

Winter 2001

Natural Law and Liberalism

Henry Mather

University of South Carolina

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Henry Mather, Natural Law and Liberalism, 52 S. C. L. Rev. 331 (2001).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

NATURAL LAW AND LIBERALISM

HENRY MATHER*

I. INTRODUCTION	331
II. NATURAL LAW THEORY	332
A. <i>Moral Realism</i>	333
B. <i>Human Nature</i>	334
C. <i>Moderate Rationalism</i>	336
D. <i>Teleology and Human Goods</i>	338
E. <i>Pluralism and Incommensurability</i>	340
F. <i>Moral Education</i>	341
G. <i>Problems for Natural Law Jurisprudence</i>	343
H. <i>The Common Good</i>	344
I. <i>Limits on Legal Coercion</i>	347
1. <i>The Subsidiarity Doctrine</i>	348
2. <i>Aquinas's Harm Principle</i>	348
3. <i>Natural Rights</i>	350
III. LIBERALISM	352
A. <i>Neutralist Liberalism</i>	357
B. <i>Berlin's Agonistic Liberalism</i>	366
C. <i>Perfectionist Liberalism</i>	369
IV. CONCLUSION	374

I. INTRODUCTION

Normative jurisprudence is a field full of rival theories, each offering guidance to lawmakers who wrestle with the question of what the law should be. Many of these theories, however, seem to be losing influence and are in danger of being eliminated as serious contenders.

Utilitarianism was on the defensive throughout the twentieth century and is now widely regarded as incapable of obtaining the quantitative comparisons on which it depends for success in resolving legal issues. Wealth maximization and other economic efficiency theories provide some useful analytic tools, but few lawmakers consider economic efficiency to be the primary factor in deciding what justice

* Professor of Law, University of South Carolina School of Law. B.A., Univ. of Rochester, 1959; M.A., Columbia Univ., 1961; J.D., Cornell Univ., 1970.

requires. Nor are many lawmakers ready to adopt extreme libertarian theories that would limit the legal system to the nightwatchman's task of protecting individual liberty against force and fraud.

Left-wing jurisprudence is faring even worse. Marxism is dead. The Critical Legal Studies movement has offered a critique of capitalist law that tells us little we did not already know and fails to provide a comprehensive positive alternative. Feminist jurisprudence and its siblings each focus narrowly on the plight of a particular social group and thus fail to provide a theory that takes the interests of all citizens fully and sympathetically into account.

A revived civic republicanism, with its emphasis on moral values, civic virtue, and pursuit of the common good, does not really stake out new jurisprudential territory. It is not easily distinguished from contemporary natural law theory or from certain forms of liberalism. So, what about natural law and liberalism?

Both liberalism and natural law are well-established traditions in Western jurisprudence. In recent years, each has exhibited remarkable resourcefulness and adaptability. Neither tradition is declining in influence; if anything, both are gaining. Indeed, liberalism and natural law now seem to be the two leading contenders for jurisprudential primacy. In a recent collection of essays entitled *Natural Law, Liberalism, and Morality*,¹ liberal thinkers and natural law theorists address each other in respectful tones that could indicate either mutual anticipation of an impending showdown in the final round of a jurisprudence tournament or a real attempt to iron out differences and draw closer together.

Unfortunately, the collection just cited does not provide clear and comprehensive pictures of natural law and liberalism—the kind of pictures that would enable the reader to discern the major tenets of each school, what the two schools have in common, and how they differ. The purpose of this Article is to furnish a systematic comparative analysis of liberalism and natural law, note their differences, and offer some judgments as to their relative usefulness. I will identify three different versions of liberalism and suggest that each version is either inferior to natural law theory or virtually indistinguishable from it.

II. NATURAL LAW THEORY

Natural law theories assert that positive, man-made law should be formulated and evaluated according to a higher moral law (the natural law) that is not made by humans, but is inherent in the nature of the universe. This ancient assertion is found in early Judaic theory, in works by Plato and Aristotle, in Greek and Roman stoic thought, in works by Cicero, and in Justinian's *Corpus Juris*, the great sixth century compilation of Roman law. This same assertion was prevalent in medieval jurisprudence, and an elaborate theory of natural law was developed in the thirteenth century by Saint Thomas Aquinas.

1. NATURAL LAW, LIBERALISM, AND MORALITY (Robert P. George ed., 1996).

My discussion of natural law theory will focus on the Aristotelian-Thomistic tradition, which could be considered the most influential natural law tradition in Western legal circles. Its major sources are the works of Aristotle and Aquinas, but it has been revised in the twentieth century by thinkers such as Jacques Maritain, Yves Simon, John Finnis, and Robert P. George. When I refer to contemporary natural law theory, I shall be referring to this living and evolving Aristotelian-Thomistic tradition.

Before describing the major tenets of this tradition, I want to emphasize that natural law jurisprudence is not tied to Roman Catholic Christianity or any other comprehensive set of theological or metaphysical doctrines. On the contrary, a lawmaker or legal commentator can adopt natural law jurisprudence as a Jew, Christian, Muslim, theological agnostic, Platonic metaphysician, Aristotelian metaphysician, or metaphysical agnostic. Although some religious or metaphysical systems may be incompatible with natural law jurisprudence, no particular system is required.

Natural law theorists in the Aristotelian-Thomistic tradition disagree among themselves as to which, if any, theological or metaphysical assumptions are necessary as logical foundations for a natural law theory.² I doubt that we can resolve this intramural debate. But for practical, jurisprudential purposes, it does not matter whether natural law principles must be based on theological or metaphysical premises or can be apprehended in some other way. However they arrive at their principles, natural law theorists tend to arrive at the same principles as guidelines for lawmaking. These common basic tenets of contemporary natural law jurisprudence are discussed below.

A. Moral Realism

Moral realism is the thesis that true moral judgments are true by virtue of a reality that is independent of human beliefs about the issues in question.³ Natural law theorists accept moral realism; however one arrives at moral truth, it corresponds to some independent reality and is not merely constructed or invented by humans.⁴

2. Compare, e.g., JOHN FINNIS, *FUNDAMENTALS OF ETHICS* 22 (1983) (asserting that ethics is not deduced from metaphysics) with ANTHONY J. LISSKA, *AQUINAS'S THEORY OF NATURAL LAW* 34 (1996) (claiming that natural law theory requires metaphysical principles for its derivation). For a concise summary of the debate among natural law theorists, see Robert P. George, *Recent Criticism of Natural Law Theory*, 55 U. CHI. L. REV. 1371, 1409-10 (1988).

3. See Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in *NATURAL LAW THEORY* 158, 158 (Robert P. George ed., 1992).

4. See ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* I-II, q. 91, art. 2, corpus, at 160, in *THE TREATISE ON LAW* (R.J. Henle ed. & trans., 1993) [hereinafter *THE TREATISE ON LAW*] (stating the natural law principles perceived by human reason are reflections of God's eternal law); see also ARISTOTLE, *NICOMACHEAN ETHICS* II. 1134b19-20, at 131 (Martin Ostwald trans., Bobbs-Merrill Co. 1962) (stating natural justice is not affected by what men think is just); A.P. D'ENTRÈVES, *NATURAL*

Moral realism can lead to epistemic skepticism about our ability to know real moral truth. If ultimate moral truth lies in some independent reality that we neither make nor control and that reality is inaccessible to our empirical investigations, then it is unlikely that we have reliable methods for attaining knowledge of ultimate moral truth, which thus remains rather mysterious. If we do not have knowledge of moral truth and cannot identify the persons who have grasped it, it might seem that it does not matter for practical purposes whether we accept or reject moral realism. Acknowledging the existence of real moral truths will not impose any additional constraint on lawmakers who cannot claim to have knowledge of such truths, and they will behave much as if they believed that moral principles are merely constructed by humans.⁵

Although I have serious doubts about our ability to gain “knowledge”—in the sense of true belief supported by reliable epistemic methods—of real moral truth, I nevertheless believe, as a matter of faith, that there is real moral truth and also believe, for the reasons that follow, that acceptance of moral realism has some practical significance. First, moral realism forces us to reject any moral conventionalism which says that society’s dominant morality is necessarily true. If society’s morality is contrary to real moral truth, it is a false morality. The possibility that it is false suggests that social and legal norms should always be open to criticism.⁶ Second, moral realism indicates that individual preferences may be mistaken; as a matter of real moral truth, what an individual prefers may be morally bad. Lawmakers therefore should not assume that their proper goal is to maximize aggregate satisfaction of individual preferences, whatever those preferences may be. Third, moral realism is conducive to a healthy humility. If there are moral truths not of our making, we are not the moral masters of the universe. And if, as seems likely, moral realism leads to an admission that our understanding of moral truth is crude and imperfect, then our humility only deepens. We thus have reasons for believing that moral realism has some practical significance.

B. *Human Nature*

Natural law theorists typically assert that moral principles are in some way based upon, or tied to, human nature.⁷ But does “human nature” refer to empirical

LAW 16 (S. Körner ed., 2d ed. 1970) (stating natural law is independent of human choice); LISSKA, *supra* note 2, at 108 (noting human ends or goods are not good merely because of human desires or interests); JACQUES MARITAIN, *MAN AND THE STATE* 82-84 (1951) (stating natural law is created not by humans but by God); Russell Hittinger, *Liberalism and the American Natural Law Tradition*, 25 WAKE FOREST L. REV. 429, 429 (1990) (stating natural law is not a human artifact).

5. See Waldron, *supra* note 3, at 176-84 (stating a similar proposition).

6. See Michael S. Moore, *Law as a Functional Kind*, in NATURAL LAW THEORY, *supra* note 3, at 188, 228-30 (making similar observations).

7. See, e.g., ARISTOTLE, *POLITICS* II. 1325b9-10, at 285 (Benjamin Jowett trans., Random House 1943) (“[N]othing which is contrary to nature is good . . .”); LISSKA, *supra* note 2, at 104 (“Morality has its foundation in human nature.”); D.J. O’CONNOR, *AQUINAS AND NATURAL LAW* 57 (1967)

facts concerning human activity—to humans as they are—or does it mean humankind's better nature (what humans could be and should be)?

A natural law morality cannot be based solely on empirical facts concerning what humans do. Humans love; they also hate. Humans sometimes pursue knowledge and sometimes prefer ignorance. From the fact that cruelty is often practiced, we cannot infer that cruelty is morally proper. Even if humans universally desire and pursue something, that does not establish that the thing is really good.⁸ We cannot validly deduce a normative conclusion from premises that merely state biological, psychological, or sociological facts.⁹ We need a normative premise.

In natural law theory, rationality or reasonableness serves as an important norm.¹⁰ Although Aquinas says that “all those things to which man has a natural inclination are . . . good,” he also indicates that “natural inclinations” do not include inclinations contrary to reason.¹¹ Furthermore, even natural inclinations must be regulated by reason.¹² The natural inclination to pleasure is not a vice, but it can lead to the vice of self-indulgence if not controlled by reason.¹³ Thus, not everything we do or want to do is “natural” in Aquinas's restricted sense. As creatures endowed with free will, we sometimes choose to act contrary to our essential nature or better nature. In discerning what we should do, we cannot merely follow our inclinations. The fact that a person has a particular biological or psychological inclination does not indicate what she should do with this inclination. Should she follow it fully, follow it to a limited extent, or overcome it altogether? Aquinas says a person should do whatever reason requires. Although it is often not clear what

(“[B]asic principles of morals and legislation are, in some sense or other, objective, accessible to reason and based on human nature.”).

8. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 66, 81 (1980).

9. See *id.* at 17, 33; see also John Finnis, *Natural Law and Legal Reasoning*, in *NATURAL LAW THEORY*, *supra* note 3, at 134, 135 (“[O]ught’ cannot be deduced from ‘is’—a syllogism’s conclusion cannot contain what is not in its premisses.”); Robert P. George, *Natural Law and Human Nature*, in *NATURAL LAW THEORY*, *supra* note 3, at 31, 33, 37; Germain Grisez, Joseph Boyle & John Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 *AM. J. JURIS.* 99, 102 (1987) (“[T]he moral *ought* cannot be derived from the *is* of theoretical truth.”).

10. The human capacity for rational thought is a natural fact, and rationality is also a moral standard. See, e.g., ARISTOTLE, *supra* note 4, at ll. 1098a7-18, at 17 (stating that the proper function of man is activity in conformity with reason); LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 57 (1987) (summarizing Aquinas as holding that “[t]he essence of man, the rational creature, is reason” and that man should fulfill his nature by using reason).

11. See *THE TREATISE ON LAW*, *supra* note 4, at q. 94, art. 2, corpus, at 250. The inclinations Aquinas mentions here as natural inclinations are the inclination to preserve life, the inclinations man shares with the other animals, and inclinations to good according to reason. *Id.* This would seem to exclude any peculiarly human inclination that is contrary to reason, such as an inclination to humiliate or torture.

12. See *id.* at 250 (translator’s interpretive comment) (“All human inclinations are good in themselves but they must be regulated by the primary inclination . . . to order his acts according to reason . . .”).

13. See ST. THOMAS AQUINAS, *COMMENTARY ON ARISTOTLE’S NICOMACHEAN ETHICS* 121-22 (C.I. Litzinger trans., rev. ed. 1993).

reason requires, it is clear that a person must make a moral judgment; in distinguishing between what is true to human nature and what is a corruption of human nature, she cannot rely solely on empirical evidence of human nature.

Those who are uncomfortable with Aquinas's restricted sense of "natural" might consider Yves Simon's broader use of the term. Simon says that any essential nature involves a developmental process with a beginning and an end.¹⁴ Both the primitive, rudimentary beginning and the accomplished end are "natural."¹⁵ But the end is "more natural" for man than the beginning. Thus, life in a civilized society is actually more natural than life in an anarchic "state of nature."¹⁶ Civilization is what nature has been striving toward from the beginning.¹⁷ What is more mature is better than what is immature. But how do we ascertain what is a step toward maturity and not a degeneration? (How do we identify what nature has been striving toward?) It would seem that in judgments about maturity, as in judgments about what reason requires, we must use both empirical observations and moral premises.

And so empirical knowledge of human nature—of man as he is—is still necessary. Morality is circumscribed by facts concerning human inclinations, abilities, capacities, and potentialities. "The basic forms of good . . . are what is good for human beings with the nature they have."¹⁸ If man's nature were different, "so would be his duties."¹⁹ Thus, although natural law morality is not inferred solely from empirical human nature, it is tied to human nature and dependent upon it.

C. *Moderate Rationalism*

As indicated in the previous section, natural law theory is rationalistic. Lawmaking and other human activities should be guided by reason. The legal method of natural law is to push reason as far as we can.²⁰

But natural law theory is only moderately rationalistic; it recognizes that pure reason is insufficient for the solution of moral and legal problems.²¹ Valid reasoning

14. See YVES R. SIMON, *THE TRADITION OF NATURAL LAW* 51 (Vukan Kuic ed., paperback ed. 1992).

15. See *id.* at 52.

16. See *id.* at 52-53.

17. See *id.* at 53.

18. FINNIS, *supra* note 8, at 34; see also George, *supra* note 2, at 1416 ("Were human nature otherwise, human goods would be correspondingly different. In this sense, the basic human goods depend . . . upon human nature."); Grisez et al., *supra* note 9, at 116-17 (stating the possibilities of human fulfillment depend on the given reality of human nature and on people's capacities, inclinations, abilities, and resources).

