized as a legal right because it is a natural right."[123] Rights make sense only within a legal order, which forms the framework that gives rights their meaning. Resorting to natural rights is nonsense to one who does not function within a "natural" order where there is one supreme Lawgiver. It makes sense – and this even Smith concedes[124] – to one who believes that God or some supreme authority is the Lawgiver within that natural order.

Finnis appears to be evasive in choosing to resort to human nature (self-evidence and all) instead of God as the traditional naturalists have done. But rights are not nonsense upon stilts in that it is possible for one to state the conclusion without exploring the cause, even though with thought one would concede that one was working within a framework with some Supreme Being. Rights are "natural" in that they do accrue to one by virtue of one's "Manhood", *ie,* one's nature – or as the Christian would say, the fact that Man is made in the image of God.[125] But perhaps Finnis really has little choice, for if he stated the cause in this secular academic environment that Smith speaks of, he might be dismissed without further consideration for

[123] Steven D Smith, "Nonsense and Natural Law" in 4 (1996) S Cal Interdis LJ 583 at 598-599.

[124] He writes:

> Providence was more than a rhetorical trope. Jefferson's providential worldview recognized a supreme legislator – the Creator, or God – who constructed the world and governs it according to a divine design. This view can support an account of natural law – natural law can be understood by reference to the providential design – and, perhaps, of natural rights. Natural rights might refer to those human interests and concerns that rank highest in the providential scheme and with which others are forbidden by Providence to interfere. For example, if in the providential scheme life is sacred and the taking of human life is accordingly prohibited, then we might say that human beings have a "natural right" to life. (*Ibid,* at 598.)

[125] In *Genesis* 1:27 (NASB), part of the account of God's Creation, it is written: "And God created man in His own image, in the image of God He created him..."

[126] As an aside, an interesting article writes of how the liberal orthodoxy at Harvard can be stifling towards conservatives in general, and Christians in particular. See Janet Tassel, "The 30 Years" War: Cultural Conservatives Struggle with the Harvard They Love", the cover story in the Sept-Oct 1999 issue of *Harvard Magazine.*

taking a Christian position.[126]

5. *Finnis' Exploration of Issues Relating to God*

Finnis argues that a moral obligation to obey a law arises when the law in question is made to secure the common good, and in that sense, the moral obligation is independent of the lawgiver's will because the common good is meta-legal.[127] One cannot reasonably rest at the justification of authority by reference to the common good, because the question is why the needs of the common good, thus far taken as ultimate, should impose an obligation on each person. There must be a deeper explanation.[128] Though participation in the basic goods is good, yet the participation of each individual and community is at best limited. Death and distance, for example, limit the participation in the good of friendship. Thus, "the question arises whether my good (and the well-being of my communities) has any *further* point, *ie,* whether it relates to any more comprehensive human participation in good",[129] or "whether human goods are of *merely* anthropocentric significance".[130] This further point would presumably also explain why self-sacrifice (for example, in friendship where the well-being of one's friend is one's good and yet can only be promoted by one's sacrifice) is required in some circumstances. Restated, the question is whether the point of being reasonable is simply for one's own sake.[131] Finnis concludes that there is an uncaused cause which favors the well-being of every person, for no other reason than its own goodness, so that in favoring the common good in one's own action, one was acting in line with the uncaused cause, "co-operating with God".[132] Such co-operation, Finnis suggests in his later work, *Moral Absolutes: Tradition, Revision and Truth,* stems not from blind obedience, but is submission to one (God) "who has practical knowledge of everything without limit", and in fact would enable us to *"take into account everything...in the only way we can"*.[133] This conclusion, however, does not affect the reasoning about the goods but simply provides a deeper understanding of them.[134] There are two main criticisms of Finnis' conclusion.

First, is it true that the conclusion only gives us a deeper understanding of the goods but does not affect the reasoning? For example, Finnis argues

[127] Finnis, at 335-337.
[128] Finnis, at 371.
[129] Finnis, at 372.
[130] *Supra*, footnote 25, at 145.
[131] Finnis, at 378.
[132] Finnis, at 409.
[133] *Supra*, footnote 120, at 20.
[134] Finnis, at 405-407.

that arriving at God as the conclusion allows us to understand that practical reasonableness need not be regarded as a form of self-perfection, but rather as what is needed to participate in the game of God.[135] A critic might argue that understanding that God is the Creator who has to be obeyed, and for whom all things are made, changes or ought to change one's perspectives of one's aims in life in a manner which alters what practical reasonableness means. Indeed, Finnis himself in a recent article seems to say that there is something which awareness of the reality of the spirit enables one to grasp which "secularism has lost its grip upon".[136] In the context of providing reasons for the grounding in God of practical reasonableness, Finnis says:

> [T]he recognition that practical reasonableness is grounded in God clarifies the goodness of the basic human goods, the freedom of free choice, and the reality of the intention (irreducible to desire or foresight), and enhances, accordingly, the directiveness of the first practical principles, the coherence and inherent forces of the moral principles, and the perfecting of inter-personal collaboration in the making and fulfilment of promises.[137]

