

Boston College Law School Digital Commons @ Boston College Law School

Boston College Law School Faculty Papers


11-27-2017

The Promotion of Personhood is a Principal Good of Law

Scott T. FitzGibbon

Boston College Law School, fitzgisc@bc.edu

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/lfsp>

 Part of the [Jurisprudence Commons](#), and the [Law and Philosophy Commons](#)

Recommended Citation

Scott T. FitzGibbon. "The Promotion of Personhood is a Principal Good of Law." (2017).

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

THE PROMOTION OF PERSONHOOD
IS A PRINCIPAL GOOD OF LAW

By Scott FitzGibbon¹

*"[T]he nature of law . . . must be sought in the nature of man."*²

Cicero, De Legibus, Book One

PART ONE: INTRODUCTION

A. The Thesis; Some Corollaries.

A great good promoted by a well constructed legal system is the protection and promotion of character. Many other purposes prove to be justifiable, if at all, based on their instrumentality to this good.

When guided by this thesis, jurisprudence brings the discussion of law – what law is and what law ought to be – into constant conversation with anthropology: the perennial inquiry which our species conducts into the nature of the person.

¹ J.D., Harvard. B.C.L., Oxford. Professor, Boston College Law School. Member of the Massachusetts bar.

This essay is copyright 2017 by Scott FitzGibbon. All rights reserved.

² "*natura enim juris explicanda nobis est eaque ab hominis repetenda natura . . .*". The term "*juris*," translated as "law" above, might also be translated "justice."

B. Some Pullbacks.

Other reasonable purposes can be identified. The law may protect animals and plants, for example, and not only to the extent that they are salubrious for humankind. The law may protect the physical health even of people who are incapacitated in such a way that their characters cannot further develop or deteriorate. The law may also protect and promote practices which are uniquely appropriate to its own time and place: the right to vote in a republic (not in a monarchy); the good of inheritance in a society with a strong kinship system (not, perhaps, in a different kind of social order). The good proposed here is not exclusive, but it is eminent and universal: it is a major one appropriately pursued by all legal systems.

Excuses and justifications may allow the law to neglect the goods here proposed. The law may reasonably refrain from promoting them on grounds of waiver, forfeiture, and just punishment. It may refrain in some instances because the matter is slippery and hard to adjudicate. It may refrain because the goods involved in a particular situation are immaterial, or because adequate substitutes are available to victims. Legal systems often apply a principle of parsimony, as they should.

Other normative orders than the legal may be used to promote the goods here identified. In some areas the social order or the family is better. In a republic with libertarian inclinations, individual responsibility is often the best reliance for the promotion of character. The legal order, when it is relied upon, may approach its mission indirectly rather than by direct prohibitions and suasions.

Other types of person than the standard and familiar must be taken into account. Human character does not take the same form in each of us; new ones may emerge in future times. Elastic and flexibility, allowing for these possibilities, is afforded at one or two places in this Essay.

PART TWO: LAW AIMS AT THE PROMOTION OF GOODS

I. Law Aims at Good.

Law involves and serves goods: ones which make law worth developing and taking as a guided to conduct, studying and improving, and with upholding in some emergencies at some risk to oneself. We would make little progress understanding medicine if we refused to take health into account, or food if we ruled out health and nourishment. We can start with understanding that laws,

also, have some purposes and involve some goods. Why else would anyone bother to frame, apply, enforce or obey them?

Some, however, have endorsed a softer sort of skepticism and asserted that even the most fundamental purposes of law are multifarious and fluid, shifting according to time and place, and variant from one doctrine to another, one judge to another, and perhaps even one citizen to another. Ronald Dworkin has said this about governments:

“Governments have goals: they aim to make the nations they govern prosperous or powerful or religious or eminent; they also aim to remain in power. They use the collective force they monopolize for these and other ends.”³

Much the same has been asserted about laws.

Cognate to this softer sort of skepticism is the assertion that a doctrine or institution in no way implicates its status as a *legal* one, however little it may instantiate goods. Such is a central thesis of some in the positivist tradition. Thus John Austin:

“[T]o say that a law is not binding or not really a law because of its pernicious character is to talk stark nonsense. The most pernicious laws, . . . are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by a sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object . . . the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity.”⁴

A theory of law along these lines runs into difficulties in accounting for the traction which law exerts. A theory which makes law the commands of an uncommanded commander – the “gunman writ large” – but offers no coherent account of why he gives his commands, nor why, other than out of fear of sanctions, people obey him, will find it difficult to account for the obligatory character of legal provisions when they are not credibly backed up by threats.

³ LAW’S EMPIRE 33 (1977).

⁴ PROVINCE OF JURPRUDENCE DETERMINED Lecture V (1832) (page 158 of the edition edited by Professor Rumble).

Such are the telling criticisms advanced by H.L.A. Hart⁵ and Hans Kelsen.⁶ Someone who can avoid sanctions by fleeing the jurisdiction seems to have no legal obligation to obey the rule he flees, nor has that rule, it seems, any sort of traction upon him. Rules such as jurisdiction-conferring norms which, though laid down by the State, are not accompanied by a threat, seem to pose the same sort of problem.

II. What Sort of Goods Underlie Law: Some Criteria.

Let me adduce five; others will readily suggest themselves.

First, law must surely be based on *important* goods; not mere desiderata. No one thinks that pleasant elevator music and the like can be the entire story.

Second, law – at least the kind of law adopted and enforced by a country or some other political community – must be based on goods which are eligible to be promoted by a common normative system. Being lucky, or of royal ancestry, may perhaps be good things, but they cannot be promoted, either by an individual or by his society.