19. FINNIS, *supra* note 8, at 34 (quoting D. J. O'CONNOR, *AQUINAS AND NATURAL LAW* 18 (1967)).

20. See LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 103 (AMS Press 1978).

21. See R.J. Henle, *Background and Commentary to THE TREATISE ON LAW*, *supra* note 4, at 75 (stating in hard cases, logic fails); Joseph Boyle, *Natural Law and the Ethics of Traditions*, in *NATURAL LAW THEORY*, *supra* note 3, at 3, 13-14.

does not guarantee moral truth,²² and there is no particular theory of justice “to which all rational persons would by their very rationality be compelled to give their allegiance.”²³

When we consider the jurisprudential method described by Aquinas, it becomes clear that the truth of its conclusions cannot be demonstrated by logic in combination with facts. We begin with basic moral principles that are indemonstrable, rock-bottom assumptions.²⁴ From these basic principles (in conjunction with other premises) we may deduce more particular subordinate principles. And from these subordinate principles we may derive even more specific principles. But the more we descend from our basic general principles to more specific principles and apply these more specific principles to particular cases, the greater the chance of error due to the contingencies of human affairs.²⁵ For example, though the principle that deposits should be returned is usually true, it would be unreasonable to return a deposit to a person who wants to use it in attacking our country.²⁶ When we get down to specific legal issues and particular cases, logical inference often fails, and we must resort to an intuitive prudence.²⁷ Natural law reasoning is thus rationally indemonstrable at both ends: it begins with first principles whose truth cannot be demonstrated, and it ends with intuitive judgments about justice in particular cases.

Because pure reason is insufficient, natural law jurisprudence must also make use of human experience, social traditions, intuition, and sheer faith.²⁸ One of the

22. Grisez et al., *supra* note 9, at 130-31.

23. ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 346 (1988).

24. See THE TREATISE ON LAW, *supra* note 4, at q. 91, art. 3, corpus, at 165 (explaining the first principles of natural law are indemonstrable); *id.* q. 94, art. 2, corpus, at 240 (stating the basic precepts of natural law are self-evident, not deduced from anything else).

25. See *id.* at q. 94, art. 4, corpus, at 260-61.

26. See *id.* at 261.

27. See Henle, *supra* note 21, at 87 (stating the application of general natural law precepts to individual cases often requires prudential judgment); YVES R. SIMON, *PHILOSOPHY OF DEMOCRATIC GOVERNMENT* 24 (Univ. of Notre Dame Press 1993) (1951) (explaining that in deciding what to do in a particular situation, one cannot get a final answer from rational argument).

28. See MARITAIN, *supra* note 4, at 90-94 (stating natural law precepts are known not through rational intellect, but through inclination, tradition, and experience); see also ARISTOTLE, *supra* note 4, at ll. 1180b28-1181a12, at 299-300 (noting lawmakers need both intellectual discernment and practical experience); ALASDAIR MACINTYRE, *AFTER VIRTUE* 220-22 (2d ed. 1984) [hereinafter *AFTER VIRTUE*] (noting any search for or reasoning about the good takes place within the context of social traditions); MACINTYRE, *supra* note 23, at 346, 350, 351, 369, 393, 401-02 (finding a rational discussion of justice can take place only within some tradition as there are no external, tradition-neutral standards); *id.* at 224 (describing Aristotle's and Aquinas's view that first principles are not demonstrated but arrived at through intuition); SIMON, *supra* note 14, at 127-29 (explaining practical judgments in concrete circumstances are incommunicable and require sound inclinations (intuition)); Grisez et al., *supra* note 9, at 118-19 (explaining that humans know the goodness of basic goods only by experiencing them). Sheer faith is sometimes needed because morality is ultimately mysterious. See SIMON, *supra* note 14, at 40, 162 (noting the moral universe is as mysterious as the physical universe).

strengths of natural law theory is that it recognizes the limits of human reason and draws upon a diverse set of resources in its quest for moral truth.

D. Teleology and Human Goods

Natural law ethical theory is teleological in the sense that it (1) identifies certain basic human goods²⁹ (for example, knowledge and friendship) which together make up the ultimate earthly end (*telos*), purpose, and goal of human living, and (2) holds that the moral rightness of an act depends on whether the act promotes those goods and that ultimate end. Thus Aquinas said that the morally right choice in deeds requires a proper end or goal,³⁰ and John Finnis suggested that “[t]he rightness of action is always . . . related to human good The upright . . . choice . . . pursues that good and avoids what harms that good.”³¹

This teleological aspect is something that natural law theory shares with utilitarianism and other consequentialist theories. Unlike many consequentialist theories, however, natural law theory identifies numerous ends, each of which is regarded as an objective and ultimate good. What should be promoted is not necessarily what people subjectively want or desire,³² nor is there any attempt to reduce all goods to one more fundamental good like utility or happiness.

We can expect any natural law ethical theory to contain two kinds of principles: first, principles that identify human ends—basic goods that are important aspects of human fulfillment; and second, moral principles that indicate norms of conduct or virtues that will enable us to best pursue these human goods. This linking of conduct-governing moral principles to basic goods or purposes is one of the strengths of natural law theory. Any theory of morally right conduct will flounder if it is not tied to some theory of the good. Norms of conduct cannot be interpreted and intelligently applied to particular situations without considering the purposes of the norms (the ends to be achieved by the norms). If the purpose of a norm

29. Natural law theorists often refer to these basic human goods as intrinsic goods. *See, e.g.*, ROBERT P. GEORGE, MAKING MEN MORAL 11 (paperback ed. 1995) (“Only those ends or purposes that are intrinsically worth while provide basic reasons for action.”). An intrinsic good is good-in-itself, even when it has no instrumental value. In my view, a list of basic human goods need not include all intrinsic goods or include only intrinsic goods. Some goods (knowledge, for example) are so instrumentally vital to human well-being that it does not matter whether we regard them as intrinsic goods as well as instrumental goods. As James Wallace observes, what usually matters in practical reasoning is the relative importance of different goods, and looking at a good in isolation, as something desirable in itself, does not help in this assessment. *See* JAMES D. WALLACE, MORAL RELEVANCE AND MORAL CONFLICT 108-09 (1988). What natural law jurisprudence needs is a list of the most important human goods that a legal system can promote.

30. *See* ST. THOMAS AQUINAS, TREATISE ON THE VIRTUES 74-77, q. 57, art. 5, corpus (John A. Oesterle trans., Univ. of Notre Dame Press 1984) (1966).

31. JOHN FINNIS, MORAL ABSOLUTES 11 (1991).

32. *See* FINNIS, *supra* note 2, at 35 (stating practical reasoning begins with identifying what is desired rather than desirable and seeking satisfactory ways to satisfy the desire); GEORGE, *supra* note 29, at 100.

requiring acts of type x is to achieve good a , it does not make sense to require x in a situation in which x would frustrate the realization of a . In the absence of such teleological interpretation, moral norms tend to become rigid, absolute rules.³³ The only alternative to this rigidity would be to regard the moral norms as discretionary, non-binding suggestions; in the absence of teleological purposes for guidance, the agent would be free to disregard these suggestions for any reason whatsoever. The only way to avoid both the absolutist and purely discretionary extremes is to view moral norms as serving some teleological ends or purposes, so that they are binding when, but only when, they promote those ends or purposes.

Our present concern is with natural law as a jurisprudential approach. This approach uses the same teleological method that characterizes natural law moral theory in general: human laws should be designed to promote human goods. As Aquinas indicated, any human artifact should be formed according to its end or purpose (as the form of a saw should be suitable for cutting); thus, human law should be appropriate for its end, which is the good of human beings.³⁴ Aristotle said that the state exists for the sake of the good life, not merely life itself or security,³⁵ and thus the end of legislation is the good for man.³⁶ Accordingly, natural law theory tries to identify the human goods that make up the end of human living, and then evaluates laws in terms of their propensity to help citizens realize those human goods.

What are those human goods? Aristotle mentioned a number of them, including life itself,³⁷ and rational and virtuous activity.³⁸ Aquinas identified life itself, child-rearing, knowledge of the truth, and cooperative social living as human goods.³⁹ Jacques Maritain's writing indicates that he would add human dignity, freedom, and brotherly love to these human goods.⁴⁰ John Finnis has provided a contemporary list of basic human goods: (1) human life and health; (2) knowledge and aesthetic appreciation; (3) excellence in work and play; (4) interpersonal harmony and friendship; (5) harmony between one's feelings and one's judgments (inner peace); (6) harmony between one's judgments and one's behavior (peace of conscience and

33. See ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY* 193 (1990); Charles Taylor, *Justice After Virtue*, in AFTER MACINTYRE 16, 28-30 (John Horton & Susan Mendus eds., Univ. of Notre Dame Press 1994) (1994).

34. See THE TREATISE ON LAW, *supra* note 4, at q. 95, art. 3, corpus, at 292-93.

35. See ARISTOTLE, *supra* note 7, at ll. 1280a31-37, at 142.

36. See ARISTOTLE, *supra* note 4, at ll. 1094b4-7, at 4.

37. See *id.* at 1170a19-22, at 265-66.

38. See *id.* at 1098a7-18, at 17-18. For Aristotle, such activity has both instrumental and intrinsic value. See *id.*

39. See THE TREATISE ON LAW, *supra* note 4, at q. 94, art. 2, corpus, at 250.

40. See MARITAIN, *supra* note 4, at 111.

authenticity); and (7) harmony between oneself and some more-than-human source of meaning and value (religion).⁴¹

E. Pluralism and Incommensurability

As the preceding paragraph indicates, natural law theorists recognize a plurality of basic human goods which are good in diverse ways. “[T]he basic goods are ultimate ends [T]hey are aspects of human fulfillment—many, distinct, irreducible [There is no] one intelligible good unifying all the goodness of all the basic goods [T]he basic goods correspond to the irreducibly diverse components of complex human nature.”⁴²

It seems to be a fact of human living that these human goods, because of their plurality and diversity, often conflict with each other.⁴³ There are situations in which two goods, each of which could be promoted alone, cannot both be promoted, and a choice must be made between them (situations in which the goods are mutually exclusive). There are other situations in which two goods can be promoted, but promoting one good to a greater extent entails promoting the other good to a lesser extent (situations in which two goods must be traded against each other). In one way or the other, liberty often conflicts with justice, friendship with knowledge, and child-rearing with excellence in work and play.

Contemporary natural law theory denies that such conflicts between goods can be resolved by simply promoting the higher good or bringing about the greatest possible overall net good. Indeed, the current tendency in natural law circles is to hold that conflicts between basic goods cannot be rationally resolved because basic goods are not rationally commensurable.⁴⁴ Two basic goods (or their particular

41. See FINNIS, *supra* note 31, at 42-43; Finnis, *supra* note 9, at 134, 135. Slightly different versions are presented by Finnis in other works. See FINNIS, *supra* note 8, at 86-90; John Finnis, *Is Natural Law Theory Compatible with Limited Government?*, in NATURAL LAW, LIBERALISM, AND MORALITY, *supra* note 1, at 1, 4 [hereinafter Finnis, *Limited Government*].

42. Grisez et al., *supra* note 9, at 133.

43. See AFTER VIRTUE, *supra* note 28, at 163-64 (suggesting Aristotle failed to recognize the extent to which good conflicts with good).

44. Contemporary scholars disagree as to what Aristotle's and Aquinas's positions were on this issue. Regarding Aristotle, compare MACINTYRE, *supra* note 23, at 141-42 (interpreting Aristotle as holding that the resolution of conflicts is not precluded by any incommensurability of goods), with NANCY SHERMAN, *THE FABRIC OF CHARACTER* 85 (1989) (interpreting Aristotle as holding that goods are incommensurable). Regarding Aquinas, compare LISSKA, *supra* note 2, at 100 (interpreting Aquinas as holding that goods are incommensurable), with Russell Hittinger, *Varieties of Minimalist Natural Law Theory*, 34 AM. J. JURIS. 133, 158 n.82 (1989) (interpreting Aquinas as holding that goods are commensurable).

A growing number of contemporary natural law theorists, however, assert that basic human goods are not rationally commensurable and that conflicts among such goods thus cannot be resolved by reason. See, e.g., FINNIS, *supra* note 2, at 94 (“The basic human goods at stake in any morally significant situation of choice are incommensurable.”); GEORGE, *supra* note 29, at 13 (noting basic human goods are incommensurable); Finnis, *supra* note 9, at 136 (observing that choice among diverse basic goods is frequently not rationally determined).

instantiations in our world) cannot be compared quantitatively, for no common standard of measure is available.⁴⁵ Nor can the various basic goods be ranked in any fixed hierarchy.⁴⁶

If the basic human goods are numerous, diverse, conflicting, and incommensurable, there will be many different ways in which people can reasonably pursue these goods and “no single pattern anyone can identify as the proper model of a human life.”⁴⁷ Although not everything that people want can be regarded as good, contemporary natural law theory does not prescribe that lawmakers impose upon citizens one exclusive vision of the good life.

F. Moral Education

In order to achieve human goods to any substantial degree, a person must not only recognize the goods as good, but must also practice certain moral virtues and adhere to certain moral principles, which tend to promote and protect those goods. The good of friendship for example, cannot be achieved without practicing the virtues of honesty, generosity, and justice. Furthermore, virtuous activity is itself a good, a necessary constituent of a good life. We thus have both instrumental and intrinsic reasons for believing that people should learn to be morally virtuous. Assuming that moral virtue is not something one individual can acquire on her own, we can also conclude that any society needs institutions that provide moral education.

45. See Finnis, *supra* note 9, at 146-47 (explaining there is no rationally identified scale for measuring or weighing different and conflicting goods); Germain Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 21, 29 (1978) (explaining goods are not “good” in the same sense and there is no standard measure that can be applied to all of them). For diverse and basic human goods to be quantitatively commensurable, they would have to be homogeneous (in which case, they would not be diverse) or they would have to be reducible to something else by which they could be measured (in which case, they would not be basic). See Grisez et al., *supra* note 9, at 110. As Finnis observes, trying to maximize overall good “is senseless in the way that it is senseless to try to sum together the size of this page, the number six, and the mass of this book.” FINNIS, *supra* note 8, at 113.

For the notion that particular instantiations of basic goods (including instantiations of the same basic good) are incommensurable, see FINNIS, *supra* note 31, at 53; Finnis, *supra* note 9, at 138; Grisez et al., *supra* note 9, at 110.

46. See FINNIS, *supra* note 2, at 51 (“[T]here is no single, objective hierarchy of basic human goods.”); FINNIS, *supra* note 8, at 92-93 (noting there is no objective hierarchy among the basic forms of human good); Grisez et al., *supra* note 9, at 137 (“[N]one of the basic goods can be said meaningfully to be better than another.”).