Finnis seems to suppose that because the list of seven goods and the nine requirements of practical reasonableness require unselfish and non-monomanic pursuits, practical reasonableness ensures one acts in a way that pleases God even if one does not go further to reach the conclusion about God. But as Finnis also believes that self-evidence is not exactly innate, but rather, is known through an awareness of one's personal experience of the urge to pursue the good, it may be questioned whether Finnis is taking a secular and unduly optimistic view of human nature – a view which would be inconsistent with the Judeo-Christian view of Man as fallen and incapable of good. Might the Judeo-Christian view not necessitate a conclusion that one has a minimal conscience (innate) in the form of the "law written on the heart", and can only "be good" through the work of the Holy Spirit?[138] It may be that practical reasonableness in Thomistic thought cannot be divorced from the Giver of that Reason, who alone is able to transform Man to exercise practical reasonableness.

Second, if indeed there is an uncaused cause with whom one is co-operating in acting for the common good, *etc,* is it escapist to stop at the penultimate explanation? If the final explanation is not essential, it is all

[135] Finnis, at 409-410.
[136] John Finnis, "On the Practical Meaning of Secularism" in (1998) 73 Notre Dame L Rev 491 at 502.
[137] *Ibid,* at 501.
[138] See *Romans* 2:15, and 8:1-17. Contrast Finnis, at 65.

right to stop at the penultimate and Finnis should be commended for his brilliance in explaining a state of affairs that would push a seeker to the conclusion of God. However, if God's gracious revelation is needed for the system to work, then Finnis may have nipped off too much of the bud for his theory to produce any good.

III. Has Finnis Advanced Classical Natural Law Theory?

A comparative assessment is pertinent because it may well be impossible to find a perfectly satisfactory justification for a legal theory. The next best question is how the justification compares with those proffered by other theorists. A good comparison is with the theory that Finnis claims his theory improves on.

It is meaningful to compare Finnis' theory and his starting point only with those theories which in the first place are on the same "plane" as Finnis'. Positivism is arguably irrelevant in our analysis insofar as it is concerned not with where the law derives its moral authority or reasonableness, but rather, with the narrow question of what constitutes law that is binding on its subjects. To this submission that positivism is not relevant to our analysis may be raised two objections.

First, a comparison of starting points is still meaningful if the question is whether positivists have missed the point by limiting the scope of their enquiry. Positivism's question, being penultimate and concerned only with an "originating act" within the juristic realm whilst admitting of a justification outside that, is an escapist one. An enterprise is only meaningful if there is a justification outside of itself. Finnis avers to this when he doubts the positivist contention that their descriptive theories identify law on the basis of non-evaluative characteristics only. He raises questions about the assessment of importance and significance involved in the selection of data and the decision as to what constitutes a "central case" and "focal meaning"[139] as opposed to a marginal or peripheral one. While "truly reasonable statements about what is good and practically reasonable" can possibly be made, "there is no escaping the theoretical requirement that a judgment of significance and importance must be made if theory is to be more than a vast rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies".[140] Extending the argument, insofar as the positivist's rationale for not going beyond legal facts is to rid the theory of subjective bias, this relies on an assumption that a restriction to the legal realm involves no subjective bias, and Finnis' argument shows the flaw in the positivist's assumption. If the only value for avoiding a meta-legal search for legitimacy

[139] Finnis, at 9.
[140] Finnis, at 17.

of law is the avoidance of subjective bias, then insofar as evaluative criteria are involved in the positivistic formulation, rooting the positivistic starting point within the legal realm serves no real purpose and seems rather arbitrary, unless further justified as a value choice. But insofar as positivists refuse to engage in the conversation with natural law theorists at the level of what meta-legal justification is more convincing, any comparison would be limited.

The second argument for the relevance of positivism to our comparative analysis is that the two questions are not distinct, as the test for valid law should take into account morality and reasonableness. The question of existence necessarily involves a narrower question of whether the "law" in question is justified by reference to some meta-legal law-giving source. Finnis' take on this question, often (too narrowly) termed the question of whether unjust laws are laws, would have to be left to another article.

As Finnis explores the conceptions of natural law in the first part of his book and draws heavily upon Aquinas' concept of the *per se nota,* whilst claiming implicitly to build upon it,[141] the issue is whether Finnis has built on classical natural law. This comparison with classical natural law involves two sub-issues: First, whether the justification Finnis offers is any more convincing; second, whether it leads to a more convincing formulation of law. The second sub-issue comprises two aspects: The comparative tenacity of links between the starting point and specific principles, and the relative internal coherence of the theories.

The primary justification of classical natural law theory[142] is aptly summed up in the words of the prophet Isaiah: "For the Lord is our judge, the Lord is our lawgiver, the Lord is our King."[143] "Heretical" as it may sound to positivists, God is the justification of law. Or as Blackstone puts it in his *Commentaries:*

> This law of nature, being co-eval with mankind and dictated by God Himself, is of course superior to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.[144]

[141] Finnis, at 34.

[142] Of course, there are many variants of natural law theory, but it is submitted that there are central tenets common to Blackstone, Aquinas and Grotius, all of whom believed in the existence of a higher order. I will not compare Finnis' theory with the secular natural law theories such as those propounded by Cicero or Aristotle.