Thirdly, law, seeking as it does to be stable and internally consistent, is best supported by a normative order which promotes those characteristics. It is doubtful, for example, that law could be based both on the good of rights, choice and freedom and at the same time base itself on an ethic which commended the promotion of slavery. It is doubtful that legal stability and consistency could be promoted based on an ethic which recommended inconstancy and constant flux.

Fourth, it would seem to be a merit in a candidate for the good underlying law that it commend itself to human nature, and even perhaps to the sensibilities of the community of people to which it applied. General self-debasement and an early death can be rejected as important underlying goods on this ground.

Finally, it is here proposed that law ought to be pursued purposes and be based on goods which are not merely instrumental, but rather are *final* or, what is here called, “fundamental. The distinction is here explained:

Some things are good only instrumentally – in other words, for the sake of something else. But things of that sort -- “instrumental goods” -- cannot be the entire story. There must be at least one good of another sort – something which is good not (only) for the sake of something else, but is instead worth having or

⁵ In *The Concept of Law* (1961), *e.g.* at 26 *et seq.*

⁶ In *Reine Rechtslehre* (1934) and its extension in the second edition (1960); both editions have been translated into English.

doing in itself. Otherwise, what would instrumental goods ultimately be good for?⁷ That other sort of good is basic, and is here called “fundamental good.”

I deploy the “dispensability criterion.” If you think something is good, but would dispense with it if nothing of any value would ensue, then you identify the dispensable thing as of instrumental value only. If you would dispense with a thing if anything worthwhile it might lead to could be more readily obtained without it, then you identify the dispensable thing as of instrumental value only. If you would be *reasonable* in dispensing with it under those circumstances, then you *reasonably* conclude that it is of instrumental value only.

A further distinction might be noticed: that between things which are *realistically* dispensable and those whose dispensability can be discerned only after an imaginative leap into a world quite different from the one we inhabit. Your bicycle is obviously dispensable (you could walk or take a taxi). *Any and all* means of locomotion can be anointed as dispensable only if you take the leap, for example by supposing the availability of “beaming up.” Potatoes are obviously dispensable; food or nourishment is dispensable only if you imagine yourself to be pure spirit. We might call the former goods “realistically dispensable” and the latter sort “only hypothetically dispensable.”

⁷ Thus ARISTOTLE, NICOMACHEAN ETHICS 1094a 17-22 (W.D. Ross, trans., J.O. Urmsom, rev.), in II THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 1729, 1729 (Jonathan Barnes, ed., 1984):

“If, then, there is some end of the things we do, which we desire for its own sake (everything else being desired for the sake of this), and if we do not choose everything for the sake of something else (for at that rate the process would go on to infinity, so that our desire would be empty and vain), clearly this must be the good and the chief good.”

Aristotle advances the same argument in METAPHYSICS 994b 9 -15 (W.D. Ross, trans.), in II THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 1552, 1571 (Jonathan Barnes, ed., 1984):

“[T]he *final cause* is an end, and that sort of end which is not for the sake of something else, but for whose sake everything else is, so that if there is to be a last term of this sort, the process will not be infinite; but if there is no such term there will be no final cause. But those who maintain the infinite series destroy the good without knowing it. Yet no one would try to do anything if he were not going to come to a limit. Nor would there be reason in the world: the reasonable man, at least, always acts for a purpose, and this is a limit, for the end is a limit.”

This Essay will employ a broadened definition of “fundamental good” which makes it include instrumental goods whose dispensability is hypothetical only: goods, such as food, which could not, realistically, be dispensed with.

Another key to the distinction between instrumental and fundamental goods might be called the “dependency criterion.” Instrumental goods would cease to be good at all were final good to be removed. Instrumental goods take their appropriate shape or character from the final goods towards which they aim. (What time you leave for work and how fast you walk depends on what your object is.).

PART THREE: THE THESIS; AN EXEMPLAR

I. The Central Question.

– What goods are worthy of legal promotion?

It is here proposed that the most important goods relate to the nature of the person. A general statement of the thesis is this: if you could not be fully a person without something -- your life, for example, or your mind – that thing is a part of fundamental good and is worthy of legal promotion insofar as it can be promoted by a common normativity. If you could not be fully a person without *doing* something – thinking, for example – that activity would seem also to be a part of fundamental good and worthy of legal promotion. Perhaps we could add: if you would be drastically different if deprived of something (your memory, for example) or prevented from ever again engaging in some project (remembering things, for example), you deserve protection from being permanently deprived of that thing or permanently thwarted in performing that project; you deserve legal support in pursuing it.

Plainly, this thesis opens out into an inquiry as to the especially important attributes and projects of a person. This paper pursues that inquiry. Reason, reasoning, and knowledge are proposed as central. This brings the discussion into close touch with the classic tradition of ethical anthropology.

II. Winston and Julia.

You remember the situation portrayed in George Orwell’s novel *Nineteen Eighty-Four*: an England subject to Big Brother, whose ever-watching face was posted on all walls; an England where the population was fearful of a large and all-powerful “Party,” and was constantly under observation through Televisors in every corner. You remember Julia and Winston: their loathing of the regime;

their secret love of one another; their rendezvous in a hidden room behind a bookstore; and their terrible vulnerability.

You remember that they were detected, captured, and separately interrogated. You remember Winston's intolerable, interminable ordeal of days or weeks, and his final capitulation:

"The circle of the mask was large enough now to shut out the vision of anything else. The wire door was a couple of hand-spans from his face. The rats knew what was coming now. One of them was leaping up and down, the other, an old scaly grandfather of the sewers, stood up, with his pink hands against the bars, and fiercely sniffed the air. Winston could see the whiskers and the yellow teeth. Again the black panic took hold of him. He was blind, helpless, mindless. * * *

"The mask was closing on his face. The wire brushed his cheek. And then--no, it was not relief, only hope, a tiny fragment of hope. Too late, perhaps too late. But he had suddenly understood that in the whole world there was just ONE person to whom he could transfer his punishment -- ONE body that he could thrust between himself and the rats. And he was shouting frantically, over and over.