If there were a fixed hierarchy of basic goods, such that a higher good must always be preferred to a lower good, there would be a danger that the higher goods would squeeze the lower goods out of our lives. See George, *supra* note 2, at 1427-28.

47. GEORGE, *supra* note 29, at 39.

Natural law theory holds that a major purpose of the legal system is to provide moral education.⁴⁸ This is an important tenet in the natural law tradition and one that distinguishes that tradition from some forms of liberalism. One might ask why the legal system must engage in moral education. Should this task not be left to the family and other nonlegal institutions? Natural law theorists would answer that these institutions cannot adequately teach virtue without help from the legal system. Familial training is insufficient.⁴⁹ The authority of the state is necessary to reinforce good parental training; unfortunately, some families do not even provide good training. Training by religious institutions is not sufficient; many persons have no religious affiliation. Training in moral virtue requires the combined efforts of families, communities, religious institutions, and the state.

The state can provide moral education in a number of ways. First, the state can use coercive law to prohibit, under threat of criminal punishment, certain immoral acts that would otherwise be performed by persons who are not amenable to rational persuasion.⁵⁰ Coercion by itself cannot make a person moral;⁵¹ a person does not become moral until she voluntarily does the right thing for the right reason. But coerced habituation to right conduct can lead to an appreciation of the value of right conduct and thus to the voluntary performance of virtuous acts.⁵²

Second, even when the law does not prohibit certain actions under the threat of criminal punishment, it can be framed so as to encourage virtuous conduct and help an individual become more aware of other persons' interests and needs. The rules of tort law, contract law, and property law, for example, can encourage an individual to practice the virtues of due care, good faith, and respect for others' property.

Third, the legal system can establish and regulate public schools which teach virtues and moral obligations as well as history, literature, law, and the other humanities.⁵³ These public schools should not impose one religious or philosophical

48. See THE TREATISE ON LAW, *supra* note 4, at q. 92, art. 1, reply 1, at 186-87, q. 95, art. 1, corpus, at 281-82; D'ENTRÈVES, *supra* note 4, at 82 (noting natural law theory rests on the conviction that the purpose of law is to help men become virtuous); GEORGE, *supra* note 29, at 20 (arguing sound politics and good law are concerned with helping people lead morally upright and valuable lives).

49. See ARISTOTLE, *supra* note 4, at ll. 1179b31-1180a1, at 296 ("To obtain the right training for virtue from youth up is difficult, unless one has been brought up under the right laws."); GEORGE, *supra* note 29, at 27-28 (noting Aristotle found both family and law are necessary for moral education).

50. See THE TREATISE ON LAW, *supra* note 4, at q. 95, art. 1, reply 1, at 277 (stating some persons are not led to virtue unless they are compelled); ARISTOTLE, *supra* note 4, at ll. 1179b4-1180a5, at 295-96 (maintaining most people are swayed by compulsion rather than by argument).

51. See GEORGE, *supra* note 29, at 25; SIMON, *supra* note 27, at 111.

52. See THE TREATISE ON LAW, *supra* note 4, at q. 92, art. 2, reply 4, at 196, q. 95, art. 1, corpus, at 282; GEORGE, *supra* note 29, at 25-26 (interpreting Aristotle).

53. See ARISTOTLE, *supra* note 7, at ll. 1337a10-33, at 320 (arguing legislators should above all direct their attention to the education of youth and all education should be public, not private, and the same for all); MARITAIN, *supra* note 4, at 111-13, 119-20 (stating public education should promote a secular democratic creed which includes individual liberties, social obligations, and notions of equality and justice, a common creed acceptable to persons of different philosophical or religious outlooks).

creed; they should merely promote the common practical tenets upon which citizens have generally agreed to live together.⁵⁴ In order to gain students' assent to these tenets, however, teachers must provide some justifications for them. As Jacques Maritain indicates, this will probably require some multicultural references to the various philosophical and religious traditions in which the common tenets find support.⁵⁵

G. Problems for Natural Law Jurisprudence

At this point in our survey of natural law jurisprudence, two problems seem to have surfaced. The first problem stems from the thesis that basic human goods are conflicting and incommensurable. If a legal issue involves a conflict between good *a* and good *b*, how can lawmakers resolve the moral conflict if *a* and *b* are not rationally commensurable? Assuming that the law should accord with morality, lawmakers must resolve the moral conflict before they can decide how to fashion the law.

The conflict problem takes different forms. In one form, an individual must decide whether to give good *a* or good *b* priority in her own life. Usually, this is not a serious problem for lawmakers; they can safely leave the decision to the individual, so long as both *a* and *b* are truly basic human goods.

Another form of conflict involves conflicts between persons. Smith's pursuit and realization of basic good *a* may conflict with Brown's pursuit and realization of basic good *b*. Such conflicts may arise between two (or more) groups of persons, not just between two individuals. And the conflict might involve only one basic good—for example, a conflict between Jones's pursuit and realization of basic good *a* and Green's pursuit and realization of basic good *a*. Whether one or a number of basic goods are at stake, all these interpersonal conflicts are conflicts between alternative instantiations of generic goods in concrete and particular forms: a new kidney for Jones (an instantiation of life and health) versus a new kidney for Green (an instantiation of life and health), or a college education for Smith (an instantiation of knowledge) versus an enhanced spirit of cooperation in a particular village (an instantiation of interpersonal harmony).

As long as instantiations of basic goods are not rationally commensurable, the ethical resolution of these conflicts is not rationally determinate. In an effort to make morality more determinate, natural law theory might employ a principle stipulating that it is morally wrong to destroy or impair one person's instantiation of a basic good in order to bring about or enhance another person's instantiation of a basic good. Such a principle preferring the status quo to any action that diminishes a basic good for any person would resolve some conflicts, but cannot resolve the

54. See MARITAIN, *supra* note 4, at 111-12, 120.

55. See *id.* at 121.

many conflicts in which all the possible alternatives involve someone suffering a diminution in some basic good.

A second problem for natural law jurisprudence stems from the emphasis on moral education. Even if natural law theory can somehow resolve all conflicts among goods and persons and discern what morality requires in any human situation, lawmakers must still decide, with respect to any kind of immoral activity, whether the legal system will prohibit it, discourage it, or leave it alone. (Surely not everything that is immoral ought to be prohibited by law.) Natural law theory emphasizes the need to use legal coercion and legal incentives for the purpose of moral education. This creates a danger. Without some clear limits on the state's legal enforcement and promotion of morality, a legal regime based on natural law theory might leave insufficient scope for individual freedom and might even become tyrannical in its efforts to bring citizens to moral perfection.

How can this danger be averted? It would be imprudent to simply trust the judgment of lawmakers, most of whom are unduly influenced by popular opinion and quite willing to oppress "moral minorities." Natural law jurisprudence needs to provide some firm guidelines concerning the extent to which legal power should be used to help people become virtuous. Natural law theorists do not seem to have filled this need.

I have identified two serious problems for natural law jurisprudence: the problem of resolving conflicts between incommensurables, and the problem of establishing limits on the state's efforts to provide moral education. I doubt that either problem can be completely solved. But let us now consider some natural law tenets that will help in achieving partial solutions.

H. The Common Good

Natural law conceptions of the common good may help in resolving conflicts among goods and among persons. Natural law theorists have always insisted that a primary purpose of any legal system is to promote the common good.⁵⁶ Although conceptions of the common good vary from one theorist to another and can be

56. According to Aristotle, just governments have a regard for the common interest, the common good of the citizens. See ARISTOTLE, *supra* note 7, at ll. 1279a17-21, at 138, ll. 1283b40-43, at 153. The proper forms of government are those in which the rulers (whether the one, the few, or the many) govern with a view to the common interest; governments which rule for the sake of the private interests of the rulers are perversions because they do not have in view the common good of all. See *id.* at 1279a17-1279b10, at 138-39.

Aquinas says that the end of law is the common good. See THE TREATISE ON LAW, *supra* note 4, at q. 96, art. 1, corpus, at 311. Law is most of all ordered to the common good. See *id.* at q. 90, art. 2, corpus, at 133. Therefore, laws should be framed for the common benefit of the citizens. See *id.* at q. 96, art. 1, corpus, at 311. In his essential definition of law, Aquinas stipulates that law is a dictate of reason for the common good. See *id.* at q. 90, art. 4, corpus, at 145.

For Jacques Maritain, the final end and the final aim of the state is the common good; the maintenance of public order is merely an immediate aim. MARITAIN, *supra* note 4, at 14, 24.

somewhat vague, most natural law theorists would probably agree that the common good is the realization of all the basic human goods by every individual citizen, a realization brought about through the cooperative and coordinated efforts of a community of persons.⁵⁷ As Jacques Maritain stated, the common good is “communion in good living.”⁵⁸

This conception of the common good includes a number of important elements. First, the *common* good requires the well-being of *each and every* individual;⁵⁹ no individual should be denied a good life for the sake of other persons,⁶⁰ and lawmakers should have equal concern for the well-being of each citizen.⁶¹ Second, the well-being that each individual should be enabled to attain involves the integral realization of what is truly good, which includes *all* the basic human goods, and not simply what individuals happen to desire.⁶² Third, a realization of human goods is not in the *common* good unless it is the result of *coordinated cooperation*. Without overall direction and restraints on individual freedom, some citizens will be deprived of some basic human goods. Given the impossibility of unanimous voluntary agreement among citizens, this overall direction and restraint on freedom can come only from the state in the form of authoritative law. The common good thus requires coordination by means of law.⁶³

From this conception of the common good, we can derive some jurisprudential norms that may help to resolve conflicts among goods and among persons. Inasmuch as the common good requires the realization of all basic human goods by each citizen, the legal system should seek to avoid distributions of goods in which any citizen is entirely deprived of any basic human good, such as life, friendship, or education. Thus, the legal system should prefer a social distribution which gives each of two groups of persons a moderate education to an alternative distribution which gives one group an extensive education and leaves the other group with no education at all.

This first norm, insisting that no individual be completely deprived of any basic good, indicates that the state should not take anyone’s life; should not permit one

57. See FINNIS, *supra* note 8, at 153 (stating the common good is a shared objective of cooperation), 155-56 (stating the common good is a set of conditions which enables each and every individual to attain the basic human goods), 262 (“[T]he common good of the community is the good of all its members . . . a participation in all the basic values.”); cf. Grisez et al., *supra* note 9, at 131 (stating the ideal of integral human fulfillment is “all the basic goods in all persons, living together in complete harmony”).

58. JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 51 (1st paperback ed., Univ. of Notre Dame Press 1966) (1946).

59. See Henle, *supra* note 21, at 78, 80, 133 (interpreting Aquinas); FINNIS, *supra* note 8, at 164 (stating the common good does not disregard the well-being of members of the community for the good of any individual or group).

60. See MARITAIN, *supra* note 58, at 50-51.

61. See GEORGE, *supra* note 29, at 203.

62. See FINNIS, *supra* note 8, at 164.

63. See *id.* at 149 (stating law is based on the need for activities to be coordinated); *id.* at 153 (concluding the objective of this coordination is the common good).

citizen to kill another, except in self-defense; and should try to ensure that each citizen has health, education, and an opportunity for meaningful work. This norm, however, leaves most legal issues unresolved.

The question inevitably arises: how much of each basic good should each citizen have? Few, if any, natural law theorists suggest that the state should attempt to give all citizens equal shares of any basic good, or equal shares of any instrumental good, such as wealth, which persons can use to attain basic goods. Basic goods cannot be quantitatively measured, and although wealth and perhaps some other instrumental goods can be measured, any attempt by the state to achieve precisely equal shares of any measurable instrumental good would entail the abandonment of other legitimate distributive criteria such as merit, incentive, need, and the capacity to make productive use of that good. And any attempt to ensure precisely equal *opportunities* to acquire basic or instrumental goods would involve excessive interference with the freedom of individuals, families, or private associations.⁶⁴ (For example, excessive regulation of families would be necessary to give each child an equal opportunity to benefit from education.) Thus, strict equality, in either basic or instrumental goods, cannot be the primary criterion for distributive justice.⁶⁵

A more reasonable approach is to prescribe that the state try to ensure that each member of society has enough of each basic good to enable that person to lead a decent human life. We might regard this as a second norm derived from the conception of the common good. This norm requires more than each person having some of each basic good, but need not involve precise minimum requirements for any or all basic goods. Given the impossibility of objectively measuring instantiations of basic goods, lawmakers' judgments in this area must be rather intuitive. But it does seem clear that the common good requires a special concern for the needs of the poor and any other persons in danger of being left with basic goods insufficient for a decent and truly human life.⁶⁶

A third norm that might be derived from the natural law conception of the common good prescribes that in utilizing its limited resources to promote various goods, the state should favor those goods that can be enjoyed by all members of society, without one person's enjoyment reducing any other person's enjoyment. Such goods, often referred to as "public goods" or "common goods," include national defense, public schools and libraries, health agencies that seek to prevent

64. See SIMON, *supra* note 27, at 222-29 (concluding perfect equality of opportunity would require excessive state interference with families, the inheritance of wealth, and child-rearing).

65. John Finnis suggests that in resolving problems of distributive justice, equality is a residual principle, applicable only when other criteria are inapplicable or fail to yield a conclusion, and that we should not assume that the common good is enhanced by treating everyone identically. See FINNIS, *supra* note 8, at 173-74.

66. See MARITAIN, *supra* note 4, at 19-20 (stating the common good requires state legislation regarding employment and labor, the enforcement of social justice, and concern for the needs of people in the lowest strata of society); SIMON, *supra* note 27, at 216 (concluding that in order to promote the common good, government leaders must have a special concern for the poor).

epidemics of disease, municipal garbage collection, television and radio broadcasting, and recreational areas open to the public. Whether such goods are regarded as constituent aspects of some basic good, instantiations of some basic good, or instrumental means to the realization of some basic good, they effectively promote the common good because they tend to provide basic goods to all citizens; they benefit everyone or at least are available to everyone.

In the design of a legal system, such goods should generally have priority over “private” goods, which cannot be shared by everyone and must be distributed in ways that result in one person’s benefit reducing the benefits available to others. Examples of private goods are money and other economic resources, consumer goods, membership in honorary societies, and vacation time for employees. Such goods are divisible goods distributed in zero-sum or fixed-sum games. They cannot be enjoyed harmoniously, only competitively. This is not to say that such goods should not be provided. Some of them are necessary for human flourishing. However, they do not promote the common good as efficiently as indivisible public goods, which if enjoyed by anyone can be enjoyed by all.

Neither the concept of the common good nor other natural law principles will rationally resolve all conflicts that confront lawmakers. Natural law theorists acknowledge this. They recognize that on many issues lawmakers must fashion legal norms whose precise content is not logically determined by natural law principles—norms which should be consistent with natural law but are largely determined by prudential assessments of social circumstances.⁶⁷ Fortunately, this logical indeterminacy does not bring natural law jurisprudence to a grinding halt because natural law commentators and lawmakers use tradition and intuition as well as formal reason.

