

Of Peacocks, Tulips, And Shotguns: Intentions and Side Effects in John Finnis' Natural Law Theory

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ABSTRACT

This article constitutes a detailed response to John Finnis' present-day critique and deconstruction of two famous tort cases decided in England in the first half of the nineteenth century: *Ilott v. Wilkes* (King's Bench 1820) and its progeny *Bird v. Holbrook* (Court of Common Pleas 1828). Both cases involved trespassers who were seriously injured upon entering landowners' property without permission. Their injuries were caused by means of 'man-traps,' i.e., shotguns set outdoors by a landowner and primed to fire upon contact with a tripwire.

Finnis concedes that in laying man-traps, landowners may not have had a desire to harm (in fact they may have had a desire not to harm) but merely to deter. Nevertheless, according to Finnis, any landowner setting such devices, even if he posts clear warnings, ineluctably involves that owner in "conditionally, but really" intending to kill or seriously injure. The present article challenges this view. It argues, by applying Finnis' own natural law theory of human action, intention, and choice, that his conclusion is undermined.

While this topic may appear arcane to some, it focuses attention on important general questions in legal theory and philosophy about the meaning of intentions, choices, and side effects.

KEYWORDS

Basic Goods; Natural Law; Intention; Side Effects; Finnis

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INTRODUCTION

John Finnis, a renowned Oxford legal scholar and professor of law, in his well-known treatise *Natural Law and Natural Rights*,¹ and his noteworthy essay *Intention in Tort Law*,² articulates a theory of practical reasoning and ethical choice that frequently relies in its analyses upon a controversial philosophical position often referred to as the ‘principle of double effect’ [hereinafter PDE]. PDE draws upon a distinction asserted to exist, by Finnis and others,³ between a person’s intention in acting and consequences that may be foreseeably caused by that action, often with certainty, but which, according to PDE are not necessarily included in the actor’s intention.⁴ Finnis employs PDE as a foundation for his analyses and resolution of critical ethical issues.⁵ In this article, I will not enter into technical discussion of PDE and all its details, which I have treated elsewhere,⁶ but rather, as Finnis often does, apply its principles generally in the course of analysis.

The specific impetus for this present study, however, while dependent at various points upon Finnis’ adoption of PDE, arises as a critique of the position taken by Finnis in his contemporary deconstruction of two seminal tort cases decided in England in the first half of the nineteenth century: *Ilott v. Wilkes* (King’s Bench 1820)⁷ and its progeny *Bird v. Holbrook* (Court of Common Pleas 1828).⁸ Both cases involved trespassers, who were seriously injured upon entering a landowner’s property without permission. Their injuries were caused by means of a ‘man-trap,’ i.e., a shotgun primed to fire when any would-be trespasser made contact with a tripwire.

¹ JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) [hereinafter NLNR (1980)].

² JOHN FINNIS, *Intention in Tort Law*, in *INTENTION AND IDENTITY: COLLECTED ESSAYS 198* (2011) [hereinafter Finnis, *Intention in Tort Law*] reprint of the same in BIRKS PETER ET AL., *PHILOSOPHICAL FOUNDATION OF TORT LAW* 229, 229-48 (David G. Owen ed., 1995).

³ Finnis has developed this theory in collaboration with a number of other philosophers, including Joseph Boyle and Germain Grisez: see, e.g., John finnis, Joseph Boyle and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (1987) [hereinafter NUCLEAR DETERRENCE]; see also John Finnis, Germain Grisez and Joseph Boyle, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 AM. J. JURIS. (1987) [hereinafter PPMT], their most significant general summary of their views; see also, John Finnis, Germain Grisez and Joseph Boyle, “Direct” and “Indirect”: A Reply to Critics of our Action Theory, 65 THOMIST 1 (2001), reprinted in 2 JOHN FINNIS, *INTENTION AND IDENTITY, COLLECTED ESSAYS 235-68* (2011) [hereinafter CE Vol. II].

⁴ See *infra* notes 146-154 and accompanying text.

