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INDIANA'S VOTER ID LAW: A HISTORY AND MORAL CRITIQUE

SUBMITTED BY ERIC W. MEDER

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Eric W. Meder

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Introduction

On March 7, 1965 state troopers in Selma, Alabama attacked civil rights demonstrators taking part in a march between Selma and Montgomery.¹ The purpose of the march was to promote voting rights for African Americans and to protest the killing of Jimmie Lee Jackson, a young black man who was killed by a state trooper during a voter registration march three weeks earlier.² The many photographs taken by reporters that day are haunting. One particularly visceral image depicts a black-shirted, steel-helmeted trooper wearing a gas mask as he winds up to strike a young black man with a billy club. The young man is on his knees, with his hands clasped behind his head. The trooper is standing over the young man, holding him down to the ground by his shoulder. As the young man struggles to lean away, the trooper's billy club hovers in the air, ready to deliver a crushing blow.

Happily, the demonstrators were ultimately successful in achieving their goals. The events that unfolded in Selma, later referred to as Bloody Sunday, outraged the nation. Just eight days after the march, on March 15, 1965, President Lyndon B. Johnson presented a bill to Congress that would eventually become the Voting Rights Act of 1965 (the "Voting Rights Act").³ The Voting Rights Act signaled that all three branches of government were finally willing to use their combined powers to protect the right to vote for all Americans. The young man from the photograph, John Lewis, recovered from his injuries and went on to represent Georgia's 5th District in the United States House of Representatives, a position he still holds

¹ Ronald Smothers, *A Selma March Relives Those First Steps of '65*, The New York Times, Mar. 5, 1990.

² *Id.*

³ *Id.*

today. Forty-three years after Bloody Sunday, America elected its first black president, Barack Obama, thanks in part to the votes of large numbers of African Americans.⁴

However, in recent years, a new threat to voting rights has emerged. In the early 2000s, many states began to pass laws requiring voters to show identification at the polls in order to vote (“voter ID laws”).⁵ Some of the first states to do so included Arizona and Georgia.⁶ In 2005, Indiana enacted the strictest voter ID law in the nation.⁷ The law was immediately challenged in court, and the case eventually reached the Supreme Court in 2008.⁸ In a controversial 6-3 decision, the Supreme Court upheld the law.⁹ Since then, states have continued to enact Voter ID laws¹⁰, and such laws continue to be extraordinarily controversial to this day.

The civil rights demonstrators who were beaten in Selma were not only seeking the right to vote. They were also seeking to protect the core goods that give human life meaning and provide the basis for human action.¹¹ Those core goods include the ability to live and procreate, to seek knowledge, to play, to enjoy aesthetic experiences, to act with reason, and to participate in religion, friendship, and community.¹² While Voter ID laws may not represent the same sort of physical threat to these core goods as the violence on display in Selma, they are a troubling development.

⁴ See *How Groups Voted in 2008*, ROPER CENTER PUBLIC OPINION ARCHIVES, (Dec. 19, 2014, 12:47 PM), www.ropercenter.uconn.edu/elections/how_groups_voted/voted_08.html.

⁵ See *Voter ID History*, NATIONAL CONFERENCE OF STATE LEGISLATURES, (Dec. 19, 2014, 12:47 PM), www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx.

⁶ See *id.*

⁷ Linda Greenhouse, *In a 6-to-3 Vote, Justices Uphold a Voter ID Law*, New York Times, Apr. 29, 2008, at 1A.

⁸ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008).

⁹ Linda Greenhouse, *In a 6-to-3 Vote, Justices Uphold a Voter ID Law*, New York Times, Apr. 29, 2008, at 1A.

¹⁰ See *Voter ID History*, *supra* note 5.

¹¹ John Finnis, *Natural Law & Natural Rights*, at 102 (Paul Craig eds., Oxford University Press, 2nd ed. 2011).

¹² *Id.*

The first part of this paper will examine the circumstances surrounding the enactment of Indiana's Voter ID law and the litigation which ensued thereafter. The second part of this paper will consider the extent to which Indiana's Voter ID law, and others like it, threaten the core goods that give human life meaning, as well as the practicable reasonableness of those who enacted it.

Part 1 – Indiana's Voter ID Law and Ensuing Litigation

I. Enactment of Indiana's Voter ID Law

In the fall of 2004, the Indiana Secretary of State asked each division of his office to submit proposals for legislation during the 2005 legislative session.¹³ The Election Division's co-Director, Brad King, was aware that the Secretary of State had vocally supported a voter ID law during his campaign for office in 2002.¹⁴ Accordingly, Mr. King proposed that the Secretary of State pursue legislation requiring photo identification of voters.¹⁵ The Secretary of State decided to undertake this legislative initiative, and, acting on the requests of certain legislators, the Indiana Legislative Services Agency drafted what eventually became Senate Enrolled Act 483¹⁶, Indiana's Voter ID law.¹⁷

The Indiana General Assembly passed the bill strictly along party lines, by a count of 33 Republican "Yeas" to 17 Democrat "Nays" in the Senate and 53 Republican "Yeas" to 45

¹³ 2005 WL 3707712

¹⁴ 2005 WL 3707712

¹⁵ 2005 WL 3707712

¹⁶ Indiana Senate Enrolled Act No. 483, Pub. L. No. 109-2005.

¹⁷ 2005 WL 3707712

Democrat “Nays” in the House.¹⁸ On April 27, 2005, Governor Mitch Daniels, a Republican, signed the bill into law.¹⁹

II. Requirements of Indiana’s Voter ID Law

Indiana’s Voter ID law requires citizens voting in-person on election day, or casting an absentee ballot in person at a county clerk's office prior to election day, to present election officials with a valid photo identification, issued by the United States or the State of Indiana.²⁰ This identification must show the name of the individual to whom it was issued, which must also conform to the name on the citizen's voter registration record, and an expiration date.²¹ The identification complies with the expiration date requirement if the expiration date has either not occurred, or occurred after the date of the most recent general election.²² Voters are required to produce acceptable photo identification before signing the poll book.²³

The law applies to voting in both primary and general elections.²⁴ It does not apply, however, to an absentee ballot sent by the county to the voter through the mail.²⁵ The law also does not apply to “a voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides.”²⁶

If a voter does not produce acceptable photo identification at the polls, a member of the precinct election board “shall challenge the voter.”²⁷ If the voter signs an affidavit attesting to

¹⁸ Mary Beth Schneider, *House OKs Strict Voter ID Bill*, Indianapolis Star, Mar. 22, 2005, at 1B; Mary Beth Schneider, *Photo ID Law Looming for Hoosiers*, Indianapolis Star, Apr. 13, 2005, at 1A.

¹⁹ *Governor Signs Voter ID Bill; ICLU To Challenge*, TheIndieChannel.com, Apr. 28, 2005.

²⁰ See Ind. Code § 3-11-8-25.1.

²¹ See Ind. Code § 3-5-2-40.5.

²² See Ind. Code § 3-5-2-40.5(3).

²³ See Ind. Code § 3-11-8-25.1(c).

²⁴ See Ind. Code §§ 3-10-1-7.2; 3-11-8-25.1.

²⁵ See Ind. Code §§ 3-10-1-7.2(e), 3-11-10-1.2.

²⁶ See Ind. Code §§ 3-10-1-7.2(e), 3-11-8-25.1(f).

²⁷ Ind. Code § 3-11-8-25.1(d)(2).

the voter's right to vote in that precinct, the voter may then sign the poll book and cast a provisional ballot.²⁸ A voter who is challenged for failure to provide acceptable photo identification and casts a provisional ballot may appear before the circuit court clerk or the county election board by noon on the second Monday following the election to prove the voter's identity.²⁹ If, at that point, the voter provides acceptable photo identification and executes an affidavit that the voter is the same individual who cast the provisional ballot on election day, then the voter's provisional ballot will be counted so long as there are no other non-identification challenges.³⁰

The provisional ballot of a voter who is challenged for failing to show acceptable photo identification at the polls on election day may also be opened and processed if, by noon on the second Monday following election day, the voter appears before the county clerk of courts or the county election board and executes an affidavit that the person is the same as the person who cast the provisional ballot and either (1) the person is "indigent" and is "unable to obtain proof of identification without payment of a fee;" or (2) has a religious objection to being photographed.³¹

III. Requirements to Obtain Photo Identification

In order to vote in-person, Indiana voters who do not qualify for any of the exceptions set forth in the Voter ID law must present qualifying identification issued by Indiana or the federal government.³²

Qualifying federally-issued identification includes passports and United States military identification.³³ In order to obtain a passport for the first time, an applicant must appear in person

²⁸ See Ind. Code § 3-11-8-25. 1(e).