"Do it to Julia! Do it to Julia! Not me! Julia! I don't care what you do to her. Tear her face off, strip her to the bones. Not me! Julia! Not me!"

You probably remember the consequences for Winston's and Julia's love:

"They sat down on two iron chairs, side by side but not too close together. He saw that she was about to speak. She moved her clumsy shoe a few centimetres and deliberately crushed a twig. Her feet seemed to have grown broader, he noticed.

"I betrayed you,' she said baldly.

"I betrayed you,' he said.

"She gave him another quick look of dislike.

"Sometimes,' she said, 'they threaten you with something -- something you can't stand up to, can't even think about. And then you say, 'Don't do it to me, do it to somebody else, do it to so-and-so.' And perhaps you might pretend, afterwards, that it was only a trick and that you just said it to make them stop and didn't really mean it. But that isn't true. At the time when it happens you do mean it. You think there's no other way of saving yourself, and you're quite ready to save yourself that way. You

WANT it to happen to the other person. You don't give a damn what they suffer. All you care about is yourself.'

"All you care about is yourself,' he echoed.

"And after that, you don't feel the same towards the other person any longer.'

"No,' he said, 'you don't feel the same.'"

You certainly remember the very last sentences of the book:

"[Winston] gazed up at the enormous face. Forty years it had taken him to learn what kind of smile was hidden beneath the dark moustache. O cruel, needless misunderstanding! O stubborn, self-willed exile from the loving breast! Two gin-scented tears trickled down the sides of his nose. But it was all right, everything was all right, the struggle was finished. He had won the victory over himself. He loved Big Brother."

You can see, I am sure, that Winston and Julia were terribly violated. This Essay seeks to establish the theoretical basis for this conclusion.

PART FOUR: WHAT PURPOSES; WHAT GOODS?

What then, are the goods on which law might be based, and the purposes which it might pursue? This Part Four aims to answer that question.⁸

I. Some Approaches Not Here Endorsed.

Here follow some possibilities not here endorsed, for reasons stated.⁹ (Time and space permit the examination of only three.)

A. Pleasure and the Absence of Pain.

Pleasure and the absence of pain have been recurrently adduced as the fundamental good.¹⁰ Such an account is convincingly undermined by a famous "thought experiment" advanced by Robert Nozick in *Anarchy, State and Utopia*:

⁸ Some of this section of the Essay is guided by and in part tracks the brilliant and telling arguments presented in the *Nicomachean Ethics*.

⁹ Not all are presented as bases for law. Many authors endorse one or another set of goods as a matter of pure ethics.

¹⁰ Thus John Stuart Mill in Chapter II of UTILITARIANISM explicated "[t]he creed which accepts as the foundation of morals 'utility' or the 'greatest happiness principle'.

"Suppose there were an experience machine that would give you any experience you desired. Superduper neuropsychologists could stimulate your brain so that you would think and feel you were writing a great novel, or making a friend, or reading an interesting book. All the time you would be floating in a tank, with electrodes attached to your brain. Should you plug into this machine for life, preprogramming your life's experiences? Of course, while in the tank you won't know that you're there; you'll think it's all actually happening. Others can also plug in to have the experiences they want, so there's no need to stay unplugged to serve them Would you plug in? *What else can matter to us, other than how our lives feel*. . . ?"¹¹

If you conclude, as most people do, that you would stay out of the machine, that almost certainly is because you identify something other than pleasure (or any other experience) as a dimension or kind of final good. (A similar line of thought is taken by Aristotle when he observes that "no one would choose to live with the intellect of a child throughout his life, however much he were to be pleased at the things that children are pleased at").¹²

Another telling argument, to similar effect, is provided by Socrates, as reported by Plato in the *Philebus*:¹³

"Soc. Would you choose, Protarchus, to live all your life long in the enjoyment of the greatest pleasures?"

Pro. [Protarchus] Certainly I should.

Soc. Would you consider that there was still anything wanting to you if you had perfect pleasure?"

Pro. Certainly not.

. . . [It] holds that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure."

¹¹ At 42-43 (1974)(emphasis in the original).

¹² NICOMACHEAN ETHICS 1174a 1-3 (W.D. Ross, trans., J.O. Urmson, rev.), in II THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 1729, 1855 (Jonathan Barnes, ed., 1984)(elision in the text as quoted; note omitted). (Where this translation renders "intellect of a child," others use the term "mind of a child", e.g. H. Rackham (1934) and J.E.C. Welldon (undated); Terence Irwin (1985) uses the phrase "child's [level of] thought" (bracketed material from Irwin).

¹³ 21b – c (Benjamin Jowett, trans), <http://classics.mit.edu/Plato/philebus.1b.txt> .

Soc. Reflect; would you not want wisdom and intelligence and forethought, and similar qualities? would you not at any rate want sight?

Pro. Why should I? Having pleasure I should have all things.

Soc. Living thus, you would always throughout your life enjoy the greatest pleasures?

Pro. I should.

Soc. But if you had neither mind, nor memory, nor knowledge, nor true opinion, you would in the first place be utterly ignorant of whether you were pleased or not, because you would be entirely devoid of intelligence.

Pro. Certainly.

Soc. And similarly, if you had no memory you would not recollect that you had ever been pleased, nor would the slightest recollection of the pleasure which you feel at any moment remain with you; and if you had no true opinion you would not think that you were pleased when you were; and if you had no power of calculation you would not be able to calculate on future pleasure, and your life would be the life, not of a man, but of an oyster or pulmo marinus. Could this be otherwise?

Pro. No.