[143] *Isaiah* 33:22, NASB.

[144] Blackstone, *Commentaries,* Book I, section 2, "Of the Nature of Laws" at 41.

From Blackstone's statement, the main tenets of natural law theory are: First, law as dictated by political and legal authorities must ultimately be traceable to, and not inconsistent with, the principles laid down by a Supreme God; second, God's law is unchanging, and it transcends time and space; third, the first tenet is necessarily predicated on the idea that this "law" as God would have us lay down is discoverable by the human reason with which we have been clothed. It cannot make sense for an omnipotent and omniscient God to expect His creation to obey His Law and then not give His creation any means to discover that Law.

Aquinas identifies four types of law.[145] The first is *lex divina*, the divine law that is revealed in Scripture. Examples are the Ten Commandments[146] and the 613 rules[147] derived therefrom. The second type is *lex aeterna* – the eternal God-given rules governing all creation and constituting a plan of governance where the supreme Governor is God. The third, and what we are more concerned with, is *lex naturalis.* This natural law is the segment of eternal law that is discoverable through the special process of reasoning mapped out by the pagan authors. It constitutes man's participation in eternal law through reason. This natural law is not static, but has to do with action when Man takes steps to actively formulate precepts. Such precepts of nature correspond to our natural inclination, and constitute the first principles that are unchangeable: First, we want to preserve life; second, we are inclined to specific ends like sexual relationships, rearing of offspring, *etc;* third, we have an inclination to do good, corresponding to rational nature. The final type of law is *lex humana:* these are the rules, supportable by reason, but articulated by human authorities for what Aquinas calls the "common good". Human laws derive legal quality and the power to bind in conscience from natural law. If they fail to accord with natural law, they are but a corruption of law.

A. *Comparison of Starting Points*

The chief attraction of Aquinas' theory, despite numerous problems with its justification, is its completeness. God is the source and justification of all Man-made law. Meaning is conferred upon, and life breathed into, the enterprise of law: The law that stems from a higher order is tested by reference to that higher order. If God is Creator, there is no need for further argument. But this is also the first objection to natural law theory, for many will reject its bud. Without a common religious base, the theory becomes unjustifiable.

[145] St Thomas Aquinas, *Treatise on Law (Summa Theologica, Questions 90-97) (*Gateway, 1998).
[146] *Exodus* 20.
[147] *Leviticus* and *Deuteronomy.*

Can God, who is the justification for Aquinas' natural law, be proven? Not everybody would accept the existence of a "brooding omnipresence in the sky".[148] The rejection of God takes various forms. The first is an outright rejection and as the whole theory presupposes the existence of God as the higher order by which one tests the validity of man-made law, the theory falls apart. Second, even if one takes a more minimalistic approach and views the starting point as some objective moral standard rather than God, it is unlikely that the non-cognitivists and relativists would accept that there can be an objective morality without a higher source.

There is something to be said in defense of God. Pertaining to the claim that God cannot be proven, one cannot add to the arguments of the apologists except raise a few questions from the point of view of one legally trained.[149] The question for the lawyer is: What is "proof"? As he who asserts the existence of a particular fact has the burden of proof, the natural law theorist has to prove God's existence. Pertaining to the standard of proof, the question is whether one can insist on 100% proof. In civil law we are content to bankrupt a manufacturer in a negligence suit if it is shown that it is more probable than not that the manufacturer has been negligent and such negligence has caused the damage to the plaintiff. In criminal law, we are content to send one accused of murder to the gallows if the crime is proven beyond reasonable doubt. But fact is sometimes stranger than fiction and a man could, in the rarest of cases, be convicted for a crime he did not commit.

[148] Holmes J. Not that I would agree that God is a "brooding" omnipresence. But rather, as the Psalmist wrote: He is a gracious and compassionate God, slow to anger, abounding in mercy. *(Psalm* 86: 15)

[149] A number of apologists have assessed the claims of Christianity (here cited as an example of monotheism, and cited only because Aquinas and Finnis are both Catholics) using the rules of evidence. The most famous of these is arguably Simon Greenleaf, formerly Dane Professor of Law at Harvard University, whose work, *A Treatise on the Law of Evidence,* is a classic of American jurisprudence. He wrote *The Testimony of the Evangelists: The Gospels Examined by the Rules of Evidence* (Kregel, 1995). Other literature include: Ross Clifford, *Leading Lawyers' Case for the Resurrection* (Doppler, 1996); Edmund Bennett, *The Four Gospels from a Lawyer's Standpoint* (Mifflin, 1899); Walter Chandler, *The Trial of Christ from a Lawyer's Standpoint* (Federal Book, 1925); Stephen Williams, *The Bible in Court or Truth vs Error* (Dearborn, 1925); *etc.* Many of these are cited in Appendix 1 of Ross Clifford's book just mentioned. The other arguments or evidence for the existence of God are outside the purview of this essay. But where historical evidence is concerned, for example, see Josh McDowell, *The New Evidence that Demands a Verdict* (Thomas Nelson, 1999).