²⁹ See Ind. Code § 3-11-7.5-2.5(a).

³⁰ See Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5.

³¹ See Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5(c).

³² 2005 WL 3707710

before an individual authorized by the United States, present certain identification, verify the application, provide two recent photographs, and pay the applicable fees.³⁴ The applicant must also present a certified birth certificate or, if one is not available, present the best obtainable other evidence available.³⁵

Qualifying Indiana-issued identification includes driver's licenses and non-license photo identification cards issued by the Indiana Bureau of Motor Vehicles (BMV).³⁶ The BMV may issue a driver's license to any applicant who meets the specific qualifications for the type of license desired, who makes the proper application, and who pays the required fee.³⁷ A driver's license application must include a request by the BMV for certain specified information pertaining to the identity of the applicant.³⁸ Similarly, the BMV must request certain specified information from applicants for a non-license photo-identification card.³⁹

An applicant for either a driver's licenses or a non-license identification card must verify under oath that the information included on the application is correct.⁴⁰ The applicant must present documentation categorized as "primary," "secondary," and "proof of residency" documentation.⁴¹

A first-time license applicant must provide the BMV with one primary document, one secondary document, one proof of residency document, and proof of a valid Social Security number.⁴² A first-time license applicant does not need to submit a secondary document if the

³³ 2005 WL 3707710.

³⁴ 22 C.F.R. §§ 51.21, 51.43.

³⁵ 22 C.F.R. § 51.43.

³⁶ See generally Ind. Code § 9-24-1-1 *et seq.*

³⁷ See Ind. Code § 9-24-11-1.

³⁸ See Ind. Code § 9-24-9-2.

³⁹ Ind. Code § 9-24-16-3.

⁴⁰ Ind. Code §§ 9-24-9-1(a)(2); 9-24-16-2(2).

⁴¹ See 140 Ind. Admin. Code 7-4-2.

⁴² 140 Ind. Admin. Code 7-4-2(b)(1).

applicant presents two primary documents, but the other documents are still required.⁴³ An applicant for a first-time non-license identification card must meet the same combination of documentation verification requirements, but is not required to present proof of a valid Social Security number.⁴⁴

Primary documents include: (1) an authenticated United States birth certificate issued by county or state departments of health; (2) a verified delayed-issued birth certificate; (3) a certificate of naturalization or citizenship; (4) a certification of report of birth; (5) a United States consular report of birth; (6) a birth certificate from a United States territories; (7) a military identification card; (8) a United States passport; (9) a United States veteran's universal-access identification card; (10) certain other types of primary documents for non-United States citizens.⁴⁵

Secondary documents include, among other things: (1) a certified academic transcript; (2) an identification card with a photo; (3) a driver's license issued by another state; (4) an Indiana gun permit; (5) prison release documentation; (6) a valid banking card; and (7) a Form W-2.⁴⁶

Proof of residency documents include any primary or secondary document that contains the applicant's name and residential address⁴⁷. They also include certain additional documents, including, among other things: (1) child-support check stubs; (2) change-of-address confirmations; (3) bill statements; and (4) voter-registration cards.⁴⁸

Amendments to driver's licenses or non-license identification cards require documentation to support any changes made.⁴⁹ A renewal of a driver's license or non-license

⁴³ 140 Ind. Admin. Code 7-4-2(b)(2).

⁴⁴ 140 Ind. Admin. Code 7-4-2(c).

⁴⁵ 140 Ind. Admin. Code 7-4-1; -3(a).

⁴⁶ 140 Ind. Admin. Code 7-4-3(c).

⁴⁷ 140 Ind. Admin. Code 7-4-3(e).

⁴⁸ *Id.*

⁴⁹ 140 Ind. Admin. Code 7-4-2(e).

identification card requires surrender of a current license or card and verification of Social Security number.⁵⁰ If the applicant does not have a current license or card, or the license or card has been expired for over ten years, an applicant must present documentation as a first time applicant.⁵¹ The BMV may not charge a fee to issue an original, renewal, or replacement non-license photo-identification card, provided that the applicant does not have already have a valid Indiana driver's license.⁵²

A person may obtain a birth certificate from either the Indiana Department of Health (“IDOH”) or the health department for the county of their birth.⁵³ The IDOH charges a \$10 fee for conducting the birth-certificate search, and county fees vary from \$2 to \$10.⁵⁴ A person seeking an Indiana birth certificate but lacking a driver's license or non-license photo identification card must present certain specified types of other identification or a combination thereof, depending on the circumstances.⁵⁵ For individuals born in other the states, the cost and requirements for obtaining a birth certificate vary.⁵⁶

IV. Arguments in Support of Indiana’s Voter ID Law

Indiana’s Voter ID law generated controversy both during the legislative process and after its passage into law. In the course of the litigation that followed, proponents of the Voter ID law set forth various arguments in support of the law.

⁵⁰ 140 Ind. Admin. Code 7-4-2(f).

⁵¹ 140 Ind. Admin. Code 7-4-2(f)(1), (3).

⁵² See Ind. Code § 9-24-16-10.

⁵³ 2007 WL 3276507.

⁵⁴ 2007 WL 3276507.

⁵⁵ 2007 WL 3276507.

⁵⁶ 2007 WL 3276507.

i. National Instances of In-Person Voter Fraud

First, proponents of the Voter ID law pointed to various purported instances of in-person voter fraud throughout the United States. Among other things, they emphasized that the United States Department of Justice had launched more than 180 investigations into election fraud, some of which had resulted in charges of multiple voting, since 2002.⁵⁷ They also pointed to purported instances of voter fraud in other states, including Washington, Wisconsin, Missouri, Florida, Maryland, New York, and Georgia.⁵⁸

In addition to documented instances of voter fraud, proponents of the Voter ID law also pointed to anecdotal evidence of voter fraud. For example, Senator Vic Hinold testified that a postal worker had told him about an incident where the postal worker was approached by a precinct committeeman with an invitation to vote multiple times on election day.⁵⁹ Another supporter alleged that the Indiana Election Division sometimes received telephone calls on election day from citizens who wished to report accusations of voter misrepresentation at the polls.⁶⁰

Significantly, supporters did not identify any documented instances of in-person voter fraud in Indiana itself. Instead, they made the general argument that “in-person voter-identity fraud is notoriously difficult to detect and investigate.”⁶¹ This is because “anybody who provides a name that is on the rolls may vote and then walk away with no record of the person’s

⁵⁷ 2005 WL 3707713

⁵⁸ 2005 WL 3707713

⁵⁹ 2005 WL 3707712

⁶⁰ 2005 WL 3707712

⁶¹ 2005 WL 3707713

actual identity.”⁶² Thus, “documentation of in-person voter fraud often occurs only when a legitimate voter at the polls hears a fraudulent voter trying to use her name.”⁶³

ii. The Impact and the Perception of Voter Fraud on the Confidence of the Electorate

The proponents of the Voter ID law also argued that the law was necessary to reassure voters that they could be confident that the results of elections were legitimate. According to this line of argument, if voters believed that fraud was a major problem, they would lack confidence in the outcome of elections. Thus, the matter of public confidence in the integrity of elections was a topic of independent significance because it affected the willingness of citizens to participate in the democratic process.⁶⁴

In support of this position, the law’s proponents pointed to public opinion data and other studies. For example, a Rasmussen poll conducted in 2000 showed that “59% of voters believed there was ‘a lot’ or ‘some’ fraud in elections.”⁶⁵ A contemporaneous Gallup Poll showed that “67% of adults nationally had only ‘some’ or ‘very little’ confidence in the way that votes are case in our country.”⁶⁶ Moreover, a 2004 survey of 1000 likely voters showed that “82% of respondents, including 89% of Bush supporters and 75% of Kerry supporters, favored photo identification at the polls.”⁶⁷ Proponents also cited the Supreme Court’s decision in *Nixon v. Shrink Mo. Gov’t PAC* for the proposition that overwhelming public support for an election reform law can establish a valid justification for the law.⁶⁸

⁶² 2005 WL 3707713

⁶³ 2005 WL 3707713

⁶⁴ See 553 U.S. 181 (2008) at 197

⁶⁵ 2006 WL 2180191

⁶⁶ 2006 WL 2180191

⁶⁷ 2006 WL 2180191

⁶⁸ 2005 WL 3707714 citing *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000) ([A]lthough majority votes do not, as such, defeat First Amendment protections, the statewide vote on Proposition A certainly attested to the perception relied upon here: An overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof.” (internal quotations and citations omitted)).