Soc. But is such a life eligible?

Pro. I cannot answer you, Socrates; the argument has taken away from me the power of speech.”

These passages establish that there is more to fundamental good than pleasure. (True, these lines of thought mention only pleasure, but a criterion of the good which looks to pain – the absence of pain – can readily be rejected based on modifications of the same approaches.).

There really can be no such thing as “pleasure alone.”¹⁴ Neither pleasure nor any other experience can exist without a being to experience it. Indeed, not any sort of being, but one with the power to think, at least to the extent of receiving and grasping the pleasure. For Nozick’s experience machine to work,

¹⁴ This insight may be implicit in the passage from the *Philebus* quoted above.

the person in it has to have a mind (“you will *think* it’s all actually happening.”¹⁵). This dimension is prior. Pleasure depends on it, would not arise without it, and would disappear if it ceased to exist.

All of this leads to the conclusion that pleasure and the absence of pain, though they may be part of noninstrumental good, are at most secondary parts of it. (Having conceded that, we are left looking for some other basis upon which to condemn O’Brien and the Party’s normative order for malfunctioning, as obviously they did. More will be said about this below.)

B. Respect; Honor; High Regard.

Another possibility is that the good for people consists in being respected, or treated with respect, or regarded or treated with concern. Is respect or concern the noninstrumental good, or a major part of it?

Respect and concern are odd candidates because, unlike pleasure, they are attributes not of the person whose good is at issue but instead find their foundations in the thoughts and doings of other people. They are not, so to speak, *inside* the person. We apprehend that whether or not a person’s life or doings are basically good depends mainly on what he himself is or does, and expect outside parties to enter into the matter only insofar as they contribute or detract. Such is not the case with respect or concern.¹⁶ Evidently there is something *relational* about concern and respect, since they implicate the connection between the person whose well-being is at issue and others – perhaps even between him and his entire society.

A second ground for doubt looks to the universal understanding that a person ought to be respected or honored *owing to merit*: respected, and honored, that is, because what he has done or what sort of a person he is. This raises the suspicion that someone who identifies honor and respect as the fundamental good really, upon examination, will be found to value something more basic still: the merits.

Another reason to doubt looks to the instrumental importance of concern and respect. Upon close examination, it will usually develop that someone craves respect and dislikes its absence owing to the likely consequences. Disrespect may lead to trouble (for example, loss of employment); respect is

¹⁵ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 43 (1974)(emphasis added).

¹⁶ Unless we take these terms to refer to *self-respect* and concern *for oneself*. Such is certainly not the intention of those who comment respect and concern as a basic good, and will not be the subject of the present discussion.

likely to lead to good outcomes (promotion; a raise in salary). More fundamentally, disrespect may confirm one's worst fears about one's worth; respect, on the other hand, reassures. In all of these ways, respect is of instrumental value.

Indication that we value concern and respect for instrumental reasons can be found in the circumstances that when we inquire as to *whose* respect and concern we seek, the answer is much affected by who they are and what they know or may do. We care more about the opinions of those who can help or hurt us, less about the opinions of those who cannot; more about the opinions of the wise and well informed, less about the attitudes of fools and strangers. We would dispense with caring much about the concern and respect which Joe displayed or possessed if he ceased to be our boss, and still the more readily if he also developed a mental or physical condition which impaired his judgment and memory. Again: in a society which had descended into a condition of malice and degradation, a person might, like Dietrich Bonhoeffer or Cardinal Stepinak, choose a way of life which incurred *disrespect*.

For these reasons, we must set aside honor and respect as the fundamental goods.

Respect is central in many of the writings of Ronald Dworkin, who emphasized "equal concern and respect."¹⁷ *Equality* of respect is especially problematic, since respect normally is accorded for merit (that's the main reason we value it) and merit is not the same for all.¹⁸

¹⁷ Dworkin writes:

"No government is legitimate which does not show equal concern for the fate of all those citizens over whom it claims dominion. Equal concern is the sovereign virtue of political community – without it government is only tyranny"

RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 1 (2000). Further:

"Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting upon intelligent conceptions of how their lives should be lived. Governments must not only treat people with concern and respect, but with equal concern and respect."

RONALD DWORKIN, LAW'S EMPIRE 272-73 (1977).

¹⁸ Compare STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY 120 *et seq.* (2006), proposing the categories "recognition respect" and "appraisal respect." Recognition respect is to be

C. John Finnis' Basic Values.

Finnis presents seven “basic values” in his book *Natural Law and Natural Rights*. The list went through revisions, but Finnis elected the following one as “best:”¹⁹

“(1) *knowledge* (including aesthetic appreciation) of reality; (2) *skilful performance*, in work and play, for its own sake; (3) *bodily life* and the components of its fullness, viz. health, vigour, and safety; (4) *friendship* or harmony between persons in its various forms and strengths; (5) the sexual association of a man and a woman²⁰ . . . call it *marriage*; (6) the good of harmony between one’s feelings and one’s judgments (inner integrity), and one’s judgments and one’s behavior (authenticity), which we can call *practical reasonableness*; (7) *harmony with* the widest reaches and most *ultimate source* of all reality, including meaning and value.”²¹

This approach satisfies many of the criteria adduced above: it commends important goods; goods which are fundamental and not merely instrumental; goods which are susceptible of being fostered by a civic order. Furthermore, all

awarded not because of special merit but as “the fitting response to dignity” dignity being defined as the authority of an equal: “the standing to make claims and demands of one another as equal and free rational agents.” *Id.* at 120-21. It is “what we owe to each other as equal moral persons.” *Id.* at 122. Appraisal respect, on the other hand, is “esteem that is merited by conduct or character.” It is “moral esteem: approbation for her as a moral agent.” *Id.*

¹⁹ Postscript to *Natural Law and Natural Rights* (2d ed. 2011) at 448 (This book and edition are hereinafter referred to as “*Natural Law and Natural Rights*.”). Finnis indicates that “goods” might be a better term for what he means than is “values,” but uses the phrase “basic values” *passim*, e.g. at 442.