⁵ *Id.*

⁶ For an especially thorough and lucid explication and defense of the principle, see THOMAS ANTHONY CAVANAUGH, *DOUBLE-EFFECT REASONING: DOING GOOD AND AVOIDING EVIL* (2006). In previous articles, I have offered descriptions and defenses of the generally unrecognized operation of double effect in various substantive areas of the law. See Edward C. Lyons, *In Incognito: The Principle of Double Effect in American Constitutional Law*, 57 FLA. L. REV. 469 (2005); see also Edward C. Lyons, *Balancing Acts: Intending Good and Foreseeing Harm - the Principle of Double Effect in the Law of Negligence*, 3 GEO. J. L. & PUB. POL’Y 453 (2005); see also Edward C. Lyons, *Slaughter of the Innocents: Justification, Excuse, and the Principle of Double Effect*, BERKELEY J. CRIM. L., Fall 2013, at 151. In the present article, however, I explore Finnis’ deeper foundations of this principle in his underlying theory of natural law, practical reason, and human choice.

⁷ (1820) 106 E.R. 674 (K.B.) (U.K.), [hereinafter *Ilott*].

⁸ (1828) 130 E.R. 911 (C.P.) (U.K.), [hereinafter *Bird*].

Finnis concedes that in laying man-traps, landowners may not have had a desire to harm (in fact they may have had a desire not to harm) but merely to deter; yet, according to Finnis, any harm or death caused by such traps must be considered “intended.” To wit, Finnis contends, in a way that would very likely have surprised those erstwhile landowners, that setting a spring gun as a deterrent, even if they post clear warnings, ineluctably involves them in “conditionally, but really” intending to kill or seriously injure.⁹ The present article challenges this conclusion, proposing that Finnis’ own theory of human action and his account of moral responsibility undermines his conclusion here.

Sections 1 and 2 of this article offer a systematic overview of essential strands of Finnis’ thought comprising his natural law theory. His theory begins with an exposition of what he terms “basic goods,” the first principles of all properly human action. While Finnis’ theory is of interest in its own right, especially his treatment of various objections to natural law theory as a philosophical project, its primary importance for the present study lies in laying the foundation of his more detailed account, developed in the sections following, of free choice; the first principle of morality; the origins of moral obligation; and related intermediate principles he asserts are entailed by that first principle of morality.

Section 3 reviews Finnis’ reflections on various instances, hypothetical and real, where human persons are killed, not accidentally and not by straightforward purposeful murder, but where questions might be raised about whether such killings were intended or not. These scenarios are important for developing a clearer understanding of Finnis’ theory of ‘man-killing’ and articulating distinctions he draws out between intentions and side effects, and the moral significance he attributes to these distinctions.

Section 4 considers in some detail Finnis’ deconstruction of the opinions in those two infamous “man-trap” cases. Although, discussions in this part center around the historical use of that common defensive practice (and its very public controversy), this section seeks to demonstrate that Finnis’ definitive rejection of the logic of the judges’ opinions in those cases—in which they unanimously expressed the view that the setting of man-traps with warnings did not ipso facto entail an intention to maim or kill—is mistaken. Moreover, it is at odds with his own explanation of human action and moral choice. While killing and maiming under such conditions may be wrong and immoral, that does not require that it be deemed intentional.

⁹ Finnis, *Intention in Tort Law*, *supra* note 2, at 230-231.

1. FINNIS' ACTION THEORY: PRACTICAL REASON AND BASIC GOODS

Finnis' account of practical reasoning, understood as the foundation for understanding moral judgment and choice, is sometimes referred to as “the new natural law theory”[hereinafter NNL].¹⁰ As will be reflected in this article, it is comprehensive and multifaceted. Almost every foundational aspect of it has proven controversial and has been debated by scholars.¹¹ The following section seeks to sketch out the essential principles of his theory of practical reason, intention, and choice necessary for the purposes of this article.