To further bolster this line of argument, supporters of the Vote ID law pointed to other areas in which courts agreed that a state had a compelling interest in protecting public confidence in the integrity and legitimacy of representative government. For example, they cited cases upholding impingements on political speech by federal government employees,⁶⁹ limitations on political campaign contributions,⁷⁰ and the Bipartisan Campaign Reform Act's soft-money ban.⁷¹ Thus, the law's proponents argued that, "here, every bit as much as in the campaign-finance context, government is right to worry that confidence in the legitimacy of elections may erode based solely on 'public awareness of the opportunities for abuse' inherent in polling-place voting unaccompanied by identification checks."⁷²

Based on these and other similar arguments, supporters argued that the Voter ID law was a reasonable response to an important problem and would effectively reassure voters that they should be confident in the results of elections.

iii. Inflation of Indiana's Voter Registration Rolls

To further justify the Voter ID law, supporters pointed to the fact that Indiana's voter registration rolls were significantly inflated. This, they argued, would make voter fraud easier to accomplish for those who attempted it.⁷³ According to sources cited by the Voter ID law's proponents, when it is "difficult to keep the voting rolls clean of 'deadwood' voters who have moved or died" such circumstances make "fraudulent voting easier and therefore more tempting for those so inclined."⁷⁴

⁶⁹ 2005 WL 3707713; *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 565 (1973)

⁷⁰ 2005 WL 3707713; *Buckley v. Valeo*, 424 U.S. 1, 27 (1976)

⁷¹ 2006 WL 2180191; *McConnel v. FEC*, 540 U.S. 93, 143-45 (2003).

⁷² 2006 WL 2180191 citing *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (internal citations omitted).

⁷³ See, e.g., 2007 WL 4232930.

⁷⁴ 2006 WL 2180191 citing John Fund, *Stealing Elections 4* (2004) and Larry J. Sabato & Glenn R. Simpson, *Dirty Little Secrets* 321 (1996).

To support this line of reasoning, the law's proponents pointed to, among other things, an *Indianapolis Star* investigation into the accuracy of Indiana's voter rolls which found that more than 300 dead people were registered to vote.⁷⁵ In an effort to establish the value of the newspaper's study, supporters noted that the study was the subject of testimony before Congress concerning election-fraud measures.⁷⁶ Moreover, in 2005, the Indiana Supreme Court decided not to use voter-registration lists to compile jury lists because they were inaccurate.⁷⁷

The Voter ID law's supporters also emphasized the findings of a report by Clark Benson, a nationally recognized expert in the collection and analysis of voter-registration and population data.⁷⁸ Mr. Benson conducted an examination of Indiana's voter registration lists and concluded that they were among the most highly inflated in the nation.⁷⁹ In fact, Mr. Benson estimated that Indiana's lists were inflated by as much as 41.4%.⁸⁰ Mr. Benson recommended two ways to combat the potential for fraud stemming from list inflation: (1) purge the lists of invalid voters more effectively, or (2) require voters to identify themselves in a reliable way.⁸¹

In rejecting Mr. Benson's former solution in favor of the latter, the Voter ID Law's proponents sought to blame the inflation problem on the federal National Voter Registration Act (NVRA).⁸² The NVRA became effective on January 1, 1995, and, in pertinent part, required states to provide voter registration at various government locations, including license branches and state welfare offices.⁸³ According to the Voter ID law's supporters, the NVRA had the

⁷⁵ 2006 WL 2180191

⁷⁶ 2006 WL 2180191

⁷⁷ 2006 WL 2180191

⁷⁸ 2007 WL 4232930

⁷⁹ 2006 WL 2180191

⁸⁰ 2007 WL 4232930

⁸¹ 2007 WL 4232930

⁸² 2007 WL 4232930

⁸³ 2007 WL 4232930; 42 U.S.C. §§ 1973gg-3, 1973gg-5.

unintended side effect of inflating voter lists with faulty registrations.⁸⁴ This is because the NVRA made it easier for people to register to vote but at the same time restricted states' ability to remove registrations from their rolls.⁸⁵ The law's supporters claimed that the NVRA prohibited states from removing voters from the registration rolls in all but the most limited of circumstances.⁸⁶ Moreover, the NVRA required states to take certain time-consuming affirmative steps to confirm the addresses of voters before purging unconfirmed voters from the list.⁸⁷

iv. Reliability of Photo Identification

Proponents of the Voter ID law also focused on the inherent reliability of photo identification to justify the law. One line of argument in this vein emphasized that under existing law, poll workers were required to compare a voter's signature to the signature that appeared in the poll book. Because poll workers were not experts in signature analysis, it was reasonable to conclude that they were not capable of performing the task accurately.⁸⁸ By contrast, by requiring poll workers to compare a photo identification to a live person the Voter ID law would make it easier for poll workers to accurately confirm a voter's identity.⁸⁹

The law's supporters also pointed to the fact that many businesses and government require a person to show photo identification before rendering services or permitting access to buildings.⁹⁰ To this end, they noted that photo identification is required to perform numerous routine tasks, such as boarding an airplane, cashing a check, opening a bank account, renting a

⁸⁴ 2007 WL 4232930

⁸⁵ 2005 WL 3707714

⁸⁶ 2005 WL 3707714

⁸⁷ 2005 WL 3707713 *citing* 42 U.S.C. § 1973gg-6

⁸⁸ 2005 WL 3707714

⁸⁹ 2005 WL 3707714

⁹⁰ 2005 WL 3707714

movie, or entering a courthouse.⁹¹ To bolster their argument, proponents of the Voter ID law identified other contexts where photo identification is relied upon by the government. For example, they noted that certain homeless shelters prefer or require residents to provide photo identification.⁹² They also noted that in some states photo identification is required to obtain a marriage license.⁹³ Moreover, attorneys providing incarcerated criminal defendants with their constitutional right to counsel must show photo identification to enter prisons.⁹⁴

Proponents also pointed to two newly-enacted federal laws in further support of this line of argument: the Help America Vote Act (HAVA) and the Real ID Act. HAVA was passed in 2002 in response to allegations of fraud in the 2000 presidential election.⁹⁵ Among other things, HAVA provides that if a voter has registered by mail and therefore has never been seen by an election official, he or she must provide a copy of a current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows his or her address before voting for the first time.⁹⁶

The Real ID Act was passed in 2005 and requires states to take certain steps to enhance the security of their driver's license.⁹⁷ Proponents of the Voter ID law pointed to the fact that when Congress was debating the legislation "it recognized not only how the driver's license has become the 'foundation of your identity' but also how the 'driver's license has come to represent more than authorization to operate a motor vehicle; it imparts a stamp of legitimacy and is often taken as unquestionable proof of identity."⁹⁸

⁹¹ 2005 WL 3707714

⁹² 2005 WL 3707714

⁹³ 2005 WL 3707714

⁹⁴ 2005 WL 3707714

⁹⁵ See *James v. Bartlett*, 607 S.E.2d 638, 642 (N.C. 2005).

⁹⁶ 42. U.S.C. § 15483(b)(3)(A), (b)(2).

⁹⁷ See *Real ID Act of 2005*, Pub. L. 109-13, 119 Stat. 231 (2005) (codified at 49 U.S.C. § 30301)

⁹⁸ 2005 WL 3707714, citing 150 Cong. Rec. H8664-02, H8682-83 (Oct. 7, 2004).

