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# Natural Law as Practical Methodology: A Finnisian Analysis of *City of Richmond v. J. A. Croson, Co.*

David Barnhizer  
*Cleveland-Marshall College of Law*

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NATURAL LAW AS PRACTICAL METHODOLOGY:  
A FINNISIAN ANALYSIS OF *CITY OF RICHMOND v. J. A. CROSON,*  
*CO.*

DAVID BARNHIZER\*

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I. INTRODUCTION

Natural law generates visions of just political orders. John Finnis provided such a vision in *Natural Law and Natural Rights*,<sup>1</sup> one that he continues in this Symposium's centerpiece essay, "Natural Law and Legal

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\* Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. A.B., Muskingum College; J.D., Ohio State University; L.L.M., Harvard University.

<sup>1</sup> J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) [hereinafter FINNIS]. See also Grisez, Boyle, & Finnis, *Practical Principle, Moral Truth, and Ultimate Ends*, 32 AM. J. JURIS. 94 (1987). The article contains a selected bibliography.

Reasoning."<sup>2</sup> In his essay, Finnis constructs a theory of human nature and legal reasoning, seeking to demonstrate how a practical, human-centered theory of natural law oriented to the value of life and basic human goods and in which principles emanate from "natural" human characteristics, can clarify basic reasons for judicial choice.<sup>3</sup> In doing so, Finnis offers important elements for the development of a practical methodology of natural law, one potentially useful for understanding the deeper nature of what judges do in making specific choices in hard cases.<sup>4</sup>

Linked concepts of nature and human nature have always been integral elements of natural law, although the concepts reflect nothing more than hypotheses. Dennis Lloyd remarks, for example, that the essence of natural law may be said to lie in "the constant assertion that there are objective moral principles which depend upon the nature of the universe and which can be discovered by reason . . . [and that] the rules governing correct human conduct are logically connected with imminent truths concerning human nature."<sup>5</sup> d'Entrevés has observed, however, that "many of the ambiguities of the concept of natural law must be ascribed to the ambiguity of the concept of nature that underlies it."<sup>6</sup>

It has nearly always been assumed within the various theories of natural law that the universe is somehow elementally and morally linked with humans and that humans possess the ability, or at least the potential ability, to join harmoniously with the universal force or being.<sup>7</sup> The fac-

<sup>2</sup> Finnis, *Natural Law and Legal Reasoning*, 38 CLEVE. ST. L. REV. 1 (1990) [hereinafter *Natural Law*]. Practical reason and practical wisdom are intimately linked with experience and judgmental maturity more than the exercise of speculative or mathematical thought. Aristotle comments: "[W]hile young men become geometers and mathematicians and wise in matters like these, it is thought that a young man of practical wisdom cannot be found. The cause is that such wisdom is concerned not only with universals but with particulars, which become familiar from experience . . ." ARISTOTLE, *THE NICOMACHEAN ETHICS*, Bk. VI, ch. 8, (R. McKeon ed. 1973) [hereinafter ARISTOTLE].

<sup>3</sup> *Natural Law*, *supra* note 2. Finnis offers what can become a shared language of natural law. A shared language is an increasingly vital need.

<sup>4</sup> Natural law, like wisdom, has had many meanings. Eugene Rice's description of the changing content of our concepts of wisdom are equally applicable to how we have thought about natural law.

[I]f the various definitions of wisdom invented by the Greek philosophers remained virtually intact from Plato's *Phaedrus* and Aristotle's *Metaphysics* to the *De la Sagesse* of Charron, their meanings changed profoundly. . . . It [wisdom] mirrored man's conception of himself, of the world, and of God. [S]uch an idea is inevitably a continual re-penetration of traditional formulas with new values and new assumptions. Word and definition remain static; the idea itself is transformed by the changing needs and aspirations of successive epochs, centuries, and even generations.

E. RICE, JR., *THE RENAISSANCE IDEA OF WISDOM* 2 (1958).

<sup>5</sup> LORD LLOYD OF HAMPSTEAD & M.D.A. FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE FIFTH EDITION* 93 (1985) [hereinafter LORD LLOYD]. Finnis continues this tradition, at least as to the existence of some objective moral criteria discoverable by the application of a richer form of practical reason. "Natural Law and Legal Reasoning" at 19.

<sup>6</sup> A.P. D'ENTREVÉS, *NATURAL LAW* 16 (Rev. ed. 1970).

<sup>7</sup> See, e.g., A. TOYNBEE, *A STUDY OF HISTORY*, (Abr. Ed. 1957) [hereinafter TOYNBEE], referring to the dominance of Greek ideas of rationalism and their influence on Western intellectual structures through the Catholic Church's extreme concentration on Aristotle.

ulty or mechanism of reason has been the predominant qualitative power that connects humans to the hypothesized universal “field” of values, morality, reason, or God.<sup>8</sup> These assumptions are anthropocentrically religious in nature, have never been proven as opposed to asserted, yet rest at the base of virtually all of the Western intellectual system including all of natural law, even Finnis’s “practical” version.<sup>9</sup>

Finnis begins “Natural Law and Legal Reasoning” by asserting that, “[a] natural law theory is nothing other than a theory of good reasons for choice (and action).”<sup>10</sup> This represents a shift from a post-Aquinian Scholastic and rationalist view of an authoritative core of singular reasons for action (or inaction) derived from sources external to humans, and to which presumptively inferior humanity was subject, and both transforms the nature of natural law and returns it in some ways to its pre-Cartesian and pre-Rationalist interpretations. Finnis does not, however, break from the universal “field” but concentrates more on the inter and intra-human dimensions of the process.

<sup>8</sup> [T]he most plausible explanation of the comparative failure of the ideals of democracy and progress lies in the overestimation their holders made of the reasonableness, the powers of analytical thought, of the average man today; that therefore all interested in man’s fate should study with great care the way men actually behave, the relation between their ideals and their acts, their words and their deeds; finally, that this relation is not the simple, direct, causal relation most of us were brought up to believe it is.

C. BRINTON, *IDEAS AND MEN: THE STORY OF WESTERN THOUGHT* 26 (1950) [hereinafter BRINTON].

<sup>9</sup> See, e.g., T. AQUINAS, *THE SUMMA THEOLOGICA*, Reprinted in G. CHRISTIE, *JURISPRUDENCE* 89 (1973), particularly Question 91, “Of The Various Kinds Of Law” in which Aquinas sets out a hierarchy that includes 1) eternal law, 2) natural law, 3) human law, and 4) Divine law; concluding in Question 93, Third Article that “. . . all laws, in so far as they partake of right reason, are derived from [and subject to] the eternal law.”

<sup>10</sup> Finnis, *supra* note 2, at 1. In writing this article, I received suggestions and criticisms from various sources. Though they were all useful, one provided a counterpoint to much of my own work (and premises) and challenged the meaningfulness of Finnis’s efforts. Various criticisms from the letter written me by Earl Finbar Murphy of the Ohio State University College of Law are quoted at length in these footnotes so that the full flavor of a legitimate alternative viewpoint is captured accurately. Murphy states:

Like you, I find Finnis a “software” approach—frankly, too “touchy, feely” for my preference. My grandmother, a Calvinist, used to say of my mother’s religion, “Well, Wesleyanism is good enough for Carrie, but you can’t call that pap a theology!” Finnis sort of reminds me of Father Devlin’s attempt (American Philosophical Society, c. 1959) to marry science and natural law or Fred Beutel’s Experimental Jurisprudence that sought to elevate science to more than lab notes—but I think those two were better. Still, yours is a valiant effort to make Finnisian analysis useful. In an age of crypto-natural law (Dworkin) and the corpses of natural law (despite your brave citation as authorities of Plato, Aristotle, and even Thomas), such an effort is worth the doing, even if—maybe—it merely shows its futility.

Letter from Earl Finbar Murphy to David Barnhizer, April 17, 1990, p.1 [hereinafter Earl Finbar Murphy letter].

Finnis's altered focus is consistent with what G.S. Brett called "the original and natural idea of knowledge," identifying the essence of knowledge as "a capacity for overcoming the difficulties of life and achieving success in this world."<sup>11</sup> This echoes Aristotle's description of practical wisdom as a "true and reasoned state of capacity to act with regard to the things that are good or bad for man."<sup>12</sup> Finnis thus simultaneously rejects the dominant focus, or at least reduces greatly the intensity, of both the theologically centrist and the metaphysically super-rational conceptions of natural law and advances the process of creating a version of natural law that emerges more from the biological, political, motivational and rational nature of humans than from more artificial (or ideal) constructs. Finnis does not, however, abandon reason and God in hypothesizing how they influence, enrich, and direct the application of natural law through human thought operating in a practical, political context.

This same kind of humanistic analysis of human capacities and values is found also in other fields of knowledge that are seeking to overcome the bondage of scientism and "pure" rationalism.<sup>13</sup> Rollo May has, for example, described our situation as one in which "we are living at a time when one age is dying and the new age is not yet born."<sup>14</sup> Central to the dying tradition is the dichotomy between subject and object; one that has been called a "cancer" with "most . . . modern schools of thought still [assuming] this split without being aware of it."<sup>15</sup>

#### A. *The Structure and Focus of This Article*

The first part of this article examines some of the main features of Finnis's theory of natural law. It suggests that Finnis offers a "soft" theory of natural law anchored in a richer and more realistic conception of human nature than has generally characterized natural law theory. It brings forth the role of Aristotelian practicality in Finnis's thinking, explaining how that assertion distances Finnis from natural law theorists who

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<sup>11</sup> G.S. BRETT, *PSYCHOLOGY ANCIENT AND MODERN* 36-37 (1928), *quoted in* M. McLuhan, *THE GUTENBERG GALAXY* 93-94 (New American Library ed. 1969).

<sup>12</sup> ARISTOTLE, *supra* note 2, at Bk. VI, ch. 5. *But see*, Earl Finbar Murphy letter, "To me, though, it's just another variety of result-oriented jurisprudence. Pick the outcome one wants; and then criticize the court's results if they don't agree with some scheme that purports objectively to reach one's preferred result. Plato in the *Laws* was great at that game, as was Aristotle in his defense of slavery. Finnis, too, certainly runs along that line, in my view, though arguably more noble." Earl Finbar Murphy letter, *supra* note 10, at 1.

<sup>13</sup> *See e.g.*, Campbell, *Scholarly Disciplines: Breaking Out*, *N.Y. Times*, Apr. 25, 1986, at A18, col. 1.

<sup>14</sup> R. MAY, *THE COURAGE TO CREATE* 11 (1975).

<sup>15</sup> *Id.* at 43. "[L]ogical positivism asserts that the only valid kind of knowledge is cumulative knowledge, the kind one finds in natural science." BRINTON, *supra* note 8, at 516.

grounded their arguments in "pure" reason. Finally, the first part of the article discusses the roles of what Finnis calls basic human goods, attempting to suggest how the particular basic human goods he advances intuitively provide an important component of a framework for a more realistic variety of natural law. These Finnisian basic goods, or reasons for choice and action, include the valuing of human life, the quest to know reality, the search for harmony on the interpersonal, communal, and internal planes, and awareness of a higher level of meaning in the universe.<sup>16</sup>

The article's second part briefly describes some methodological aspects of Finnis's theory. The focus explores how Finnis has arguably created a distinct methodology of natural law that is changed in character from the more rigid rationalistic varieties that had dominated Western thought. In doing so, Finnis offers a modern, complex form of natural law that contains a fuller account of human nature and basic goods as integral elements of judicial thinking, mission, judgment, and decision making.

The third part seeks to apply Finnis's principles to Justice O'Connor's opinion in *City of Richmond v. J. A. Croson Co.*,<sup>17</sup> a decision that makes it extremely difficult for state and local governments to combat the subtle devices and consequences of racism except in the most narrow sense. *Croson* erects barriers that go beyond a strict scrutiny standard of review of race-conscious remedial legislation, with additional barriers including: 1) the requirement of significant specificity of findings of discrimination imposed on state and local governments; 2) the need for local governmental units to find they were either active or passive participants in the pattern of discrimination they seek to remedy through legislative action; 3) the overly restrictive method by which the dimensions of the class of those entitled to remedial relief is computed and thus significantly limited; 4) the reduced ability of local governments to rely on national findings about discrimination in a particular field or subsystem of economic activity in order to aid in determining the need for and the scope of remedial action; and, 5) the restriction of state and local governments' use of statistics about underlying forms of systemic discrimination to support their analysis of the need for action.<sup>18</sup>

As a result of that "Finnisian" analysis it is concluded that O'Connor's opinion in *Croson* reflects the classic tendency to use abstract natural law principles as ideological assertions to aid an interest group to either defend against encroachments by others seeking to gain shares of power or as a justification for seizing power.<sup>19</sup> While Finnis's "practical" theory

<sup>16</sup> NATURAL LAW, *supra* note 2, at 1-2. See also FINNIS, *supra* note 1, at 86-89.

<sup>17</sup> *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706 (1989).

<sup>18</sup> *Id.* See *infra* text accompanying notes 102-123. During the past year or so, the Supreme Court has decided a set of affirmative action cases that undermine the ability of governments, courts, and private litigants to either force or take remedial steps to redress past discrimination that has continuing structural and distributive effects which perpetuate the distortions of long-term racism in employment. See *infra* notes 22-24. Included among the cases is *Wards Cove Packing Co., Inc. v. Atonio*, 109 S. Ct. 2115 (1989).

<sup>19</sup> See *infra* note 57, to the effect that natural law can have a subversive impact when directed toward entrenched political systems.

can be abused in this same way, it nonetheless holds substantial promise as a critical method for analyzing what judges actually do in hard cases.

### *B. The Idea of Authentic Practical Judgment*

Magnificent judicial rhetoric may lack insight, integrity, logic, or meaning in the processes of application and decision. Judicial decisions must be examined in light of their practical meaning, quality, and authenticity, not simply in terms of judicial rhetoric or formal logic. Implied within Finnis's practical theory of natural law is the need for authentic application of practical reason in deciding legal controversies. The Aristotelian concept of practical reasoning is not an abstraction but a principle that by implication carries within itself the requirement that one who exercises practical reason seek to achieve a heightened level of insight simultaneously directed at understanding the conditions of the external world and the quality and limits of one's own ability. In each dimension the person is never satisfied with where he or she is, but is continually seeking to extend, clarify, and enrich the content and quality of individual awareness.

These considerations suggest that a judge, for example, must: 1) seek an experientially-based, and accurate, understanding of human systems and the reality of their operation; 2) be willing to question the quality of personal knowledge and values; 3) seek to communicate fully, accurately, and honestly with others; 4) possess the ability to authentically apply largely abstract principles to the reality of problems with which the judicial decision maker is confronted; 5) allow a case's internal and external contextual realities to merge with the principled abstractions and by doing so define, enrich, and interpret the practical interactions between fair and just political needs and abstract principles, in essence to understand that principles are energized and given life by the decisional context; and 6) be aware that judicial decisions, and the reasoning processes on which they are based, are not exercises in either pure or formal logic but are inevitably a complex set of choices that has been described as not "a chain of deduction" such as is required by formal logic or mathematics, but "a succession of cumulative reasons which . . . cooperate in favor of saying what the reasoner desires to urge," and that "the reasons are like the legs of a chair, not the links of a chain."<sup>20</sup>

<sup>20</sup> LORD LLOYD, *supra* note 5, at 1139-40, 1189. Joseph Vining discusses the idea of authenticity in J. VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (1986).

A statement, document, or text is authentic when it can be taken seriously. If a statement is to be taken seriously the author of it must mean what he says.

*Id.* at 42.

The legal analyst whether lawyer or judge, in erecting the edifice that, after he is finished, he presents as the law of this or that, or as the opinion of a court—who is structuring precedents, or sentences, and deciding which will have more weight than others and which are

Judicial logic is judgmental and practical rather than abstract, and inevitably demands and reflects a series of both subtle and explicit choices by judges, not only as to initial or beginning premises, but also as to the desired outcomes to be served by the decision, and internal preferences that favor particular values over others. What is therefore being described is the fairness, quality, accuracy, and authenticity of the subtle hidden, and often inchoate processes of judicial choices that are integral elements of any judicial decision. In this dimension of qualitative judicial practicality (in the Finnisian and Aristotelian sense), Finnis's theory only begins the process of describing how the internal dynamics of judicial thought can be examined and how we can evaluate those dynamics as well as the quality of judges' connecting of their internal world with the extrinsic conditions being judged.