Finnis begins his analysis of human conduct by inquiring into and examining the principles of specifically human actions, or as Finnis restates it, those “initiated by free choice.”¹² By referring to his search for the “principles” of human action, Finnis employs the term in a technical sense as *principium* or origin. In other words, he seeks to uncover the very foundations of human choice, which in his view, cannot be reduced to any conditions precedent: “principles are uncovered by examining that of which they are the principles. The principles we are concerned with here are motives of human action. As principles, they will be basic motives, irreducible to any prior motives of the same sort.”¹³

The first principle of free action asserted by Finnis is that it is an act guided by reason aiming at some object, i.e., an end. “The first type of principle of human action . . . is that *for the sake of which* such an action is done” (emphasis added).¹⁴ This “for the sake of which” (whether a specific object produced by an action or action sought for its own

¹⁰ The New Natural Law (NNL) theory is the name given to a particular revival and development of Thomistic natural law theory, first proposed in the 1960s by Germain Grisez in an interpretative article on St Thomas Aquinas, in which Grisez challenged the then-dominant interpretation of Aquinas on natural law. In subsequent decades Grisez, John Finnis, Joseph Boyle and other richly developed the theory and applied it to other issues (free choice, moral absolutes, abortion, euthanasia, marriage and others).

Patrick Lee, *The New Natural Law Theory*, in *THE CAMBRIDGE COMPANION TO NATURAL LAW ETHICS* 73 (Tom Angier ed., 2019).

¹¹ “Finnis is known as an exponent of the ‘new natural law’ school, which presented a fresh understanding of St Thomas Aquinas, politics and moral questions. On all these points, more traditionally-minded Thomists have strongly criticised Finnis and his associates.” See Dan Hitchens, *The incoherent campaign against John Finnis*, *CATH. HERALD* (Jan. 17, 2019), <https://catholicherald.co.uk/magazine/john-finnis-critics-are-loud-but-incoherent>. See also, Steven A. Long, *Fundamental Errors of the New Natural Law Theory* 13 *NAT’L CATH. BIOETHICS Q.* 105, 105-32 (2013).

¹² *PPMT*, *supra* note 3, at 100. (“Perhaps the most important presupposition from philosophical anthropology is that human persons can make free choices. Whether they assented to this proposition or not, most who have contributed to ethical theory, whether in ancient or more recent times, have denied, overlooked, or, at best, not fully appreciated the role of free choice in morality.”).

¹³ *Id.* at 102.

¹⁴ *Id.*

sake) refers then to the rational ground for choice of an action marked out as a means to one’s purpose. Elaborating all this, Finnis explains:

That for the sake of which one acts is one’s PURPOSE in acting; one hopes that this purpose will be realized through and/or in one’s action. A purpose in this sense is a state of affairs—something concrete, which can exist or not exist in reality. For example, if one enters a contest, one’s purpose is to win a prize; if one does not feel well and goes to the doctor, one’s purpose is to get better.

People do not always have a purpose distinct from their action; sometimes doing the action is itself their purpose in acting. That is very often the case when one plays a game or reads a novel.¹⁵

In further expanding on this conception of ‘purpose’, Finnis proposes that an object, action, or possible state of affairs can be envisioned by a rational agent as a purpose only if it can be understood rationally to participate in or instantiate some general good grasped and desired by the acting person.¹⁶ As an example, Finnis notes that a person’s reason for playing a game or reading a book has as its purpose some good, but the pursuit of that good is not exhausted by those particular actions. “Thus, playing and knowing always have their basic appeal, insofar as they are good, but like other goods they can be realized only in limited ways through particular actions”.¹⁷

Drawing out his account of the general types of goods that underlie all human choices, Finnis develops his theory of basic goods. This theory, which he avowedly bases closely on the writings of Thomas Aquinas,¹⁸ proposes that there are some rationally grasped goods to which all human persons are inclined by virtue of the very experience of the inclinations of shared human nature.¹⁹ Since, as noted, Finnis’ position has roots

¹⁵ *Id.* at 102-103.