According to the Voter ID law's proponents, the prevalence of photo identification requirement in everyday life, combined with Congress's recent emphasis on photo identification, demonstrated that photo identification is highly reliable.

v. Ease of Compliance With Photo Identification Requirement

The law's proponents put forth several lines of argument in this area. First, they argued that a majority of voters already possessed the required identification.⁹⁹ Thus, there would be no cost in time or money to those voters who could use their existing identification at the polls. Supporters also pointed out that the BMV would offer both driver's licenses and non-license photo-identification cards.¹⁰⁰ While there would be a fee to obtain and renew a driver's license, there would be no fee to obtain or renew a non-license photo-identification.¹⁰¹ Moreover, voters would be able to use other forms of identification, such as a passport or military identification card, to satisfy the law's requirement.¹⁰²

Supporters of the law also emphasized certain exceptions to the photo identification requirement that were carved out of the law. Because the law did not apply to absentee voters, those who would have difficulty obtaining identification could presumably vote by absentee ballot.¹⁰³ Similarly, the law's indigency and religious objection exceptions would allow those who were poor or objected to having their photograph taken for religious reasons to vote without complying with the new requirements.¹⁰⁴ The law's exception for residents of state licensed-care facilities who voted at polling places within those facilities were also cited by proponents as important to the law's overall scheme. The so-called nursing home exception would

⁹⁹ 2006 WL 420778

¹⁰⁰ 2005 WL 3707714

¹⁰¹ 2005 WL 3707714

¹⁰² 2005 WL 3707714

¹⁰³ 2005 WL 3707714

¹⁰⁴ 2005 WL 3707714

accommodate the small set of the elderly voters who could not easily travel to obtain photo identification, but who also did not need to travel to vote.¹⁰⁵ Moreover, the law would permit anyone who could not produce the required identification at the polls to cast a provisional ballot.¹⁰⁶ Under this exception, if the voter could produce the required identification within 13 days, the provisional ballot would be counted, provided there were no other reasons not to count it.¹⁰⁷

The law's supporters essentially dismissed the fact that some voters would inevitably have difficulty obtaining a birth certificate. From the outset, they noted that this group was likely to be very small subset of the population.¹⁰⁸ They also argued that the types of documentation that could be used obtain a birth certificate were numerous and included many types that were readily available.¹⁰⁹ Additionally, they presented evidence that birth certificates could be obtained over the telephone or internet with relative ease, even from another state.¹¹⁰ Finally, they argued that the BMV would institute a policy exempting senior citizens from complying with the birth certificate requirement when applying for a driver's license or non-license identification card.¹¹¹

vi. The Baker-Carter Commission Report

Proponents of the Voter ID law relied heavily on the findings of a September 2005 report produced by a commission chaired by former President Jimmy Carter and former Secretary of

¹⁰⁵ 2005 WL 3707714

¹⁰⁶ 2005 WL 3707714

¹⁰⁷ 2005 WL 3707714

¹⁰⁸ 2006 WL 420778

¹⁰⁹ 2006 WL 420778

¹¹⁰ 2006 WL 420778

¹¹¹ 2005 WL 3707710

State James A. Baker III.¹¹² The report recommended many election reforms and suggested that states create universal, interconnected voter-registration systems and experiment with vote centers.¹¹³ To some extent, the report addressed in-person voter fraud, and concluded that “there is no doubt that it occurs.”¹¹⁴

In light of these findings, the report recommended requiring photo identification at the polls in order to combat voter fraud.¹¹⁵ As to those who could not provide identification at the polls, the report recommended that they be able allowed to vote provisional and provide the required identification within 48 hours.¹¹⁶ Supporters of the Voter ID law emphasized that Indiana’s law was even less restrictive than what the report recommended because it allowed provisional voters to validate their ballots by providing the required identification within 13 days.¹¹⁷

Proponents of the Voter ID law also pointed out that the report supported their general argument that the perception of voter fraud “contributes to low confidence in the system.”¹¹⁸ To this end, in one of their legal briefs, the law’s proponents argued that “the Commission also recognized that protecting the integrity of election by requiring voters to present photo identification would advance the independent, but equally compelling, government interest in protecting public confidence in the legitimacy of election outcomes.”¹¹⁹

¹¹² Comm’n on Fed. Election Reform, Report, *Building Confidence in U.S. Elections* (Sept. 2005).

¹¹³ 2007 WL 4232930

¹¹⁴ 2007 WL 4232930

¹¹⁵ 2007 WL 4232930

¹¹⁶ 2007 WL 4232930

¹¹⁷ 2006 WL 420778

¹¹⁸ 2005 WL 3707714

¹¹⁹ 2005 WL 3707714

However, President Carter and Secretary of State Baker later clarified that photo identification should be required only if states first assure that all citizens have been provided with such identification.¹²⁰

V. Challenges to Indiana's Voter ID Law in the Courts

After the enactment of Senate Enrolled Act 483, the Indiana Democratic Party and the Marion County Central Committee filed a lawsuit in the Federal District Court for the Southern District of Indiana seeking a judgment declaring the Voter ID Law invalid and enjoining its enforcement.¹²¹ A group of elected officials and nonprofit organizations filed a separate lawsuit seeking the same relief.¹²² The cases were consolidated, and the State of Indiana intervened to defend the validity of the Voter ID Law.¹²³

The lawsuits challenged the validity of the Voter ID Law on the following bases: (1) that the law substantially burdened the right to vote in violation of the Fourteenth Amendment; (2) that it was neither a necessary nor appropriate method of avoiding election fraud; and (3) that it would arbitrarily disenfranchise qualified voters who did not possess the required identification and would place an unjustified burden on those who could not readily obtain such identification.¹²⁴ The defendants rejected all of these criticisms, arguing that the Voter ID Law was justified by a legitimate legislative concern for in-person voting fraud.¹²⁵ Thus, the law represented a reasonable exercise of the State's power to regulate the time, place, and manner of

¹²⁰ 2007 WL 4466632; citing Jimmy Carter & James A. Baker, *Voting Reform is in the Cards*, N.Y. Times, Sept. 23, 2005, at A19.

¹²¹ See *Ind. Democratic Party v. Rokita*, 458 F.Supp.2d 775, 782-84 (S.D. Ind. 2006)

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See *Crawford*, 553 U.S. at 187.

¹²⁵ See *Ind. Democratic Party*, 458 F.Supp.2d at 784

elections.¹²⁶ Additionally, the defendants argued that the plaintiffs lacked standing to attack the Voter ID Law and that the Secretary of State and the Co-Directors of the Indiana Elections Division were not proper defendants to the action.¹²⁷

The District Court granted Indiana's motion for summary judgment, finding, among other things, that the Voter ID Law's challengers had "not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of SEA 483 or who will have his or her right to vote unduly burdened by its requirements."¹²⁸ A divided panel of the Seventh Circuit Court of Appeals affirmed the District Court's judgment.¹²⁹ Four judges voted to grant a petition for rehearing en banc.¹³⁰ Because the Supreme Court agreed with the dissenting panel judges' assessment of the importance of the matter, it granted certiorari in 2007.¹³¹

The Supreme Court's decision was issued in April 2008.¹³² The lead opinion, written by Justices Stevens, held that the evidence in the record was not sufficient to support a facial attack on the validity of the entire Voter ID Law.¹³³ Thus, the Court affirmed the judgment of the Court of Appeals. Justice Scalia concurred in the judgment, joined by Justices Thomas and Alito. In their view, the lead opinion applied the incorrect standard of review.¹³⁴ Rather than applying an individual-focused approach to evaluating the impact of the Voter ID Law, Justice Scalia would have applied a deferential "important regulatory interests" standard.¹³⁵ This is because, in his

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 783-84.

¹²⁹ *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007).

¹³⁰ *Crawford v. Marion Cnty. Election Bd.*, 485 F.3d 436 (7th Cir. 2007) (Wood, J., dissenting from denial of rehearing en banc).

¹³¹ *Crawford*, 553 U.S. at 188; *Ind. Democratic Party v. Rokita*, 551 U.S. 1192, 128 S.Ct. 34, 168 L.Ed.2d 809 (2007).

¹³² *Crawford*, 553 U.S. 181.

¹³³ *Id.* at 189.

¹³⁴ See *id.* at 204-09 (Scalia, J., joined by Thomas, J., and Alito, J., concurring in the judgment).

¹³⁵ *Id.* at 204.

view, the Voter ID Law represented a nonsevere, nondiscriminatory restriction on the right to vote.¹³⁶

Justice Souter, joined by Justice Ginsburg, dissented.¹³⁷ In his dissent, Justice Souter focused on the “nontrivial burdens” imposed by the law and expressed concern that they would deter a significant number of people from voting.¹³⁸ He also emphasized that fact that Indiana had not identified any instances of in-person voting fraud.¹³⁹ Justice Breyer also dissented, but wrote separately.¹⁴⁰ In his dissent, Justice Breyer compared Indiana’s law to similar laws in Florida and Georgia.¹⁴¹ He noted that in the latter states, a wider range of identification were considered acceptable.¹⁴² In his view, Indiana’s Voter ID law was too strict by comparison and created a “significantly harsher, unjustified burden.”¹⁴³

Part 2 – A Moral Critique of Indiana’s Voter ID Law

I. Was the Indiana Legislature Justified in Enacting the Voter ID Law?

To determine if the Indiana legislature was just in enacted the Voter ID law, the meaning of “justice” or “morality” must first be considered. Positivist thinkers, for example, insist on the separation of law and morals.¹⁴⁴ According to positivists, the law is simply an aggregate of rules. As such, “[w]hether a law was moral or immoral [is] not within the providence of jurisprudence.”¹⁴⁵ Adherents of relativist theories reject the idea that there is an objective basis

¹³⁶ *Id.*

¹³⁷ See *Crawford*, 553 U.S. at 209-37 (Souter, J., joined by Ginsburg, J., dissenting)

¹³⁸ *Id.* at 221.