Given that judicial opinions are woven from choices made by judges about principles, reality, reasons, language, desired outcome and acceptable consequences, Finnis's use of the practical dimension as a fundamental element of his theory of natural law requires that judicial choices be understood as practical reason operating in a context of and in reference to the judge's system of practical wisdom. Practical wisdom can be defined as the quality of a particular judge's moral, political, experiential, and intellectual understanding.

Understanding the authenticity of a particular judicial application of practical reason, choice, and judgment forces us to become aware of the way humans decide complex questions, including the factors that tend to be generated by what would be accepted as negative elements in the exercise of human judgment, e.g., ideologic rigidity, blindness to or intolerance of other's legitimate views, closed-mindedness, pursuit of a personal agenda that is in the interest of a very limited group and/or does not seek to achieve fundamental fairness or justice, lack of understanding of factual and experiential realities that are highly relevant to the particular controversy, and inherent deficiency in judgmental ability. Understanding whether judges are being authentic in their choices and decisions is difficult, however, because such analysis requires a subjective awareness of the judge as a specific human being, in addition to the bare language used in the decision.

In applying the requirement of judicial authenticity to Justice O'Connor's opinion in *Croson*, it is argued that, while she does not fail at the initial point of her articulation of abstract principles of equality, personal rights, and the need for a strict standard of review of race-conscious remedial legislation or affirmative action plans, her practical reasoning is seriously flawed once she moves away from the initial premise to the far more challenging processes of authentic application. Lofty principles are almost inevitably valid as abstractions, as opposed to their much more complex application to the specific content and context of particular cases and understanding of their distributive and redistribu-

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aberrations and mistakes—will put aside first those texts and expressions in which the speaker was not attempting at all to say what the law was but was rather saying what he wanted his listeners to think the law was.

*Id.* at 43.



tive implications for society, in other words, their *practical* levels of meaning. It is at these practical levels of intellectual depth, judgment, perception of reality, honesty, and fairness that O'Connor fails to authentically analyze the content, context and consequences of the *Croson* case.

Justice O'Connor's failure to make authentic connections between abstract premises and their application and consequences is a product of two factors: 1) the too-rigid structure of her basic core belief systems that allow her to understand the world she judges only in terms consistent with the ideological tenets of those beliefs,<sup>21</sup> and 2) a failure of perception on her part that is exacerbated by the fact that the newly formed majority of the Supreme Court is engaged in a strategy to undermine civil rights advances in America.<sup>22</sup>

The emergence of the Supreme Court's new political majority has altered not only the controlling ideology of the Court but has transmuted its decisional dynamics and criteria. The majority's members are largely freed from the need to compromise and negotiate outside the value preferences of their own group. In affirmative action and civil rights cases, at least, the new majority is now able to rely on ideological power, rather than practical wisdom, in choosing cases and designing and expressing choices.<sup>23</sup> Members such as O'Connor are less compelled to provide sound

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<sup>21</sup> Thomas Green describes how humans often organize their core-belief systems in ways that protect them from evidence that would otherwise require change in those beliefs, stating:

[W]e tend to order our [core] beliefs in little clusters encrusted about, as it were, with a protective shield that prevents any cross-fertilization among them or any confrontation between them.

T. GREEN, *THE ACTIVITIES OF TEACHING* 47 (1971) [hereinafter cited as GREEN].

<sup>22</sup> For a description of Reagan's strategy to create a Supreme Court that would reflect his views on race, affirmative action and abortion see Press and McDaniel, *Judging the Judges: The Courts are Being Re-created in Reagan's Image*, *Newsweek*, Oct. 14, 1985, at 73.

Unable to win Congress over to its views on social issues, the administration has pinned its hopes on the courts. And it has done so with no apparent irony, despite the longtime insistence of conservatives that courts are the wrong place to make policy.

*Id.* For fundamentalist and conservative opinions on the role of the judiciary and the proper response. See also, T. LAHAYE, *THE BATTLE FOR THE MIND* 20 (1980) [hereinafter cited as LAHAYE] and W. Berns, "Judicial Rhetoric," in *RHETORIC AND AMERICAN STATESMANSHIP* 55 (G. Thurow and J. Wallin Ed. 1984) [hereinafter cited as Berns].

<sup>23</sup> Benjamin Hooks, Executive Director of the NAACP, recently stated that: "Four men in judicial robes and one woman in judicial robes [sic] are doing more to send this nation backward than all the people who wore Ku Klux Klan robes in the history of this nation. . . ." Segall, *NAACP Chief Blames Court for Rights Losses*, *The Plain Dealer*, Apr. 6, 1990, at 2-B, col. 3. The Senate Labor and Human Resources Committee recently approved a bill aimed at reversing what were perceived as Supreme Court reverses of civil rights advances. Sen. Paul Simon stated: "The reality is that we have had a retreat on civil rights and we have to turn it around." *Senate Panel OKs Civil Rights Bill: Veto Threatened*, *The Plain Dealer*, Apr. 5, 1990, at 8-A, col. 1. *Contra see*, Earl Finbar Murphy letter, *supra* note 10, at 2:

reasons for their choices, or subject to pressure to comprehend the deeper meaning of their own choices, than were members of less ideologically committed or more politically complex majorities of the Supreme Court.<sup>24</sup> The final part of this article develops these points in the context of *Croson*.

## II. AN OVERVIEW OF FINNIS'S THEORY

### A. A "Soft" Theory of Natural Law

The past abuses of natural law should not blind us to its legitimate uses, ones we have been generally unwilling to explore until quite recently because the theses possessed by Enlightenment and Scientific orthodoxies rejected the possibility of metaphysical and religious truth of which natural law had been seen as an integral part.<sup>25</sup> It is only recently that natural law theorists such as Finnis have begun to reweave natural law into a countervailing thesis to the exhausted languages of discourse represented in Scientism and Scientific Rationalism.<sup>26</sup>

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I cannot get excited over: (1) these 6 or 7 civil rights cases that have the legal community (and not just the liberals in that community, either) in an uproar. They are based on statutory interpretation; Congress can over-rule them legislatively; and, if Bush doesn't veto the latest Congressional override, Congress has done so. Only if the Court says Congress cannot do so is there much to be excited about. (2) Nor am I upset muchly over Republican packing of the federal judiciary. FDR did it; LBJ did it; Jimmy Carter did it—all for noble motives, of course. If Tricky Dick did not do it, more fool he. (3) Nor am I bothered that the neoconservatives would pursue an activist judicial stance, as Bork would have done and as—maybe—Scalia, Kennedy, *et al.*—are doing. *Neo* is not *paleo*; and there is no reason to passively accept as cut in stone what prior liberal activist majorities built from the rubble of the precedents they found in place and then smashed. As for (4) O'Connor being "inauthentic"—that sounds more Sartrean to me than Finnisian; and I do not want to put on paper my view of "Sartre the great humanist" (Shostakovich, in his diary, covered that subject very well).

<sup>24</sup> Press and McDaniel write:

Reagan's approach breaks with past presidencies. By today's standards, for example, many of Nixon's appointments were moderates; indeed, many joined in the decisions that the new Reagan judges aim to reverse. The new strict scrutiny troubles some Republicans. Says one former senior Reagan official, "The emphasis is almost totally toward philosophy and disregards almost everything else, including a willingness to approach issues with an open mind."

Press and McDaniel, *supra* note 22, at 74.

<sup>25</sup> See LORD LLOYD, *supra* note 5, at 111.

<sup>26</sup> The idea of the competing ebb and flow of languages of discourse is described by C. AXELROD, *STUDIES IN INTELLECTUAL BREAKTHROUGH* 2-3 (1979).

Ideas do not float freely among people; they become rooted in commitments, ossified and sustained within intellectual communities; they are cradled among avid sponsors and defenders whose work relies on their stability. Thus the tension of discourse refers not only to the presence of one language addressing (and straining) another, but to the presence of one language addressing the inertia of another.

Those who determine our fundamental premises shape the dialogue about the proper or true nature of reality. If we agree with the assertions of thinkers such as Finnis, Rawls, Kant, Aquinas, Pufendorf, Locke or Hobbes, it is not because they have been proved "right," but because we want to, or because they seem to "make sense." Their thought can be useful, conceptually elegant, or simply congruent with our own preferred values, but a natural law theory will never be proved right, even if absolutely true. This *a priori* character of natural law is what allowed it to become a tool of religious, political and philosophical orthodoxies, often leading to abuses that caused its rejection as anything more than manipulative metaphysical rubbish or ecclesiastical propaganda.<sup>27</sup>

Natural law of any kind is grounded on faith and assumption concerning the validity and nature of its fundamental tenets. Finnis's theory, as do all other natural law theories, contains "soft" elements that cannot be validated through any method considered suitably authoritative, precise, or scientific.<sup>28</sup> Finnis's theory is even "softer" than most of the grand natural law schemes that have been advanced, however, because it is centered much more in humans than in implicit or explicit assumptions concerning divine existence or the hidden structure of the universe, and does not pretend to be based on a singular and absolute certainty. Conversely, by seeking (or claiming) certainty, the grand natural law systems inevitably foundered on the fluidly chaotic realities of modern society while Finnis, by softening and humanizing the focus of natural law, has created a natural law methodology with far greater potential for useful application. The fact that Finnis's theory is not yet complete should not obscure the important and valuable transformation of natural law thinking he has wrought by expanding its focus and extending the concepts of human nature and social purpose.

### *B. The Functions of Natural Law*

Natural law provides a mechanism that compels attention be paid to what Toynbee called the "questions that modern Science could not answer," those of justice, truth, life, death, purpose.<sup>29</sup> While natural law

<sup>27</sup> See, e.g., BRINTON, *supra* note 8.

The logical positivist tends to regard all traditional philosophical thinking, the kind involved in fields like metaphysics, ethics, political theory, even most epistemology . . . as a complete waste of time . . .

*Id.* at 517.

<sup>28</sup> Natural law is a noncumulative form of knowledge. Crane Brinton drew the distinction between what he called cumulative knowledge (science) and noncumulative knowledge (ethics, beauty, literature, justice). See BRINTON, *supra* note 8, at 13, observing that "our contemporary men of letters are today writing about the very same things the Greek men of letters wrote about, in much the same way and with no clear and certain increase in knowledge."

<sup>29</sup> TOYNBEE, *supra* note 7, at 99-100.

Man's intellectual and technological achievements have been important to him, not in themselves, but only in so far as they have forced him to face, and grapple with, moral issues which otherwise he might have managed to go on shirking. Modern science has thus raised moral issues of profound importance, but it has not, and could not have, made any contribution toward solving them. The most important questions that men must answer are questions in which science has nothing to say.

may not produce ultimate answers, it provides a focal point for a set of fundamental ideals of a kind that complex societies are better off taking into account in their policy setting and decision making. This equates with Plato's description of the function of ideals, exemplified by the ideal of "absolute justice and . . . the character of the perfectly just . . ." <sup>30</sup> Plato urged that, "[we] were to look at these in order that we might judge of our own happiness and unhappiness according to the standard they exhibited and the degree in which we resembled them, but not with any showing that they could exist in fact." <sup>31</sup>

By creating standards of the good and attempting to conform our behavior to those standards, we create a mechanism of inquiry that hopefully drives us closer to that ideal. As will be discussed shortly, this is a main element of Finnis's theory. Forgetfulness or denial of the fact that ideals are aspirational and not true renderings of reality, however, is a critical flaw and constant danger not only among natural law theorists, but among judges who continually and unwittingly use natural law themes in their decisions. In *Regents of the University of California v. Bakke*, Justice Powell warned against relying completely on abstractions and failing to understand the reality with which the Supreme Court must deal:

[C]laims that law must be "colorblind" or that the datum of race is no longer relevant to public policy must be seen as aspirations rather than as a description of reality.

. . . .

[W]e cannot . . . let colorblindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens. <sup>32</sup>

In *Croson*, for example, Justice O'Connor reifies the ideals of equality and individual rights to such an extent that she blinds herself to the reality of the appropriate interplay and balancing that must occur within practical political systems or, put more cynically, she may understand the nature of what she is doing and seeks to blind those who read the opinion.

<sup>30</sup> PLATO, THE REPUBLIC, in THE WORKS OF PLATO 387 (I. Edman ed. 1928) [hereinafter PLATO].

<sup>31</sup> *Id.* But compare, Earl Finbar Murphy letter, *supra* note 10, at 2:

"Justice stinks in the nostrils of the common lawyer" has always been a favorite concept of mine. The common law is a law of process. If due process is done, then all that a court, or the whole Bar of lawyers, or the whole panoply of a *legal* system has done all that can be done. Otherwise, one calls in the *auto-da-fe*, or the stormtroopers, or the other forces that "do the justice thing". Your footnote 79, quoting Willard Hurst, goes as far in the direction of seeking justice as I can allow my passion to be carried—although I try not to be a Stefan George, crying, "When I hear the word culture [in my case, justice], I reach for my revolver" or like Mayakovsky, declaiming, "Comrade Politicians [in my case, jurists], give it a rest: Comrade Revolver has the floor."

<sup>32</sup> *Regents of The University of California v. Bakke*, 438 U.S. 265, 327 (1977).

In Finnis's system, natural law's function becomes that of guiding and enriching the development, application, and interpretation of human law rather than its control. Finnis asserts that "a natural law theory is nothing other than good reasons for choice (and action)," but what are the implications of this statement? First, it recognizes implicitly that numerous claims have been made about the power of natural law to control human-made laws.<sup>33</sup> Unlike many of his predecessors, Finnis is hesitant to claim such ultimate insights. Words like "nothing other" reflect a calculated effort to avoid claiming too much for his theory of natural law, recognizing that such a claim would doom his arguments.

Natural law thus assumes two identities. In one guise it is primarily an internal or personal methodology of life and action rather than an external or revealed system. In its personal character it provides each of us with a set of values and reasons through which we can enrich and clarify our thought processes and choices. In its other use, i.e., an externalized set of normative premises that arguably ought or do provide a value matrix and referent for human decision making, natural law offers a methodology by which the decisions of courts can be evaluated.<sup>34</sup>

Finnis's initial premise that natural law is nothing other than a means of identifying good reasons for our choices distances his theory of natural law from those belonging either to the religious tradition of natural law that claimed too much, or highly rationalistic metaphysical sources grounded in assumptions that the universe was governed by natural laws emanating from a "natural," essentially Deistic source of pure reason.<sup>35</sup> In presenting a "softer" theory, Finnis creates a more humanistic version of natural law. Finnis does not, however, abandon the existence of a

<sup>33</sup> See, e.g., J. LOCKE, *ESSAYS ON THE LAW OF NATURE* (W. von Leyden trans. 1954), particularly Essay VI: "Are Men Bound By The Law of Nature? Yes," *Reprinted in* G. CHRISTIE, *JURISPRUDENCE* (1973).

<sup>34</sup> In looking at Finnis's theory and thinking about it in terms of a substantive method, Brinton's language of a healthy form of *anti-intellectualism* is helpful: [*Anti-intellectualism* . . . [is] the attempt to arrive rationally at a just appreciation of the actual roles of rationality and nonrationality in human affairs. The term is widely used, however, to describe something quite different—the praise of nonrationality, the exaltation of nonrationality as the really desirable human activity, the denigration of rationality. Such an attitude of dislike for rationality and love for nonrationality we prefer to call romanticism, the romanticism of Goethe's "feeling is all."

BRINTON, *supra* note 8, at 504.