In any case, the following additional points may bolster the case for Aquinas' natural law theory:

(1) The scrolls constituting the Christian Bible appear to have a transcendent authorship, particularly when one takes into account the coherence that exists notwithstanding the fact that it comprises 66 books written by various authors over a period of several centuries. Moreover, if Scripture were the work of one human author

Yet, we are content with the probable, admitting that absolute proof is not possible. But in the same breath, we insist on absolute proof where God's existence is concerned. It seems somewhat hypocritical. We must begin by acknowledging that we can work only on probabilities, and not absolute certainty.[150] Further, the casting of the burden may not be uncontroversial, as it has been cast by the framing of the issue. The burden appears to be on the theist who claims that God exists. However, (and this is not just a case of semantics) one must note that one *exists,* and is born into a world that *is.* We must address the issue of our being. There are two broad

> who was crafting a splendid lie, it is unlikely he would leave some matters less clear than it could be, and some apparent inconsistencies to be explained. It is more likely that it is the work of God rather than a genius or rogue, that the book may be understood with the guidance of God.
>
> (2) If the testimony of Christ's disciples are examined, it shows Christ claimed not just that He is a Teacher or Prophet but that whoever has seen him has seen God. No man claims he is God unless he is a lunatic, a great liar like the devil, or really God himself. If one examines the life of Christ, one finds he is blameless, and that it is unlikely he is either a lunatic or the devil. As he has not left one with the option that he is just a great man (as a great man would not lie or be himself deluded that he is God), one is persuaded that he really is God. (CS Lewis, *Mere Christianity* (Collier Books, 1986).)
>
> (3) Despite the great persecution that they faced, and against all the other religions of the world and all the public sentiments, including the disapproval of the rulers of that time, the apostles asserted with one voice that Christ had risen from the dead, and was the only way to salvation. If they were deliberately propagating a lie, they could not have persisted in the face of all the opposition, and in the first place would be unlikely to group together to dream up such a lie considering that their lives during Christ's human lifetime showed them to be ordinary men who had fled when Christ was arrested. If they were deceived by others, they had every opportunity to re-examine their claims throughout their lives, yet they chose to suffer unto death. Also, they had no motives for lying. Even supposing the apostles were bad men who had to lie about their master's resurrection, why would they propagate a religion of the God who is Truth and assert there is hell? And if they did not believe in God or in hell, why would they forsake all possibilities of worldly honor and riches, and suffer unto death for what they all knew to be a lie? It is thus probable that they stated only the Truth, that they did know for sure that Christ rose from the dead as He appeared to them, that Christ's transforming love and power gave them the courage to endure. (Simon Greenleaf, *supra.)*

[150] Roger T Simonds, "The "Natural Law" Controversy: Three Basic Logical Issues" in (1960) 5 Natural Law Forum 132 at 132 writes:

> [W]e must not suppose that absolute verification is in question here. If the impossibility of absolute verification is to be held against normative laws, then it must also be held against "descriptive" laws such as those of mathematical physics. Yet no one is going to argue seriously that the methods of the natural sciences are "fallacious" because they involve the assumption of certain propositions which cannot be verified absolutely. There is no more reason to demand absolute verification in jurisprudence than there is in physics; in either case, the demand could be satisfied only by an empty formalism.

possibilities: We are created by a personal God or, we are the impersonal result of the Big Bang and Darwinian evolution. When we realise two possibilities, each possibly asserting a fact, the incidence of the burden is not uncontroversial. It does not necessarily lie with the theist.

The second way to counter the attack on natural law theory based on the rejection of God is to argue, as Grotius did, that it is not necessary to consider God in the formulation of a natural law ethics.[151] In Grotius's view, the ability to judge what things are harmful or agreeable is inherent in the nature of man. This is valid "even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him".[152] Grotius, however, has been criticized for being unconvinced in his own arguments against the necessity of considering God in the development of natural law ethics. It has been said that he "frequently appeals to the authority of God or divine law when supporting a moral claim of natural law".[153] Further, if one does not accept that we are all created by a divine Being, one might perhaps be arguing in the abstract when one claims that there is such a thing as the "nature of Man" or that certain principles are universally binding.[154] Perhaps then a step of faith is always required for natural law theory to be meaningful.

How does Finnis fare in resolving such objections to natural law's starting point? One may contend that Finnis' use of self-evidence as both his methodology *and* his starting point lends a vagueness to his theory that actually makes it more acceptable. This is contrasted with classical natural law theories such as Aquinas' which view human law as derived from God's law, thus making self-evidence only one of the methodologies (others include reason), and God the starting point. In rooting his theory in his methodology, Finnis leaves himself with fewer objections to deal with since the objections

[151] Giovanni Ambrosetti has also argued with regards to the interplay between Christianity and natural law theory:

> Fundamental human norms are elaborated on a purely philosophical basis, but account is always taken of well-defined theological concepts. And even when the starting point is a pronouncement of the Magisterium, the process will never be dogmatic because within the pronouncement is contained an underlying rationality. (Giovanni Ambrosetti, "The Spirit and Method of Christian Natural Law" in (1972) 16 American Journal of Jurisprudence 290 at 301.)

[152] Hugo Grotius, *Prolegomena to the Law of War and Peac*e (Liberal Arts Press, 1957) at 10.