¹³⁹ *Id.* at 225-29.

¹⁴⁰ See *id.* at 237-241 (Breyer, J., dissenting).

¹⁴¹ *Id.* at 239-40.

¹⁴² *Id.*

¹⁴³ *Crawford*, 553 U.S. at 240.

¹⁴⁴ See Michael P. Ambrosio, *Legal Realism*, 205 N.J. LAW 30 (October 2000).

¹⁴⁵ See Michael P. Ambrosio, *A Moral Appraisal of Legal Education: A Plea for a Return to Forgotten Truths*, 22 Seton Hall L. Rev. 1177, 1191

for morality.¹⁴⁶ Therefore, they deny the existence of objective standards upon which moral decisions can be made.¹⁴⁷ According to this view, different societies and cultures exist around the world; thus, truth depends on culture and not on a universal standard. Realist thinkers believe that legal rules are meaningless until interpreted by judges and other legal decision makers.¹⁴⁸ Like positivists, realists insist on the separation of law from morals.¹⁴⁹

On the other hand, according to Thomas Aquinas and other natural law philosophers, the law is an expression of human reason and is closely connected with morality.¹⁵⁰ Thus, the law must be measured on the criteria of justice.¹⁵¹ At the core of natural law theory are the concepts of the common good and individual good.¹⁵² The common good entails the conditions necessary for the full flourishing of all members of society. And, in a properly functioning society, individuals must be mindful of the need to reconcile their own individual good with the common good.¹⁵³ Under the natural law rubric, “[t]he ultimate justification of a law is the extent to which it fosters both individual good and the common good.”¹⁵⁴ Therefore, to analyze whether the Indiana legislature was just in enacting the photo ID law requires us to contemplate the “good” that it sought to achieve.

Determining the “good” can be a difficult exercise. This is because the concept of the good is somewhat subjective and may vary from person to person, leaving room for interpretation. Fortunately, John Finnis has developed a comprehensive theory of the good that

¹⁴⁶ *Id.* at 1192.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1195.

¹⁵⁰ *Legal Realism*, supra note 140 at 31.

¹⁵¹ *Id.* at 31.

¹⁵² *A Moral Appraisal*, supra note 141 at 1185 n. 16.

¹⁵³ *A Moral Appraisal*, supra note 141 at 1204.

¹⁵⁴ *A Moral Appraisal*, supra note 141, at 1190.

is useful for exploring the meaning and purpose of a law.¹⁵⁵ According to Finnis, human flourishing is the product of participation in seven basic and irreducible goods: life, knowledge, friendship, play, practical reason, aesthetic experience, and religion.¹⁵⁶ His “Basic Requirements of Practical Reasonableness” consists of nine interrelated, objective considerations for assessing whether or not a particular course of action is practically reasonable.¹⁵⁷ Thus, Finnis’ framework provides a useful tool for analyzing whether or not the Indiana legislature was practically reasonable in enacting the Voter ID law. That is, whether the Indiana legislature acted to advance the good.

i. A Coherent Life Plan

The first consideration in evaluating the practical reasonableness of an act is whether or not the act was part of a “coherent plan of life.”¹⁵⁸ For the Voter ID law to have been part of a coherent plan, the Indiana legislature must have enacted it with care and thought. The law must not have been the product of impulse or instinct.¹⁵⁹ Moreover, the Voter ID law must have been intended to operate with a harmonious set of purposes and orientations.¹⁶⁰ The good the legislature sought to achieve by enacting the law must have been appropriately placed amongst the hierarchy of other basic values.¹⁶¹

The Voter ID law fails this first test miserably. From the outset, it is worth remembering how the law was enacted. In 2004, the Republican Party took control of the Indiana governorship for the first time in 16 years and the House of Representatives for the first time in 8

¹⁵⁵ John Finnis, *Natural Law & Natural Rights*, (Paul Craig eds., Oxford University Press, 2nd ed. 2011).

¹⁵⁶ *See Id.* at 86-90.

¹⁵⁷ *See Id.* at 100-33.

¹⁵⁸ *See Id.* at 103.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

years.¹⁶² This development gave the Republicans control over all three branches of government for the first time in many years.¹⁶³ The Republicans used this newfound power to railroad the Voter ID law through both the House and Senate without a single Democratic vote.¹⁶⁴ Clearly, the Republican acted on impulse and political instinct, and thus, contrary to the first rule of practical reasonableness.

Not only was the process by which the law was enacted lopsided, the law itself was internally incoherent. Key terms, such as “conforms” and “indigency” were left undefined.¹⁶⁵ The lack of the definition for the term “conforms” was problematic, because it did not provide guidance as to how polling station officials should determine if a voter’s identification was acceptable.¹⁶⁶ Would a small discrepancy between the voter’s identification and the information listed in the poll book disqualify the voter? What if the voter had changed their appearance since the time their photograph was taken? These unanswered questions were made even more problematic by the fact that during the same legislative session, the legislature amended other provisions of Indiana law to give partisan poll watchers more power to challenge voters.¹⁶⁷ Given this enhanced power, whether or not partisan poll watchers could be trusted to refrain from manipulating the definition of “conforms” was a legitimate concern.

The lack of a definition for “indigent” was equally problematic. Although the Voter ID law contained an exception that would allow individuals to vote if they signed an affidavit

¹⁶² See William R. Groth, *Litigating the Indiana Photo-ID Law: Lessons in Judicial Dissonance and Abdication*. PS: POLITICAL SCIENCE & POLITICS, 42, pp 97-101 (January 2009).

¹⁶³ *Id.*

¹⁶⁴ Mary Beth Schneider, *House OKs Strict Voter ID Bill*, Indianapolis Star, Mar. 22, 2005, at 1B; Mary Beth Schneider, *Photo ID Law Looming for Hoosiers*, Indianapolis Star, Apr. 13, 2005, at 1A.

¹⁶⁵ 2007 WL 3276506 at n. 6; 2006 WL 1786074.

¹⁶⁶ 2006 WL 1786074

¹⁶⁷ 2006 WL 1786074

attesting to their indigency, the meaning of indigent was left unclear.¹⁶⁸ How would election authorities determine who qualified for the indigency exception? Would this lack of clarity lead to partisan manipulation to deny certain individuals the right to vote?

These were not the only examples of incoherence within the statute. In order to qualify for the indigency exception, a voter would have to attest that they could not obtain the required identification “without payment of a fee.”¹⁶⁹ Presumably, this meant a fee for obtaining a driver’s license or state identification card. But what about a birth certificate? To easily obtain a driver’s license or a non-license identification card, an individual would need to procure a birth certificate.¹⁷⁰ The cost of a birth certificate was approximately \$10 in Indiana and substantially more in some other states.¹⁷¹ Was the cost of a birth certificate considered a fee? The statute did not say. When challenged on this point in court, the proponents of the Voter ID law claimed that the BMV would implement a policy of not requiring a birth certificate from certain elderly individuals who would have the most difficulty complying with this requirement.¹⁷² However, the opponents of the law pointed out that the BMV could not prove that such a policy had ever been implemented.¹⁷³ Nor would the purported policy resolve the problem with respect to indigent voters.

Another problematic aspect of the statute was that it implied that an individual could not qualify for a free non-license identification card if they already possessed a driver’s license.¹⁷⁴ This meant that if a new resident of Indiana possessed driver’s license from another state, they

¹⁶⁸ 2007 WL 3276506 at n. 6.

¹⁶⁹ Ind. Code § 3-11.7-5-2.5(c)(2).

¹⁷⁰ See 2005 WL 3707711

¹⁷¹ *Id.*

¹⁷² 2007 WL 3276506 n. 7.