<sup>35</sup> Brinton describes the Enlightenment's concept of nature:

Nature was to the Enlightenment wholly a benign concept . . . [T]he Nature of Newton as filtered down into the educated and half-educated was the orderly, untroubled, beautifully simple working of the universe properly understood. Once we understand this nature in human affairs, all we have to do is regulate our actions accordingly, and there will be no more unnatural [*bad, irrational*] behavior.

*Id.*, *supra* note 8, at 370.

Brinton adds:

"Rationalism as it grew up in the sixteenth and seventeenth centuries . . . is in fact a complete metaphysical system; more than that, it served for a minority, and continues to serve, as a substitute for religion."

*Id.*, *supra* note 8, at 336.

universal structure of values, choosing instead to soften its intensity and shift its source and content toward the human end of a continuum on which we still can find God as well as a subtle natural structure to the universe, at least as far as it relates to humanity.<sup>36</sup>

Finnis's assertion that a natural law theory provides good reasons for choice and action also implies that humans are capable of comprehending natural law in some form and, in fact, of creating the specific manifestations of natural law by their choices.<sup>37</sup> Finnis theorizes that an identifiable set of basic human goods provides authoritative, though not singularly definitive, sources of "natural" values.<sup>38</sup> He argues that human emotion and human reason are practically integrated in such a way that the basic human goods can be understood and applied in the decision making process.<sup>39</sup>

Natural law provides a source of authority that is anchored to humans' deeper beliefs about our own nature, the nature of humanity and of the universe we inhabit.<sup>40</sup> When these beliefs "feel" of sufficient moral or natural power (and the concept of nature is itself a moral and normative judgment), the balance can cause humans to suspend their concerns about

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<sup>36</sup> Finnis includes religion as a basic good. See FINNIS, *supra* note 1, at 89. For many the concept of God is inextricably intertwined with the nature of the universe. Stephen Hawking, one of our leading physicists, writes that the search for a unified theory of physics will lead to "the ultimate triumph of human reason — for then we would know the mind of God." S. HAWKING, *A BRIEF HISTORY OF TIME: FROM THE BIG BANG TO THE BLACK HOLE* 175 (1988) [hereinafter HAWKING].

<sup>37</sup> *Natural Law*, *supra* note 2, at 3. The idea of natural law with a variable content in which the absolute ideal of justice is nonetheless differently applied depending on the period, culture and needs can be found in J. STONE, *HUMAN LAW AND HUMAN JUSTICE*, Chap. 6 (1965).

<sup>38</sup> *Natural Law*, *supra* note 2, at 7-8. Finnis argues that there are objectively good basic human values. Finnis attempts to offer a practical answer to dilemmas such as Roberto Unger's. In examining the nature of jurisprudential thought, Unger comments that he soon found himself in a "house of reason . . . which . . . proved to be a prison-house of paradox whose rooms did not connect and whose passageways led nowhere." R. UNGER, *KNOWLEDGE AND POLITICS* 3 (1975). Unger is not rejecting reason as a tool but is questioning the inadequacies of our assumptions. "Reason cannot establish the ends of action, nor does it suffice to determine the concrete implications of general values on which we may begin to agree." "Reason," however, is of vital importance, "because it is a machine for analysis and combination: the capacity to deduce conclusions from premises and the ability to choose efficient means to accepted ends." *Id.* at 75.

<sup>39</sup> *Natural Law*, *supra* note 2, at 1. To Kant, there was only one faculty of reason but two distinctive applications. "One gives knowledge of things as they are (or appear); the other gives direction to the changes we introduce into this natural order by means of voluntary action." L. BECK, *A COMMENTARY ON KANT'S CRITIQUE OF PRACTICAL REASON* 39 (1960).

<sup>40</sup> Boorstin puts our need for a belief in a deeper source of authority than ourselves as follows:

For us, the idea of a constitution — a fundamental law which in some strange way is less changeable than the ordinary instruments of legislation — has had a peculiar therapeutic attraction . . . . We retain an incurable belief that constitutions are born but not made . . . .

D. BOORSTIN, *THE DECLINE OF RADICALISM* 88 (1969) [hereinafter BOORSTIN].

the desirability of the outcome. This suspension helps a society avoid the resort to actual (rather than latent) force or threat of force to implement or gain obedience to the particular choice.<sup>41</sup>

The desire to maintain the stability of our legal system causes Finnis to argue in favor of obedience to law under nearly all conditions.<sup>42</sup> Aristotle also suggested that "the law has no power to command obedience except that of habit . . ." and that the "citizen will not gain so much by making the change [in a law] as he will lose, by the habit of disobedience."<sup>43</sup> Similarly, recognition that the decision was reached through a fair and open process of choice to which all are subject, reduces the desire of those who oppose the decision to resist its implementation at all, or to resist only by taking action through the system's process, or to at least refrain from using force.

A critical function of the "field" we call natural law is that it helps achieve social compromises in situations for which a society otherwise lacks effective dispute resolution mechanisms.<sup>44</sup> The Constitution is, for example, to a significant degree, a distilled and codified system of natural law. It is our primary device for temporarily resolving disputes among competing interest groups which, without such an authoritative mechanism, would be unable to achieve compromise.<sup>45</sup> Echoing this theme, Finnis describes the need for law as follows:

Political authority in all its manifestations, including legal institutions, is a technique for doing without unanimity that would almost always be unattainable or temporary - in order to secure practical unanimity about how to coordinate our actions with each other, which, given authority, we do simply by conforming to the patterns authoritatively chosen.<sup>46</sup>

Finnis's system of natural law offers a kind of "Marquis of Queensbury" rules. The ultimate intent of such systems is to define the internal and

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<sup>41</sup> Lawrence Friedman has identified the role of law as a substitute for force, although the threat of force is always implicit:

[I]n complex societies custom is far too flabby to do all the work — to run the machinery of order. Law carries a powerful stick: the threat of force. This is the fist inside its velvet glove.

L. FRIEDMAN, *AMERICAN LAW* 257 (1984) [hereinafter FRIEDMAN].

<sup>42</sup> FINNIS, *supra* note 1. See also, Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1 (1985).

<sup>43</sup> ARISTOTLE, *THE POLITICS*, Bk. II, ch. 8, reprinted in *THE OXFORD TRANSLATION OF ARISTOTLE* (W.D. Ross ed. 1921) [hereinafter *THE POLITICS*].

<sup>44</sup> *Natural Law*, *supra* note 2, at 6.

<sup>45</sup> See, e.g., Thomas Hobbes' description of factors that lead to the dissolution of a commonwealth. T. HOBBS, *LEVIATHAN*, reprinted in G. CHRISTIE, *JURISPRUDENCE* (1973). Friedman describes the situation:

[L]aw and . . . courts stand at the very core of crucial decisions in the United States. These decisions concern policy in many spheres of life, including the major social questions and such sticky issues as obscenity, abortion, sexual deviancy, personal morality. . . .

FRIEDMAN, *supra* note 41, 275.

<sup>46</sup> *Natural Law*, *supra* note 2, at 6.

external rules of formalized conflicts and to thereby produce a struggle that participants and observers will acknowledge to be "fair."<sup>47</sup> The system's combination of rules and process operates as a safety valve. If the terms of dispute resolution are acknowledged as fair by the disputants, they are more likely to accept the outcome, even when it is unpopular. Central to such a system is that the particular contest will end with the specific dispute being resolved according to the terms of the rule system. The fundamental dispute itself will remain, but its intensity will be diminished, at least for a time, by the perceived fairness of the process. An important feature is that the dissatisfied class of disputants retains the opportunity to resort to the dispute resolution processes in the future.<sup>48</sup> The "fair fight" resolves the dispute for a period of time and allows the disputants' anger and energy to be focused, channeled, and dissipated through formalized conflict rather than through more damaging routes such as political terrorism or rebellion. Without such a process to manage and transmute conflict, there would be a buildup of pressure, and ultimately an explosion that could damage the political system itself.

The need for dispute resolution mechanisms always exists, but is intensified in the context of disputes about fundamental values of the kind that Hobbes argued tended to lead to the "dissolution of a commonwealth."<sup>49</sup> These are precisely the kinds of disputes that have entered our legal system in the form of contests over such issues as abortion, the death penalty, racial discrimination and affirmative action for various minorities, the relationship between church and state, and limits on the power of government to regulate and intrude upon individual freedoms. It is this dispute about fundamental values which is reflected in *Croson*—a tension between competing definitions (and applications) of fairness,

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<sup>47</sup> Aristotle concludes "justice is the bond of men in states, for the administration of justice, which is the determination of what is just is the principle of order in political society." *THE POLITICS*, *supra* note 43, at Bk. I, ch. 2. John Rawls continues this theme in describing "justice as fairness." J. RAWLS, *A THEORY OF JUSTICE* (1971). The unresolved issue is of course what is fair or just in a specific context. This is what *Croson* involves.

<sup>48</sup> Once our faith is lost in courts as fair and just mechanisms for resolving disputes, then the courts' moral command over us diminishes and they become explicit instrumentalities of power. The conservative and fundamentalist movements have reacted to what they perceived to be morally (and politically) wrong decisions by the Supreme Court and lower federal courts by generating a movement directed toward seizing control of those courts. This movement has succeeded substantially in little more than a decade. Walter Berns declaims:

What were we taught by *Roe v. Wade*? That the constitution is on the side of the big battalions or, at least, the most strident battalions. That an up-to-date judiciary is contemptible because it is nothing but a political body but, unlike a political body . . . it pretends not to be.

Berns, *supra* note 22, at 55.

<sup>49</sup> Hobbes identified beliefs that lead to the dissolution of a commonwealth.

1. "That every private man is Judge of Good and Evil actions."
2. "That whatsoever a man does against his Conscience, is Sinne."
3. "That Faith and Sanctity, are not to be attained by Study and Reason, but by supernatural Inspiration or Infusion."

T. HOBBS, *LEVIATHAN*, reprinted in G. CHRISTIE, *JURISPRUDENCE* 347 (1973).



distributive justice, and the limits of political power vis-a-vis the individual. For both valid and invalid reasons it is a dispute that is impossible to resolve in any absolute sense but one that must be answered practically in the Finnisian meaning of that term.<sup>50</sup>

Finnis's definition of law takes his natural law theory into an operational context while continuing to insist on a vision of an evolving society.<sup>51</sup> Law and natural law are interacting and overlapping components that are part of an overall system. In Finnis's conception, law is not an unbounded instrument of sovereign will, but is oriented to the furthering or instantiation of a social and individual vision.<sup>52</sup> This we see in Finnis's description of basic human goods, practical reason, and the responsibility to make decisions that instantiate those basic goods. The fundamental vision is that of "human flourishing," one essential to our understanding of Aristotle's practical dimension.<sup>53</sup>

Finnis argues that the terms of practical systems are created by the act of choosing between "rationally appealing and incompatible alternatives, such that the choosing itself settles which option is chosen and pursued."<sup>54</sup> Even here, however, the nature of the choice evolves within a visionary structure for human societies. The particular system created by specific choices, and the interaction and competition between bundles of choices, is not an infinite or random one without limits, direction, and purpose. As long as the game of choice is played correctly the overall system will move in the proper direction, even if there are specific winners and losers and individual interests will often not be satisfied.

<sup>50</sup> A decade ago the Reverend Tim LaHaye outlined a strategy to take over the courts, including the Supreme Court:

[A]moral humanists have moved in until they control our nation's destiny and are seeking to separate her from God. This is particularly true of our judges, a high percentage of whom make humanistic decisions. Because most judgeships are appointed positions, it will take several years to change that picture. The only way to bring morality back into our judicial system is to elect strong, pro-moral candidates to all federal offices particularly in the key position of president. . . .

LAHAYE, *supra* note 22, at 20.

<sup>51</sup> "The idea of justice is at heart, then the idea of legal criticism." GARLAN, LEGAL REALISM AND JUSTICE 127, (1941 Rothman Rep. 1981) [hereinafter GARLAN].

<sup>52</sup> *Natural Law*, *supra* note 2, at 3,6.

<sup>53</sup> Finnis's theory involves the theme of human flourishing. Finnis argues that "an account of basic reasons for action should not be rationalistic. It should not portray human flourishing in terms only of the exercise of our capacities to reason. We are organic substances, animals, and part of our genuine well-being is our bodily life, maintained in health, vigour and safety, and transmitted to new human beings." *Id.* at 1. This is a theme found in Aristotle, from whom Finnis derives core elements of his theory. For an excellent discussion see J. M. COOPER, REASON AND HUMAN GOOD IN ARISTOTLE (1975) [hereinafter COOPER], particularly Part II, "Moral Virtue and Human Flourishing." See also, H. GADAMER, THE IDEA OF THE GOOD IN PLATONIC AND ARISTOTELIAN PHILOSOPHY (1986) [hereinafter GADAMER].

<sup>54</sup> *Natural Law*, *supra*, note 2, at 3.

*C. A Modern, Complex Form of Natural Law*

Finnis's softening of the claimed authority and clarity of natural law was made necessary by the differences between the complexities of the distribution of power in the pre-Enlightenment phase of natural law, the political diversity that characterizes many nation-states in the modern democratic world, and in the altered metaphors science has created in its description of the fundamental character of universal reality. Finnis's theory reflects the effects of the more relativistic, Einsteinian worldview that has partially replaced, at least among intellectuals, the classical conception of the universe as a perfect and immutable system created by God and centered on humankind.<sup>55</sup> Intellectual transformations such as have been generated by Copernicus, Newton, Darwin, and Einstein have combined to alter our philosophical and scientific worldviews, but have not destroyed our desire to view the universe and ourselves as created by God, perfect and unchangeable. The altered worldview has, however, undermined our ability to hold on to rigid visions demonstrably at odds with our understanding of physical reality.<sup>56</sup> This more fluid worldview has infiltrated the realms of values, political theory, and natural law by paradoxically removing our sense of certainty while simultaneously intensifying our desire to hold on to the kind of absoluteness the authoritarian and fixed systems afforded.

A similar change in the nature of natural law was dictated by the altered nature of democratic political orders. In more monolithic social forms where political and economic power is distributed to only a small portion of society occupying a very limited set of political institutions, natural law can and will be directed toward justifying, legitimating, and sustaining those dominant arrangements. In such a setting natural law is neither dialectical nor profound. As power, resources, knowledge, and the instruments of communication become more widely distributed, however, a change in the "nature" of natural law occurs. Those holding power still attempt to use the premises of natural law to legitimate and justify the continuation of their power, but the premises of natural law also provide theses by which one base of power challenges another, or those seeking to overthrow or participate in the processes of power attempt to undermine the claims to legitimacy of those from whom they are attempting to acquire a share.<sup>57</sup>

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<sup>55</sup> See, e.g., Hawking's discussion of the effects of our changing conceptions of the universe in HAWKING, *supra* note 36, at Chap. 1. See also, Cleveland, *The Creative Combination of Human Limits and Human Opportunities*, in STRATEGIES FOR SUSTAINABLE SOCIETIES 76 (D. Barnhizer, ed. 1988).

<sup>56</sup> Complex democracy diffuses and distributes power more widely. A system based on communicative media to the extent as represented in the United States works an even more extensive transfer of interest and opportunity to "know," regardless of whether there is a resulting shift in actual power.

<sup>57</sup> "By the end of the [eighteenth] century the French Revolution had shown how what was primarily a conservative doctrine justifying existing law could be turned into a weapon of subversion . . ." LORD LLOYD, *supra* note 5, at 114.

As power and knowledge become more widely distributed in complex societies, the need is heightened for an overarching set of unifying premises to link the many competing interests. The need for basic unifying themes in a relativistic, uncertain, and complex system transforms natural law from a traditionally authoritarian phenomenon into a methodology of roughly textured coherence and balance in the face of extreme complexity, one that seeks *authoritative* insights but abandons its *authoritarian* character.<sup>58</sup> If this shift did not occur, the strongly authoritarian variety of natural law would be relegated to small enclaves of belief, unable to contribute meaningfully to analysis of basic social problems. This, of course, is precisely what did happen to the strongly authoritarian forms of natural law. In contributing to the more complex political mode, however, natural law must function in a weaker sense because the greater complexity and diversity creates a less powerful "field" of shared values, the tenuous coherence of which can dissipate rapidly if too much is demanded.