[153] John F Kilner, "Hurdles for Natural Law Ethics: Lessons from Grotius" in (1983) 28 American Journal of Jurisprudence 149 at 159.

[154] In the rights discourse, it is common for the Christian ethicist to express the dignity of Man in terms of humanity being created in God's image. See, for example, Kieran Cronin, *Rights and Christian Ethics* (Cambridge University Press, 1992) at 253, and Frederick Crosson, "Religion and Natural Law" in (1988) 33 American Journal of Jurisprudence 1 at 17.

targeted at his starting point are also those targeted at his methodology, *ie,* those of relativism and non-cognitivism, which he would have to deal with anyway. Finnis does not have to prove additionally the existence of some higher order. But it could also be argued that by stopping at what he concedes to be the penultimate – the starting point of self-evidence, Finnis leaves his theory sounding rather "iffy". He concedes elsewhere that his theory of goods, whilst appearing to be objective and applying absolutely to all individuals, seems to lack something when one considers the entire humanity and notices how restricted or limited one's own participation (or even the participation of an entire commmunity) is. This "something" is a further reason, an uncaused cause, that would make sense of the participation of successive communities and of sacrifices that any individual makes and fit these into an overall pattern of the universe:

> [T]here is no need to labour the point that if God were revealed as the cause of all human goods, and as offering the gift of friendship with all human beings of every time and place, this fact would eliminate the subjectivity...of goods that seem merely relative to us, as individuals and communities apparently cut off from the goods and ills of countless other individuals and communities and from vast parts of a universe whose overall point we do not grasp. For, on the hypothesis that I am considering, we could be confident that the participation in human good(s) that we can realize by our own free choices is a good which will indeed "have a place" and "have a point" in the overall pattern and common good of the created universe – a pattern and common good not now understood by us, but understood and chosen by the same God who is responsible for all the goods that we can, at least partly, understand and value.[155]

The question that one is left with is whether, if indeed there is still something lacking in retreating only to the penultimate, Finnis' theory is superior to the Thomist who boldly admits the existence of God, leaves himself with something that not everybody would accept, but which if others accept would give a complete picture of the reason of existence and of human laws. Finnis ultimately retreats behind the same assumption. Where relativity and non-cognitivism are concerned, Finnis' starting point of self-evidence faces the same objections to the assumption of objectivity as the classical natural law theorist's starting point of God or an objective higher order. Still, if we accept that Finnis' methodology of self-evidence is an entirely different enterprise from that of moral reasoning, then arguably it would not meet with the same objections of relativism and non-cognitivism,

[155] *Supra*, footnote 25, at 150.

since no moral reasoning is involved. In this regard, it must be noted that Finnis said that the product of the nine requirements of practical reasonableness is morality. If so, even if this is a merely incidental product, it could be so because Finnis has again done the inverse of what the classical natural law theorist would do: Instead of reasoning from morality, Finnis has simply started by stating the goods, and the means to pursue the goods which, if chosen, would be moral means. His reasoning seems somewhat too slick and is surely not free of controversy if his theory involves essentially the same absolutist claims.

B. *Relative Practicability of Legal System Stemming from such a Starting Point*

Another question is whether Finnis fares any better in linking his methodology to the principles for framing a legal system. A main objection of classical natural law pertains to the practicability of a legal system stemming from such a starting point. If God is the Law Giver, and *lex humana* is to conform with His law, the question then arises as to how the issue of conformity is to be resolved in controversial areas as to the details of *lex humana.* Further controversy arises with the determination of *lex naturalis* which is not detailed by God. Where general principles are concerned there is one standard applicable to all and known to all. An illustration of this is the general principle that it is right and true to act according to reason. Where specifics are concerned in the realm of contingent matters into which human actions enter, one reasons from general principles to details by employing practical reason. There is, however, neither the same standard of truth or rightness, nor is the conclusion known to all. The further one goes into detail, the more the conclusion is open to exceptions. For instance, there is a principle that debts must be repaid, but where the repaid sum is being used to wage war against one's country, it may be irrational to repay the sum.

There are several objections to the practicability of natural law theory. First, there is the problem of interpretation and definition and the subjectivity therein – general principles are true and known to all, yet in the manifold situations of human interaction, one is inevitably more concerned about specific conclusions. In the event of conflict of opinion, who has the authoritative say on what the specific details are?[156] It begs the question to say that the

[156] As one writer puts it: "The heart of the trouble is its failure to provide any clear and convincing principle ordering priorities among the multitude of discrete goods." (George W Constable, "What Good is Natural Law? A Lawyer's Perspective" in (1981) 26 American Journal of Jurisprudence 66 at 66.)

[157] George W Constable, "Who can determine what the natural law is?" in (1962) 7 Natural Law Forum 54 at 58.