¹⁷³ *Id.*

¹⁷⁴ See 2005 WL 3707710

would have to pay for an Indiana driver's license.¹⁷⁵ If they could not afford an Indiana driver's license, they would be out of luck. They could not obtain a free non-license identification card, because they already possessed a driver's license, albeit from another state.¹⁷⁶ The law's proponents attempted to blame this problem on the BMV.¹⁷⁷ They claimed that the BMV had "misunderstood" the law and would therefore change its policy going forward.¹⁷⁸

The Voter ID law contained a similarly incoherent exception for individuals with a religious objection to being photographed. To utilize this exception the voter would have to go through a multi-step process: they would have to go to the polls, cast a provisional ballot, and then return to the county clerk's office within 13 days after the election to sign an affidavit swearing to their religious objection to being photographed.¹⁷⁹ As the statute was written, the voter would have to go through this process for *every* election.¹⁸⁰ Presumably, such a voter's religious objection would not fade over time. Therefore, it made little sense for the legislature to require a religious objector to go through the same process for every election. When challenged on this point in court, the proponents of the Voter ID law essentially conceded this point but attempted to argue that religious objectors could avoid the problem of multiple trips by planning ahead and taking advantage of Indiana's early voting option.¹⁸¹

Perhaps the law's most problematic feature was the complete exclusion of absentee voting from its scope.¹⁸² None of the law's photo identification requirements applied to absentee voters. The proponents of the Voter ID law argued that photo identification would be of little

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *See* 2005 WL 3707714.

¹⁷⁸ *Id.*

¹⁷⁹ *See* 2007 WL 4618316.

¹⁸⁰ *See* 2007 WL 3276506.

¹⁸¹ *See* 2007 WL 4232930.

¹⁸² *See* Ind. Code 3-11-10-1.2.

use in the context of absentee voting.¹⁸³ However, as the law's opponents pointed out, one of the main justifications for passing the law was the need to combat fraud. While the law's supporters could not point to a single documented case of in-person voting fraud in Indiana, there were numerous documented cases of absentee voting fraud *in Indiana*.¹⁸⁴ If the purpose of the law was to combat voting fraud, why did it exclude from its scope the only type of voting fraud that was admitted by all parties to be a serious problem? The law's opponents were correct to emphasize this inconsistency.

ii. No Arbitrary Preference Amongst Values

The second step in determining the Indiana legislature's practical reasonableness in enacting the Voter ID law is to consider whether it preferred one value arbitrarily over another.¹⁸⁵ "Values" as defined by Finnis, are the most basic goods which drive human action.¹⁸⁶ Any commitment to a coherent plan will necessarily require some shifting of focus amongst these basic goods.¹⁸⁷ While such shifting is reasonable, it would have been unreasonable for the legislature to have made such a shift "willy-nilly"¹⁸⁸ Moreover, it would have been unreasonable if it acted on the basis of a devaluation of any basic goods or an overvaluation of derivative and instrumental goods, such as opportunity.¹⁸⁹

In elevating the value of knowledge above all others, Indiana's voter ID law fails Finnis' second test of practicable reasonableness. By knowledge, Finnis means an inquiry into a

¹⁸³ 2007 WL 4232930; *See also Crawford* 553 U.S. at 232 (Souter, J., dissenting) (Noting that certain individuals are forced to travel to the county seat every time they wish to vote and arguing that "[n]othing about the State's interest in fighting voter fraud justifies this requirement).

¹⁸⁴ 2007 WL 3276506.

¹⁸⁵ Finnis at 105.

¹⁸⁶ *Id.* at 90-2.

¹⁸⁷ *Id.* at 105.

¹⁸⁸ *Id.* at 106.

¹⁸⁹ *Id.* at 105.

proposition “out of curiosity, the pure desire to know, to find out the truth about it simply out of an interest in or concern for the truth and a desire to avoid ignorance or errors as such.”¹⁹⁰ The Indiana legislature certainly had this goal in mind. In enacting the Voter ID law, the legislature hoped to ensure that Indiana’s voters would know that everyone who voted in elections was legally entitled to vote. Such a requirement was designed to protect Indiana’s citizens from erroneous election outcomes based on fraud. There is no question that Indiana had an interest in protecting the integrity of elections.

However, the legislature’s preference for knowledge was certainly arbitrary. For example, recall from Part 1, *supra*, that the law’s proponents placed a heavy emphasis on the findings of a September 2005 report produced by a commission chaired by former President Jimmy Carter and former Secretary of State James A. Baker III.¹⁹¹ The report recommended many election reforms and suggested that states create universal, interconnected voter-registration systems and experiment with vote centers.¹⁹² Among other things, the report recommended requiring photo identification at the polls in order to combat voter fraud.¹⁹³ However, the law’s proponents obscured the report’s emphasis on pursuing the suggested reforms *gradually* and with careful attention to the needs of all citizens.¹⁹⁴ Indeed, after the enactment of Indiana’s Voter ID law, President Carter and Secretary of State Baker wrote an article in *The New York Times* clarifying that photo identification should be required only if states first assure that all citizens have been provided with such identification.¹⁹⁵ By obscuring

¹⁹⁰Finnis at 60.

¹⁹¹ Comm’n on Fed. Election Reform, Report, *Building Confidence in U.S. Elections* (Sept. 2005).

¹⁹² 2007 WL 4232930

¹⁹³ 2007 WL 4232930

¹⁹⁴ See *Crawford* 553 U.S. at 231-33 (Souter, J., dissenting)(Noting that “[Indiana] conspicuously rejected the Carter-Baker Report’s phase-in recommendation aimed at reducing the burdens on the right to vote, and just as conspicuously fails even to try to explain why.”)

¹⁹⁵ Jimmy Carter & James A. Baker, *Voting Reform is in the Cards*, N.Y. Times, Sept. 23, 2005, at A19.

the true findings of the report and pursuing a strict photo identification requirement on an accelerated timetable, the Indiana legislature acted “willy-nilly.” And in doing so, it devalued other goods while simultaneously overvaluing the opportunity presented by the Republican’s partisan advantage in the legislature.

Most obviously, the legislature devalued the good of sociability. By sociability, Finnis means, in its most basic form, “a minimum of peace and harmony amongst persons.”¹⁹⁶ In its strongest form, friendship, this involves individuals acting on behalf of the purposes and well-being of others.¹⁹⁷ In enacting the Voter ID law, the Indiana legislature clearly incited disharmony amongst the citizens of Indiana.

A review of the amicus briefs and other court filings submitted during the course of the litigation that ensued after the law’s enactment demonstrates as much. The most vigorous opponents of the law included groups representing the poor and homeless, the elderly, and minorities.¹⁹⁸ The reasons for this are straightforward. Many homeless persons do not have any possessions or a permanent address. Thus, they would have difficulty obtaining even a free non-license identification card under the law. For poor but not homeless persons, the process of obtaining a photo identification would be both expensive and time-consuming. For example, consider a poor person with no birth certificate, vehicle, or photo identification. That person would have to pay for a birth certificate, pay for transportation to state agencies, and perhaps take time off from work in order to obtain the required identification. Likewise, many elderly persons might never have been given a birth certificate or might have lost it at some point during

¹⁹⁶ *Id.* at 88.

¹⁹⁷ *Id.* at 88.

¹⁹⁸ See *Crawford v. Marion County Election Bd*, SCOTUSBLOG, (Dec. 19, 2014), <http://www.scotusblog.com/case-files/cases/crawford-v-marion-county-election-bd/> (providing links to numerous amicus briefs from groups representing the poor and homeless, the elderly, and minorities).

their lives. Moreover, as result of age or infirmity, many elderly persons might have difficulty traveling to obtain the required documents. Yet, under the Voter ID law, elderly persons without the required identification would be required to go through multiple steps to obtain the required identification. Minorities are both more likely to be poor and less likely to possess the documents necessary to obtain the required identification. If the legislature had been acting on behalf of the purposes and well-being of the poor and homeless, the elderly, and minorities, it would not have made it extraordinarily difficult for these groups to comply with the law.