*D. A Finnisian Account of Human Nature:  
Valuing Life and Judicial Instantiation of Basic Human Goods*

Finnis creates an account of human nature, just as has inevitably been done by all other natural law theorists, as well as positivist thinkers.<sup>59</sup> While any particular theorist may be unaware of the underlying assumptions, or may instinctively use intermediate masking principles that obscure the nature of what has been done, no theory, whether of natural or positivistic law, can be created without making fundamental assumptions about human nature and the purposes and ends of political communities. Ernest Becker captured this when he wrote about the "delicately constituted fiction" of human aspiration:

The world of human aspiration is largely fictitious and if we do not understand this we understand nothing about man. It is a largely symbolic creation by an ego-controlled animal that permits action . . . . Man's freedom is a fabricated freedom, and he pays the price for it. He must at all times *defend the utter fragility of his delicately constituted fiction, deny its artificiality.*<sup>60</sup>

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<sup>58</sup> Marc Galanter suggests that the recent "knowledge explosion" in law is making the law more accessible to many people and causing the law and its institutions to lose their "remote and transcendent character. Its contingency, discretion, and malleability are visible to a wider audience." Galanter, *The Legal Malaise; Or, Justice Observed*, 19 LAW & SOC. REV. 537, 549 (1985).

<sup>59</sup> Finnis accepts the fact that he is presenting a theory of human nature. In "Natural Law and Legal Reasoning," he states:

To state the basic human goods . . . is of course to propose an account of human nature. . . . [A] full account of human nature can only be given by one who understands the human goods practically, i.e., as reasons for choice and action, making full sense of feelings, spontaneities and behaviour."

*Natural Law*, *supra* note 2, at 2.

<sup>60</sup> E. BECKER, *THE BIRTH AND DEATH OF MEANING* 139 (2nd ed. 1971), *quoted*

Various principles have been used to mask and defend our fragile fictions.<sup>61</sup> The most common include those of utility, pleasure/pain as providing an almost Skinnerian base of human behavior and motivation, the nature and function of the state, sovereignty, science both as method and quasi-religion, the existence and quality of God, the nature of private property, the interpretation of personal existence, and the primacy of Reason.<sup>62</sup> Regardless of the auras of precision and power that emanate from such beliefs, they are nothing more than assumptions about fundamental characteristics of reality, not statements reflecting proved, or even provable, conditions of reality. In spite of, or perhaps due to this inherent nature, the resulting language is language of power.<sup>63</sup>

The heightened practical orientation used by Finnis reflects the effort to integrate the multiple human faculties that we have come to refer to by labels such as reason, judgment, sense, choice and action, all integrally and intimately tied to humanity functioning in the world.<sup>64</sup> This practical

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*in Sciececca, Cultural Hero Systems and Religious Beliefs: the Ideal-Real Social Science of Ernest Becker*, 21 REV. OF RELIGIOUS RES. 62, 63 (Fall, 1979). Aristotle, for example, based the state in the family, concluding that its function depended on facilitating the well-being of its citizens. He asserted, "man is more of a political animal than bees or any other gregarious animals . . ." THE POLITICS, *supra* note 43, at Bk. I, ch. 2, and "that which can[not] foresee by the exercise of mind is by nature . . . a slave;" *Id.* For Locke, "I assume there will be no one to deny the existence of God, provided he recognizes either the necessity for some rational account of our life, or that there is a thing that deserves to be called virtue or vice." J. LOCKE, ESSAYS ON THE LAW OF NATURE, (W. von Leyden trans. 1954) Essay I. The essay also contains analysis of the different forms of natural law. Hobbes is known for his depiction of humans as naturally aggressive, savage, greedy, describing "the condition of man" as "a condition of war of every one against every one." T. HOBBS, LEVIATHAN, *reprinted in* G. CHRISTIE, JURISPRUDENCE 306, (1973).

<sup>61</sup> See C.K. OGDEN, BENTHAM'S THEORY OF FICTIONS (1932); J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS (1964), particularly ch. 7 "Categories of Illusory Reference in the Growth of the Law." Edward Levi has suggested that "[t]he categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas." E. LEVI, AN INTRODUCTION TO LEGAL REASONING 4 (1949).

<sup>62</sup> See generally, J. NOONAN, PERSONS AND MASKS OF THE LAW (1976), and J. TAYLOR, THE MASKS OF SOCIETY (1966), particularly ch. 4, "The Masks of Society: Law."

<sup>63</sup> Ruth Anshen concludes: "[M]an is that being on earth who does not have language. Man is language." R. N. ANSHEN, LANGUAGE: AN ENQUIRY INTO ITS MEANING AND FUNCTIONS (1983). J. Bronowski, "The Reach of Imagination," in THE NORTON READER (A. Eastman, ed. 1977) suggests:

The tool that puts the human mind ahead of the animal is imagery.

...

The symbol is the tool which gives man his power, and it is the same tool whether the symbols are images or words, mathematical signs or mesons.

*Id.* at 170-72.

<sup>64</sup> Overton Taylor captured the essence of the quest in his statement:

The seeker of reasoned, moral wisdom, or knowledge of the principles which ought to guide us in the conduct of all public affairs, needs the fullest, universal width or breadth of outlook on the basis, affairs, and interests not of some but of all human beings and on all departments of their lives.

O. H. TAYLOR, THE CLASSICAL LIBERALISM, MARXISM, AND THE TWENTIETH CENTURY 94 (1960) [hereinafter TAYLOR].

construct is of a different character and focus than the speculative, or purely rational, faculty that is considered to look away from what we consider the real human toward the illusion of a higher order of existence that at best tolerates, and often rejects, the true nature of biological humanity.<sup>65</sup>

Finnis's concentration on the practical orientation and content of the rational faculty accepts that humans are biological animals, fully organic beings, and not independent or other-worldly souls trapped in prisons of flesh. Practical thought of the kind he calls natural law cannot, therefore, be restricted only to pure reason, logic or faith, but must seek to integrate emotional realities and motivations within its sphere of operation.<sup>66</sup> His concern, however, is not to suggest that humans are possessed by "lower" bodily and sensory drives, or that they do not possess souls or a profound spiritual component, but that an enriched faculty of practical reason properly takes feelings and human emotions into account rather than simply denying their legitimacy. Finnis is attempting to develop a more truly human and integrative form of understanding, one beyond the sterile abstractions of pure reason, the excesses of romanticized feeling, and the rigidity of cold logic.<sup>67</sup>

Finnis's theory of human nature relies heavily on the primacy of human life, both in terms of its preservation and qualitative richness.<sup>68</sup> He argues that taking life into account as a central value in decision-making helps make sense of diverse and complex purposes and goals; in effect, that the valuing of life as a basic human good creates and sustains a generative, open-textured decision-making process that enhances the quality of our society.<sup>69</sup>

Life and the other basic human goods combine to provide us with good reasons for choice and action and it is these goods upon which Finnis grounds his theory. He argues that the "fundamental principle of practical

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Finnis reflects much the same idea in his statement that "a full account of human nature can only be given by one who understands the human goods practically, i.e., as reasons for choice and action, making full sense of feelings, spontaneities and behaviour." *Natural Law*, *supra* note 2, at 2.

<sup>65</sup> Rollo May criticizes our extreme dependence on rationalistic processes. R. MAY, *THE COURAGE TO CREATE* 43 (1965), describes the dichotomy of subject and object that has long characterized Western thought, as "the cancer of all psychology and psychiatry up to now."

<sup>66</sup> *Natural Law*, *supra* note 2. See, e.g., A. H. MASLOW, *THE FARTHER REACHES OF HUMAN NATURE* (1971). Maslow describes the limits on knowledge he perceived in his own discipline:

In the thirties I became interested in certain psychological problems, and found they could not be answered or managed well by the classical scientific structure of the time (the behavioristic, positivistic, "scientific," value-free mechanomorphic psychology). I was raising legitimate questions and had to invent another approach to psychological problems in order to deal with them. This approach slowly became a general philosophy of psychology, of science in general of religion, work, management, and now biology. As a matter of fact, it became a *Weltanschauung*.

*Id.* at 3.

<sup>67</sup> BRINTON, *supra* note 8.

<sup>68</sup> *Natural Law*, *supra* note 2, at 1.

<sup>69</sup> *Id.* at 2.

rationality is: Take as a premise at least one of the basic reasons for action and follow through to the point at which you somehow instantiate that good in action . . . .<sup>70</sup> Finnis's activist orientation hauntingly echoes the prose of John Bunyan in *The Pilgrim's Progress* as he comments on the need to not only piously profess good values but to act upon one's values:

[A]t the day of Doom, men shall be judged according to their fruits. It will not be said then, *Did you Believe?* but, were you *Doers*, or *Talkers* only? and accordingly shall they be judged.<sup>71</sup>

It is not enough, therefore, to simply talk about basic goods. One must accept the responsibility to engage in authentic application that possesses the tendency to advance a basic good. This idea is also contained in Aristotle's description of justice as the highest human virtue because it was directed toward the welfare of others.<sup>72</sup>

Finnis describes the valuing of life as the most basic reason for action, but also argues for other basic human goods, including:

- knowledge of reality (including aesthetic appreciation of it);
- excellence in work and play whereby one transforms actual realities to express meanings and serve purposes;
- harmony between and amongst individuals and groups of persons (peace, neighborliness and, friendship);
- harmony between one's own feelings and one's judgments and choices (inner peace);
- harmony between one's choices and one's judgments and behavior (peace of conscience and authenticity in the sense of consistency between one's self and its expression);
- harmony between oneself and the wider reaches of reality including the reality that the world has some more-than-human source of meaning and value.<sup>73</sup>

Finnis urges the necessity of doing nothing without a reason and the need to seek to apply the chosen good or goods in action, urging us to:

[A]llow nothing but the basic reasons for action to shape your practical thinking as you find, develop, and use your opportunities to pursue human flourishing through your chosen actions . . . .<sup>74</sup>

Phrases such as "undeflected reason," "integral human fulfillment," "human flourishing," and the "instantiation of all the basic human goods in all human persons and communities" also provide insight into key aspects of Finnis's theory.<sup>75</sup> He asserts that, "[u]ndeflected reason will be

<sup>70</sup> *Id.* at 3.

<sup>71</sup> J. BUNYAN, *THE PILGRIM'S PROGRESS* 85 (HARVARD CLASSICS, C. Eliot ed. 1904).

<sup>72</sup> Aristotle described justice as the greatest of virtues because it involved the exercise of virtue between humans, not simply the contemplation of what was good or virtuous for oneself. *THE POLITICS*, *supra* note 43, at Bk. VII, ch. 2.

<sup>73</sup> *Natural Law*, *supra* note 2, at 3.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

guided by the ideal of integral human fulfillment, i.e., by the ideal of the instantiation of all the basic human goods in all human persons and communities."<sup>76</sup>

Such assertions are themselves a substantive construct that reflects assumptions about the naturalness of human progress, the rightness of social and individual evolution, the propriety of an expanding pattern of distributive justice, and the importance of the faculty of reason enriched by its focus on basic values. In essence, Finnis offers a process which, if honored in our decision making, could act as a sort of "invisible hand" helping transcend the complexities and idiosyncrasies of a myriad of individual decisions and generating a subtly purposive flow toward the attainment of a more just society. This was Edwin Garlan's point when he wrote:

Justice states the fundamental method of law—the method of purposeful activity that is, action directed toward ends. Law is teleological, and justice in its broadest terms is the statement of that fact and is in a sense the instrument which keeps law teleological in its method. Justice expresses and celebrates this purposeful orientation of law; it is formative because its use keeps men sensitive to their responsibility and willing to fight for concrete achievements. It thus is the expression for the motive power of law . . . .<sup>77</sup>

### III. SOME METHODOLOGICAL OBSERVATIONS CONCERNING FINNIS'S THEORY

#### A. *A Methodology of Substantive Categories of Thought*

Finnis's methodology centers on individually rational choices by humans, including judges, oriented to the attainment of basic human goods, much in the same way that Adam Smith's invisible hand depended on the operation of individually rational choices concerning economic opportunities.<sup>78</sup> Finnis creates a form of natural law whereby the substance is brought into being and energized by the medium and focus of the inquiry, combined with a vision of the desired outcome, rather than by a specific, predictable, substantive principle.<sup>79</sup>

<sup>76</sup> *Id.*

<sup>77</sup> GARLAN, *supra* note 51, at 125.

<sup>78</sup> Finnis remarks: "[I]t is the diversity of *rationaly* appealing human goods which makes free choice both possible. . . ." *Natural Law*, *supra* note 2, at 3.

<sup>79</sup> This idea is captured by Marshall McLuhan's famous observation that the medium is the message, and by Charles Silberman's suggestion that:

The essence of the law . . . is the emphasis it places on what Willard Hurst calls the "substantive importance of procedure"—on the recognition that means shape and even determine ends — that the *way* men do things may be more important than what they do. The way men do things determines what kinds of men they are and what kind of society they have, as much as the other way around.

Silberman, *Educational Trends and the Law*, CLEPR NEWSLETTER (August 1971).

Finnis's theory is also a subtle mechanism for conditioning us against using our political institutions for false ends. It is much like Hannah Arendt asked in *The Life of the Mind*, "[c]ould the activity of thinking as such . . . be among the conditions that make men abstain from evil-doing or even actually 'condition' them against it?"<sup>80</sup> By creating a goal-oriented but open-textured decisional mechanism in which judges are required to consider basic human goods and to use a particular sort of value-laden language, Finnis's natural law medium could generate identifiable classes of increasingly more probable substantive outcomes, even if specific outcomes cannot be predicted with certainty. His natural law theory is sufficiently open-textured that it would rarely dictate a particular answer in hard cases involving the clash of competing conceptions of the good, but it would produce a principled answer that could in an important sense be thought of as right. In fact, the *right* outcome is produced by choosing among good alternatives with the act of choice itself the means of transforming options that only possess the "*potentiality of rightness*" into the *right* answer.<sup>81</sup>

Finnis's theory is not dependent on judges being able to find a single right answer, or there even being a single "natural" right answer that preexists the act of judicial choice.<sup>82</sup> Of course, Finnis's identification of basic human goods will exclude many options from the bundle of potentially right answers because they do not reflect a basic good or are in conflict with, and presumably "trumped" by, the meta-goods of life and human flourishing. Finnis's theory allows for and anticipates that different choices can properly be made among a group of potentially "right" answers among which judges may choose, with a requirement that they articulate sound reasons for their choices. While his principles do not dictate a specific answer for the judge, they define the underlying values and goals for the choices that must be made and impose an obligation on judges to attempt to extend the values reflected in basic goods more deeply into our social fabric.

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<sup>80</sup> H. ARENDT, *THE LIFE OF THE MIND: VOL. ONE/THINKING*, 5 (M. McCarthy ed. 1978).

<sup>81</sup> *Natural Law*, *supra* note 2, at 9, argues that while there is not a "uniquely correct" answer to hard cases, there is a "right" answer, defining it in terms that state: "the choice [between rationally appealing options] established the "right" answer—i.e. established it in, and by reference ultimately to, the dispositions and sentiments of the chooser." *Id.* at 9.

<sup>82</sup> For the idea that there is a single right answer even to "hard" judicial questions see, R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), [hereinafter cited as DWORKIN] particularly chapter 4, *Hard Cases*. Such a view reflects a pre-Einsteinian conception of the fixed nature of reality, one that seeks certainty, shies away from ambiguity and relativity, and chases the illusion of a fixed universal truth. Relativity, random motion, and uncertainty as reflected in modern physics have become powerful metaphors that have created pressures on fixed systems that the adherents of those systems are still seeking to ignore. Finnis disagrees with Dworkin, arguing that, "we approach cases which have not been simply settled by prior choice or an applicable rule—hard cases—with a view to finding good answers, and rejecting bad ones, but we should not dream of finding a best answer." *Id.* at 13.