²⁰ The elided words are: “which, though it essentially involves both friendship between the partners and procreation and education of children by them, seems to have a point and shared benefit that is not reducible either to friendship or to life-in-its-transmission and therefore (as comparative anthropology confirms and Aristotle came particularly close to articulating [e.g. Aristotle, *Nicomachean Ethics* VIII.12: 1162a15-29] not to mention the ‘third founder’ of Stoicism, Musonius Rufus, should be acknowledged to be a distinct basic human good,”. (The material between brackets is present, bracketed, in the original).

²¹ This appears in the Postscript to *Natural Law and Natural Rights* at 448 (emphasis in the original). An earlier list of basic goods, on page 90, read as follows: “life, knowledge, play, aesthetic experience, friendship, practical reasonableness, and religion.”

]

of them are well known and much prized, in our society and in almost all enduring social orders. The approach does not (implausibly) elevate the feelings to a prominent position, nor base the good of one person on the honor or respect he is accorded by others.

I offer four lines of criticism.

The first, and most fundamental, criticism notes that some of the values on the list are conditions, without apparent regard to how they are achieved or exercised, whereas that others are activities, without great attention to why they are engaged in or what they are directed towards. Examples of the former are health, vigor, and harmony between one's feelings and one's judgments. Examples of the latter are skillful play and skillful work.²² Knowledge – a very important basic value indeed -- seems to fall into the former category; Finnis usually refers to it, true to the meaning of that term, as something one has or does not have. Reason – the processes of achieving, retaining, and perhaps deploying knowledge – is not separately listed.

Contrary to what Finnis apparently believes, the full good for people involves both a condition and the activities which appropriately produce it. This is reflected in the central Aristotelean formulation, which identifies the good as “activity in accordance with virtue,”²³ a phrase which could just as accurately be reconstructed as “the possession of the virtues and their exercise.”²⁴ This can clearly be demonstrated in the case of knowledge and

²² “Skilful performance, in work and play” – does come attached to a requirement as to what the person thinks, but this item is elusively identified only by the phrase “for its own sake.”

²³ 1098a 17 (per the translation by Terence Irwin. More fully, the phrase is “activity of the soul in accordance with virtue.”

²⁴ See *id.* at 1144a:

“We say some people who do just actions are not yet thereby just, if, for instance, they do the actions prescribed by the laws either unwillingly or because of ignorance or because of some other end, not because of the actions themselves, even though they do the right actions, those that the excellent person ought to do.”

To be sure, this passage asserts, not that those unwilling or ignorant people are *uneudaemonic*, but only that they are unjust. Towards completing the argument, consider another passage (*id.* at 1105a 29 *et seq.* (second interpolation in brackets by Irwin):

“[F]or actions in accord with the virtues to be done temperately or justly it does not suffice that they themselves have the right qualities. Rather, the agent must

the virtuous activities which produce it: both are needed as a condition to the full good's being achieved. It would not be so good to possess knowledge if one had acquired it through its having been drummed in by a pedagogue and retained and deployed it only so as to avoid the hickory stick. Still less would one participate fully in this sort of good if one was immersed for life in some sort of analogue of the Nozick machine, which the neuropsychologists wired so as to infuse you with a constant flow of information, none of it acquired by the exercise of your reason.

A second line of criticism focuses on the problem of ordering within the values. Knowledge again affords an example. Knowledge is surely a value; but knowledge of what sort? Finnis commends differentiation in a brief sentence, where he notes that it is better to know about the matters discussed in *Natural Law and Natural Rights* than to know how much ink was used to print it,²⁵ but he does not offer us a criterion. Knowledge of what sort; of what matters? Surely, knowledge of important, basic and weighty matters --- about the good, and especially fundamental good, not merely the instrumental good, for example – is more thoroughly a part of human wellbeing than is knowledge of trivia. (The wealthiest Englishman of one generation apparently devoted much of his life to the acquisition of information about the habits of rats.).

A similar problem appears in regards to the other basic values. Friendship affords a second example. Finnis acknowledges, as one must, that friendships are of different levels and types and involve different sorts of commitment, but he affords no basis for preferring one sort over another. Scrooge may have been a member of an affiliation of utility with Cratchett, but one would reasonably choose instead to be in a relationship like that of Mother Theresa with her religious sisters and her patients.

A third line of criticism relates to differentiating and discriminating, not within the basic goods but among them. Finnis tells us that “each may equally be reasonably be focused upon, and each, when focused upon, claims a priority of value. Hence, there is no objective priority of value amongst them.”²⁶

also be in the right state when he does them. First, he must know [that he is doing virtuous actions]; second, he must decide on them, and decide on them for themselves; and, third, he must also decide on them from a firm and unchanging state.”

²⁵ “. . . [I]t is more worthwhile to know whether the contentions in this book are true than to know how many milligrams of printer's ink are used in a copy of it.” *Natural Law and Natural Rights*, *supra*, at 62.

²⁶ *Natural Law and Natural Rights*, *supra*, at 93. This assertion is modified but not retracted in the Postscript (page 450).

The conclusion can only be that a man or woman who stands at a youthful crossroads, choosing between a life of skillfully playing pool and a life of studying legal philosophy, or one devoted to enriching friendships and participating in them, has no grounds on which to make the decision and might as well flip a coin.