It is worth noting that in making it difficult or impossible for certain groups to vote, the legislature arguably devalued all of the basic goods while overvaluing the opportunity to take advantage of a historic Republican majority. This is because voiting is the primary means by which citizens express their preferences for the way society is run. While governments do not control all aspects of citizens' lives, they nonetheless make decisions that have a significant impact. If citizens cannot participate in the decisions that affect their lives, "every aspect which puts a human being in good shape for self-determination" is threatened.¹⁹⁹ And if this is so, then arguably all of the other goods—knowledge, play, aesthetic experience, sociability, and religion—are at least indirectly threatened. Accordingly, because the Indiana legislature arbitrarily preferred knowledge at the expense of all the other goods, either directly or indirectly, it did not act reasonably under this second consideration.

iii. No Arbitrary Preference Amongst Persons

The third step in evaluating practical reasonableness is to consider whether the act in question arbitrarily prefers one group or class of people over another.²⁰⁰ According to Finnis,

¹⁹⁹ *Id.* at 86.

²⁰⁰ *Id.* at 106.

“this third requirement remains a pungent critique of selfishness, special pleading, double-standards, hypocrisy, indifference to the good of other who one could easily help, and all the other manifolds of egotism and group bias.”²⁰¹ It is almost undisputable that the Voter ID law preferred certain groups over others.

The Voter ID law required voters to show a driver’s license, a non-license identification card, or a limited category of other types of photo identification in order to vote. Although the parties disputed the specific numbers, it is clear that a large number of Indiana citizens already possessed the required identification at the time the Voter ID law was enacted.²⁰² Even so, those who did not possess the required identification were likely to be homeless or poor, elderly, or minorities.²⁰³

Although the law provided that free state identification cards would be available to everyone, it did not make this process simple. To obtain a state identification card, one would have to travel to a BMV office. As the opponents of the law pointed out in court, the number of BMV offices in Indiana was rapidly diminishing.²⁰⁴ This meant that the distance certain individuals would be required to travel was correspondingly increasing. Moreover, the law placed restrictions on the types of documents that could be used to obtain identification. For example, the list of documents was substantially more restrictive than the federal HAVA, which requires voters to provide certain identification when registering to vote in federal elections for the first time.²⁰⁵

²⁰¹ *Id.* at 107.

²⁰² Compare 2007 WL 4466632 with 2007 WL 4232930.

²⁰³ See, eg., 2007 WL 4466632.

²⁰⁴ See 2005 WL 3707711.

²⁰⁵ See 2007 WL 4618316.

According to the law's opponents, these document restrictions were likely to have a disproportionate impact on poor and homeless persons, the elderly, and minorities.²⁰⁶ For various reasons, these groups were less likely to be able to reproduce the necessary documents. On the other hand, the law provided that in addition to driver's licenses and state identification cards, voters would be allowed to provide certain federal documents such as passports and military identification cards in order to vote. As the law's opponents pointed out, only wealthier voters would be likely to possess these of documents, particularly passports.²⁰⁷

As noted above, the law also completely excluded absentee votes from the identification requirement. While this is not indicative of the same sort of socioeconomic discrimination evidenced by the strict documentation requirements, the law's opponents persuasively argued that it was arbitrary.²⁰⁸ In their view, if the law was truly intended to prevent voter fraud, it made no sense to exclude absentee voters from its purview, as absentee voting fraud was the only type of fraud for which there was documentary proof.²⁰⁹

In a sense, Finnis' third requirement bears a resemblance to Rawls' focus on the importance of maximizing the good of the least well-off in a society.²¹⁰ The Indiana legislature should have framed the Voter ID law with an eye towards ensuring that the least well-off could easily comply with its requirements. Because it did not, and because it arbitrarily preferred certain persons over others, the Voter ID law fails the third requirement of practical reasonableness.

²⁰⁶ See 2005 WL 3707711.

²⁰⁷ See 2005 WL 3707710 n. 9.

²⁰⁸ See, e.g., 2007 WL 4618316.

²⁰⁹ *Id.*

²¹⁰ See Finnis at 108-09.

iv & v. Detachment and Commitment

Finnis' fourth and fifth requirements of practical reasonableness are easy to analyze together as they are closely complementary.²¹¹ On the one hand, it is unreasonable for one to pursue one of the goods so blindly that all other goods are disregarded.²¹² On the other hand, having made one's general commitments, one must not abandon them lightly.²¹³ These twin requirements compliment the first requirement of adopting a coherent life plan.²¹⁴

As discussed to some extent above, the circumstances surrounding the enactment of Voter ID law were indicative of fanaticism, not detachment. The law was enacted by a newly-seated Republican House, Senate, and Governor, without the vote of a single Democrat. Moreover, the law's requirements were the strictest in the nation at the time it was enacted. A non-fanatical legislature would have worked with Democrats in developing, writing, and debating the legislation in order to produce a law that at least most parties could agree upon. A non-fanatical legislature would have taken notice of the outrage generated by similar Voter ID laws that were being contemporaneously challenged in other states such as Florida and Georgia. Such coordination would have taken time and required concessions from all sides, but it would have ensured the sort of detached process that is necessary to prevent an one from succumbing to the lure of fanaticism and threatening the other basic goods. However, the Indiana legislature did not exhibit detachment and so it violated the fourth principle of practicable reasonableness in enacting the Voter ID law.

²¹¹ *Id.* at 109.

²¹² *Id.*

²¹³ *Id.* at 110.

²¹⁴ *Id.* at 103.

Finnis' fifth requirement focuses on the balance between fanaticism and dropping out, that is, "unreasonable failure, or refusal to 'get involved' with anything."²¹⁵ This type of failure—the failure to live up to commitments—can threaten all of the basic values.²¹⁶ Here again, the Indiana legislature failed to meet Finnis' test. This is most clearly demonstrated by the fact that the Voter ID law would not have been necessary had Indiana not abandoned its obligations. As was discussed in Part I, *supra*, supporters of the Voter ID law pointed to the massive inflation of Indiana's voter registration rolls as one of the primary justifications for the law. However, as the law's opponents repeatedly emphasized in their court papers, this was largely Indiana's fault.²¹⁷ Although the law's supporters alleged that federal restrictions made it too difficult to maintain accurate voter registration rolls, the law's opponents persuasively demonstrated that this was a poor excuse and that Indiana could have done more.²¹⁸ They correctly noted the hypocrisy of supporters' attempts to justify the Voter ID law on the basis of the state's own enforcement failures. If Indiana's inflated voter registration rolls represented a threat to Indiana's citizens, the state had an obligation to fix the rolls. Instead, the state did nothing and blamed the federal government, thereby demonstrating the "sub-rational complacency of habit" that Finnis warns against.²¹⁹ Thus, the legislature violated the fifth requirement of practical reasonableness in enacting the Voter ID law.

²¹⁵ *Id.* at 110.

²¹⁶ Finnis at 110.

²¹⁷ *See, e.g.*, 2007 WL 4618316.

²¹⁸ Indeed, Indiana was sued by the United States government for violating its obligation to maintain accurate voter registration rolls. *See* 2007 WL 3276506 n. 11 (Noting that "the United States brought suit against the State of Indiana and state election officials for failing to comply with their duties under [the NVRA] to purge ineligible voters from the list").

²¹⁹ Finnis at 110.

vi. The Relevance of Consequences: Efficiency, Within Reason

The sixth consideration in determining whether the Voter ID law was practically reasonable focuses on whether the law was efficient for its purposes.²²⁰ This consideration is designed to prevent the waste of opportunities by using inefficient methods.²²¹ According to Finnis, “one’s actions should be judged by their effectiveness, by their fitness for their purpose, by their utility, by their consequences.”²²² On the other hand, efficiency should not be the sole factor in the decision making process.

The Voter ID law fails to meet the sixth requirement for practical reasonableness. The law created new requirements for obtaining photo identification that would be difficult for certain group of voters to comply with. As has been mentioned elsewhere in this paper, in order to obtain photo identification, certain individuals would have to go through multiple steps. These steps would include gathering various documents (possibly requiring travel to other states), traveling to state agencies (possibly multiple times), and going through the same process every four years. Moreover certain individuals without the proper identification would be required to make multiple trips in order to have their votes *counted*. For example, a voter without identification would be allowed to cast a provisional ballot on election day. But they would then have to travel to a state agency to obtain the required identification. They would then have to return to the circuit-court clerk or county election board within 13 days in order to present their identification or attest to their indigency or religious objection to being photographed.

²²⁰ *Id.* at 111.