The most difficult question, however, is how are competing sets of alternative and incommensurate goods to be given weight and priority. It is not enough to say that the debate ends at the point of good faith judicial choice between competing goods and that the resulting algorithm or sub-algorithmic permutation is therefore "right." We need more than a sophisticated restatement of categories of inquiry, to which judges refer when selecting a particularly exotic judicial repast. Certainly, there is validity and utility in establishing a formula to assist decision making. But the question is whether *any* good faith decision that chooses a basic good is sufficient to meet Finnis's standard or if there is some specific way in which his theory helps decide between difficult alternatives as well as identifying wrongly motivated choices masquerading as reasonable alternatives?

### *B. Judicial Conservatism and Finnis's Theme of Harmony*

Harmony is a dominant theme in Finnis's system of basic human goods, appearing in at least four of his primary categories. Finnis's choice of language is troubling in part because it is so appealing. Finnis's language—"life and human flourishing," "knowledge," "reality," "aesthetic appreciation," "excellence," and four categories of basic human goods in which harmony is a fundamental element, evoke, within me at least, such feelings as peace, grace, and goodness. It describes what we ought to be or think we ought to be in a sort of fully-realized, harmoniously blissful state of existence much like we assume characterized Eden before the fall from grace. This is not a basis of criticism from a personal or individual perspective. From a systemically *practical* viewpoint, however, such profound, almost spiritual values may well end up as tools of legitimation and preservation of dominant interests, just as has traditionally been so with natural law concepts.

A significant danger is that, politically, the aura from the value of harmony tends to produce an unconscious preference for structures that appear harmonious primarily due to their scale and inclusiveness. To illustrate, an irony of *Croson* is that American conservatives have long chastised liberals for their preoccupation with "big-government" and large-scale approaches to problem solving, but the consequences of *Croson* will centralize more power in the federal government while denying to state and local governments the opportunity to take innovative, focused action. *Croson* helps us understand that sacred political themes can often serve as strategies to gain power or defend one's position. Even if believed by their advocates, such arguments will frequently be little more than propagandistic tools for justifying claims to power and legitimacy.<sup>83</sup> The

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<sup>83</sup> Slogans and propaganda have been substituted for intelligent exchanges of positions, data, and values. Virtually everyone sees those who disagree with them as an enemy rather than the source of alternative conceiving and viewpoints. Slogans are "rallying symbols" that "in no sense describe what actually exists, yet they are taken—wishfully or desperately—to be generalizations or statements of fact." M. GREENE, *TEACHER AS STRANGER* 70 (1983).

reason that conservatives such as O'Connor and Rehnquist seek principles to justify the shifting of power from local political institutions, on its face, an honored tenet of conservatives, to the national level, may be because the new phenomenon of urban political institutions in which blacks participate meaningfully for the first time in creating distributional rules may intuitively offend their instinctive preferences. Because whites are no longer in control of the urban political process and do not sufficiently trust the motives of the urban legislative bodies, i.e., substantially black, the rules of the game concerning what types of decisions allowed are changed in cases such as *Croson*.

It may be that some conservative thinkers such as Justices O'Connor and Rehnquist are comfortable with the free-form structures implied by the *laissez faire* thesis only when their political interest group determines the rules. If this is so, the structure they implicitly prefer without understanding its discriminatory nature is not free and open-textured for all. The principles they assert are devices which preserve and enhance the interests of those already possessing substantial power because they can use their power "freely" to gain more power and prevent access by other groups. The arguments in favor of *laissez faire* approaches, "trickle down" economics, and Social Darwinism, for example, help resist demands on the power and resources of political conservatives and provide arguments against the legitimacy of large-scale welfare states that would tend to interfere with the existing allocation of power and resources, even demanding some reallocation. Such principles may, properly understood, and responsibly articulated, provide important antitheses to the seemingly inevitable tendency of political systems to progressively absorb and interfere with the interests of the individual. They do not, however, provide an adequate or complete foundation for a workable system of democratic government.

Even if not politically conservative, judges are judgmentally conservative, and judicial algorithms grounded in values such as harmony and aesthetics will tend to reflect the political and social beliefs and preferences of the judges.<sup>84</sup> Smaller scale strategies such as are reflected by the action of the Richmond City Council in *Croson* will tend to subtly offend the justices' sense of harmony and aesthetics even if they are not consciously aware of their response. To members of a Supreme Court unconsciously committed to maintaining utopian themes that imply large scale order, individuality and creativity, including small-scale responses by localized elements of the political system, will automatically take on a more threatening, random, and chaotic appearance.

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<sup>84</sup> For the idea that judges are responsible for reformulating "ultimate truths" in language appropriate to the culture within which they are deciding cases, see Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 PITTS. L. REV. 127 (1988).

### C. *The Limits of Judicial Choice*

Francis Bacon recognized a practical limit on the form and content of judicial thought, concluding that judicial opinions ought not go wherever the logic of law and justice leads, but should be confined to consideration of the "immediate cause" before the court. Bacon explained: "[i]t were infinite of the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause and judgeth of acts by that, without looking to any further degree."<sup>85</sup> In other words, it is practically important to draw lines that constrain the scope of judicial thought.

Such observations by themselves do not answer the questions of whether judges either can or should rely on explicit natural law models in reaching decisions. Given the nature of the judicial task and role, the judge's focus on solving finite disputes, the significant degree of discretion already exercised by judges, and the danger of legitimating direct engagement of judges' core belief systems, while Finnis offers a method that has great promise for scholars seeking to analyze what judges do, it may be too amorphous a tool in the hands of judges, who, as Bacon suggests, ought to be restricted as much as possible to finite realms and specific authority rather than embarking on even more discretionary and personal voyages than at present. This does not, however, deny the validity of Finnis's method, suggest that judges ought not understand its implications, or imply that individual judges should not strive to comprehend the quality of their thought in reference to the Finnisian criteria. It does, however, assert that Finnis's criteria are not self-sufficient sources of authority in the absence of other standards.

Judicial choices are a form of action, of doing, and the judge's responsibility is not fulfilled by professing the importance of particular values while crafting decisions that fail in fact to advance those values.<sup>86</sup> Judges create, apply, and act through words of power. Their interpretations of the characteristics of disputes are not ephemeral musings but specific actions that generate strong consequences both directly on participants and through their effects on the "field" or "web" of forceful principles reflected in the law.<sup>87</sup>

Judges must, therefore, be able to distinguish goods from bads, unmask false goods, understand the contextual reality of the case and its social

<sup>85</sup> F. BACON, *THE ELEMENTS OF THE COMMON LAWS OF ENGLAND: THE MAXIMES OF THE LAW REGULA I* (1630).

<sup>86</sup> I have always liked the judicial attitude of Skelly Wright as described by Arthur S. Miller. See A. MILLER, *A "CAPACITY FOR OUTRAGE": THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT* (1984). At a minimum the judicial responsibility is governed by the nature of the judicial task, defined long ago by Aristotle: "[T]he nature of the judge is to be a sort of animate justice . . . . The just, then, is an intermediate, since the judge is so . . . [t]he judge restores equality." ARISTOTLE, *supra* note 2, at Book V, ch. 4(B).

<sup>87</sup> The idea of the "field" is a powerful metaphor for both science and philosophy. See the discussions in HAWKING, *supra* note 36.

and political implications, and avoid the tendency toward self-deception.<sup>88</sup> Judges must seek to understand the nature and quality of their own core-belief systems, work to improve those systems, and attempt to transcend the distortions of reality generated by individual systems of belief of which we are often unaware.<sup>89</sup> A major premise of this article is that in *Croson*, Justice O'Connor failed in these processes of practical intellectual analysis and judgment.

We are easily seduced by the tension between what we would like to be and what we are. Similarly, given the inherent conservatism of the judiciary, values that rely heavily on themes such as harmony and aesthetics contain an internal quality that will cause judges to be even more conservative than at present. Most of Finnis's basic goods, therefore, while appealing as a utopian vision, will produce consequences that are often at odds with the vision. I make this point even while feeling pulled toward accepting Finnis's system, because it "feels" right.

#### *D. Hard Choices and Incommensurable Goods*

Finnis is concerned not only with the fact of basic goods and their recognition and interpretation through practical reason, but also with the need to make choices consistent with those goods. This is both a strength and weakness of his theory. The effort to extend natural law analysis to the actual processes of decision making reflects significant intellectual courage. Finnis recognizes that a legal controversy involves critical choices between alternative, often incommensurable, conceptions of basic goods or, perhaps more important, between competing processes or means for instantiating a basic good through the act of judicial choice. This dilemma of choice is continually faced by judges in "hard" cases, ones for which there is no sufficient source of clearly dispositive authority and in which the choices made by judges create operative principles of law (or legal algorithms) that allocate significant bundles of rights and responsibilities.<sup>90</sup>

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<sup>88</sup> Arthur Brown has suggested that our institutional systems often make us "stupid," while Donna Kerr concludes they lead us to deceive ourselves. Brown states:

Institutions are social systems that shape not only our actions but our values and dispositions . . . [T]o the extent that institutions shape our values and dispositions they can make us stupid . . . and stupidity deprives us of our humanity.

Brown, *Foreword to D. KERR, BARRIERS TO INTEGRITY: MODERN MODES OF KNOWLEDGE UTILIZATION IX* (1984); Kerr describes the effects of such systems as leading to lies and self-deception. *Id.* at 29.

<sup>89</sup> Thomas Green offers a penetrating analysis of core belief systems, including how we are able to hold internally inconsistent beliefs that allow evidence to penetrate only to particular systems. The danger is that our core beliefs resist inconsistent data without us being aware that we are doing this. A judge such as O'Connor can therefore feel she is absolutely correct in her perception of reality and in her principles, and thus be able to feel that she is operating in principled good faith. GREEN, *supra* note 21, at 43.

<sup>90</sup> See e.g., DWORKIN, *supra* note 82.

It is particularly important that judges be able to penetrate the veils of false goods argued for by advocates or hidden deep within the judges' own belief systems. This is extremely vital in the context of what we are calling hard cases because those cases are ones that result in substantial distributions and redistributions of power and social goods and are the controversies that shape public awareness of law and justice.<sup>91</sup>

Each phase of this choice process represents a distinctive and increasingly difficult task for judges.<sup>92</sup> The choice process includes: 1) the identification and analysis of the presence of basic human goods in a controversy; 2) the interactions between competing conceptions of the good; 3) the understanding of the nature and limits of one's personal beliefs; 4) the penetration behind masks of rhetorical arguments; 5) the choice of action to instantiate basic goods; 6) the ranking or prioritizing of basic goods; and 7) understanding the consequences of one's choices.

There is also a critical, practical difference between someone acting as a self-interested individual and seeking to make proper choices concerning basic goods, and a judge who must persuade others as to the authoritativeness and rightness of the choice and whose exercise of practical wisdom is not primarily self-directed but system directed. A main distinction between the personal and the judicial orientations is that the judge's decision must be framed within a system of values that are acceptable to many others of diverse beliefs.<sup>93</sup> There is thus a rhetorical and symbolic aspect to judicial opinions that makes them very different from individual decisions concerning what is good for oneself. The individual's decision can be much more "pure" or even more selfish than the judicial or, stated differently, the nature of what is correct within the judicial system must take into account the practical nature and needs of that system, including the system's readiness to accept particular concepts of justice, distribution, and obligation. This idea is demonstrated clearly in *Furman v. Georgia* as the members of the Court struggled with the issue of "evolving standards of decency" as applied to whether a political community ought put one of its members to death.<sup>94</sup>

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<sup>91</sup> A case like *Croson* is arguably a "zero-sum game" in which gains by one group require losses by another.

<sup>92</sup> It is difficult because there often is no right answer or at least no answer that is capable of achieving a societal consensus. If this is not enough the belief systems of the judges and the particular cultural segment from which judges emerge, as well as the quality and extent of the judge's experience in life gained prior to appointment combine to obscure the reasons and answers even from the judges themselves. See, GREEN, *supra* note 21.

<sup>93</sup> Judicial decisions need to be framed within an acceptable set of positive social values held by the society within which the decision is to operate. This is not always possible but Justice Blackmun recognized the need in *Roe v. Wade* as he reiterated Holmes understanding that "[The Constitution] is made for people of fundamentally differing views . . ." *Roe v. Wade*, 410 U.S. 113, 117 (1973); (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

<sup>94</sup> *Furman v. Georgia*, 408 U.S. 238, 242 (1972), (Douglas, J., concurring) ("evolving standards of decency that mark the progress of a maturing society" quoting from *Trop v. Dulles*, 356 U.S. 86, 101 (1958))

*E. Finnisian Algorithms and Judicial Choice*

To Finnis, “the law” is a “cultural object, constructed or posited by creative human decision, . . . an instrument which we adopt because we have no other way of agreeing amongst ourselves over significant spans of time about precisely *how* to pursue our moral project *well*.”<sup>95</sup> According to Finnis, a function of law is to provide “algorithm[s] for deciding as many questions as possible . . . . As far as it can, the law seeks to provide sources of reasoning — statutes and statute-based rules, common law rules, and customs — capable of ranking (commensurating) alternative dispute resolutions as right or wrong, and thus better or worse.”<sup>96</sup> In Finnis’s view, judges transmute competing sets of incommensurable but good reasons from states of potentiality to ones of “rightness” through their acts of choice and their justification of those choices. Those judicial choices shape, alter and create many of the conditions of legal and political reality. If law involves the choice of algorithmic designs to clarify and simplify social choices, natural law helps fill in the foundations for the algorithm by providing good reasons for rules, interpretations, and claims to authority and legitimacy.

Algorithms of law are formulae to which we automatically turn when confronted by both simple and difficult questions. Most algorithms are simple formulae which rapidly and efficiently resolve large numbers of disputes for which any of a number of rules would have been sufficient. Algorithms such as consideration, reliance, and reasonableness are examples of formulae which structure and help to resolve most conflicts over relevant legal questions.

As we move away from simple algorithms dependent on a generally shared set of values, to areas where conflict exists concerning the validity and desirability of the underlying values themselves, increasingly more complex, controversial and tenuous algorithms are needed to resolve disputes. At simpler levels, or ones on which the underlying values supporting the algorithm are shared generally, an algorithm is effective in large part because it is accepted as being validly created, i.e., the choice was made properly according to the rules. As the social stakes get higher, however, there is a need to have stronger reasons for choice or, alternatively, a need to make the choice between incommensurable goods fit or at least seem to fit into strong basic reasons of a kind held by many in a society.<sup>97</sup>

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<sup>95</sup> *Natural Law*, *supra* note 2, at 6.

<sup>96</sup> *Id.*

<sup>97</sup> Oddly enough, I find myself agreeing with both Machiavelli and George Gilder at least to the extent that they recognize that political leadership and effective action is not dependent primarily on what might be called “fully enlightened reason” and idealism, but that key political decisions must depend upon appealing to the accepted beliefs of those being led, to some degree. Gilder puts the point as follows:

The idea of algorithms describes an important element of the law, but it does not answer the need to have something on which to ground the choice of an algorithm. Although the fundamental values from which the legal algorithms emerge are limited in number, they generate an inevitable inner tension because they represent competing and overlapping subsystems, fundamental values, and preferences rather than a single, integrated, and complete system.<sup>98</sup> Beneath, surrounding, and permeating the specific algorithms of law are the formulae, benchmarks, deep principles, "grundnorms," or similar foundational beliefs that taken together comprise our attempts to express something intelligible about the ultimate character of the values that underlie our decisions.<sup>99</sup> This sphere of deep values, however, is not a smoothly consistent "seamless web," but a collection of webs, many of which contain significant tears and gaps. It contains multiple subsystems of competing and inconsistent values as well as idiosyncratic and unsystematic beliefs.

The more powerful algorithms of law emerge from the increasingly general and deeper thematic forces of natural law, which themselves derive from even deeper assumptions and beliefs.<sup>100</sup> The social and political outcomes produced by particular choices of legal algorithms will differ depending on which set of deeper principles provides the grounding values for the formula chosen. Finnis's theory consequently does not resolve disputes as much as it sets terms of controversy and establishes conditions of legitimacy.