Finnis' point here is not constructed on an exalted doctrine of choice, freedom, and the good of preference satisfaction. Those are not items on the list of basic values. Are we driven to a similar conclusion when the goods a person pursues are selected, not by him but by someone else – the state, for example, and the law? Finnis does not generally insist that an item on the list of values is required to be chosen by the person in order for him to participate in its goodness. What if the Party had chosen the “good” of “skillful work” for Winston without his consent, as indeed it likely did. Supposing the Party to have done this in Winston's early youth, before he was “focused” on some good of his own, would there be no way of criticizing the Party for having chosen badly?

The fourth line of criticism objects that the list of values is incomplete (whereas Finnis, while acknowledging that there are other values, asserts that those other values “will be found, on analysis, to be ways or combinations of ways of pursuing (not always sensibly) and realizing (not always successfully) one of the basic seven forms of good, or some combination of them.”²⁷). A significant omission is that of love. To be unable to love, not even to know what love is; or, knowing it, to be precluded somehow from ever putting it into action, would be a great privation and make one less than fully human. Finnis' list does not make a proper place for this sort of possibility.

To be sure, Finnis' list includes friendship, which, at least in its stronger forms, suggests love. There is a fairly extensive discussion of love in the notes to *Natural Law and Natural Rights* at 158, in which Finnis seems to say that friendship is a sort of stand-in for love, and is the better choice for his list because the term “love” has become too charged with “special Christian (agapeistic) . . . overtones” or with erotic or sentimental ones. This suggests three defenses for its exclusion:

First, the passage almost certainly asserts that friendship does the job well enough. This is manifestly not the case. Friendship requires mutuality of knowledge, benevolence and beneficence whereas love is possible even towards who does not reciprocate, or even know or wish or do well for the lover. Thus love may subsist without friendship: one may love a person who does not love one back – an enemy for example – or something nonhuman such as the truth or a great work of architecture.

²⁷ *Natural Law and Natural Rights*, *supra*, at 90.

Second, the passage tells us that the term “love” has been corrupted. This may well be the case, but the remedy for the scholar – since no better term than “love” is available – is to take the time to clarify.

Third, the passage tells us that the term has Christian or “agapeistic” overtones. I find this objection mystifying. *Agape* is the principal word for love in Greek; the highest sort. Its being the preeminent Christian virtue ought not to discredit it.

This leads us back to Winston and Julia. One of the great evils of the Party consisted of its depriving them of their love for one another and also, likely enough, their capacity for love of anyone (except perhaps Big Brother).²⁸

III. Fundamental Good: The Approach Here Commended.

The best approach, as here maintained, identifies as a fundamental good the possession of a certain sort of character and its effective exercise.²⁹ (If that sounds too constricted – if “certain kind of character” seems to imply a single model only – do not let that deter you from reading on. The theory allows for *variora*, as will emerge.).

It is for the sake of these elements that we would stay out of the experience machine. We would not choose to forfeit our minds -- our ability to apprehend, consider, grasp and remember; nor our use of our minds in considering and contemplating and in reaching conclusions; nor our ability to conform our actions to our conclusions; nor our use of that ability so as actually to act reasonably. We would not choose to forfeit other fundamental attributes of character.

Character traits, or some of them, will survive application of the dispensability criterion. To be sure, possession of a good character is

²⁸ A hybrid of the third and fourth lines of criticism notes that even if love were on the list, Finnis makes it clear that one might choose – without vulnerability to any reasonable criticism – a life which eschewed it, for example in favor of skillful play.

²⁹ Compare S. Matthew Liao, *Human Rights as Fundamental Conditions for a Good Life*, in *PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS* 79 (Rowan Cruft, S. Matthew Liao & Massimo Renzo, eds., 2015)(proposing at page 81 that human rights protect the “fundamental conditions” to a good life, and that a good life “is one spent in pursuing certain valuable, basic activities.” This Essay is to similar effect as regards activities, but identifies certain character traits as part of basic good. Liao makes them *conditions* to basic good, since they are needed in order to pursue basic activities. So indeed they are; but many character traits, notably those of the mind, are not only good as necessary for something else – not only instrumentally good -- but part of final good as well.).

instrumentally helpful (it helps your career, for example). But we would not dispense with it, though we had all the other goods. The same can be said of the exercise of character traits. This point is developed below.

This, then, leads on to the question of what attributes are best, basic, central to being human. This Essay pursues that question; but it first emphasizes the conclusion that this is the *right* question; that the perennial inquiries into what the law is and what the law should be, on the one hand, and into what persons are and how we should be, on the other, are best pursued in tandem. The nature of law, as Cicero put it, must be found in the nature of man.

What understanding of the nature of the person is best and most insightful; what best grounds the law? (Plainly one which recommended constant variation, as did Galen Strawson in a fairly recent article,³⁰ or which offered a thoroughly reductionist view of human identity and thus denied its persistence across time,³¹ would provide very shaky foundations.

This Essay proposes that fundamental good consists in possessing and exercising those character traits which are basic to the others (in a sense which will here be explained). Here follow some central instances.

A. Reason.

Reason is a basic trait: the abilities and qualities of the mind which enable a person to think clearly and to arrive at the attainment of knowledge.

That reason is a fundamental good can be established using the dispensability test. A clear, reason-pursuing, conclusion-grasping quality of mind is something we would not dispense with. Such is the lesson of the experience machine, the lesson of Aristotle's reference to the "intellect of a child," and the lesson of Plato's reference to the oyster or *pulmo marinus* (all quoted above). Losing one's mind, one loses a significant part of oneself.

That reason is basic is suggested by its involvement in the other goods. Love involves knowing the loved one. Courage involves knowing danger. Respecting others involves knowing them. Choosing Finnis' basic values requires the use of the mind.

As promised, this Essay endorses the insight that reason, like other qualities of character, has many dimensions and shows forth in different ways

³⁰ *Against Narrativity*, in *Real Materialism and Other Essays* (2008), https://www.academia.edu/328380/Against_narrativity_final_2008_version_auto=download.