"reasonable man" has the correct view, for we must then still determine who the reasonable man is.[157] Second, supposing one depends on both the perception of natural law from one's reason and conscience, as well as the general principles of divine law enunciated in Scriptures, there arises the question of whether Man-made specific rules of law should be totally congruent with divine law. For example, while under the Seventh Commandment of Mosaic Law one is not to commit adultery, there remains the question of whether extra-marital affairs should be considered criminal under the law or whether it should be a moral issue only. The flip side of this is whether Man-made law can prescribe a higher standard than that which is explicit in divine law. For example, while the Ninth Commandment states that one is not to give false testimony against one's neighbor, there is no explicit command to state the whole truth and nothing but the truth, though of course arguably there is no difference between the two. Third, the problem of subjectivity (despite all good will) in defining *lex humana* is exacerbated by the possibility of the perversion of reason.[158] This possibility is by no means imaginary if one considers that the Thomist who devoutly holds that God is the Law Giver is also one who accepts the Judeo-Christian view of Man as fallen. Thus, if the starting point is God, but an evil and fallen creature is the one coming up with specific laws, the question arises as to whether such a theory is workable.

Perhaps the attitude to these objections, quoting CS Lewis, lies in the view that the fact that a ship is sinking is no reason to allow it to be a floating hell while it floats. We can, and should, try our best. If God exists[159] and has entrusted the task of specifics to Man, He must have given Man

[158] Indeed, the famous distinction which Grotius draws between right reason and wrong reason has been criticised. While Grotius claims that the principles of natural law are "manifest and clear" if one pays "strict heed" to them as opposed to being self-interested, he says at the same time that it is natural for man to sin. John F Kilner wonders if this tendency to sin and be self-interested would thus mean that the "right reason" is "seriously jeopardized in most if not all people". *(Supra,* footnote 153, at 153-154.)

[159] The arguments for the existence of Aquinas' God have been considered in the previous section, "Comparison of Starting Points". See footnote 149.

[160] *Romans* 2:14-15. Or as St John Chrysostom put it: "In creating man at the beginning, God placed within him a natural law. And what is this natural law? He structured our conscience and made it so that our knowledge of good acts and those which are not so, was self-learned (autodidakton)." (Quoted by Stanley S Harakas, "Eastern Orthodox Perspectives on Natural Law" in (1979) 24 American Journal of Jurisprudence 86 at 89.)

[161] Thus, Paul wrote that even when he acknowledged the law of God with his mind, with his flesh he served the law of sin so that the good that he wanted to do he sometimes did not do, while the evil that he did not want to do, he found himself sometimes doing. See *Romans* 7:22, 19 and 15. It has sometimes been queried whether Paul in fact adopted such views on conscience from the stoics. See for example, Stanley S Harakas, *ibid,* at 94-97. The Christian answer is: "All Scripture is inspired by God and profitable for teaching, for

a conscience in the form of the law "written on the heart",[160] which indicates to fallen Man what sin is.[161] We have been left the freedom to fail, but at the same time, "while the mind may not always be able to rationalize, the heart still guides, just as an inspiration or "feel" guides the artist in determining the appropriate strokes of his brush".[162] In practice, if one accepts natural law theory and the biblical view of the law written on the heart, the problems of concretization may not be insurmountable.[163] While there may be problems, for example, in deciding whether certain private acts are moral, if broadly speaking only the relations between Man and Man are within the domain of the law, then the subjectivity in concretizing the general principles may not be that great. The single principle enunciated by Jesus (which presumably Finnis will subscribe to) as one that "sums up the Law and the Prophets", also referred to as the Golden Rule,[164] serves as a guide: "(I)n everything, do to others what you would have them do to you ..."[165] No right-thinking person will want to be assaulted, and when one wrongs a fellow human being, one would hope that the victim resorts to legal means to get any compensation rather than seeking revenge. One is being simplistic here, and given the perversion of reason and the selfishness so typical of fallen beings, it is not hard to imagine the self-interested arguments one could make against the single principle mentioned. Perhaps this egocentricity of human beings, which manifests itself in the problems of concretizing the general natural law principles and which makes natural law theory seem unworkable, is really a symptom of the rejection of the "first and greatest commandment", one of the two on which "(a)ll the Law and the Prophets hang" (again mentioned as presumably Finnis would agree with). Elsewhere, Jesus has said:

> "Love the Lord your God with all your heart and with all your soul and with all your mind." This is the first and greatest commandment. And the second is like it: "Love your neighbor as yourself." All the

reproof, for correction, for training in righteousness, that the man of God may be adequate, equipped for every good work." (2 *Timothy* 3:16-17, NASB).

[162] *Supra,* footnote 156, at 79.

[163] For an example of how theology is relevant to formulation of a concept of law, Frank S Alexander starts with the concepts of individuality, community and purpose. See Frank S Alexander, "Beyond Positivism: A Theological Perspective" in 20 Ga L Rev 1089.

[164] See, for example, Mark Greenlee, "Echoes of the Love Command in the Halls of Justice" in (1996) XII Journal of Law & Religion 255 and Michael J Perry, "Moral Knowledge, Moral Reasoning, Moral Relativism: A "Naturalist" Perspective in (1986) 20 Ga L Rev 995 at 1016.

[165] *Matthew* 7:12, NIV.

[166] *Matthew* 22:37-40, NIV. For an interesting article on the second commandment from the lawyer's point of view, see Mark B Greenlee, *supra* footnote 164.