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Inevitably failing to fulfill the impossible dream of a society without conflict or hierarchy, the supposed idealists [here read Liberals] often lash out at the very attitudes and institutions—social pressures and legal processes—that are indispensable to all social improvement in a democracy. Idealists, for example, always much abominate what they call hypocrisy. But hypocrisy—the insincere profession of unfulfilled ideals—is the means by which the influence of ideals is extended beyond the small circles of true believers.

G. GILDER, *WEALTH AND POVERTY* 107 (Bantam ed. 1982).

<sup>98</sup> Dworkin argues that the "law may not be a seamless web, but the plaintiff is entitled to ask Hercules [Dworkin's super-judge] to treat it as if it were." DWORIN, *supra* note 82, at 116. See generally, N.K. HAYLES, *THE COSMIC WEB: SCIENTIFIC FIELD MODELS AND LITERARY STRATEGIES IN THE TWENTIETH CENTURY* (1984).

<sup>99</sup> Pareto argued that "residues" provided the force that binds human societies: [W]hat does move men in society, and keeps them together in society, says Pareto, is the residues. These have extraordinarily little intellectual in them, though they are usually put in logical form. They are expressions of relatively permanent, abiding sentiments in men, expressions that usually have to be separated from the part that is actually a derivation, which may change greatly and even quickly. BRINTON, *supra* note 8, at 521.

<sup>100</sup> There are two distinct kinds of residues that fall into:

- 1) persistent aggregates (regularity, discipline, and tradition and habit), and
- 2) instinct for combinations (novelty and innovation, hating discipline, etc.). Pareto claimed that all men were mixtures of these residues, mixtures that were logically inconsistent.

*Id.*

## IV. AN APPLICATION OF FINNIS'S THEORY OF NATURAL LAW

A. *City of Richmond v. J. A. Croson Co.*

*City of Richmond v. J. A. Croson Co.* is an attempt to deal with the distributive consequences produced by long-term, pervasive public and private racism in the United States, and the political tensions resulting from remedial efforts aimed at redressing the effects of those past injustices. *Croson* is an ideal case for determining whether Finnis offers a useful analytical approach for identifying and evaluating: 1) whether judges intuitively use the framework of values he describes, 2) the quality of that use, and 3) if Finnis's theory helps to better understand what has been done. What follows is at best a rough and preliminary attempt to apply aspects of Finnis's system to Justice O'Connor's opinion in *Croson*. Even that preliminary effort, however, suggests that ideas such as the valuing of life and human flourishing, the need to choose among competing goods, the importance of fundamental algorithms of law, and the responsibility to accurately perceive the reality of the conditions involved in a case such as *Croson* and to make authentic connections between statements of principle, reality, and consequence are extremely useful tools.

B. *American Apartheid*

One may describe a great deal of past and present political behavior by whites toward black Americans as *American apartheid*, just as much as that which we frequently profess to deplore in South Africa. A main distinction between the two situations, however, often seems to be that the diametrically different proportions of racial mix in America and South Africa allowed and required different strategies of control. *South African apartheid* was forced to use more heavy-handed, visible, and explicit measures to achieve its purposes because whites could not rely on a pretense of democracy, given the much larger numbers of black South Africans. The white majority in the United States has, however, been able to dominate the political, legal, and economic processes to such a degree that the law and other potent mechanisms of power could be used as more subtle, rather than brute, instruments of discrimination and control. Until the late 1960s, for example, in locations where blacks outnumbered white voters, measures such as poll-taxes, literacy tests, and even physical intimidation of black voters operated as extremely effective mechanisms of repression.

Claims such as were made by Justice O'Connor in *Croson* to the effect that there is no basis for remedial action for blacks because there is no logical way to differentiate them from any other kind of minority are nonsensical if the practical reality of being black in America is understood. *American apartheid*, though less explicit and formalized, was for



black Americans as profoundly oppressive as its South African counterpart. This suggests that O'Connor's use of distorted interpretations of Constitutional language and social reality in an effort to undermine the civil rights process in America is an attempt to allow the continuation and expansion of the subtle and pervasive forms of racial discrimination that have increasingly become the primary devices for perpetuating racial discrimination in America.<sup>101</sup>

My initial premises concerning the reality of racial discrimination in America are contained in the following assertions: 1) American racism is deeply rooted and profoundly intertwined throughout all our economic, political, and social institutions. 2) The effects of racism are continuing and discrimination on the basis of being "black" offends any fair concept of fundamental justice. 3) Deeply embedded racial prejudice among many white Americans is manifested in subtle discriminatory judgments in the discretionary sphere of decision making. 4) Economic structures exclude most black Americans from participating in our society in a meaningful as opposed to menial manner (including gaining employment in the skilled crafts and construction industry). 5) Housing and residential patterns confine a significant proportion of blacks to "urban reservations." 6) Our welfare system breeds dependency for the inhabitants of those urban reservations. 7) Educational systems in our major cities often have 45-50% dropout rates among predominantly black students, and provide a poor quality of education for most of the students who do remain. 8) There is a stigma based on simply being black that is far more powerful and morally repugnant than any lower-level stigma that individuals such as Justice O'Connor are increasingly arguing is created by preferential remedial plans. 9) Many blacks face the denial of the opportunity for even a basic quality of life and have never been allowed to reach the level at which discussion of "human flourishing" becomes meaningful. 10) Compared to white Americans, blacks have shorter life spans, higher infant mortality rates, and much higher chronic unemployment rates. 11) Whites generally accept a separate urban culture with higher crime rates, drug dependency, and violence that is allowed as long as it is committed by blacks against other blacks and restricted to the black community. 12) An inevitable inferiority complex exists among many blacks that has been generated as a byproduct of racial discrimination, a "self-fulfilling prophecy" that makes it even more difficult to counter the effects of racism.

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<sup>101</sup> Justice Marshall recognized in *Croson* the way that racism adapts itself and its strategies to the dictates of law in observing the ingenious forms it takes. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 745 (1989). Justice Burger understood this in his opinion in *Fullilove* citing an important governmental report on the failures of non-remedial strategies to alter the patterns of racist choices in the economic sphere and in the subtle barriers that existing economic subsystems erect to prevent access by black Americans. *Fullilove v. Klutznick*, 448 U.S. 448 (1979).

*C. Background Information on Croson*

In *Croson*, the city of Richmond, Virginia had adopted a Minority Business Utilization Plan (Plan) requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" (MBEs), which the Plan defined to include a business from anywhere in the country at least 51% of which is owned and controlled by black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens.<sup>102</sup>

The Richmond City Council adopted the Plan following a public hearing. The Plan required prime contractors awarded Richmond city construction contracts to "subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBEs)."<sup>103</sup> The requirement did not apply to contracts awarded to minority owned prime contractors.<sup>104</sup> The Plan declared its purpose to be remedial, there were no geographic limits on the area from which an MBE could be hired, and it provided for full or partial waiver of the set-aside requirement when a prime contractor demonstrates that every possible attempt has been made to locate and involve MBEs. An MBE was defined as "[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members." The stated purpose of the Plan was to promote "wider participation by minority business enterprises in the construction of public projects." By its terms the Plan expired on June 30, 1988, months prior to argument in the Supreme Court.

At the public hearing, presentations involved testimony by seven individuals. Five of the individual presentations opposed the Plan, while two were in support. The City Council also relied on a study indicating that:

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<sup>102</sup> *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. at 712-13. See, however, Earl Finbar Murphy letter, *supra* note 10, at 2-3:

But I may be wrong on all the above. Maybe I should be excited by these issues. Still, I am not. What *does* excite me, however, is the potential for dishonesty within such legislation as that passed by the Richmond council. These schemes are the sort of contrivance Boss Tweed would have found ready-made for his purposes and Boss Plunkett would have called "honest graft." Assume everything you say about racism is true, how is an innocent black youth shot by a police officer, who racistly assumes all black youths to be criminals, benefitted by giving money to white capitalists investing in "black" firms? I don't see it—and the fact that *black* has quotation marks around it, as one adjective and not as another, is evidence why. Yes, such ordinances may strengthen capitalism; do strengthen local political/business ties; and may spread the taxpayers' money around the trough a little more evenly—maybe. (Again that ever-present, for me, "maybe"! ) But, at best, only a marginal good results, purchased with (at least) the risk of a considerable bad.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 713.

[W]hile the general population of Richmond was 50% black, only .67% of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983. It was also established that a variety of contractor's associations, whose representatives appeared in opposition to the ordinance, had virtually no minority businesses within their membership . . . . The city's legal counsel indicated . . . that the ordinance was constitutional under this Court's decision in *Fullilove v. Klutznick* . . . .<sup>105</sup>

One councilperson stated that in his years of experience as a lawyer and through his familiarity with the local, state and national construction industry he had come to understand that "race discrimination and exclusion on the basis of race is widespread" on all three of those levels.<sup>106</sup>

Opponents of the Plan argued that: 1) the statistical disparity between Richmond's black population (50%) and the number of prime contracts awarded to MBEs (0.67%) did not establish discrimination in the construction industry; 2) there may not be enough MBEs in the Richmond area to meet the 30% set-aside goal; 3) non-Richmond MBEs might come in and take jobs away from area workers, and 4) nonminority contractors in the Richmond area did not discriminate. The Plan passed 6-2, with one abstention.<sup>107</sup>

The J. A. Croson Company challenged the Plan, claiming that it violated the Fourteenth Amendment's Equal Protection Clause. The District Court upheld the Plan, relying on a finding of five predicate facts that were considered to be a reasonable basis for the legislation.<sup>108</sup> The Court of Appeals (*Croson I*) found that national findings of discrimination in the construction industry, in conjunction with the statistical study of grants of prime contracts for the years 1978-1983, rendered reasonable the City Council's conclusion that "low minority participation in the city contracts was due to past discrimination."<sup>109</sup> The Supreme Court remanded for reconsideration in light of its intervening decision in *Wygant v. Jackson Board of Education*<sup>110</sup> and on remand, a divided Court of Ap-

<sup>105</sup> *Id.* at 714. *Fullilove v. Klutznick*, 448 U.S. 448 (1979).

<sup>106</sup> *Fullilove*, 448 U.S. 448.

<sup>107</sup> *Croson*, 109 S. Ct. at 714.

<sup>108</sup> *Id.* See also, Earl Finbar Murphy letter, *supra* note 10, at 3: *Croson* might have done far better to have played the local game. But, then, the very "flexibility" in the Richmond ordinance, which seems just, may have made that impossible. *Croson* had chosen its partner; but the whole matter was withdrawn for new bidding and the dance could not go on between Richmond, *Croson*, and *Croson's* minority supplier. Again, not a relevant *datum*. But *why* did Richmond throw all the rules up in the air when *Croson* came in (late, to be sure) with the minority contractor it all along had been seeking (of which the city seemingly had been kept informed). Wouldn't the ordinance had to have been predicated, anyway, on higher bids from minority contractors, *if* the council truly meant to make the ordinance produce a statistically meaningful result? Just this sort of reference (at your pp. 45-46) is the one that tends to excite me.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 716. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

peals (*Croson II*) struck down the set-aside plan as violating both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment, the standard that had arguably been applied in *Wygant*.<sup>111</sup> The Supreme Court affirmed the second decision of the Court of Appeals striking down the Plan. Applying a strict scrutiny test to its review of the Richmond Plan, the Supreme Court affirmed the Court of Appeal's holding that:

(1) the Plan was not justified by a compelling governmental interest, since the record revealed no prior discrimination by the city itself in awarding contracts, and (2) the 30% set-aside was not narrowly tailored to accomplish a remedial purpose.<sup>112</sup>

In doing so, the Court attempted to distinguish *Croson* from *Fullilove*, relying primarily on a reinterpretation of the scope of Congressional civil rights power under the Due Process Clause of the Fourteenth Amendment contrasted with what, after *Croson*, appears to be significantly diminished remedial powers available to state and local governments seeking to redress the distortions caused by long-term racial discrimination in their geographic areas.

This judicial formula obviously contains several critical elements that state and local legislative units must now take into account in attempting to craft race-conscious remedial measures. First is the shift to a strict scrutiny standard of review from the intermediate standard utilized by the Supreme Court in *Regents of Univ. of Cal. v. Bakke* and *Fullilove* in which race-conscious remedial actions were examined in light of a strong standard of review but were not treated in the same way as were racially discriminatory statutes of the traditional "white v. black" kind clearly aimed at disadvantaging identifiable and largely powerless minority groups.<sup>113</sup> Justice Marshall indicates in his dissent that the newly formed majority of the Court is now equating true remedial measures with statutes attempting to preserve racial discrimination, tarring each with the same brush.<sup>114</sup>

The ability to identify a compelling state (or local) interest was made dependent upon, or is defined by, the city having itself actively or pas-

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<sup>111</sup> *City of Richmond v. J. A. Croson Co.*, 779 F.2d 181 (4th Cir. 1985) (*Croson I*). See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). *City of Richmond v. J. A. Croson Co.*, 882 F.2d 1355 (4th Cir. 1987) (*Croson II*).

<sup>112</sup> *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. at 717.

<sup>113</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), and *Fullilove v. Klutznik*, 448 U.S. 448 (1980). Justice Marshall comments that:

My view has long been that race conscious classifications designed to further remedial goals "must serve important governmental objectives and must be substantially related to achievement of those objectives" in order to withstand constitutional scrutiny.

*City of Richmond v. J. A. Croson Co.*, 109 S. Ct. at 743.

<sup>114</sup> "For concluding that remedial classifications warrant no different standard of review than the most brute and repugnant forms of . . . state-sponsored racism . . ." *Croson*, 109 S. Ct. at 752.

sively discriminated in some way against minorities, with specific and substantial findings required as a predicate to the enactment of a remedial plan. After *Croson*, even when active or passive discrimination has been documented and a compelling interest arguably identified, local governments can apparently only create remedial plans that respond directly and narrowly to that specific type of discrimination. A local government can arguably take essentially the same kind of action as if it were a losing defendant in a suit for racial discrimination and subject to a specific court order pursuant to a finding of guilt. Given the traditional opposition voiced by conservative judges toward federal interference with state and local government, it is ironic that the decision in *Croson* hamstring local governments and intrudes the Supreme Court's judgment far into the integrity of those governmental processes.<sup>115</sup>

For the city project involved in *Croson*, the Croson Company received the bid forms on September 30, 1983, and testified in the District Court that, on that same day, 5 or 6 MBEs were contacted with none expressing interest in the project or offering a quote. Subsequently, on the day the bids were due, representatives of the Croson Company again telephoned a group of MBEs. One MBE (Continental) expressed interest and sought price quotes from several supply companies. One supply company refused to supply Continental with a quote, while the other company indicated a lack of familiarity with Continental and stated that before supplying a bid estimate it would be necessary to do a credit check that would require at least thirty days.<sup>116</sup>

Given that the Croson Company was the only bidder on the prime city contract, it was awarded the bid on October 13, 1983. On October 19, 1983, Continental (the MBE) was still unable to supply the bid figures for fixtures needed by Croson, and on that date Croson asked for a waiver of the 30% set aside requirement on the grounds that Continental was "unqualified."<sup>117</sup> After Croson's waiver request, Continental contacted another supplier and subsequently gave Croson a figure that was \$6,183.29 higher than that included in Croson's bid. Croson then asked the City to allow a price increase to cover the higher cost of the fixtures. The City instead decided to rebid the project and awarded the prime contract to a different company.<sup>118</sup>

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<sup>115</sup> Justice Marshall criticizing the *Croson* majority's disbelief of the finding of the Richmond City Council, concluding:

Disbelief is particularly inappropriate here in light of the fact that appellee Croson, which had the burden of providing unconstitutionality at trial . . . [citing *Wygant*] has at no point come forward with any direct evidence that the City Council's motives were anything other than sincere.

*Croson*, 109 S. Ct. at 749.