³¹ See generally DEREK PARFIT, REASONS AND PERSONS (1982), emphasizing mental continuity and connectedness rather than (or perhaps as the true meaning of) personal identity.

in different cultures and among different individuals. Lincoln was reasonable. Newton was reasonable. Samuel Johnson was reasonable. Mother Theresa was reasonable.

A normative system miscarries when it deprives a person of reason. If O'Brien and the Party drove Winston mad, as they probably did, they in that way violated the precepts here advanced.

B. Reasoning.

Reason naturally leads on to reasoning, and that is proposed here as a second fundamental good. Actually to deploy reason for its obvious purpose: to gaze insightfully, to think clearly, to grasp propositions, to weigh evidence, to endorse conclusions, to draw inferences and apply them -- these are projects fundamental to human life. Since speech -- either aloud, or by way of interior discourse -- is basic to reasoning, a component of this fundamental good is the deployment of vocabulary and the formulation of coherent and telling propositions.

A normative system therefore miscarries when it greatly impedes clarity of thought. Such would be the effect, for example, of a project which obstructed a person's grasp or deployment of language and speech.

The normative system administered by the Party miscarried by the imposition of Newspeak (as described in the Appendix to this Essay).

C. Knowing.

Reasoning naturally leads on to the acquisition of knowledge, which is proposed here as a third fundamental good. Actually to know: to endorse insights, to sustain an understanding of things both particular and general -- is good, as it is to retain knowledge and to employ it and reenact it on what has been called the "stage of consciousness."

Nor is the good of knowing instrumental only. No reasonable person would dispense with knowledge, even under the unlikely circumstance that all other goods could be achieved without it. To be sure, many kinds of knowledge are instrumental to action and its achievements, but we would hold onto our knowledge even were this not the case. We prize speculative insights, even those which have no practical application.

This leads on to the insight that knowledge is the more valuable the more important and basic are the things known. Where knowledge of the good is concerned, for example, knowledge of fundamental, noninstrumental good is of greater value than is knowledge of transient and instrumental goods.

D. Benevolence and Love; Beneficence; Friendship and Loving.

Fundamental goods in a fourth cluster enable a person to care about others, to be benevolent towards them, and to love them. Again, the indispensability of these characteristics is evident. We would choose to be kind and loving, “though we had all the other goods”:³² quite apart, in other words, from what further benefits might accrue to us.

Thus a normative system would miscarry if it deprived a person of his capacity to love. Perhaps the Party did this to Winston and Julia; indeed, through its Hate Sessions, the Party may have sought the comprehensive eradication of love.

As with reason, so with beneficence and love: it is not enough to possess the traits; one wishes actually to exercise them, and to exercise them effectively and to see them take effect. Like other good traits, these do not come into their own so long as they remain bottled up.

"A bell is no bell 'til you ring it,
A song is no song 'til you sing it,
And love in your heart
Wasn't put there to stay -
Love isn't love
'Til you give it away."³³

Thus a normative system would miscarry if it prevented a person from ever participating in a loving relationship.

E. The Ability to Conform One's Conduct to the Requirements of Reason and Love.

A further fundamental good consists in the ability to conform one's actions to the directives of reason and to pursue the goods commended by benevolence and love. Intemperance, cowardice, and rage harm the sufferer, not only by thwarting his success in the pursuit of instrumental goods, but also by preventing his reason and benevolence and love from fully taking effect.

³² See Aristotle, *Nicomachean Ethics* 1155a 6-7 (Terence Irwin trans, 2d ed., 1999) (“[N]o one would choose to live without friends, though he had all the other goods.”).

³³ This lyric is from theatrical version of *The Sound of Music* by Rodgers and Hammerstein.

A man's actions are not fully his own when he is in the grip of some such disorder. His deeper self is overwhelmed. He has been broken.

Winston was broken. His final capitulation – his acknowledgement that he loved Big Brother – reflects the Party's success in destroying Winston's capacity to bring his reason to bear on the matter of whom to love.

IV. SOME APPLICATIONS

It was noted above that fundamental goods include not only noninstrumental goods but also those goods which, though they are instrumental, cannot realistically be dispensed with. Nourishment is an example. Nourishment is dispensable only hypothetically: realistically we have to have it as a condition of life, and thus as a condition of possessing the faculty of reason, of reasoning, and of knowing, and as a condition of the possession and effective exercise of our other capacities. Nourishment is therefore a fundamental good, and a normative system miscarries when it substantially deprives a person of nourishment.

A disinterested judge in a criminal proceeding is, for this sort of reason, a fundamental good. You can, by a stretch of the imagination, picture a judge who entirely disregards his own interests in all cases; but, to be realistic, few are so pure. Therefore, the judge's disinterest is a realistically indispensable good. The same can be said of other circumstances which tempt people to misconduct. (One might call them "occasions of wrongdoing."). Claims to conditions which protect against such temptations involve the pursuit of fundamental good and serve the purposes of a decent legal system.

The good of an accused in criminal proceeding to learn the charges and to confront witnesses, and many other procedural devices aimed at ensuring a fair trial, can be identified on similar grounds as aimed at promoting fundamental good. To be sure, one might imagine a legal system in which judges and prosecutors, though they refrained from informing suspects of what was afoot, and violated procedural norms in many other ways, nevertheless reliably arrived at just decisions. Human nature being what it is, however, consistently just results under those circumstances are unlikely. For this reason, the right of an accused to learn the charges against him and to confront witnesses are elements of a decent legal system.

APPENDIX

Here is a portion of the Appendix to Orwell's *Nineteen Eighty-Four*, describing Newspeak.