> Law and the Prophets hang on these two commandments.[166]

Indeed, because of the rejection of God, the abstract guidance of the heart will always, as one writer puts it, "sound too startling, too revolutionary, too idealistic, too unworldly, for the temper of our pragmatic, affluence-minded times".[167] After all, most live by *sight* and *not* by *faith.*[168]

Further, a legal system rooted in vague principles carries with it the danger associated with lofty ideals. When one acknowledges this higher order whilst at the same time admitting that the only spokesman for this higher order is a fellow human being, there is the danger of oppression from an equal who continually justifies irrational behavior by reference to a higher being. This argument is in a way tied to the foregoing, but hits not so much at the practicability of the legal system borne of such a theory as at the danger of religious or moral fundamentalism (in the pejorative sense of the word). After all, if law remains separate from morals, the ordinary man can still sit back and criticize it. Once viewed as inextricably linked to morals, however, intolerant fundamentalist sentiments could easily be aroused.[169]

Is Finnis' theory any better in this respect? Notably Finnis criticizes Aquinas for his failure to relate his first principles to the formulation of law:

> [B]etween those first principles and *moral* norms such as we find in, say, the Decalogue there is a logical space, which is filled by a process of "derivation" or inference. The derivation or inference is in some cases immediate and obvious; but in others it requires wisdom, *ie,* a reasonableness not found in everyone or even in most people. Here, then, is the gap which Aquinas failed to fill. His work was theology, not philosophical ethics...The history of moral philosophy, especially in the centuries during which it has sought to distinguish its method from the method proper to theology, is the history of a search for the

[167] *Ibid.*

[168] I play on the words in 2 *Corinthians* 5:7, where it is written: "We live by faith, not by sight."

[169] Or as CS Lewis puts it:

> The loftier the pretensions of the power, the more meddlesome, inhuman and oppressive it will be. Theocracy is the worst of all possible governments. All political power is at best a necessary evil: but it is least evil when its sanctions are most modest and commonplace, when it claims no more than to be useful or convenient and sets itself strictly limited objectives. Anything transcendental or spiritual, or even anything very strongly ethical, in its pretensions is dangerous, and encourages it to meddle with our private lives. "Lilies that Fester" in *Christian Reunion and Other Essays* (Fount, 1990) 22-44.

[170] *Supra*, footnote 25, at 69-70.

missing *intermediate principles.*[170]

Are Finnis' nine principles of practical reasonableness[171] the more convincing missing link? Finnis does not adequately link his concept of self-evidence to his nine principles of practical reasonableness, and further falls into the trap of non-exhaustive listing of principles. In rooting the basis of the legal system in practical reasonableness rather than morality, perhaps the problem of arbitrariness substitutes for the danger of fundamentalist moralizing. Further, insofar as Finnis' theory is premised on a claim to truth and rightness, it is arguably just as "arrogant" in its absolutist stance. Indeed, without judging the merits of Finnis' claim, one should mention that Finnis rejects certain kinds of pluralism: " '(P)lural-ism' of opinion on matters basic to the common good is a deficiency, an evil, something to be regretted – not something to be held up as a standard."[172]

C. *Relative Internal Coherence of Theory*

According to Aquinas, the proper object of the law is the well-being of the whole community. Its first and principal object is the "ordering of the common good". The "well-being of one man is not a final end, but is subordinate to the common good". But this smacks of utilitarianism and seems to weaken Aquinas' theory in so far as he claims that God is the starting point. After all, the Christian viewpoint is that society is for Man and not Man for society[173] (although this does not mean that one subscribes to the extreme form of Western liberalism).

In Aquinas' defence, he speaks of the duty of those "charged with the care of the community". The "common good" is not the utilitarian one where the "greatest number" dictates what "happiness" means. Rather, he had in mind a society of Christians under the charge of a God-fearing sovereign

[171] *Ibid,* at 74, he claims these are his intermediate principles, though of course this is obvious to us from his reasoning *per se* without any specific statement.

[172] John Finnis, "Unjust Laws in a Democratic Society: Some Philosophical and Theological Reflections" in (1996) 71 Notre Dame L Rev 595 at 596. Rejection of certain worldviews is not uncommon in the "framework" school. Rawl's idea of justice also requires the rejection of "unreasonable comprehensive doctrines" *(Political Liberalism* (Columbia University Press, 1996)).

[173] Lord Denning, for example, in *The Influence of Religion on Law* (1997) at 47 quotes William Temple:

> The primary principle of Christian Ethics and Christian politics must be respect for every person simply as a person. If each man and woman is a child of God, whom God loves and for whom Christ died, then there is in each a worth absolutely independent of all usefulness to society. The person is primary, not the society: the State exists for the citizen, not the citizen for the State.

body. Thus when he speaks of "common good", he speaks of that identified by reference to Scripture. This does away with any apparent inconsistency in his theory. However, insofar as Aquinas' theory is not practicable in a secular society where not all citizens subscribe to the same or even similar beliefs, Finnis' theory is apparently superior in that it is capable of being imported into a secular context.

IV. Conclusion

Finnis begins with the prescriptive aim characteristic of a natural law theory, which "may be undertaken, as this book is, primarily to assist the practical reflections of those concerned to act, whether as judges or as statesmen or as citizens."[174] The object has been to assess Finnis' success, in terms of the justification he provides.