<sup>116</sup> *Id.* at 715. Marshall discusses at length the record relied on in Fullilove and the studies suggesting other methods than race-conscious remedial legislation had been tried both nationally and in Richmond but had failed. Central to the analysis was the existence of entry barriers that prevented minorities from participating meaningfully. *Id.* at 740-43.

<sup>117</sup> *Id.* at 715.

<sup>118</sup> *Id.*

D. *The Incommensurable Values of Croson*

Finnis's theory involves the need to make choices between incommensurable, but good, alternatives. At the abstract, rather than practical level, Justice O'Connor's opinion and Justice Marshall's dissent each offer "rationally appealing and incompatible alternatives." At the practical level, however, O'Connor's opinion does not reflect the exercise of practical wisdom in the Finnisian sense, lacking an accurate perception of racial reality, consequences, and the complex intellectual judgments involved in applying fundamental premises to difficult issues.

O'Connor, for example, relies on a basic belief in individualism, ironically masked by heavy reliance on language of liberal equality often considered incompatible with individualism.<sup>119</sup> This tension between the ideals of individualism and liberal equality is revealed in her statements that:

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o state shall . . . deny to *any person* within its jurisdiction the equal protection of the laws."<sup>120</sup> [Individualism]

The "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."<sup>121</sup> [Individualism]  
[O]ur interpretation . . . stems from our agreement with the view expressed by Justice Powell in *Bakke*, that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."<sup>122</sup> [Liberal Equality]

The dissent's watered-down version of equal protection review effectively assures that race will always be relevant in American life . . . .<sup>123</sup> [Liberal Equality]

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<sup>119</sup> See, e.g., J. GARDNER, *EXCELLENCE: CAN WE BE EQUAL AND EXCELLENT TOO?* (1961). Taylor states an important change in political attitudes of liberalism and individuality:

[I]n spite of the fact that the views and attitudes of our remaining devotees of that older tradition are now generally described—correctly enough in one sense—as conservative or even reactionary, the old liberal ideal was a society of largely free or ungoverned or only self-governed, independent individuals, living together under and jointly supporting a small, simple, inexpensive government having only a quite limited sphere of authority or a few quite limited powers and functions.

TAYLOR, *supra* note 64, at 7.

<sup>120</sup> *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. at 720-21.

<sup>121</sup> *Id.* at 721.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 722.

Justice Marshall, on the other hand, raises arguments that emerge from beliefs profoundly opposed to Justice O'Connor's, at least at the level of the practical consequences of the Court's decision. The tenor of the two decisions reflects the real distinction between a too-rigid ideologic form of judicial analysis that avoids the richness of issues and judgment and a form of judicial thought that attempts to understand the true nature, meaning, and consequences of the decision being made.<sup>124</sup> This does not mean that Marshall is himself free of distorting personal biases or that he performs his task perfectly, but unlike O'Connor, one has a feeling in reading his dissenting opinion that Marshall is attempting to resolve *Croson* in a just and practically wise manner.

Marshall, for example, demonstrates a considerably keener understanding of the consequences of the Court's decision in such statements as: "[T]oday's decision marks a deliberate and giant step backward in this Court's affirmative action jurisprudence,"<sup>125</sup> and, "[t]he more government bestows its rewards on those persons or businesses that were positioned to thrive during a period of private racial discrimination, the tighter the dead-hand grip of prior discrimination becomes on the present and future."<sup>126</sup>

Marshall also sees the complex contrast of doctrines of equal protection, affirmative action, and continuing discriminatory behavior. His comments can be understood as saying that prior versions of the Supreme Court understood better the wisdom and effectiveness of intermediate and substantial standards of review for remedial legislation, recognizing that racial discrimination is like a mutagenic virus, taking a myriad of "ingenious and pervasive forms."<sup>127</sup> This awareness comprehends that, a "profound difference separates governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism,"<sup>128</sup> and government action that directly or indirectly discriminates against minorities on the basis of race.

### *E. Justice O'Connor's Analysis*

The authenticity of any judicial decision involves: 1) the language chosen by the judge to clothe the concepts; 2) the choice of language to attack opposing premises; 3) the judge's deeply buried system of values and core

<sup>124</sup> O'Connor's language seems both overly aggressive and brittle, perhaps reflecting the fact that:

[M]any people . . . find it almost impossible to realize that Socrates, in his precept "know thyself" was urging upon the individual the most difficult challenge of all. And they likewise find it almost impossible to understand what Kierkegaard meant when he proclaimed, "to venture in the highest sense is precisely to become conscious of one's self."

R. MAY, *MAN'S SEARCH FOR HIMSELF* 55-56 (1953).

<sup>125</sup> *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. at 745.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at at 717.

<sup>128</sup> *Id.* at 752.

beliefs that are often unexamined clusters of symbols determining the judge's conceptual structure and defining how the judge is able to see the world; 4) the implicit aims of the judicial decision maker, including illegitimate as well as legitimate goals; 5) explicitly presented judicial goals, both in terms of the specific case and the larger systemic consequences of a particular choice of judicial algorithm; and 6) the judge's ability to perceive and interpret reality at all levels including the factual, legal, interpretive, predictive, and consequential.

Justice O'Connor begins her opinion in *Croson* with the assertion that the Court again confronts "the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society."<sup>129</sup>

O'Connor makes several assertions of note, including:

- 1) The purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a *highly suspect tool*,<sup>130</sup>
- 2) Unless they [classifications based on race] are strictly reserved for remedial settings, they may . . . promote notions of racial inferiority and lead to a "politics of racial hostility",<sup>131</sup>
- 3) Affirmative action typically involves the decision by a politically dominant group to disadvantage themselves;<sup>132</sup>
- 4) A *generalized assertion* that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the *precise scope* of the inquiry it seeks to remedy. It "has no logical stopping point",<sup>133</sup>
- 5) An *amorphous claim* that there has been past discrimination in a particular industry cannot justify the use of an *unyielding racial quota*;<sup>134</sup>
- 6) It is *sheer speculation* how many minority firms would be in Richmond absent past societal discrimination;<sup>135</sup>
- 7) The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary . . . . But when a legislative body chooses to employ a *suspect classification*, it cannot rest upon a *generalized assertion* as to the classification's relevance to its goals;<sup>136</sup>
- 8) In rejecting the District Court's findings of five predicate facts in support of the Plan Justice O'Connor claimed that, "standing alone this evidence is *not probative* of any discrimination in the local construction industry;"<sup>137</sup>

<sup>129</sup> *Id.* at 712.

<sup>130</sup> *Id.* at 721.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 722.

<sup>133</sup> *Id.* at 723.

<sup>134</sup> *Id.* at 724.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 724-25.

<sup>137</sup> *Id.* at 726.



- 9) To accept Richmond's claim that past societal discrimination alone can serve as the basis for *rigid racial preferences* would be to *open the door* to competing claims for "remedial relief" for every disadvantaged group;<sup>138</sup>
- 10) The *dream of a nation of equal citizens* in a society where race is irrelevant to personal opportunity and achievement would be *lost in a mosaic of shifting preferences* based on *inherently unmeasurable claims* of past wrongs;<sup>139</sup>
- 11) The 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the "*completely unrealistic assumption* that minorities will choose a particular trade in *lockstep proportion* to their representation in the local population" (citing her own opinion in *Local 28, Sheet Metal Workers v. EEOC* regarding the fact that minorities will not "*gravitate with mathematical exactitude*" to particular areas of employment in numbers that reflect their makeup in the population);<sup>140</sup>
- 12) The history of school desegregation in Richmond and numerous congressional reports, *does little to define* the scope of any injury to minority contractors in Richmond or the necessary remedy.<sup>141</sup>

The highlighted language suggests that Justice O'Connor is attempting to persuade and justify much more than engaging in a practically wise effort to understand and explain either the reality of racial discrimination or the continuing need for legitimate remedial action.<sup>142</sup> Like any rhetorician, O'Connor selects language of justification and legitimation when supporting her position, and language of delegitimation when employed against others' arguments.<sup>143</sup> Consider, for example, some of O'Connor's most basic terms contained within the passages quoted above. Her language includes "generalized assertion," "no logical stopping point," "amorphous claim," "unyielding racial quota," "sheer speculation," "standing alone this evidence is not probative," "rigid racial preferences," "open the door to competing claims . . . for every disadvantaged group," "Richmond's claim that past societal discrimination alone can serve as the basis," "the dream of a nation of equal citizens . . . would be lost in a mosaic of shifting preferences," "completely unrealistic assumption . . . lockstep proportion," "mathematical exactitude," and "little to define the scope of injury."

Such language is of the character employed by rhetoricians attempting to persuade, not by someone concerned with doing justice in a complex

<sup>138</sup> *Id.* at 727.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 724-28.

<sup>141</sup> *Id.* at 727.

<sup>142</sup> ARISTOTLE, *The Epilogue, reprinted in THE RHETORIC OF ARISTOTLE* (L. Cooper ed. & trans. 1932); PLATO, *supra* note 30, at 292, 306.

<sup>143</sup> Aristotle captured the essence of rhetoric:

[Y]ou must render the audience well-disposed to yourself, and ill-disposed to your opponent; (2) you must magnify and depreciate [make whatever forms your case seem more important and whatever forms his case seem less]. ARISTOTLE, *The Epilogue, reprinted in THE RHETORIC OF ARISTOTLE* 3.19 (L. Cooper ed. & trans. 1932).

and morally troubling area where incommensurable values of both good and bad kinds are in conflict and a principled exercise of practical wisdom is demanded. The fact that O'Connor is seeking to persuade and justify by magnifying the arguments that support her position and depreciating her competitors' analysis does not in itself condemn her opinion. It is inevitable that O'Connor desires that her opinion be taken as credible and legitimate and that opposing arguments be shown to be inappropriate. When one's use of rhetoric becomes extreme, however, and where the author of such language demonstrates a rigidity and brittleness of thought, as well as a failure to understand the conditions of reality within which a particular case is embedded, legitimate rhetoric becomes illegitimate propaganda.<sup>144</sup>

O'Connor's interpretive language has little to do with either the reality of *Croson* or the current conditions of racial discrimination in America. There was, for example, no "unyielding racial quota" in *Croson*. While roughly similar to the statutory plan in *Fullilove*, the Richmond Plan provided for a waiver of all or part of the set aside requirement in appropriate situations. The fact that the language of the *Fullilove* waiver provision was slightly softer than in *Croson* is primarily due to the intent of Congress to allow for exemptions in regions of the United States where virtually no minorities resided.

A repeated thread in O'Connor's analysis is the disaggregation of the factual predicates on which the Richmond City Council relied in enacting the Plan. O'Connor is not in fact applying a strict scrutiny standard to Richmond's action. She is reciting platitudes of strict scrutiny while creating a unique Constitutional standard for review of legislative action, one that is troublingly similar to that applied in criminal litigation, i.e., *proof beyond a reasonable doubt*, a standard entirely inappropriate outside the sphere of specific criminal litigation. O'Connor is acting much like a trial or appellate judge reviewing a challenge to a prosecutor's presentation on the basis of whether "each and every element has been proved beyond a reasonable doubt" rather than seeking to weigh the totality of the evidence. This mindset, intended or not, goes far in explaining why O'Connor disaggregates Richmond's legislative evidence and insists on a specific evaluation of each component.

O'Connor questions single elements as if each must in itself be a sufficient reason for creating the Plan. This is obviously what was feared by Justice Brennan in *Bakke* who warned about the standard as being "strict in theory, fatal in fact."<sup>145</sup> The hollowness of O'Connor's analysis can be found in the fact that Richmond never attempted to rely on a single

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<sup>144</sup> In propaganda it is important to distinguish between being accurate factually and how the progandist lies or distorts in the phase of interpretation and intention. Jacques Ellul describes the need for factual accuracy and the great difficulty involved in identifying falsified interpretations and professions of intent: "[N]o proof can be furnished where motivations or intentions are concerned or interpretation of a fact is involved." J. ELLUL, PROPAGANDA 57 (1965).

<sup>145</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 362 (1978).

category of evidence, "standing alone," but, as indicated clearly by the District Court, and as analyzed by Marshall, depended on an interwoven set of findings. Viewed interactively and cumulatively, i.e., the way in which evidence is evaluated in any situation other than the reasonable doubt defense of a criminal case, the legislative evidence strongly supports the conclusion that racial discrimination existed in Richmond's construction industry when the Plan was created.

There was also no claim by Richmond that "past societal discrimination alone" would be a sufficient basis for the specific action it took.<sup>146</sup> O'Connor's continual repetition of this theme ignores the valid distinction between generalized assertions of undifferentiated racism, regardless of their truth, and proof of systemic discrimination against blacks (or other minorities) in identifiable units of economic, educational, or political activity.<sup>147</sup> O'Connor's concern about the implications and consequences of accepting the thesis of general societal discrimination as a standard for legitimating either court decisions or legislative strategies is valid. Standing alone, such a "standard" would in fact provide no standard, but an emotionally charged political fulcrum that would intensify racial hostility and resentment rather than ameliorate it.

The difficulty, however, is that O'Connor's "general societal discrimination" is primarily a rhetorical device having little or nothing to do with the pervasive systemic and subsystemic discrimination that was the focus of the Richmond Plan. In that more focused "systemic," rather than "societal" context, there is Court precedent that takes into account the reality of racial discrimination and the burdens of proof and persuasion appropriate to those systemic contexts.

Similarly, the fact that indicators of general societal discrimination do not and ought not provide a sufficient basis for justifying or focusing remedial activity by state and local governments has no logical relevance to the important questions of: 1) whether knowledge of the consequences of particular forms of discrimination can legitimately aid our understanding of the sources, extent, severity, intractability and scale of the systemic discrimination; 2) how we should design the remedial mechanisms; and 3) how long the remedial efforts should last. It seems obvious, for example, that the more sweeping, intense, and pervasive the contextual pattern of general discrimination in an area such as Richmond, the more justified it will be for the City Council to take remedial action of a strong character, the more compelling the state interest, *and* the burden of providing specific proof as to the existence of racial discrimination in systems and subsystems ought to be lowered rather than raised.

Finally, no one, other than O'Connor, made the assertion that minorities would move in "lockstep proportion" or with "mathematical exactitude" to particular industries or areas of economic activity. In fact, O'Connor's footnoted reference to such an assumption was oddly enough

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<sup>146</sup> *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706, 728 (1989).

<sup>147</sup> *Id.* at 727.

a reference to a point she herself had made in a prior case, an exercise in judicial “bootstrapping.”

### *F. Equality, Human Flourishing, and Distributive Justice*

Merit, fairness, equality, and distributive justice have been basic themes since Aristotle's *Politics and Nicomachean Ethics*. By now these themes are so deeply embedded in our belief structures that they are elements of our basic patterns of thought. Either because Aristotle was right, or because his concepts dominated our educational and intellectual systems for centuries, his themes resonate within us at deep levels of thought and feeling.<sup>148</sup> Aristotle argued that distribution of a community's resources depended on individual merit, linking merit to distributive justice, fair treatment, and proportional equality as necessary conditions of a just state.<sup>149</sup> When the state violates or allows violations of these basic tenets it sows the seeds of its own corruption, transforming itself from what Aristotle described as a true form of society to a more corrupt version.<sup>150</sup>

If a political community blocks or denies basic opportunities for its citizens, or favors one group or individual over another on criteria other than that of merit, the community has violated its “natural” charter.<sup>151</sup> This Aristotelian ideal is embodied in the constitutional principles of equal treatment relied upon by Justice O'Connor in *Croson* as she argues, for example, that:

The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their “personal rights” to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decision-making.<sup>152</sup>

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<sup>148</sup> TOYNBEE, *supra* note 7, at 86. Toynbee describes: “In Western Christendom this Hellenic intellectual alloy became overwhelmingly dominant after it had been reinforced in the twelfth century by the ‘reception’ of Aristotle.” *Id.*

<sup>149</sup> The universal and chief cause of . . . revolutionary feeling [is] . . . the desire of equality, when men think that they are equal to others who have more than themselves or, again the desire of inequality and superiority, when conceiving themselves to the superior they think that they have not more but the same or less than their inferiors.