THE PRINCIPLES OF NEWSPEAK

“* * * The purpose of Newspeak was not only to provide a medium of expression for the world-view and mental habits proper to the devotees of Ingsoc, but to make all other modes of thought impossible. It was intended that when Newspeak had been adopted once and for all and Oldspeak forgotten, a heretical thought — that is, a thought diverging from the principles of Ingsoc — should be literally unthinkable, at least so far as thought is dependent on words. Its vocabulary was so constructed as to give exact and often very subtle expression to every meaning that a Party member could properly wish to express, while excluding all other meanings and also the possibility of arriving at them by indirect methods. This was done partly by the invention of new words, but chiefly by eliminating undesirable words and by stripping such words as remained of unorthodox meanings, and so far as possible of all secondary meanings whatever. To give a single example. The word FREE still existed in Newspeak, but it could only be used in such statements as ‘This dog is free from lice’ or ‘This field is free from weeds’. It could not be used in its old sense of ‘politically free’ or ‘intellectually free’ since political and intellectual freedom no longer existed even as concepts, and were therefore of necessity nameless. . . . Newspeak was designed not to extend but to DIMINISH the range of thought, and this purpose was indirectly assisted by cutting the choice of words down to a minimum.

“As we have already seen in the case of the word FREE, words which had once borne a heretical meaning were sometimes retained for the sake of convenience, but only with the undesirable meanings purged out of them.

Countless other words such as HONOUR, JUSTICE, MORALITY, INTERNATIONALISM, DEMOCRACY, SCIENCE, and RELIGION had simply ceased to exist. A few blanket words covered them, and, in covering them, abolished them. All words grouping themselves round the concepts of liberty and equality, for instance, were contained in the single word CRIMETHINK, while all words grouping themselves round the concepts of objectivity and rationalism were contained in the single word OLDTHINK. Greater precision would have been dangerous. . . .* * *

“So far as it could be contrived, everything that had or might have political significance of any kind was fitted into the B vocabulary. The name of every organization, or body of people, or doctrine, or country, or institution, or public building, was invariably cut down into the familiar shape; that is, a single easily pronounced word with the smallest number of syllables that would preserve the original derivation. In the Ministry of Truth, for example, the Records Department, in which Winston Smith worked, was called RECDEP, the Fiction Department was called FICDEP, the Teleprogrammes Department was called TELEDEP, and so on. This was not done solely with the object of saving time. Even in the early decades of the twentieth century, telescoped words and phrases had been one of the characteristic features of political language; and it had been noticed that the tendency to use abbreviations of this kind was most marked in totalitarian countries and totalitarian organizations. Examples were such words as NAZI, GESTAPO, COMINTERN, INPRECORR, AGITPROP. In the beginning the practice had been adopted as it were instinctively, but in Newspeak it was used with a conscious purpose. It was perceived that in thus abbreviating a name one narrowed and subtly altered its meaning, by cutting out most of the associations that would otherwise cling to it. The words COMMUNIST INTERNATIONAL, for instance, call up a composite picture of universal human brotherhood, red flags, barricades, Karl Marx, and the Paris Commune. The word COMINTERN, on the other hand, suggests merely a tightly-knit organization and a well-defined body of doctrine. It refers to something almost as easily recognized, and as limited in

purpose, as a chair or a table. COMINTERN is a word that can be uttered almost without taking thought, whereas COMMUNIST INTERNATIONAL is a phrase over which one is obliged to linger at least momentarily. In the same way, the associations called up by a word like MINITRUE are fewer and more controllable than those called up by MINISTRY OF TRUTH. This accounted not only for the habit of abbreviating whenever possible, but also for the almost exaggerated care that was taken to make every word easily pronounceable.

“In Newspeak, euphony outweighed every consideration other than exactitude of meaning. Regularity of grammar was always sacrificed to it when it seemed necessary. And rightly so, since what was required, above all for political purposes, was short clipped words of unmistakable meaning which could be uttered rapidly and which roused the minimum of echoes in the speaker’s mind. The words of the B vocabulary even gained in force from the fact that nearly all of them were very much alike. Almost invariably these words — GOODTHINK, MINIPAX, PROLEFEED, SEXCRIME, JOYCAMP, INGSOC, BELLYFEEL, THINKPOL, and countless others — were words of two or three syllables, with the stress distributed equally between the first syllable and the last. The use of them encouraged a gabbling style of speech, at once staccato and monotonous. And this was exactly what was aimed at. The intention was to make speech, and especially speech on any subject not ideologically neutral, as nearly as possible independent of consciousness. For the purposes of everyday life it was no doubt necessary, or sometimes necessary, to reflect before speaking, but a Party member called upon to make a political or ethical judgement should be able to spray forth the correct opinions as automatically as a machine gun spraying forth bullets. His training fitted him to do this, the language gave him an almost foolproof instrument, and the texture of the words, with their harsh sound and a certain wilful ugliness which was in accord with the spirit of Ingsoc, assisted the process still further.

“So did the fact of having very few words to choose from. Relative to our own, the Newspeak vocabulary was tiny, and new ways of reducing it were

constantly being devised. Newspeak, indeed, differed from most all other languages in that its vocabulary grew smaller instead of larger every year. Each reduction was a gain, since the smaller the area of choice, the smaller the temptation to take thought. Ultimately it was hoped to make articulate speech issue from the larynx without involving the higher brain centres at all. This aim was frankly admitted in the Newspeak word DUCKSPEAK, meaning 'to quack like a duck'. Like various other words in the B vocabulary, DUCKSPEAK was ambivalent in meaning. Provided that the opinions which were quacked out were orthodox ones, it implied nothing but praise, and when 'The Times' referred to one of the orators of the Party as a DOUBLEPLUSGOOD DUCKSPEAKER it was paying a warm and valued compliment."