I. Limits on Legal Coercion

Most natural law theorists would agree that individual liberty is a good and has an important place in any sound theory of the human good.⁶⁸ Free choice, if not a basic good, is at least an instrumental good necessary for human fulfillment.⁶⁹ Some basic goods, such as friendship, religious experience, aesthetic appreciation, and practical reasonableness, cannot be realized at all by someone without free choice.⁷⁰

67. See FINNIS, *supra* note 8, at 28, 284–86 (summarizing Aquinas); see also Henle, *supra* note 21, at 91–92, 288–89, 344 (interpreting Aquinas’s notion of “determinations”); SIMON, *supra* note 14, at 154–55 (applying Aquinas).

68. See, e.g., FINNIS, *supra* note 2, at 50 (recognizing liberty and authenticity as valid goods, not merely the means to pursue goods).

69. See Grisez et al., *supra* note 9, at 111, 116–17.

70. See GEORGE, *supra* note 29, at 192 (stating liberty and privacy “enable people to realize . . . intrinsic goods whose realization would be prevented or seriously hampered by the lack of liberty or privacy”). Arguably, no basic good can be realized unless freely chosen. See Martha Craven Nussbaum, *Shame, Separateness, and Political Unity: Aristotle’s Criticism of Plato*, in *ESSAYS ON ARISTOTLE’S ETHICS* 395, 422–23 (Amélie Oksenberg Rorty ed., 1980) (interpreting Aristotle).

And with respect to any basic good, it would seem that its realization must be diminished if it is imposed on the individual agent and not freely chosen.

This recognition of the importance of individual freedom is reflected in some natural law tenets that impose limits on the use of legal coercion in promoting moral education or regulating human conduct generally. One such tenet is the doctrine of subsidiarity.

1. *The Subsidiarity Doctrine*

As Yves Simon explained, the common good requires autonomous initiative in citizens.⁷¹ Therefore, no task which can be satisfactorily accomplished by a smaller social unit should be assumed by the state; centralized governmental management is preferable only when its gain in efficiency is so great that it overcomes the loss of autonomy.⁷² Thus, to facilitate the pursuit of the good life, much must be left to free churches, a free press, private schools, independent labor unions, and privately owned businesses.⁷³

The problem, of course, is that individuals and private associations will quite properly have particular loyalties and specialized tasks that make it difficult for them to see all sides of social issues and fully consider the interests of all citizens.⁷⁴ The principle of subsidiarity therefore provides that private activity should not be left free of legal constraint when such freedom would cause injury to the common good.⁷⁵ For example, the law should regulate private business when private business does not serve the common good of all citizens.⁷⁶

2. *Aquinas's Harm Principle*

Although they recognize the need for some legal regulation of conduct, natural law theorists have always asserted that the state should not try to enforce all of morality nor attempt to make citizens perfectly virtuous. As Jacques Maritain stated,

71. See SIMON, *supra* note 27, at 128-30.

72. See *id.*; see also Henle, *supra* note 21, at 78, 80 (interpreting Aquinas as stating individual citizens must enjoy a large measure of freedom and the state should control only those things that cannot be achieved by individuals and voluntary associations); FINNIS, *supra* note 8, at 146-47 (explaining the principle of subsidiarity affirms that the function of association is to help individuals help themselves through personal initiative, and larger associations should not assume functions that can be performed efficiently by smaller associations); MARITAIN, *supra* note 4, at 67 (stating everything that can be accomplished by the free initiative of private associations should be left to those associations).

73. See SIMON, *supra* note 27, at 136-38.

74. See *id.* at 36-48 (stating citizens will properly have differing views on social issues because of their different situations and duties, and state authority is necessary to identify what is in the common good).

75. See FINNIS, *supra* note 8, at 169.

76. See Henle, *supra* note 21, at 80-81 (interpreting Aquinas).

“political hypermoralism is not better than political amorality.”⁷⁷ In the first place, law by itself cannot make persons good; it can only provide the conditions to enable persons to make themselves good.⁷⁸ Second, any attempt to legally prohibit all evils is apt to be counterproductive. As Aquinas observed, “[h]uman law intends to bring men to virtue, not suddenly but gradually, and so, it does not impose . . . upon the multitude of imperfect men . . . that they abstain from all evils, otherwise these imperfect men, being unable to bear such precepts, would break forth into worse evils”⁷⁹ Third, if the legal system attempted to punish all evil deeds, many good things would be lost.⁸⁰ For example, if the law prohibited everyone from engaging in malicious gossip, this would have a chilling effect on conversations between spouses or friends, whose relationships would lose the intimacy and spontaneity that make them valuable.

The question as to which moral vices should be tolerated by the law is largely a prudential question to be answered in the light of variable social circumstances.⁸¹ Lawmakers should ask the following: Which is more conducive to moral education, legal prohibition of this vice or legal toleration? Is this vice serious enough to warrant the use of the legal system’s scarce resources? Although the legal coercion versus legal toleration issue cannot be governed by any bright-line test, Aquinas provided a helpful general principle, hereinafter called “Aquinas’s harm principle” because of its partial resemblance to John Stuart Mill’s harm principle:

[H]uman law is framed for the whole community of men in which most men are not perfect in virtue. And therefore human law does not prohibit all vices from which the virtuous abstain but only the more serious ones from which it is possible for the majority to abstain and especially those which are harmful to others and which, if not prohibited, would make the preservation of human society impossible: Thus human law prohibits murders, thefts and the like.⁸²

Although the word “especially” indicates that the law might justifiably prohibit some serious vices that are not harmful to others, the passage suggests that the legal system should, for the most part, focus its coercive attention on vices like murder and theft that are not merely harmful to other persons, but so harmful that they constitute threats to a peaceful society.

77. MARITAIN, *supra* note 4, at 61-62.

78. See GEORGE, *supra* note 29, at 1; H. MCCOUBREY, THE DEVELOPMENT OF NATURALIST LEGAL THEORY 197 (1987) (attributing this perspective to Aristotle, Aquinas, and Rousseau).

79. THE TREATISE ON LAW, *supra* note 4, at q. 96, art. 2, reply 2, at 313.

80. See *id.* at q. 91, art. 4, corpus, at 171.

81. See GEORGE, *supra* note 29, at 32-33, 42 (discussing Aquinas’s propositions).

82. THE TREATISE ON LAW, *supra* note 4, at q. 96, art. 2, corpus, at 316.

As previously noted, Aquinas seemed to leave open the possibility that paternalistic laws might sometimes be justified. “Paternalistic laws” are laws that coerce a citizen purely for the sake of his own virtue or well-being, laws prohibiting actions that do not harm other citizens. Some natural law theorists suggest that paternalistic laws are never justified.⁸³ Many natural law theorists, however, hold that paternalistic law may sometimes be justified. This is the position taken by theorists who assert that the limits on legal coercion are prudential and relative to social circumstances.⁸⁴ (If the limits are dependent on contingent circumstances, there cannot be any absolute moral bar against paternalistic law.) What looks like a third position is the notion that the legal system should not prohibit private and secret non-coercive acts of vice (for example, consuming cocaine), but should prohibit conduct by which the agent facilitates acts of vice by other people (for example, selling cocaine).⁸⁵ The kind of law being favored is not paternalistic; it prohibits conduct that has harmful effects on other persons. This position might therefore be a version of the first position—that paternalistic laws are never justified. Whether it presents two or three different positions on the issue of legal paternalism, natural law theory does not exhibit any general consensus.

3. *Natural Rights*

In addition to the doctrine of subsidiarity and Aquinas’s harm principle, a third natural law tenet that limits the use of coercive law is the concept of natural rights. To say that individual *A* has a natural right to *x* is to say the following: *A* has some property *p* which is an essential aspect of human nature, property *p* is manifested or realized in or through *x*, other people are morally obligated not to interfere with *A*’s doing or enjoying *x*, and *A*’s moral right to *x* ought to be protected by the legal system—ought, to some extent, be a legal right.⁸⁶

Property *p* will be something that one must have in order to be fully human—an end to be realized by virtue of his human nature (a basic human good). Because the essence of human nature is common to all humans and a basic human good is good for all humans, we must acknowledge that if person *A* has property *p*, so does every other person. This does not mean that every person in the world will also have a right to *x*. In some societies, *x* may be necessary for the realization of *p*, while in other societies, *p* can be realized without *x*. Within any one society, however, a

83. See D’ENTRÈVES, *supra* note 4, at 84 (stating that even the medieval scholastics acknowledged that human laws should regulate only conduct involved in human interaction and social relationships and thus implying that conduct affecting no one but the agent should not be regulated by law).

84. See GEORGE, *supra* note 29, at xii (stating paternalism can be morally legitimate); *id.* at 32-33 (interpreting Aquinas as viewing the limits on the legal prohibition of vice as prudential); *id.* at 42 (identifying some reasons for legal toleration of some evils as prudential).

85. See Finnis, *Limited Government*, *supra* note 41, at 8-9, 17.

86. This definition of “natural right” draws heavily upon CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES* 195 (1985).

common set of legal, social, and economic institutions will make it likely that every citizen will have pretty much the same set of natural rights (the same necessary means to the basic human goods).

Within any one society, a particular set of natural rights can be derived from different philosophical or religious traditions as long as each such tradition recognizes a similar set of basic human goods. Most Americans would agree with Jacques Maritain that the natural rights to be protected by law include a right to personal freedom, a right to private property, a right of free association (including a right to form labor unions), a right to free speech, and a right to choose one's occupation.⁸⁷ In a society like ours, these rights are necessary for the realization of basic human goods such as rational activity, authenticity, knowledge, human dignity, excellence in work, friendship, and religion. Note also that the natural rights just enumerated are liberty rights which, if they are to be protected *by* law, must be legally protected *against* coercive law.

Some natural rights are absolute.⁸⁸ (It is difficult to conceive of any reason why the right not to be tortured should not be absolute.) Most natural rights, however, are not absolute.⁸⁹ Rights conflict, and *A*'s right to *x* may sometimes be justifiably limited by *B*'s right to *y* or by the common good, which requires that *all* citizens be enabled to realize each of the basic human goods.⁹⁰

In fixing the limits of legal rights, lawmakers should keep two things in mind. First, the particular ways in which a citizen is allowed to exercise a natural right may be limited. Prohibiting a particular exercise of a right does not destroy that right, so long as the citizen is allowed other ways of exercising that right.⁹¹ But if lawmakers effectively deny a citizen any way of exercising a natural right, they destroy that right and violate their own moral obligations. Second, while positive or welfare rights (such as rights to education or income) must always be limited by available resources and requirements of distributive justice, important liberty rights should be restricted only for the most compelling reasons.⁹²

Contemporary natural law theorists thus propose a scheme of liberty rights very similar to that enforced under the United States Constitution. Freedom of assembly is not an absolute right, but any state interference is justified only by compelling reasons. Even Nazi groups must be allowed to hold meetings and march in parades, provided that they do not exercise their right of assembly in ways that involve violence or intimidation.⁹³ Freedom of speech is not an absolute right. There are

87. See MARITAIN, *supra* note 4, at 100-01, 104.

88. See FINNIS, *supra* note 8, at 225; SIMON, *supra* note 27, at 202.

89. See, e.g., MARITAIN, *supra* note 4, at 101, 103, 106-07.

90. See FINNIS, *supra* note 8, at 216-18; MARITAIN, *supra* note 4, at 101.

91. See MARITAIN, *supra* note 4, at 101, 106 (distinguishing between the possession of a right and the exercise of a right and suggesting that all rights are subject to limitation as to their exercise).

92. See GEORGE, *supra* note 29, at 228.

93. Compare *id.* at 218-19 (stating a political group has the freedom to assemble peaceably as long as activity does not include violent or intimidating acts) with *Collin v. Smith*, 578 F.2d 1197, 1201-02 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) (holding that although a march by Nazis

often justifying reasons for restricting the time, place, and manner of speech, but speech should rarely be restricted on the ground of its content.⁹⁴ Freedom of religion is an important right because the basic good of religion cannot be realized under compulsion. But not even the free exercise of religion is an absolute right; there are compelling reasons, for example, to suppress a religious practice involving human sacrifice.⁹⁵

III. LIBERALISM

In contemporary American discourse, the word “liberal” usually refers to political or legal theories that advocate personal liberty in matters of lifestyle, but prescribe increased government action in the economic arena, including efforts to redistribute wealth more equally among citizens. In this article, “liberal” is used in a broader and more old-fashioned sense: liberal theories regard individual liberty as the highest, or one of the highest, political and legal values.⁹⁶ A theory can thus be liberal even if it does not prescribe increased governmental regulation of the economy or efforts to reduce inequalities in wealth.

in a largely Jewish suburb could be subjected to reasonable regulation of time, place, and manner, a peaceful march could not be prohibited on the ground of its offensive symbols).

94. Compare GEORGE, *supra* note 29, at 198-99 (identifying criminal conspiracy, disclosure of national security secrets, and other situations in which content restrictions would be justified) with *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983) (stating that speech in a public forum may be subjected to reasonable time, place, or manner regulations that leave open ample alternative channels of communication but that speech cannot be excluded because of its content unless the exclusion is narrowly drawn to serve a compelling state interest), *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (explaining a state must not forbid the advocacy of violations of the law, except where such advocacy is directed to inciting or producing imminent illegal action and is likely to incite or produce such action), and *Konigsberg v. State Bar*, 366 U.S. 36, 49-51 (1961) (stating freedom of speech not absolute).

95. Compare GEORGE, *supra* note 29, at 220-22 (explaining that there are conclusive reasons to forbid certain activities even when these activities are part of religious worship) with *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32, 542, 545-46 (1993) (invalidating city ordinances prohibiting animal sacrifices under the principle that unless a law burdening a particular religious practice is religion-neutral and of general applicability, it must be justified by a compelling governmental interest) and *Employment Div. v. Smith*, 494 U.S. 872, 877-79 (1990) (holding that the right to free exercise of religion does not require an exemption from criminal law prohibiting the use of peyote under the principle that the state can apply religion-neutral laws of general applicability, even when such laws proscribe activity that some religions prescribe).

96. See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 17 (1986) (explaining that “[l]iberalism . . . revolves [around] the importance of personal liberty”); JEREMY WALDRON, *LIBERAL RIGHTS* 37 (1993) (stating “the importance of individual freedom lies close to the heart of most liberal political positions”). A liberal does not regard either liberty or autonomy as a top-priority value that always overrides all other values. Stephen Gardbaum suggests that although autonomy is perhaps the distinctive liberal value, it is not the only essential liberal value and might sometimes be trumped by other liberal values. See Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 *STAN. L. REV.* 385, 416-17 (1996). “Libertarian” theory could be distinguished as going beyond liberalism because it asserts that individual liberty is the only value, or the overriding value, in politics and law.