THE POLITICS, *supra* note 43, at Bk. V, ch. 2.

<sup>150</sup> Aristotle described three true forms of government (kingly rule, aristocracy, and constitutional government) and three perversions (tyranny, oligarchy and democracy). THE POLITICS, *supra* note 43, at Bk. III, ch. 7. He concluded that the distinguishing factor was that the true forms sought to serve the common good of all citizens while the perversions had the benefit of specific classes as the purpose. In the real world, democracy was considered the most fair because it more closely approximated a true form of government, and its abuses would be less centralized.

<sup>151</sup> “[T]he state or political community . . . aims at good in a greater degree than any other, and at the highest good.” THE POLITICS, *supra* note 43, at Bk. I, ch. 1.

<sup>152</sup> *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706, 719 (1989).

This passage reflects deeper values of fairness, equality, equal treatment, innate human dignity, individuality, and merit. It also contains an implicit conception of the nature of human society. The real question, however, is not sufficiently captured by such recitations but must be understood in its practical sense. This is where O'Connor's reasoning weakens and she makes insupportable leaps from abstractions to flawed interpretations of *Crososon's* reality. O'Connor either fails to recognize the differing textures of a political and economic majority's rights to maintain their opportunities or to expand them, and the need to create basic life opportunities for racial minorities who have been deliberately prevented from participating in the economic and political system, i.e., denied the basic opportunity to even embark on the path of Finnis's (and Aristotle's) *human flourishing*.<sup>153</sup>

While equality and equal treatment are fundamental principles both in terms of political theory and our Constitution, at stake in *Crososon* is not equality of treatment at all, but the earlier question of the nature, extent, and direction of the responsibility of a political community that deliberately and grossly mistreated a specific class of its members. This is not simply an argument that blacks are entitled to some sort of "war reparations." It is a recognition that our political community is in fact a community and that it owes the obligation of doing justice to its members.

American society has the responsibility to facilitate the ability of blacks, as a particularly abused class of citizens, to arrive at a point of rough equality of opportunity *before* O'Connor's analysis of equal treatment and distributive fairness is triggered. A practical concept of justice must recognize historical realities and behaviors, it must take prior injustices into account, it must understand the legitimacy of balance, compromise, and trade-offs and, above all, will not claim to have a single or absolute meaning. This is the key difference between judicial analysis that is practical but principled in the Finnisian sense, and analysis such as is relied on by O'Connor that seeks to assign fixed and frozen meanings to deeply complex terms such as equality, fairness, equal treatment and the like.

If there had not been a totally pervasive pattern of private and public discrimination against blacks in America, then much of O'Connor's analysis might be correct both practically and abstractly. In that nonexistent America, apparently perceived as current reality by O'Connor, a different kind of substantive practicality would apply. If the extent of American discrimination had only been relatively mild rather than total or had truly ended several generations ago, O'Connor's concern about insisting on more precise and limited vehicles of remedial action and the need for a very strict standard of review would be appropriate. But American history is one of nearly complete discrimination against black Americans, not one of moderate discrimination, or even limited pockets of intense discrimination. O'Connor, and the others who joined her in *Crososon*, either

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<sup>153</sup> See COOPER *supra* note 53 and GADAMER, *supra* note 53, concerning the social ideal of human flourishing.

refuse to recognize, or their core beliefs block their ability to recognize that the systemic discrimination against blacks is of a different character and texture than what they describe or have experienced.<sup>154</sup>

The issue in *Croson* is therefore not one of equal treatment but of equal access to opportunities that, only when roughly achieved, make O'Connor's abstract concerns about equal treatment and preservation of the "dream of equality" valid. At that point the disposition of race-conscious remedial legislation is obvious, and O'Connor's two-dimensional analysis would apply. We are not even close to that level of racial justice, however, and *Croson* consequently generates a "chilling effect" on local governments' attempts to create innovative solutions to attempt to mitigate the effects of racial discrimination. Unfortunately, from the standpoint of assessing the moral legitimacy of the Supreme Court's new majority, it must be concluded that the result was intended, or most charitably, that they simply do not understand that the reality of the world they are judging bears scant resemblance to their fairy tale perception of America's racial behaviors.

## V. CONCLUSION

### A. *The Utility of Finnis's Theory*

The utility of Finnis's theory of natural law lies not in its ultimate explanatory power as an accurate depiction of universal reality, but in the fact that humans have the power and the ability to choose the terms of society that they consider most appropriate and just, and to decide that they desire to act in ways that increase the likelihood of realizing that vision of society.

Whatever the peculiar nature of their intellectual prison, humans possess the power to define its internal rules of operation. It is irrelevant that this power may not be cosmically ultimate. Belief in an order of reality beyond humans acts as a critical force for natural law, regardless of the actual existence of that order of reality, and whether or not it is labeled as God.<sup>155</sup> In other words, if God did not exist, we would need to invent some equivalent source of deep authority that functioned as a sort of "surrogate-God."<sup>156</sup> This is in fact what Finnis is doing in his description

<sup>154</sup> There is a distinction between use of principles in good faith in an effort to describe reality and pursue ideals, and the use of arguments relying on principled themes as part of a conscious political strategy. The comment has been made that "[t]he tradition of American moral and political thinking is not, anti-intellectual. The practice of a good deal of American politics, and of much of American life . . . is anti-intellectual." BRINTON, *supra* note 8, at 513.

<sup>155</sup> "Positivism . . . tends to banish God and the supernatural from the universe." BRINTON, *supra* note 8, at 335. FINNIS, *supra* note 1, at 89, states the religious idea has meaning for a society whether or not true.

<sup>156</sup> There are two false routes by which the human mind seeks to fulfill the need for a deeper grasp on being. One is the way of scientism, which refuses to recognize the essential boundaries of scientific thought. The other is an undisciplined appeal to sheer feeling and purported irrational sources of insight.

J. COLLINS, CROSSROADS IN PHILOSOPHY: EXISTENTIALISM, NATURALISM, THEISTIC REALISM 33 (1962).

of factors such as basic human goods, the valuing of human life, and the nature of practical thought. He is creating a natural law for a post-Enlightenment society that has been struggling with the dilemma of seeming to be alone in a universe without a directly engaged or commonly accepted Supreme Being, and that has come to know that science is an inadequate and incomplete substitute.<sup>157</sup> Daniel Boorstin captured the essence of our dilemma in *The Decline of Radicalism*:

The discovery, or even the belief that man could make his own laws, was burdensome . . . . [N]early every man knew in his own heart the vagueness of his own knowledge and the uncertainty of his own wisdom about his society. Scrupulous men were troubled to think that their society was governed by a wisdom no greater than their own.<sup>158</sup>

Given our dilemma of self-doubt and the need to be able to accept the validity of others' choices, natural law keeps open the question of a deeper and wiser (because it is not simply human and we know we are not sufficiently wise) "nonhuman" source of authority upon which we can ground our choices.<sup>159</sup> Natural law is a paradoxical attempt to construct a theory of wisdom while being tacitly aware that a degree of manipulation of public awareness is essential to a society's ability to function.

Finnis, like all other natural law theorists, is a political architect whose theory is an hypothesis about the necessary characteristics of a society that desires to be free, harmonious, just and equitable, and to facilitate the development or flourishing of each member. Finnis's theory attempts to fill the gap between the Existentialist thesis of aloneness, moral relativity, and personal responsibility, and a loss of faith in the ability of humans to identify "true" choices about basic goods. Finnis offers a theory of what humans should value if our societies are to be more likely to possess the desired characteristics.<sup>160</sup> The real question is not whether Finnis describes some sort of absolute truth, but is he *practically* correct? Does Finnis's theory provide a workable hypothesis about a practical decisional methodology that will enable us to move toward the chosen conditions of a "good" society?

At a minimum, if we have decided that a political community of the kind Finnis describes is, (a) the most natural and proper, and/or (b) the form of society we have chosen to create and facilitate, then Finnis's

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<sup>157</sup> *Id.*

<sup>158</sup> BOORSTIN, *supra* note 40, at 74.

<sup>159</sup> [T]he mystery — of law in modern society . . . [is] How retain any belief in the immanence of law, in its superiority to our individual, temporary needs, after we have adopted a whole-hearted modern belief in its instrumentality? How continue to believe that something about our law is changeless after we have discovered that it may be infinitely plastic? How believe that in some sense the basic laws of society are given us by God, after we have become convinced that we have given them to ourselves.

BOORSTIN, *supra* note 40, at 76.

<sup>160</sup> *Natural Law*, *supra* note 2.

theory is about what processes and values are most likely to have the greatest tendency to sustain and enhance our ability to achieve those goals. If these two judgments about ends and means are made, regarding the desirability of achieving a specific kind of political community and the processes most effective in achieving that community - then Finnis's theory becomes one of "effect and cause." To "effect" (create, bring about) a specific set of social conditions, attention must be given to an identifiable set of central, core, or basic values that, when instantiated in the behaviors of a society, will "cause" that society to more closely resemble the desired vision.

Much work must be done by legal scholars in order to explore the limits and techniques of Finnis's theory as represented in the context of judicial decisions. Finnis's hypotheses must be seen in the light of their tenuousness. Finnis offers a more human-centered theory of natural law than past natural law theorists, but the question remains concerning whether his collection of human goods will help clarify decision-making or instead produce an even more complex series of inevitably conflicting and incommensurate human goods that generate apparently principled reasons for almost anything the decision maker prefers. Here I find myself in agreement with Justice Rehnquist's concern about the importance of judicial restraint, one he voiced in *Furman v. Georgia*:

Rigorous attention to the limits of this Court's authority is likewise enjoined because of the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth, and justice upon others. Judges differ only in that they have the power, if not the authority, to enforce their desires.<sup>161</sup>

Rehnquist's advice about the inevitable tendency of judges to abuse their power and to impose their personal views on others would be language well-heeded by both himself and O'Connor now that they comprise part of a majority on the Court that will resolve questions about fundamental issues of "goodness, truth, and justice." *Croson* represents a significant exercise of judicial power that appears to violate Rehnquist's own warnings about the potential for beguiled abuse of judicial power. Of course, in *Furman*, Rehnquist was speaking from the posture of dissent, which seems to have much to do with the nature of arguments about the appropriate limits on the exercise of judicial power.

### *B. A Critique of Justice O'Connor's Opinion*

The inauthenticity of Justice O'Connor's opinion lies in her application and interpretation of the initially principled language upon which she attempts to ground her analysis; her refusal to understand the reality of racial discrimination in America; her disaggregation and deemphasis of

<sup>161</sup> *Furman v. Georgia*, 408 U.S. 238, 467 (1972) (Rehnquist, J., dissenting).



the factual and legal predicates relied on by Richmond's City Council in enacting the Plan; her failure to pursue other legitimate ways in which *Croson* could have been decided; her failure to draw reasonable distinctions between *Wygant* and *Croson*, and her generally simplistic distinguishing of *Croson* and *Fullilove*.<sup>162</sup> A single flaw in one of these dimensions could be accepted as a simple lapse in judgment. The series of distortions in which O'Connor engages leads, however, to the conclusion that, 1) it is an intentional choice on her part and/or, 2) her belief system is sufficiently rigid that she is incapable of either fairly analyzing or comprehending the true nature of the issues involved in *Croson* and in the area of affirmative action generally.

In *Croson*, O'Connor fails to make an authentic connection between her profession of basic goods, the case's reality, and her choice of means. O'Connor, for example, ignores the century during which the language of equal protection and personal rights upon which she relies as being close to an absolute standard was dishonored by the decisions of the Supreme Court, and at virtually all levels of government throughout the United States.<sup>163</sup> Her recitation of the American "dream of equality" ignores a condition that for blacks has been, and remains, more a "nightmare of inequality" than a "dream of equality." Until very recently, the rights of generations of black citizens were violated in every dimension of their existence. Some progress has been made, but American racism remains extraordinarily pervasive. Given the explicit prohibitions against racist behavior contained in civil rights laws, we seem to have shifted from overt racism to a multitude of implicit approaches that, as Justice Marshall indicates in *Croson*, increasingly take "ingenious and pervasive forms."<sup>164</sup> O'Connor's opinion reduces our ability to counteract these subtle, but very real, mechanisms that perpetuate ongoing racism.

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<sup>162</sup> *Fullilove v. Klutznick*, 448 U.S. 448 (1979) also involved an affirmative action set-aside statute granting preferences to minorities. The Congressionally created provision was essentially identical to the one passed by the City Council in *Croson*, with main differences being that the federal statute established a preference for minority contractors in the Public Works and Employment Act of 1977 that set-aside 10% of relevant federal contracts for the same categories of minorities covered by the Richmond Plan. Justice Burger wrote the main opinion in *Fullilove* upholding the 10% MBE, with Justice Blackmun concurring in the judgment and reiterating the test he and three others supported in *Bakke*. Justices Stewart, Rehnquist, and Stevens dissented. There Burger reviewed the data relied upon by Congress in considering the need for the set-aside provision including reports on the U.S. construction industry that expressed disappointment with attempts to devise effective solutions using tools that were not race-specific and that a shift had occurred away from overt discrimination to a "business system which is racially neutral on its face but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate those past inequities." *Id.* at 466.

<sup>163</sup> Justice Marshall, in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), examined how the Supreme Court participated in subverting the purpose of the Equal Protection Clause as a judicial reaction to efforts to grant black citizens equal rights.

<sup>164</sup> *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706, 745 (1989).

Language of fundamental values bypasses our rational minds and goes directly to our core beliefs. Because of this, the language of natural law has great symbolic power. It is therefore susceptible both to conscious misuse by ideologues, and to unwitting misapplication by those mesmerized by its power, and is as likely to be used as illegitimate propaganda as it is well-reasoned principles of practical truth.<sup>165</sup> In *Croson*, O'Connor uses principles of natural law, translated into constitutional terminology, as propaganda designed to manipulate the algorithms of law in order to "re-engineer" American society in terms consistent with her flawed vision.

Because American racism has been (and is) so pervasive and enduring, a rebuttable presumption of racial discrimination is appropriate in many situations. Rather than impose a specific burden requiring identification of individual victims and specific violations, a practical understanding of justice suggests that when there are significant findings of racial discrimination, such as were made by Congress regarding the construction industry in the United States, a presumption of reasonableness of the legislative decision is appropriate with a shifting of the burden of proof to the challenging parties. This type of presumption is in fact nothing more than the traditional test for review of legislative action. It is also much more consistent with the standard of review relied on by four members of the Court in *Bakke* and reasserted by Marshall in *Croson*.<sup>166</sup>

Virtually no black American, living or dead, has avoided being discriminated against in some fundamental way simply on the basis of race. Fewer opportunities, poorer education, reduced access to social goods, chronic unemployment, a worse quality of life, and similar factors are consequences that have been imposed on blacks, are still imposed, and will continue to be imposed for the foreseeable future. The fact that it has become fashionable among the American Neoconservative movement to proclaim that racial discrimination is an almost entirely historical phenomenon does not rewrite reality to make that claim true, any more than claims that the Nazi Holocaust did not occur alters the terrible tragedy of that nightmare. Progress has been made for many black citizens, but for many others the situation has become even more bleak. With the depth, subtlety, and power of American racial attitudes, it is clear that without affirmative action laws and hiring preferences the injustice of racial inequality would be even worse than it is at present. Given the fact that most of the progress for blacks has been generated by affirmative action measures, availability of government jobs, and special educational programs, it is inevitable that a reaction would emerge among those affected by the measures, as well as those who continue to possess a deeply ingrained bigotry against blacks.

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<sup>165</sup> The concepts of justice are hypothetical, and no part of justice is self-evidently just but may always be called upon to justify itself. The role of particular, clear, and distinct values, ends, and standards is to guide and illumine judgment determinately, but in constantly occurring and important phases of legal judgment, justice is problematic and an object of search . . . . By nature, principles of justice are manipulated rather than followed in reaching decisions.

GARLAN, *supra* note 51, at 130.

<sup>166</sup> See *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706 (1989).