²²¹ *Id.*

²²² *Id.*

The legislature could have recognized these difficulties and taken steps avoid creating such a burdensome process. For example, the legislature could have adopted less stringent requirement for obtaining photo identification by allowing voters to utilize more types of documents to verify their identities. The legislature also could have drafted the law to allow provisional votes to be counted at the polling stations themselves, provided that the voter signed an affidavit as to their indigency or religious objection at that time. There was no logical reason for the legislature to require an indigent voter or religious objector to make a second trip to the circuit-court clerk or county election board. As the opponents of the law emphasized in their court papers, polling officials could compare a provisional voter's signature with the signature on the poll book in order to detect fraud.²²³ Indeed, signature comparisons were already deemed to be an acceptable way to validate absentee ballots.²²⁴ Opponents of the law also pointed out the fact that in-person voting fraud was already a felony under Indiana law.²²⁵ Thus, they correctly perceived that the legislature should have recognized that these features represented a sufficient deterrent to in-person voting fraud.

Unfortunately, it seems that the legislature's primary justification for the Voter ID law involved the sort of cost-benefit analysis that Finnis dismisses.²²⁶ The proponent's court papers are filled with references to the small number of individual upon whom the law would have a substantial effect in comparison to the large number of voters who already possessed the required identification.²²⁷ The greater good of preventing voter fraud was justified by the supposedly minor difficulties the new requirements would impose on a relatively small segment of the

²²³ See 2007 WL 3276506.

²²⁴ *Id.*

²²⁵ See 2007 WL 4232929.

²²⁶ See Finnis at 112-13.

²²⁷ See, e.g., 2006 WL 420778.

population.²²⁸ In adopting a harsh cost-benefits approach to evaluating the efficiency of the Voter ID law, the legislature failed to meet the sixth requirement of practical reasonableness.

vii. Respect For Every Basic Value

According to Finnis' seventh requirement of practical reasonableness, "reason requires that every basic value be at the least respected in each and every action."²²⁹ Put simply, "for most practical purposes this seventh requirement can be summarized as: Do not choose directly against a basic value."²³⁰

As discussed to some extent above, the enactment of the Voter ID law represented a direct attack on the value of sociability. After the law was signed, a substantial number of individuals who had previously been eligible to vote were suddenly placed in a position where they could not vote. Those who did not have the required identification would be required to go through the potentially time-consuming and expensive process of obtaining identification in order to regain the rights they had enjoyed before. The legislature did not act to promote these individuals' well-being. And it did not promote peace and harmony. If, on the other hand, the legislature had decided to wait until all Indiana citizens were able to obtain proper identification *before* enacting the Voter ID law, it would not have represented a direct attack on the value of sociability. However, this is not what transpired.

viii. The Requirements of the Common Good

To pass muster under the eighth requirement of practical reasonableness, the Voter ID law must have been enacted with the purpose of favoring and fostering the common good of the

²²⁸ *Id.* (Proponent's legal brief arguing that "it is highly significant that birth-certificate fees are relevant to the Voter ID Law for only a limited category of voters...").

²²⁹ Finnis *at* 120.

²³⁰ *Id.* at 123.

community.²³¹ In the context of a political community, such as Indiana, the common good refers to “the securing of a whole ensemble of material and other conditions that tend to favor the realization of each individual in the community, of his or her personal development.”²³²

The primary reasons given for enacting the Voter ID law were preventing voter fraud and promoting and preserving public confidence in the fairness of election outcomes. Clearly, these are important goals. Voting in elections is one of the only ways a citizens can exert influence over the rules that shape the societies in which live. Fraudulent voting undermines this influence by diluting each legitimate voter’s voice. And a lack of confidence in the system discourages citizens from voting, thereby depriving of their ability to influence their government. Thus, protecting the voting process from fraud and voter apathy promotes the common good.

While there is no doubt that preventing voter fraud and enhancing the public’s confidence in the outcome of elections are fair and just goals, the Voter ID law clearly had the effect of tearing apart the community. This is because there was a complete disconnect between what proponents claimed their intentions to be and what their intentions appeared to be.

The proponents of Indiana’s Voter ID law could not point to a single instance of in-person voter fraud having occurred in Indian. Moreover, many of the studies and reports cited by supporters of the law did not convincingly demonstrate that other types of voting fraud were affecting the outcome of elections.²³³ Nonetheless, the legislature enacted a strict Voter ID law.

²³¹ *Id.* 125.

²³² Finnis at *154.

²³³ *See* 2006 WL 1786074. “There is no evidence that imposter voting has ever occurred in the history of the State or that it threatens the integrity of Indiana’s system of public elections. The record is devoid of any studies or other information the Legislature actually considered in enacting the Photo ID Law. Although the State during the course of the proceedings below introduced a plethora of unsworn, unauthenticated material purporting to demonstrate the existence of voter fraud in other states, nearly all of those materials involved fraud that this law does not address and could not have corrected nor detected. More importantly, the State offered no evidence that the Legislature ever

In doing so, the legislature shot itself in the foot. It undermined one of the primary goods it sought to promote: confidence in the integrity of elections. To many, the Voter ID law's strict requirements were unnecessary to combat voter fraud or voter apathy, even if it existed. Instead they represented an attempt by the legislature to prevent certain citizens from voting at all.²³⁴ Instead of creating favorable conditions in the community, the Voter ID law spurred immediate and outright acrimony. Again, this was evidenced by the immediate legal challenges filed against enforcement of the law as well as the nature and composition of the groups that lined up in opposition to the law.

Rather than promote the common good, the Voter ID law pitted the poor, the elderly, minorities, and the Democrat party against the Indiana state legislature, the Republican party, and voters who already possessed qualifying identification. Moreover, the ensuing legal challenges consumed countless hours and public resources as they worked their way up to the Supreme Court. In other words, the Voter ID law failed to promote the common good because it violated the principles of distributive justice. Distributive justice consists of five criteria, including need, function, capacity, merit, and risk of harm.²³⁵ The Voter ID law promised to distribute all of the burdens of compliance to the least well-off members of society, and all of the benefits to the most well-off members of society, who were already in compliance. For these reasons, the Voter ID law fails the eight requirement of practical reasonableness.

considered or relied upon any of this information, some of which was not in existence at the time the Legislature enacted the Photo ID Law.”

²³⁴ See e.g., *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007) (Evans, J., dissenting) (Characterizing the Indiana Voter ID law as a “not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic”).

²³⁵ See Finnis at 174-75.

ix. Following One's Conscience

Finnis' ninth requirement of practical reasonableness mandates that one follow their conscience and not perform any act that their conscious tells them should not be done.²³⁶ Put simply, "it is the requirement that one should not do what one judges or thinks or 'feels'-all-in-all should not be done."²³⁷ Being correct in this regard is not all-important, however.²³⁸ Thus, "[the] dignity of even the mistaken conscience is what is expressed in the ninth requirement."

Based on the facts set forth throughout this paper, I cannot conclude that the Indiana legislature fulfilled the ninth requirement in enacting the Voter ID law. First, the law was enacted on a strictly partisan basis immediately after the Republican regained control of all three branches of government in Indiana for the first time in many years. No Democrat was involved in this process. Second, the law was promoted on the basis that it would prevent voter fraud and preserve public confidence in the outcome of elections. Yet, the legislature could not present any evidence of the type of in-person voter fraud the law was purported to target. Third, the law strictly limited the types of documents a citizen could use to obtain the required photo identification. The law's supporters could not adequately explain why such strict limits were necessary to achieve the law's stated purposes. And fourth, it was clear from the outset that the law would have a disproportionate impact on the least well-off members of society. The law's supporters could not convincingly explain why this failure of distributive justice was an acceptable result.

Thus, when considering the totality of the circumstances, it is nearly impossible to conclude that the legislators were following their consciences when they enacted the Voter ID

²³⁶ *Id.* at 125.

²³⁷ *Id.*

²³⁸ *Id.* at 126.

law. Indeed, had they been following their consciences, President Carter, whose report the law's supporters egregiously manipulated for their own benefit, would not have called laws like Indiana's "discriminatory"²³⁹ or "abominable [and] a disgrace to democracy."²⁴⁰ Had they been following their consciences, they would have carefully considered their constituents' ability to live and procreate, to seek knowledge, to play, to enjoy aesthetic experiences, to act with reason, and to participate in religion, friendship and community. They would have recognized that passing the Voter ID law was an immoral act that undermined the most intrinsic and basic human values. Thus, based on the practical thinking which Finnis proposes, it is impossible for me to conclude the legislators acted consistent with a practically reasonable approach to preventing voter fraud.

²³⁹ Jimmy Carter & James A. Baker, *Voting Reform is in the Cards*, N.Y. Times, Sept. 23, 2005, at A19.

²⁴⁰ 2005 WL 6142059