Liberalism began in Europe as a bourgeois movement opposed to powerful monarchies, state-established churches, feudal restrictions on transfers of property, and various forms of aristocratic privilege. Each aspect of this early liberalism reflected a basic denial of any natural social hierarchy, a profound confidence in the judgment of the ordinary individual citizen. Liberals were thus not only committed to individual liberty and limitations on the power of the state, but were also dedicated to notions of rational and moral equality and would become increasingly dedicated to democracy.⁹⁷

By the middle of the nineteenth century, laissez-faire had become a dominant theme in liberal thinking, especially in England, where the Anti-Corn-Law League, the Manchester School, and the new Liberal Party opposed governmental regulation of economic activity, favored free markets and free trade, and had little concern for the plight of the working class.⁹⁸ This “classical liberalism” that conquered Great Britain and the United States in the nineteenth century was thus at least consistent in its demands for individual liberty in all spheres of life, economic as well as non-economic.⁹⁹

In the last decades of the nineteenth century, however, many British liberals began to accept the need for state activity to protect the working class.¹⁰⁰ In the twentieth century, numerous British, French, and American liberals advocated governmental efforts to reduce economic inequality and called for increased state provision of public education, public health programs, and other public goods that benefit all citizens.¹⁰¹ Liberals are now divided on these issues. There is no liberal consensus on governmental intervention in the economy or on distributive justice.

What still unites all liberals is a set of basic and abstract ideas about individual liberty. One such idea is that *free voluntary choice is generally preferable to coercion*. An individual cannot achieve a worthwhile life unless she has freely chosen her life; free choice is not sufficient, but is necessary for a worthwhile life.

97. See GUIDO DE RUGGIERO, THE HISTORY OF EUROPEAN LIBERALISM 50-51 (R.C. Collingwood trans., Beacon Press 1966) (1927) (stating that liberalism implied not only liberty, but also equality in practical judgment); *id.* at 370 (stating democracy is a logical extension of liberal ideas). De Ruggiero notes that the egalitarian and democratic aspects of liberalism have often conflicted with the individual liberty aspect. *Id.* at 51, 372.

98. See *id.* at 123-34.

99. In France, notions of laissez-faire were never accepted as readily as in Great Britain and the United States. See *id.* at 172 (contrasting France and Britain in the nineteenth century).

100. See *id.* at 136-51 (observing that under pressure from the Conservative Party, the British Liberal Party became more open-minded about state involvement in the economy and state protection of the working class); Maurice Cranston, *Liberalism*, in 4 THE ENCYCLOPEDIA OF PHILOSOPHY 458, 458 (Paul Edwards ed., 1967) (noting that in the late nineteenth century, T.H. Green and other British liberals advocated state action to liberate the poor from the burdens of poverty).

101. Cranston sees a Lockean strain and a conflicting egalitarian strain in British, French, and American liberalism. See Cranston, *supra* note 100, at 458-59, 460. Stephen Holmes suggests that liberals have always recognized the need for state power to enforce individual rights, enhance the economic position of the poor, and provide public goods. See STEPHEN HOLMES, PASSIONS AND CONSTRAINT 18-23 (1995).

Although a flourishing society depends on cooperative activity as well as individual initiative, voluntary cooperation is usually more efficient than forced cooperation. Thus, in both individual and cooperative activity, free choice is generally preferable to coercion.

This basic idea does not distinguish liberalism from natural law theory. As noted in section II.I, most natural law theorists recognize that an individual cannot achieve fulfillment as a human being without free choice, and many natural law theorists accept a subsidiarity doctrine holding that autonomy for private associations is preferable to centralized social control unless it injures the common good. Natural law theory, like liberal theory, thus tends to have a general preference for free choice over coercion.

Because of this preference for free choice, liberals commonly accept a second basic idea: *to the extent that it is feasible to do so, the legal system ought to protect each citizen's liberty against interference from any source, be it the state, the moral majority, private corporations, or other individuals.* This is a jurisprudential idea about the proper functions of the legal system. It reflects the contemporary liberal recognition of the fact that threats to individual liberty come not only from the state, but also from other citizens.

To what extent is it feasible for the legal system to protect each citizen's liberty? In many situations, the legal system can protect one citizen's liberty against interference by other citizens only by interfering with the liberty of those other citizens. No matter how the legal system responds to such a situation, someone's liberty will be impaired. The contemporary liberal approach, which can be traced back to French liberals such as Montesquieu and Benjamin Constant, is to favor some sort of overall compromise whereby power is checked by power,¹⁰² and no branch of government or citizen can do everything it wants to do.¹⁰³ In some realms of life, a person's liberty should not be impaired by legal constraints; in other realms, the legal system should constrain an individual's conduct in order to protect the liberty of others.¹⁰⁴

Contemporary liberals disagree about the precise contours of the proper compromise; they differ as to what an individual should be free to do and what she should not be free to do and thus disagree about the extent to which it is feasible for the legal system to protect a citizen's liberty. Similarly, natural law theorists accept the basic idea that the legal system should protect each citizen's liberty, but disagree

102. Montesquieu suggests that anyone who has power is apt to abuse it and that things should be arranged so that power checks power and no one can abuse power. MONTESQUIEU, *THE SPIRIT OF THE LAWS* bk. 11 ch. 4, at 155 (Anne M. Cohler et al. ed. & trans., 1989). For a discussion of Montesquieu's conception of liberty under law as a compromise between conflicting interests, see PIERRE MANENT, *AN INTELLECTUAL HISTORY OF LIBERALISM* 53-64 (Rebecca Balinski trans., 1995).

103. See MANENT, *supra* note 102, at 62 (discussing Montesquieu).

104. Constant maintains that no individual or group is entitled to subject the rest of society to its particular will. See BENJAMIN CONSTANT, *POLITICAL WRITINGS* 176 (Biancamaria Fontana ed. & trans., 1988). However, society should not have unlimited sovereignty over an individual; there is a private realm of life which must remain individual and independent of social control. See *id.* at 176-77.

among themselves as to the extent to which this is just and practicable. I see nothing here that helps us draw a clear dividing line between liberals and natural law thinkers.

A third basic idea that unites liberals involves rights: *some types of liberty* (for example, freedom of expression and freedom of religion) *are so essential that they should not only be recognized as moral rights, but should also be specifically enumerated as legal rights enjoying a special legal priority over governmental attempts to interfere.*¹⁰⁵ These legal rights are to be extended to all citizens equally, without regard to social station. Most liberals suggest that although these rights should enjoy a special priority, none of them should have absolute priority over all other considerations.¹⁰⁶ Any particular right may sometimes have to give way to another conflicting right or some compelling governmental interest.

This liberal idea about rights is very similar to natural law doctrines of natural rights. As summarized in section II.I, such doctrines typically hold that although most of our important liberty rights are not absolute, they should enjoy special legal priority and should be restricted only for the most compelling reasons.

A fourth idea shared by liberals is that *legal paternalism can seldom, if ever, be justified.* A law is paternalistic if it coerces a citizen for the sole purpose of enhancing her well-being or saving her from some harm. A law is not paternalistic if it coercively prohibits a citizen from doing something, partly because her doing it might result in harm to other persons. Liberals have always had a strong distaste for legal paternalism. Isaiah Berlin said that paternalism is “an insult to my conception of myself as a human being.”¹⁰⁷ Some liberals hold that paternalistic laws are never justified. For example, John Stuart Mill’s “harm principle” asserts that the legal system should interfere with a person’s liberty only for the purpose of preventing harm to others; “[h]is own good, either physical or moral, is not a sufficient warrant.”¹⁰⁸ Other liberals, however, believe that legal paternalism might sometimes be justified. William Galston suggests that it depends on the circumstances.¹⁰⁹ An individual’s noncoerced pursuit of what is bad is not always

105. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 156-57 (1996) (stating a liberal conception of justice will protect certain basic rights and assign them special priority).

106. See ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* lx (1969) (recognizing that even the most sacred liberty rights “may have to be disregarded if some sufficiently terrible alternative is to be averted”); CONSTANT, *supra* note 104, at 273-74 n.1 (stating freedom of press cannot be absolute); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 169-70, 190-94, 268 (1978) (explaining that rights are not absolute and that even a fundamental right can be overridden by competing individual rights); WILLIAM A. GALSTON, *JUSTICE AND THE HUMAN GOOD* 127 (1980) (stating rights cannot be absolute); RAWLS, *supra* note 105, at 295, 356 (explaining a basic liberty is not absolute and can be restricted for the sake of other basic liberties); RAZ, *supra* note 96, at 187, 256-57 (stating rights are not “trumps in the sense of overriding other considerations based on individual interests” and the degree to which government may properly interfere with rights depends on social conditions).

107. BERLIN, *supra* note 106, at 157.

108. JOHN STUART MILL, *ON LIBERTY* 13 (Currin V. Shields ed., 1956). Mill then says an individual has an absolute right of independence with regard to conduct that concerns only herself. *Id.*

109. See GALSTON, *supra* note 106, at 97, 129-30.

preferable to her coerced pursuit of what is good; liberating a person from heroin addiction is good, even though she does not wish to be liberated from heroin.¹¹⁰ Joseph Raz asserts that although the government can never justifiably coerce a person for the purpose of protecting her moral virtue,¹¹¹ paternalistic coercion can be justified if, for example, it is for the purpose of protecting long-term autonomy and meets certain other conditions.¹¹²

We can thus see a lack of consensus among liberals on the issue of legal paternalism. In section II.I, we noted a similar variety of natural law views on this issue. Although some natural law theorists may hold that legal paternalism is never justified, many of them suggest that it depends on what is prudent in the circumstances and that legal paternalism is seldom proper but cannot be absolutely ruled out.

Even if there were some doctrinal distinction separating all liberals from all natural law thinkers on the paternalism issue, the distinction would not be significant enough to determine our choice between liberalism and natural law as general jurisprudential approaches. The distinction would hardly ever matter because purely paternalistic laws are rare. It is difficult to imagine a law meant to coerce a person to do something for her own good that could simultaneously be unrelated to the well-being of other persons. In support of any law prohibiting a person from doing *x*, which would be harmful to that person, one could argue that a reason for the prohibition is that her doing *x* (and being permitted by the law to do *x*) could tempt other persons to do *x* and thus also harm themselves.

My brief survey of tenets commonly accepted by liberals has revealed nothing that separates liberals from natural law theorists. Furthermore, there is no reason why a liberal could not accept all of the natural law tenets discussed in Part II above.

In view of the numerous tenets liberals can share with natural law theorists, it is not surprising that the major problems confronting contemporary natural law theory are also major problems for liberal theory. In section II.G above, I noted two serious problems for natural law jurisprudence: (1) how to resolve conflicts between alternative instantiations of basic goods that are not rationally commensurable; and (2) how to set limits on the legal system's efforts to promote morality. Earlier in the present section, I observed that liberals prescribe that the legal system protect each citizen's liberty but have been unable to agree on any principle that could resolve conflicts between one person's liberty to do *x* and another person's liberty to do *y*. Because a liberty to do *x* (or *y*) is a liberty to pursue certain instantiations of goods, the liberal conflict problem looks like the natural law conflict problem. I also observed that most liberals do not regard liberty rights as absolute. This creates a problem liberals have not solved: how to establish limits

110. See WILLIAM A. GALSTON, *LIBERAL PURPOSES* 85-87 (1991).

111. See Joseph Raz, *Liberty and Trust*, in *NATURAL LAW, LIBERALISM, AND MORALITY*, *supra* note 1, at 113, 127-28.

112. See *id.* at 121-22.

on the state's power to restrict a liberty right for the sake of promoting morality or pursuing other important collective goals. This liberalism problem looks like the second problem for natural law theory. These two problems, faced by both liberalism and natural law, are closely related and substantially overlapping but not identical. The second problem concerns the question of when legal interference is justified. The first problem comes into play when legal interference is justified and lawmakers must decide how legal interference will resolve some conflict between persons which is also a conflict between liberties and a conflict between instantiations of goods.

The preceding discussion indicates that we cannot distinguish liberalism from natural law theory by focusing on the jurisprudential principles generally accepted by liberals and the jurisprudential principles generally accepted by natural law theorists. The two sets of principles are very similar or at least compatible. Nevertheless, some versions of liberalism are incompatible with contemporary natural law theory. In what follows, we will examine three current versions of liberalism, each of which is influential, but none of which is generally accepted by those who call themselves liberals. With respect to each version, we will look to see whether it is compatible with natural law theory and, if it is not, whether it is superior or inferior to natural law as a general jurisprudential approach.

A. *Neutralist Liberalism*

Neutralist liberals assert that lawmaking should be based on reasoning that is neutral on certain moral issues. This assertion is often made in sweeping terms suggesting that lawmakers should be neutral on all moral issues, or at least all questions of what is good for humans. John Rawls has stated that government has no right to do what it wants to do regarding questions of morals.¹¹³ Ronald Dworkin has proposed, as an important principle of liberalism, that government must be neutral toward conceptions of the good,¹¹⁴ conceptions of the good life.¹¹⁵

These sweeping statements are, however, frequently qualified and restricted in various ways. Because they cannot reasonably ask lawmakers to be neutral about both the good and the right, neutralist liberals typically suggest that although lawmakers should be neutral as to conceptions of the good, they may properly base

113. JOHN RAWLS, A THEORY OF JUSTICE 186-87 (1999). For a similarly sweeping judicial statement, see *People v. Onofre*, 415 N.E.2d 936, 940 n.3 (N.Y. 1980), suggesting that it is not the function of the criminal law to enforce moral values. See also WALDRON, *supra* note 96, at 160-63 (presenting the liberal view that lawmakers should be neutral about conceptions of the good life, including ethical ideals and any other beliefs about what is important in a human life).

114. RONALD DWORIN, LAW'S EMPIRE 441 n.19 (1986); see BRIAN BARRY, JUSTICE AS IMPARTIALITY 12 (1995) (suggesting that justice requires a certain kind of neutrality between conflicting conceptions of the good).

115. RONALD DWORIN, A MATTER OF PRINCIPLE 191 (1985); see CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 46 (1987) (asserting that liberal neutrality denies "the state any right to foster or implement any conception of the good life that some people reject").

their decisions on principles of justice and certain other notions of moral rightness.¹¹⁶ Neutralist liberalism can be made more palatable if it also permits government to use *noncoercive* means to promote certain goods; the neutrality thesis is thus sometimes stated in terms suggesting that state neutrality about the good is required only in enacting coercive law.¹¹⁷ A third qualification often proposed by neutralist liberals is that neutrality about the good is required only in fashioning basic principles such as constitutional essentials or basic principles of justice; for example, lawmakers need not be neutral in legislating certain taxation or environmental protection measures.¹¹⁸ The neutrality thesis is sometimes qualified in a fourth way, permitting lawmakers to employ a belief about the good if that belief is noncontroversial or would be accepted by all reasonable citizens.¹¹⁹ Such a qualification might allow lawmakers to promote human health, knowledge,

116. See, e.g., RAWLS, *supra* note 105, at xix-xx, 11 n.11, 44, 175, 192, 339 (prescribing that lawmakers be guided by a “political conception” that is a moral conception and includes principles of justice but is neutral as to comprehensive doctrines of the good); Ronald Dworkin, *What Liberalism Isn’t*, N.Y. REV. BOOKS, Jan. 20, 1983, at 47 (stating liberals insist that political decision-making be neutral among conceptions of the good life, but true liberals do not require that politics be neutral among principles of justice).