Finnis' starting point of self-evidence is less objectionable to atheists and agnostics, and he avoids the usual controversy by making God his conclusion instead of his premise. His minimalism, and his ingenuity in presenting a methodology that does not appear to allow any arguments outside the enterprise, are attractive points. But accepting his methodology appears to require a prior rejection of, *inter alia,* relativism and non-cognitivism. Further, the concept of self-evidence is itself a source of controversy in philosophy. In any case, his insistence on the clarity of results from the methodology seems too arbitrary, too glib. If the failure of classical natural law theorizing was due to a failure to distinguish between faith and reason so that those who do not share the faith cannot but react with distrust,[175] then insofar as it requires faith to accept Finnis' claim of self-evidence, Finnis' theory falls into the same trap, though philosophically instead of religiously. Finnis also does not seem to be very sure whether his theory (and concepts like "authority" and "practical reasonableness") can truly be

[174] Finnis, at 18.

[175] Philip Soper, "Some Confusions About Natural Law" in (1992) 90 Mich L Rev 2393 at 2405:

> Thus, if the test for truth in a natural law theory is that a proposition is "self-evident," those who disagree seemingly must admit to being either immoral or stupid. The resulting perception of self-righteousness may explain why a hostile reaction to the term natural law arises even when the proponent intends no particular theological connection.

But he does continue:

> (I)t should be clear that this aversion to natural law is not a justified reaction to the theory itself but is, at best, a plausible response to particular versions of the theory or to the zeal with which particular advocates of natural law press their views. (At 2406.)

[176] I use the word "apparent" here as it is arguable that God is Finnis' premise rather than conclusion.

understood without his apparent[176] "conclusion" of God. Perhaps Finnis is just trying to be acceptable to theorists from all camps by being as minimalistic as possible.

Despite his criticism of Aquinas' failure to link his starting point and principles adequately to his structuring of a legal system, Finnis is perhaps similarly guilty, although he does attempt to provide some specificity. He does not adequately explain how the principles of practical reasonableness are arrived at, nor does he list them exhaustively in a way that clarifies the structure of the legal system. Ultimately, the retreat to the common good, justice and the idea of rights, and his belief that morality is the product of the nine principles of practical reasonableness, make the theory rather too nebulous. He may have done better simply by developing Aquinas's theory more "purely" by showing how one gets from divine, eternal and natural law to human law, especially as he derives his nine principles somewhat arbitrarily as well. In contrast, classical natural law theories merit consideration because, though perhaps requiring a step of faith[177] to justify them, they explain the phenomenon of law and provide a basis for legal reform, once that step of faith is taken. If Finnis' theory falls into the same trap of having an unacceptable starting point which overarches the theory and which cannot validate its substance, and further lack the authority that gives meaning to the enterprise of law, classical natural law theory deserves consideration by its opponents.[178]

Finnis' final retreat to God and his indirect statement in a subsequent article that practical reasonableness can be best understood in the light of the Uncaused Cause, despite his initial attempt to be minimalistic, only goes to show that whichever way we start or proceed, all explanation is in the end incomplete without the assumption of the existence of God. A penultimate explanation leaves one feeling there must be "something more out there", some further explanation. To stop there leaves the reader with an experience akin to discovering after the soup and the starter that the entrée will not be served after all. An assumption of God's existence, even if one cannot prove this to satisfaction, on the other hand, confers sense and a complete meaning on the enterprise of law. There is something we can gain from Dworkin's words:

[177] This is not to say that faith is inconsistent with Reason, for Aquinas drew on Aristotelian thought.

[178] Some theorists have indeed taken this approach of conceding that there is difficulty in concretizing the demands of natural law, but it still provides a more complete justification than rival theories:

> The advantage of natural law theorizing lies not in its character as a prolific generator of satisfying concrete answers to moral dilemmas. Instead, natural law provides more reasonably justified moral injunctions than do its putative rivals. (R George Wright, "Legal Obligation and Natural Law" in (1989) 23 Ga L Rev 997 at 1010-1011.)

> Scientists sometimes cannot explain their observations about the known universe except by assuming the existence of something not yet discovered – another planet or star or force. So they assume that something else does exist, and they look for it. Astronomers discovered the planet Neptune, for example, only after they realized that the movements of the planet Uranus could be explained only by the gravitational force of another celestial body, yet unknown, orbiting the sun still farther out.[179]

For a deeper explanation, one may have to assume (though not unreasonably) that God exists, and see if the explanation for the enterprise of law becomes more meaningful. If so, this may persuade one that God is indeed the explanation. If Finnis' theory leaves the reader wishing for more, and if Finnis himself finds that only God can confer absolute meaning on the enterprise but does not go as far as to insist that the secular portions of his book cannot be understood without the homiletic,[180] then his book, while not being a perfect version of natural law, may indeed be the inchoate version of, or launchpad for, a more complete theory of natural law.

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[179] Ronald Dworkin, *Life's Dominio*n (First Vintage Books, 1994) at 68.

[180] Finnis, at 343.

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