117. See, e.g., DWORKIN, *supra* note 106, at 272-73 (maintaining government must not *constrain liberty* because one conception of the good life is superior to another); Ronald Dworkin, *Foundations of Liberal Equality*, in 11 THE TANNER LECTURES ON HUMAN VALUES 1, 115 (Grethe B. Peterson ed., 1990) [hereinafter Dworkin, *Foundations*] (stating that although liberal equality does not prevent people from campaigning for what they believe is good, it “denies them one weapon: even if they are in the majority, they must not *forbid* anyone to lead the life he wants, or *punish* him for doing so, just on the ground that they think his ethical convictions are wrong” (emphasis added)).

118. See, e.g., BARRY, *supra* note 114, at 160-61 (arguing that neutrality about the good is required only at the constitutional level, not the legislative level); RAWLS, *supra* note 105, at 10-15, 214, 227-30, 252 (asserting that reasoning in lawmaking should be based on a “public reason,” a “political conception” that includes only those notions of the good that all citizens can endorse, but also asserting that this limitation on reasoning applies only to questions of constitutional essentials and basic principles of justice, which determine the “basic structure” of society); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 767 (1997) [hereinafter Rawls, *Public Reason*] (stating that the limitations of “public reason” apply only to questions of constitutional essentials and basic justice).

It is not clear how Rawls draws the line between basic principles of justice, which help shape the basic institutional and normative structure, and nonbasic or derived principles of justice, which do not affect the basic structure. In one passage, Rawls says that the basic structure enforces the rules of contract law. RAWLS, *supra* note 105, at 268-69 (suggesting that the principles that yield these rules are basic principles of justice and must be either neutral about the good or acceptable to all citizens). In the next paragraph, however, Rawls prescribes “an institutional division of labor between the basic structure” and the rules to be followed by citizens in particular transactions. See *id.*

119. See LARMORE, *supra* note 115, at 54-55 (suggesting that the state must be neutral only regarding *controversial* conceptions of the good life, not all values); RAWLS, *supra* note 105, at 137, 139-40 (arguing that the “political conception” or “overlapping consensus” that constrains lawmakers’ reasoning includes values that “all citizens can reasonably be expected to *endorse*” (emphasis added)). I doubt that Rawls meant to require reasonable empirical expectations of actual unanimous assent and thus interpret his statement as referring to values that all reasonable citizens would endorse. For a similar interpretation, see Gardbaum, *supra* note 96, at 389 & n.13, 410; see also Rawls, *Public Reason*, *supra* note 118, at 771, 773 (arguing that public reason and reciprocity require reasons and values that other citizens might *reasonably* be expected to *reasonably* endorse).

and other things that virtually everyone regards as basic human goods.¹²⁰ Finally, the neutrality thesis is sometimes presented as requiring government neutrality as to a citizen's private conduct that does not harm or interfere with other citizens, but not requiring government neutrality as to conduct that does harm or interfere with others.¹²¹

In order to evaluate neutralist liberalism in its most plausible form, we will assume that it asserts: (1) lawmakers must be neutral, not about all moral propositions, but only as to conceptions of the good, and (2) lawmakers may properly promote or protect perceived goods through noncoercive measures.

We will not assume that the neutrality requirement is restricted to constitutional essentials and basic principles of justice. If neutralist liberalism is confined to the realm of constitutional law, it cannot serve as a general jurisprudential approach. Basic principles of justice are involved in many realms of law, but I see no effective way to draw a line between basic principles of justice (which would have to be neutral about the good) and nonbasic principles (which need not be neutral).

In lawmaking, a principle of justice is basic if, in conjunction with facts or another principle, it yields a derived principle or a legal rule, but is not itself derived from another principle. A basic principle of justice is thus a fundamental or foundational principle. If a lawmaker uses some notion of the good as a basic principle of justice, he would violate the liberal neutrality requirement (assuming that no exception applies). A lawmaker might use some notion of the good as a nonbasic, derived principle, but it would have to be derived from another notion of the good, ultimately from some *basic* notion of the good, so that at least implicitly and indirectly the lawmaker would be using some notion of the good as a basic principle of justice, thus violating the neutrality requirement. Whenever some proposition about the good is introduced in an argument about justice, some proposition about the good (not necessarily the same one) is being used as a basic principle of justice. So it does not make sense for a neutralist liberal to say that

120. See, e.g., RONALD DWORKIN, *LIFE'S DOMINION* 149 (1994) (stating that no one doubts that government may properly identify and protect intrinsic values such as art and the natural environment); LARMORE, *supra* note 115, at 44 (suggesting that the neutrality constraint still permits the state to protect life); RAWLS, *supra* note 105, at 177 (stating that any workable "political conception" must regard human life as good); WALDRON, *supra* note 96, at 159 (suggesting that liberal legislators can be nonneutral as to goods regarded as values by everyone and naming health and education as possible candidates).

121. See, e.g., BARRY, *supra* note 114, at 87-88, 90 (arguing that justice as impartiality requires the prohibition of acts that directly cause harm to others); DWORKIN, *Foundations*, *supra* note 117, at 10 (stating liberals oppose coercive legislation on matters of personal morality, such as consensual sexual conduct); *id.* at 113-17 (suggesting that liberal equality permits legal prohibition of coercive conduct, such as theft, which impairs justice, but liberal equality does not allow legal prohibition of acts, such as consensual homosexual acts, that are merely believed to be bad for the lives of the agents performing them); DWORKIN, *supra* note 116, at 47 ("Liberals believe . . . that government must be neutral in matters of personal morality, that it must leave people free to live as they think best so long as they do not harm others.").

lawmakers can use notions of the good in their reasoning but not as basic principles of justice.

Even if lawmakers could use propositions about the good as nonbasic principles of justice without using propositions about the good as basic principles of justice, nothing would be gained (in the interest of neutrality) by excluding notions of the good from the basic level of principles of justice while still allowing the same notions of the good to be employed at nonbasic levels from which they can have the same impact on the content of legal rules. The neutralist liberal should simply say that lawmakers must not fashion coercive legal rules by using principles that involve notions of the good.

We will not assume that the neutrality thesis contains an exception allowing lawmakers to use notions of the good that are acceptable to all reasonable citizens. As a device for making the neutrality thesis more palatable by allowing lawmakers to use some widely accepted notions of the good, a reasonableness test may be the best of a bad lot. If lawmakers may use only those beliefs about the good that are actually accepted by *all* citizens, the government will be unable to adequately protect life, liberty, or property. If lawmakers may use any belief accepted by a *majority* of citizens, the state cannot guarantee individual rights and will not be a liberal state.

A reasonableness test, however, must be rejected as unworkable. If “reasonable” means rational, the test requires lawmakers to be neutral about the good except when nonneutrality is required by rational reason. Which standards of rationality are to be used?

Lawmakers who recognize the rational incommensurability of conflicting goods would have to refrain from enacting coercive laws in situations involving conflicts between incommensurable goods, since rational persons can disagree as to which good should prevail. This would preclude, for example, the resolution of constitutional issues concerning the relative priority of different rights that are based on different goods. Any sophisticated conception of rationality will not be stringent enough to preclude rational disagreement on any issue of the good and would thus prevent lawmakers from using any notion of the good (even the good of human life or the evil of human slavery) in their reasoning about what justice requires.

On the other hand, many lawmakers who use unsophisticated standards of rationality would tend to identify rationality with their own ways of thinking and would be insufficiently constrained by a neutrality requirement containing an exception for beliefs required by reason. It is difficult, if not impossible, to conceive of a notion of rationality that is loose enough but tight enough to give the neutralist liberals what they need. And if “reasonable” does not mean rational, what does it mean? Any answer is likely to beg the jurisprudential question.

We will not assume that the neutrality thesis applies only to the legal regulation of individual conduct that does not harm or interfere with other persons. A neutrality thesis so restricted would reduce neutralist liberalism to a rather insignificant antipaternalism. (We noted above that legal paternalism is rare.) In order to be a significant and general jurisprudential approach, neutralist liberalism

must assert a need for government neutrality in at least some interpersonal conflicts involving individual conduct that has adverse effects on others.

In summary, we will interpret the neutrality thesis as asserting that coercive lawmaking should be based on reasoning that is neutral as to conceptions of the good. Such a thesis is obviously incompatible with natural law jurisprudence, which is teleological and requires the identification of some basic human goods to be promoted by the legal system, sometimes through coercive measures. In evaluating this neutrality thesis, we should first consider what it means to say that lawmakers should be neutral about conceptions of the good (or conceptions of the good life).

Perhaps it means neutrality between your complete conception and my complete conception, neutrality between your detailed life plan (or comprehensive religious or philosophical doctrine) and mine. But there is no need for liberals to require this kind of neutrality. Our lawmakers never violate this kind of neutrality. Lawmakers never choose between complete conceptions (plans or doctrines) and are not even interested in anyone's complete conception. Lawmakers merely require or prohibit certain kinds of acts and are interested only in certain aspects or details of our complete conceptions.

About which aspects or details should lawmakers be neutral? Perhaps what is required is neutrality as to which things are basic goods. But any such requirement raises severe problems. Although neutralist liberals disagree about when and how human life should be protected or how persons should be educated, they all acknowledge that human life and education are basic goods that should be protected or promoted by the state. If lawmakers cannot recognize these and other basic goods, the liberal state will remain stagnant. (There could still be a state, but without respect for life and a commitment to public and democratic education, it would not be a liberal state.)¹²²

Perhaps what is required of lawmakers is neutrality as to how conflicting basic goods (for example, free expression and individual privacy) should be ranked or prioritized. But it is difficult to see how certain crucial constitutional issues could be resolved without nonneutral judgments about the relative importance of different basic goods in various situations. If they do not make such judgments, liberal lawmakers and judges will not even be able to identify a set of constitutional rights enjoying a special priority. (The strength of a legal right depends on the importance of the basic goods it protects.) It does not make sense to require lawmaker neutrality about priorities among basic goods.

Perhaps the required neutrality is neutrality as to the different modes in which basic goods might be instantiated, the specific ways in which these generic and abstract goods can be realized in more concrete form. The neutralist liberals may

122. We can thus understand why many neutralist liberals favor a neutrality thesis containing an exception for notions of the good that all reasonable citizens would accept. The neutralists are confronted with a severe dilemma: such an exception is dependent upon what is required by reason and is therefore apt to be indeterminate or even empty; a thesis without such an exception threatens to preclude the legal operations of a truly liberal state.

be telling us, for example, that lawmakers need not be neutral about the claim that sexual activity is a basic good, but should be neutral about different modes or forms of sexual activity and should not prohibit homosexual activity on the ground that it is not a good mode for realizing the basic good of sexual activity. As a general proposition, however, any requirement of lawmaker neutrality about ways of instantiating basic goods must be rejected. It would preclude lawmakers from prohibiting rape as a bad form of sexual activity. And assuming that private property is a basic good, lawmaker neutrality about ways of instantiating this good would preclude the legal prohibition of human slavery.

It is difficult to see any viable way to interpret the requirement of state neutrality concerning conceptions of the good. The required neutrality would have to be neutrality among complete conceptions, neutrality in identifying basic goods, neutrality in ranking basic goods, neutrality concerning the modes of instantiating basic goods, or some combination of the above. But none of these interpretations seem to make any sense.

Even if they can develop some sensible interpretation of the requirement that lawmakers be neutral about conceptions of the good, neutralist liberals face another problem. How can this neutrality requirement be justified? Is there any good reason for it?

Some neutralist liberals argue that government neutrality about the good is necessary for social consensus and political stability. Brian Barry suggests that for purposes of political stability, basic principles of justice or constitutional law should be imposed on citizens only if they are principles nobody could reasonably reject; since any conception of the good can be reasonably rejected, it should not be imposed as a basic principle.¹²³ Charles Larmore argues that state neutrality regarding controversial conceptions of the good life can be justified by the need for rational dialogue that avoids points of controversy and thus facilitates social agreement.¹²⁴ John Rawls asserts that democracy cannot be stable without an “overlapping consensus” on basic principles that all reasonable citizens can accept despite their differing comprehensive religious or philosophical views.¹²⁵ When constitutional essentials and questions of basic justice are at stake, lawmakers are regulated by this overlapping consensus¹²⁶ and may employ some notion of the good only if it would be endorsed by all reasonable citizens.

Such arguments are not very convincing. In the first place, they seem to assume that social harmony and political stability are overriding values that always outweigh competing values such as justice, diversity, and free and vigorous dissent.

123. See BARRY, *supra* note 114, at 160-73.

124. See LARMORE, *supra* note 115, at 53-55.

125. See RAWLS, *supra* note 105, at 35-40, 97, 134-49.

126. See *id.* at 44, 139-40.

There is no good reason to assume that harmony and stability should always prevail over those other political values.¹²⁷

In the second place, even if harmony and stability were overriding goals, they can be achieved without a consensus endorsement of every basic principle in the legal system.¹²⁸ With respect to constitutional principles, political stability does not depend on every principle gaining the approval of all citizens, all reasonable citizens, or a majority of citizens; it is probably enough if most citizens accept most of the principles.¹²⁹ A neutral government's failure to resolve certain controversial issues might actually perpetuate social division in situations where a nonneutral legal directive would bring about enforced cooperation that eventually becomes voluntary. For example, consider the abolition of slavery and enforced racial integration in public schools which have, if anything, enhanced social unity and stability despite initial opposition by majorities in many states. If the legal implementation of some principles lacking general acceptance is unlikely to damage social harmony or political stability, one must ask why lawmakers should never implement notions of the good that happen to be controversial.

Some neutralist liberals attempt to justify a requirement of government neutrality about the good by arguing that neutrality is required in order to treat all citizens with equal respect. Ronald Dworkin has suggested that the best justification for the neutrality principle is the fundamental principle that government should treat people with equal respect for their capacity to form intelligent conceptions of how their lives should be lived.¹³⁰ If government is not neutral and prefers one person's conception of the good life to another person's conception, then the government has violated its duty to treat persons with equal respect.¹³¹

The equal respect justification for neutrality is weak. If lawmakers prohibit certain acts because they accept a conception of the good life that excludes such

127. See JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 69-73 (1994) (questioning why social unity and stability through consensus should be regarded as the ultimate values and suggesting that the popularity of an ideal is relevant to its validity only insofar as popularity relates to the feasibility of implementing the ideal); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* 18-19 (1996) (questioning why the practical interest in social cooperation should always defeat competing moral or religious ideals and suggesting that it is not always reasonable to set aside competing values that arise from moral and religious doctrines); Michael J. Sandel, *Judgemental Toleration*, in *NATURAL LAW, LIBERALISM, AND MORALITY*, *supra* note 1, at 107, 108-11 (questioning why social cooperation should always prevail over moral interests and suggesting that the reasonableness of legal neutrality on issues such as slavery and abortion depends partly on which view is more plausible, the view that such practices are morally wrong or the view that such practices are morally right).

128. Cf. RAZ, *supra* note 127, at 83-84 (suggesting a Rawlsian consensus is not necessary for social unity and stability).

129. Cf. *id.* at 83 (suggesting that support for a constitution may be sufficient if any two citizens agree on some of the prevailing constitutional principles).

130. See DWORKIN, *supra* note 106, at 272-73.

131. See DWORKIN, *supra* note 115, at 191-92; Dworkin, *supra* note 116, at 47; see also LARMORE, *supra* note 115, at 53-55, 59-62 (suggesting a good reason for political neutrality, which abandons controversial positions and keeps the dialogue going, is the desire to show everyone equal respect).

acts, it is difficult to see how this treats person *A*, who wishes to perform these acts, with less respect than is accorded to other persons. The lawmakers are showing disrespect for *A*'s conduct when she performs these acts and may be showing disrespect for any component of *A*'s conception of the good life that endorses such acts. But they are not necessarily showing less respect for *A* as a human person; indeed, they may be showing respect for her as a person by trying to prevent her from performing acts they believe would degrade her.¹³² An equal respect principle should not be interpreted to require equal respect for every person's conception of the good life.¹³³ That would require equal respect even for a conception that endorses violence, suffering, and humiliation as human goods. A viable equal respect principle can only require equal respect for each person as a human worthy of our equal concern.

What really matters here is that lawmakers treat citizens with equal concern, equal caring about each citizen's well-being.¹³⁴ Equal respect for each citizen's conception of the good life and choices concerning values is often incompatible with equal concern for citizens. A legal system that respects a person's choice to become a heroin user or a prostitute seems to display less concern for that person's well-being than is shown for the well-being of other citizens.¹³⁵ Assuming that what really matters is the government's duty to treat citizens with equal concern, this duty certainly does not imply government neutrality about conceptions of the good. Some notions of the good must be used to identify aspects of persons' lives about which to be concerned.

Even if we could restate the neutrality thesis in its most plausible form, make sense of a requirement for lawmaker neutrality regarding conceptions of the good, and discover some strong justification for this requirement, we would still have to reject neutralist liberalism as a general jurisprudential approach. Although it may be useful in the realm of constitutional law, neutralist liberalism prevents lawmakers from resolving the interpersonal conflicts that arise in activities governed by tort law, contract law, property law, family law, and so on.

This kind of interpersonal conflict is pervasive in human affairs. It exists when one person desires to pursue a course of action (or inaction) that will help him realize one of his values, another person desires to pursue a course of action (or inaction) that will help her realize one of her values, and the two desires are wholly or partially incompatible. Fulfillment of either person's desire would frustrate the other person's desire at least to some extent. For example, Mr. Jones wants to sell

132. See FINNIS, *supra* note 8, at 221-23; GEORGE, *supra* note 29, at 95-97; Finnis, *Limited Government*, *supra* note 41, at 23 n.42.

133. Even if we assume that all citizens have an equal capacity to form intelligent conceptions of the good life, it is obvious citizens do not equally exercise that capacity and do not form equally intelligent conceptions.

134. Dworkin has suggested that government should treat citizens with equal concern and respect. See DWORKIN, *supra* note 106, at 272-73.

135. See FINNIS, *supra* note 8, at 222 (noting that the legal system's leaving a person to succumb to drug addiction denies him the active concern one would show for a friend in such a situation).

to Ms. Adams a house he has contracted to sell to Ms. Washington, and Ms. Washington wants the house. Or, researchers at the Roberts Medical School are searching for a cure of cancer and want to dump some chemical wastes into Lake Lakota, while the local anglers assert (correctly) that such wastes would kill all the fish in the lake, which is the only place within 100 miles where they can pursue their sport.

A legal system cannot resolve such interpersonal conflicts solely by means of deontological rules of justice that provide no room for judgments about human goods or their relative importance in particular situations. Purely deontological rules will be excessively rigid if they do not allow for exceptions, and it is difficult to see how exceptions could be developed without some balancing of the competing goods (or instantiations of goods) that are at stake. In disputes like the Washington-Jones example, exceptions to any deontological rule requiring that promises be kept (for example, exceptions permitting nonperformance of promises induced by fraud or duress) must be based partly on the relative importance of various instantiations of goods such as autonomy and knowledge. If Jones is liable for breach of contract and Washington requests specific performance as a remedy, any deontological rule concerning specific performance should be open to equitable exceptions that consider the comparative importance of the goods each party seeks to realize (for example, the importance of the goods Washington would realize by living in this particular house).

In addition, any deontological rule, no matter how specific, will often require interpretation. It is difficult to see how a rule can be interpreted in the absence of judgments about the purposes of the rule—purposes which ultimately rest in basic human goods.¹³⁶

We should therefore conclude that even if some area of human activity could be governed largely by deontological rules, these rules would not be sufficient to resolve interpersonal conflicts. We need some judgments about the relative importance of the conflicting instantiations of goods, judgments employing some conception of the good.¹³⁷ How could the conflict between Roberts Medical School and the fishermen, for example, be resolved without someone balancing the goods of medical knowledge and human health against the good of the fishermen's recreation?¹³⁸

Who should that someone be? It must be the state, acting through its authorized lawmakers. The state is the person most likely to render decisions that will be

136. See Taylor, *supra* note 33, at 28-29 (arguing rules always need interpretation and any theory of the right that denies an underpinning in a theory of the good would collapse in incoherence).

137. See RONALD BEINER, WHAT'S THE MATTER WITH LIBERALISM? 92-93 (1992) (arguing that conflicts between rights cannot be resolved without evaluations of goods); FINNIS, *supra* note 8, at 219 (arguing that in resolving conflicts between rights, we need some conception of human good and individual flourishing); JOHN GRAY, ISAIAH BERLIN 148 (Princeton Univ. Press 1996) (1995) (arguing that there can be no purely deontic political morality and thus conflicts between liberties cannot be resolved "without appeal to the impact the various freedoms will have on human well-being").

138. We can assume that the resolution should not be arbitrary or random.

peacefully accepted. The state's lawmakers are also more capable of impartiality than are citizens with a vested interest in the outcome of the conflict. Finally, if the lawmakers insist on being neutral about the good and refuse to resolve the conflict, each party to the conflict will be legally free to do as it wishes, and the conflict will probably be resolved in favor of the person or persons who can exercise superior physical, economic, or social power.¹³⁹ I do not think this is the outcome liberals really want.

Therefore, lawmakers must use conceptions of the good and must be nonneutral about the good in order to resolve interpersonal conflicts. The neutrality thesis should be rejected with respect to lawmaking that regulates conduct affecting other persons because it prevents lawmakers from doing what we have just concluded they must do.¹⁴⁰ And, as earlier noted, a neutrality thesis that applies only to the legal regulation of conduct that does not affect others is too insignificant and narrow in scope to serve as a general jurisprudential approach.

B. Berlin's Agonistic Liberalism

Isaiah Berlin's agonistic¹⁴¹ liberalism is very liberal and also very plausible. John Gray has suggested that Berlin's liberalism is the most plausible version of liberalism because it acknowledges the limits of rationality.¹⁴²

This acknowledgment is exhibited in one of Berlin's greatest contributions to liberalism, his notion of value pluralism. There is a world of objective values—ultimate ends, virtues, and moral principles that rational persons can endorse.¹⁴³ Many such values, each of them equally ultimate, exist in the world of agnostic liberalism.¹⁴⁴ But they form a limited set, “for the nature of men, however various and subject to change, must possess some generic character if it is to be called human at all.”¹⁴⁵ Unfortunately, true values can clash.¹⁴⁶ Some of them are

139. See BEINER, *supra* note 137, at 27 (suggesting that state action might be needed in order to make individuals more autonomous by inhibiting the power of other social forces that will not be neutral even if the state is neutral).

140. Even a neutrality thesis that allows lawmakers to use conceptions of the good that would be endorsed by all reasonable persons would still prevent lawmakers from using conceptions of the good in resolving interpersonal conflicts involving incommensurable goods or incommensurable instantiations of goods. By definition, conflicts between incommensurables are not rationally resolvable, and thus no resolution would be acceptable to all reasonable persons.

141. The term “agonistic liberalism” was coined by John Gray to reflect Berlin's ideas. See JOHN GRAY, ENLIGHTENMENT'S WAKE 68 (1995); GRAY, *supra* note 137, at 1; JOHN GRAY, POST-LIBERALISM 67 (paperback ed. 1996) [hereinafter GRAY, POST-LIBERALISM]. The expression reflects the Greek word *agon*, meaning conflict or rivalry. *Id.*

142. See GRAY, *supra* note 137, at 145.

143. See ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY 11-13 (Henry Hardy ed., Alfred A. Knopf 1991).

144. See BERLIN, *supra* note 106, at 168-69.

145. BERLIN, *supra* note 143, at 80.

146. See *id.* at 12.

incompatible with others, and so the possibility of conflict and tragedy can never be eliminated from human life.¹⁴⁷ Choice cannot be avoided because when “ends collide . . . one cannot have everything.”¹⁴⁸ Furthermore, our choice between conflicting values is not dictated by reason; objective values are incommensurable.¹⁴⁹ We cannot grade all values on one scale.¹⁵⁰ Nor can they be ranked in a fixed hierarchy.¹⁵¹

While Berlin’s pluralism and acknowledgment of the limits of reason make his theory plausible, his conception of negative freedom makes his theory liberal. Berlin initially defined negative freedom as the area within which a person is “left to do . . . what he is able to do . . . without interference by other persons.”¹⁵² Berlin distinguished negative freedom from positive freedom, which is the mastery of one’s higher, rational, autonomous, true self over his lower, irrational self.¹⁵³ Berlin subsequently redefined negative freedom as the absence of human obstacles to one’s actual or potential choices: “absence of such freedom is due to the closing of . . . doors or failure to open them, as a result, intended or unintended, of alterable human practices, of the operation of human agencies.”¹⁵⁴ Negative liberty can thus be reduced by society’s unintentional failure to open a door as well as by some other individual’s intentional closing of a door. Although the extent of negative freedom is difficult to estimate, it depends on, *inter alia*, how many possibilities are open and the relative importance of each possibility in a person’s life plan.¹⁵⁵

Berlin seems to have regarded negative freedom as an intrinsic good because the freedom to choose is what makes us human.¹⁵⁶ Berlin also recognized the instrumental value of negative freedom. Each individual must be guaranteed a certain minimum area of negative freedom,¹⁵⁷ for if this zone of freedom is violated by the state, the individual cannot develop the natural faculties needed to conceive and pursue the various ends that men hold good. This necessary zone of negative liberty, which is to be protected from governmental intrusions, is what makes Berlin’s theory so liberal.

But we should note what Berlin did not say about negative freedom. He never said that each individual citizen’s protected zone of negative liberty should be

147. See BERLIN, *supra* note 106, at 169.

148. *Id.* at li.

149. See BERLIN, *supra* note 143, at 87; see also GRAY, POST-LIBERALISM, *supra* note 141, at 288 (observing that in Berlin’s theory, conflicts between liberties or other values cannot be arbitrated by reason alone).

150. See BERLIN, *supra* note 106, at 171.

151. See BERLIN, *supra* note 143, at 79-80.

152. BERLIN, *supra* note 106, at 121-22.

153. See *id.* at 131, 132, 136.

154. *Id.* at xl.

155. See *id.* at 130 n.1.

156. See *id.* at lix-lx.

157. See *id.* at 124.

enlarged to its maximum.¹⁵⁸ Nor did he propose that aggregate negative freedom throughout society should be maximized or that each citizen's area of negative freedom should be equal to that of every other citizen.

Berlin did not claim that negative freedom is the overriding value in political and legal affairs.¹⁵⁹ He acknowledged that both negative freedom and positive freedom are ultimate values, "ends in themselves," and must be compromised with each other in a political system that promotes both of them.¹⁶⁰ He noted that negative liberty can lead to social evils.¹⁶¹ He asserted that a person's negative liberty should sometimes be reduced for the sake of other persons' liberty or for the sake of other values: "[L]iberty . . . may have to be curtailed in order to make room for social welfare, to feed the hungry, to clothe the naked, to shelter the homeless, to leave room for the liberty of others, to allow justice or fairness to be exercised."¹⁶²

Nor did Berlin ever suggest that lawmakers and other political officials should remain neutral as to notions of the good. When goods conflict, he noted, choices must be made; in concrete situations, not every claim has equal force, and public priorities must be established.¹⁶³

We justify [curbs on negative freedom] on the ground that ignorance, or a barbarian upbringing, or cruel pleasures and excitements are worse for us than the amount of restraint needed to repress them. This judgment in turn depends on how we determine good and evil, that is to say, on our moral, religious, intellectual, economic, and aesthetic values; which are, in their turn, bound up with our conception of man, and of the basic demands of his nature. In other words, our solution of such problems is based on our vision, by which we are consciously or unconsciously guided, of what constitutes a fulfilled human life To protest against the laws governing censorship or personal morals as intolerable infringements of personal liberty presupposes a belief that the activities which such laws forbid are fundamental needs of men as men To defend such laws is to hold that these needs are not essential, or that they cannot be satisfied without sacrificing other values which come higher—satisfy deeper needs—than individual freedom,

158. Indeed, Berlin clearly stated that the frontiers of the protected zone should not be extended against sufficiently stringent claims on behalf of other values. *See* BERLIN, *supra* note 106, at 1xi.

159. *See id.* at lvi (stating that negative liberty is not absolutely superior to other ultimate values, such as justice, happiness, and love); *id.* at 169 (disclaiming any assertion that "individual freedom is . . . the sole, or even the dominant, criterion of social action").

160. *See id.* at xlvi, xlix, 166.

161. *See id.* at xlv-xlvi. "Freedom for the wolves has often meant death to the sheep." *Id.* at xlv.

162. BERLIN, *supra* note 143, at 12-13.

163. *See id.* at 17.

determined by some standard that is not merely subjective, a standard for which some objective status . . . is claimed.¹⁶⁴

Any natural law theorist would be proud to have been the author of these words. Indeed, I do not see any aspect of Berlin's liberalism that is incompatible with contemporary natural law theory. Nevertheless, we have good reasons to prefer natural law theory to Berlin's liberalism if we are seeking a comprehensive jurisprudential approach.

First, Berlin provided very little guidance as to how lawmakers should resolve interpersonal conflicts involving alternative instantiations of basic goods. He merely suggested that public choices should aim to avoid extremes of human suffering, none of the conflicting goods or other relevant factors should be ignored, and political judgments should be governed by the traditional forms of life of our particular society.¹⁶⁵ Of course, the resolution of interpersonal conflict is a serious problem for any liberal or natural law theory that recognizes the plurality and incommensurability of basic goods. But natural law theory offers conceptions of the common good that identify the basic human goods, provide norms of distributive justice, assess the relative importance of public goods and private goods, and thus go beyond anything Berlin has provided for the purpose of resolving interpersonal conflicts.

Second, and perhaps more important, Berlin's liberal theory seems to lack any clear recognition of the need for a legal system that provides moral education and helps citizens become virtuous. Natural law theory has always emphasized this need, which is especially acute today, given the increased number of persons who do not receive adequate moral training from private institutions. To be useful, comprehensive, and attuned to contemporary social needs, a jurisprudential theory must recognize moral education as a major task of the legal system and an important goal for lawmakers. Thus, natural law theory has a distinct advantage over Berlin's version of liberalism. Like the natural law advantage in resolving interpersonal conflicts, this second advantage is undoubtedly gained because Berlin's brilliant essays in intellectual history were never intended to provide a comprehensive theory of law and lawmaking.

C. *Perfectionist Liberalism*

"Perfectionist" liberalism asserts that the main purpose of government is to help people lead fulfilling lives and thus promote human well-being.¹⁶⁶ The adjective "perfectionist" is misleading. The theory does not require the legal system to try to make all individuals' lives perfect; it merely says that law should promote the

164. BERLIN, *supra* note 106, at 169-70.

165. See BERLIN, *supra* note 143, at 17-18.

166. See Raz, *supra* note 111, at 113.

prospects of having good lives.¹⁶⁷ Our examination of perfectionist liberalism will concentrate on the illustrative works of Joseph Raz and William Galston.

Perfectionist liberals suggest that in order to promote well-being, the legal system must not only use conceptions of the good and promote morality, but must also respect individual freedom.¹⁶⁸ We will consider each of these three requirements in turn.

Like natural law theory, perfectionist liberalism is teleological. It asserts that the state should promote the good life.¹⁶⁹ This task obviously requires that lawmakers utilize some conception of the good.¹⁷⁰ The liberal state thus cannot be neutral about the good. It must embrace “a view of the human good that favors certain ways of life and tilts against others.”¹⁷¹ Like natural law theory (and like Berlin’s liberalism), perfectionist liberalism uses a conception of the good in which goods are both objective and pluralistic. Some things are objectively good and some things objectively bad.¹⁷² The human good must be objective, at least in part, because it is constrained by evident features of human nature: “our bodily constitution, our emotions, our need for society, and our rationality.”¹⁷³ Furthermore, human goods are plural and often incompatible or conflicting.¹⁷⁴ When heterogeneous goods conflict, they cannot be reduced to any common measure and cannot be ranked in any fixed priority.¹⁷⁵ They are thus rationally incommensurable.¹⁷⁶

In the perfectionist liberal view, a second requirement for the legal system is to promote morality.¹⁷⁷ Because individuals do not have an innate propensity to act

167. See RAZ, *supra* note 127, at 166.

168. See *id.* at 120 (stating ideals of the good must be pursued with respect for individual freedom because people prosper through free choices among a plurality of valuable activities).

169. See RAZ, *supra* note 96, at 426.

170. See RAZ, *supra* note 127, at 76-77 (justifying political values and resolving conflicts among them requires a comprehensive view of the good and a complete moral theory).

171. GALSTON, *supra* note 110, at 3; see also *id.* at 96-97 (stating neutrality is impossible when decisions on controversial issues must be made).

172. William A. Galston, *The Legal and Political Implications of Moral Pluralism*, 57 MD. L. REV. 236, 239 (1998) (stating a liberal polity should be guided by value pluralism); *id.* at 241 (explaining value pluralism holds that some things are objectively good and some things objectively bad).

173. GALSTON, *supra* note 110, at 168 (citing ARISTOTLE, NICOMACHEAN ETHICS II. 1178a8-21).

174. See GALSTON, *supra* note 106, at 58 (stating that basic, irreducible principles of the human good are multiple and will conflict); RAZ, *supra* note 127, at 118-19, 179 (stating we should accept value pluralism and its many and incompatible values).

175. See GALSTON, *supra* note 106, at 94; GALSTON, *supra* note 110, at 172; RAZ, *supra* note 127, at 179 (explaining values cannot be reduced to a common denominator); Galston, *supra* note 172, at 241.

176. See RAZ, *supra* note 96, at 324 (stating if two options or values are incommensurable, “reason has no judgment to make concerning their relative value”); *id.* at 358-59 (stating different instantiations of well-being are often incommensurable).

177. See *id.* at 415.

justly, the state must provide education in justice and morality,¹⁷⁸ using legal incentives and punishments,¹⁷⁹ as well as public schools and the regulation of private schools.¹⁸⁰ Galston suggested that the state should teach only those moral virtues (the “liberal virtues”) that are necessary to support liberal institutions and preserve liberal society.¹⁸¹ But Galston’s list of liberal virtues is quite comprehensive: courage, law-abidingness, individual responsibility, tolerance, a willingness to delay gratification, adaptability, a capacity to discern and respect the rights of others, the ability to evaluate candidates for public office, a willingness to moderate demands, and a capacity to engage in public discourse.¹⁸² This list seems to include most of what is covered by the Aristotelian and Thomistic virtues of courage, temperance, justice, and prudence.

The third requirement for a perfectionist liberal legal system is a deep respect for individual freedom.¹⁸³ It is this requirement that makes the theory liberal. Significantly, respect for freedom is based on the major purpose of government: promoting human well-being.¹⁸⁴ Without a large measure of freedom, a person cannot achieve well-being.¹⁸⁵ Perfectionist liberals offer a number of reasons for this assertion.

First, the flourishing life is a life engaged in freely chosen pursuits.¹⁸⁶ If an activity is not chosen freely, it will probably not be pursued whole-heartedly, and the well-being achieved through the activity will be reduced. Government thus cannot impose a completely good life on anyone; it can only provide the conditions in which individuals might freely choose and pursue valuable options.¹⁸⁷ This sounds like natural law theory.¹⁸⁸

Second, according to Raz, individual autonomy is itself a constituent aspect of human well-being.¹⁸⁹ Raz’s conception of autonomy is broad and complex: autonomy involves not only freedom from coercion (negative freedom) but also an adequate range of options and mental capacities to make use of available options.¹⁹⁰

178. See GALSTON, *supra* note 106, at 276.

179. See *id.*

180. See GALSTON, *supra* note 110, at 254-56.

181. See *id.* at 216-17, 220.

182. See *id.* at 221-27.

183. See RAZ, *supra* note 127, at 120-21.

184. See *id.* at 121.

185. See *id.* at 120-21.

186. See *id.* at 120.

187. See *id.* Unlike the coerced pursuit of a valuable activity, the freely-chosen pursuit affords the possibility of realizing as much well-being as that activity can provide. Of course, a person with free choice can decide not to pursue the good activity at all. The granting of free choice is always a gamble.

188. See *supra* text accompanying notes 77-85.

189. See RAZ, *supra* note 96, at 408.

190. See *id.* at 372-73, 408-10; Raz, *supra* note 111, at 113-14 (adding physical health and adequate economic resources as conditions of autonomy). The adequacy of a range of options depends on the diversity of available options, not the number of options; the available options should allow the

Raz insisted that autonomy has value only when used to pursue valuable (good) options that add to one's well-being.¹⁹¹ Negative freedom is thus necessary for valuable autonomy but far from sufficient. And, since "[a]utonomy is valuable only if exercised in pursuit of the good,"¹⁹² the legal system should not always attempt to maximize each person's autonomy.¹⁹³

Third, as Galston suggested, human individuals differ greatly in their aptitudes and in what they require in order to flourish; a narrow society that permits only one or a few ways of life will therefore make it impossible for the majority of individuals to have satisfying lives.¹⁹⁴ A liberal society that tolerates a wide diversity of ways of life is superior because it makes satisfying lives possible for more individuals.¹⁹⁵ When coupled with a premise asserting that the legal system should allow as many persons as possible to have good lives, Galston's argument provides a strong reason for concluding that the legal system should afford each citizen a broad range of freedom.

Although perfectionist liberalism requires governmental respect for individual freedom, it also recognizes that freedom must sometimes be limited by law. Perfectionist liberals offer some guidelines that may help lawmakers decide when legal coercion is justified and when it is not, an issue we have identified as one of the two major problems for both liberalism and natural law theory. The perfectionist liberal approach to legal coercion is similar to the prudential natural law approach, which advises lawmakers to use coercion only when it enhances human well-being.

The basic idea is that not everything immoral should be legally prohibited,¹⁹⁶ and legal coercion is justified only when it is more important for citizens to do the right thing than to have free choice.¹⁹⁷ Raz identified a number of situations in which legal coercion might thus be justified. Coercion of *A* might be necessary to protect *B* from a loss of autonomy or from some other harm.¹⁹⁸ Coercion of *A* might be justified when it is necessary to protect *A*'s long-term autonomy or other interest.¹⁹⁹ Coercion of *A* might be justified when it makes *A* perform an important duty.²⁰⁰ Coercion of *A* might therefore be justified when it forces *A* to take action necessary to *improve* other persons' options or opportunities.²⁰¹ Legal coercion is

individual to exercise each human capacity. See RAZ, *supra* note 96, at 375.

191. See RAZ, *supra* note 127, at 119-20; RAZ, *supra* note 96, at 380-81; Raz, *supra* note 111, at 120.

192. RAZ, *supra* note 96, at 381.

193. See *id.* at 391.

194. See Galston, *supra* note 172, at 245-46.

195. See *id.* at 246.

196. See GALSTON, *supra* note 110, at 280-81.

197. See Raz, *supra* note 111, at 119-20.

198. See *id.* at 121; see also RAZ, *supra* note 96, at 156 (suggesting reasons liberals may use coercion to promote autonomy).

199. Raz, *supra* note 111, at 121; see RAZ, *supra* note 96, at 419.

200. See Raz, *supra* note 111, at 121.

201. RAZ, *supra* note 96, at 416.

not necessarily justified in every one of the preceding situations. In each situation, lawmakers must try to ascertain whether coercion or freedom best enhances well-being. In this regard, an important question is whether the coercive elimination of a particular option would still leave the coerced individuals with an adequate range of options.²⁰²

Perfectionist liberalism is opposed to self-centered individualism.²⁰³ Like natural law theory, perfectionist liberalism tries to strike a balance between individual liberty and communitarian interests.²⁰⁴ A pronounced similarity with natural law theory is evident in the statements of perfectionist liberals concerning the common good.

Like the natural law thinkers, Raz maintained that the common good and individual well-being do not compete with each other; the common good is presupposed by individual well-being.²⁰⁵ Just as there is no common good without individual well-being, an individual cannot flourish unless the common good flourishes.²⁰⁶

Natural law theorists assert that the common good requires the well-being of every member of society and that lawmakers should have equal concern for the well-being of each citizen.²⁰⁷ Perfectionist liberals likewise suggest that society should provide every individual with capacities and opportunities adequate for a good life,²⁰⁸ and that public policy should give equal weight to each individual's good.²⁰⁹ Natural law theorists and perfectionist liberals agree that the well-being of every citizen (and hence the common good) cannot be attained unless the state takes action to eradicate poverty wherever poverty makes good lives impossible for some individuals.²¹⁰

We noted in section II.H above that a natural law conception of the common good implies that the state should accord a priority to the provision of particular common goods (public goods) that benefit all citizens in a noncompetitive fashion. Perfectionist liberals similarly assert that an individual's range of options, and hence an individual's well-being, depend to a large extent on the provision of

202. *See id.* at 421 n.1.

203. *See RAZ, supra* note 127, at 121.

204. *See id.*

205. *Id.* at 58-59.

206. *See id.*; *see also* authorities cited *supra* notes 57-59.

207. *See supra* text accompanying notes 59-61.

208. *See RAZ, supra* note 127, at 16-18.

209. *See GALSTON, supra* note 110, at 182.

210. Compare authorities cited *supra* note 66 (suggesting that promotion of the common good requires concern for the impoverished) with RAZ, *supra* note 127, at 19 (noting that some pain and suffering is valuable to society and should not be eliminated, but emphasizing the need to combat poverty when it makes a good life impossible).

noncompetitive public goods which serve all citizens;²¹¹ the state thus has an important duty to provide and enhance such common or public goods.²¹²

When we consider perfectionist liberalism's emphasis on human well-being as the major purpose of the legal system, its pluralistic but teleological and nonneutral conception of the good, its concern with moral education, its respect for individual liberty together with its prudential approach to limitations on liberty, and its recognition of the pervasive importance of the common good, perfectionist liberalism appears to be virtually indistinguishable from natural law jurisprudence. Undoubtedly, there are issues on which a particular perfectionist liberal will disagree with a particular natural law theorist, but these are issues on which perfectionist liberals will disagree among themselves and natural law thinkers will disagree among themselves.

IV. CONCLUSION

In Part II of this Article, we identified a number of basic tenets that unify contemporary natural law theory. In Part III, we saw that liberalism is more diverse than natural law theory, but were still able to identify a few ideas that seem common to all liberal theorists. In comparing these two sets of doctrinal ideas, we found nothing that makes liberalism incompatible with the natural law approach.

This does not mean, of course, that all forms of liberalism are compatible with natural law theory. A particular version of liberalism may incorporate some tenet that is not accepted by all liberals, and this tenet might be incompatible with natural law theory. In comparing natural law jurisprudence with any version of liberalism (whether compatible or incompatible with natural law theory), we should ask which approach is more useful to lawmakers.

Neutralist liberalism should be rejected, not simply because it is incompatible with natural law doctrine, but because it is not useful to lawmakers. A requirement that lawmakers remain neutral about the good when resolving interpersonal conflicts precludes any legal resolution of such conflicts. And if the neutrality requirement is confined to the legal regulation of conduct that does not conflict with other citizens, neutralist liberalism collapses into an antipaternalism that seldom comes into play.

Isaiah Berlin's agonistic liberalism is compatible with natural law theory, but as a jurisprudential approach is less useful than natural law theory. Berlin's liberalism largely ignores the state's important role in providing moral education and provides little guidance for resolving interpersonal conflicts.

"Perfectionist" liberalism is virtually indistinguishable from natural law jurisprudence. Both theories recognize that the primary goal or purpose of the legal system is to enable (not force) each citizen to have a good life. Both theories advise

211. See RAZ, *supra* note 127, at 58-59, 121-22.

212. See *id.* at 34, 122-23.

lawmakers to use a pluralistic conception of the good. Both theories emphasize morality as well as freedom and try to strike a prudent balance between them. Both theories use a notion of the common good which, although not yet sufficiently developed, shows promise as a theoretical approach to interpersonal conflicts and distributive justice. Both theories suggest that a legal system is defective if it allows widespread poverty.

Neither perfectionist liberalism nor natural law theory provides clear-cut solutions to our most difficult jurisprudential problems, resolving interpersonal conflicts and deciding which forms of immoral conduct are to be legally prohibited. But this is a strength, not a weakness. We should distrust any jurisprudential theory that makes the hard questions look easy.

The soundest and most helpful jurisprudential approach now available is the one offered by contemporary ("liberal") natural law theorists and teleological ("perfectionist") liberals. The labels are not important; it is the same theory. As long as it avoids the two extremes of Cromwellian theocracy and free-market libertarianism, it will deserve our continued respect. If it also assists lawmakers in promoting the common good, it will deserve our eternal gratitude.