¹⁶ We distinguish between purposes and that about a purpose which makes one rationally interested in acting for it. We call the latter a GOOD. For example, among goods are winning and being healthy, considered insofar as they can be realized-protected, promoted, and so on—not only by one action but by many possible actions. In entering a contest or going to the doctor, one’s purpose of winning or regaining health only PARTICIPATES in the goods of winning and health, in which one is interested more generally. To explicate this participation relationship between a purpose and a good, we say: Achieving the purpose will INSTANTIATE the good which is the reason one is interested in acting for that purpose.

Id. at 103.

¹⁷ *Id.*

¹⁸ Finnis at times relies quite closely on the texts of Thomas Aquinas. For example, with respect to his book NATURAL LAW AND NATURAL RIGHTS, NLNR see *supra* note 1, he states: “To understand this book aright, one should note that whenever Thomas Aquinas is quoted or cited, the author is to be taken (except in a few cases where he expresses a reservation) to mean to adopt Aquinas’ view.” *PPMT*, *supra* note 3, at 150.

¹⁹ This conception of “shared” nature will be taken up in Section II.A.2.a below, see footnotes 85-90 and accompanying text.

deep in the views of Aquinas, it will be useful to review Aquinas' summary of the foundations of natural law²⁰ as found in his *Summa Theologiae*.²¹

1.1. THOMAS AQUINAS AND THE PRINCIPLES OF NATURAL LAW

Aquinas begins his discussion of natural law by commenting on the most general characteristic of practical reason i.e., reason directed by persons' thinking about what they are going to do.²² He observes that practical thinking about action is rooted in orientation of actions towards ends (i.e., goals) under the aspect of good: "[G]ood is the first thing that falls under the apprehension of the practical reason, which is directed to action: since every agent acts for an end under the aspect of good."²³

Immediately following this point, Aquinas emphasizes its significance by asserting this insight into the experience of practical reasoning as being directed to 'good' is self-evidently embodied as the very first principle of all exercise of practical reason. "Consequently the first principle of practical reason is one founded on the notion of good, viz. that 'good is that which all things seek after.' Hence, this is the first precept . . . good is to be done and pursued, and evil is to be avoided."²⁴

²⁰ THOMAS AQUINAS, *SUMMA THEOLOGIAE* II-II q. 94, art. 2 corp. (Fathers of the English Dominican Province trans., Benziger 1911) (1265-73) deals with "The Natural Law." "*De lege naturali*" This is Aquinas most elaborate treatment of natural law though references to "the natural law" (*lex naturae*) occur throughout his writings.

²¹ For ease of access, this article will—unless otherwise noted—cite the popular English translation of the *Summa Theologica* or "Theological Summary" (in more contemporary academic writings it is usually referred to as the *Summa Theologiae* or Summary of Theology") of the Benziger edition, published originally in 1911 revised in 1920. Latin parallel citations are taken from the online edition found at <http://www.logicmuseum.com/authors/aquinas/Summa-index.htm>.

²² One philosopher has described the difference between theoretical and practical reason in the following way:

How are we to understand this opposition between the theoretical and the practical?

One possibility is to understand theoretical reflection as reasoning about questions of explanation and prediction. . . . Theoretical reflection is concerned with matters of fact and their explanation. . . . Theoretical reasoning, . . . finds paradigmatic expression in the natural and social sciences. Practical reason, by contrast . . . typically asks, of a set of alternatives for action none of which has yet been performed, what one ought to do, or what it would be best to do. . . . In practical reasoning agents attempt to assess and weigh their reasons for action, the considerations that speak for and against alternative courses of action that are open to them. Moreover they do this from a distinctively first-personal point of view.

Wallace, R. Jay, Practical Reason, in *The Stanford Encyclopaedia of Philosophy* (Edward N. Zalta ed., Spring 2018), <https://plato.stanford.edu/entries/practical-reason/#PraTheRea>.

²³ "[B]onum est primum quod cadit in apprehensione practicae rationis, quae ordinatur ad opus, omne enim agens agit propter finem, qui habet rationem boni." THOMAS AQUINAS, *SUMMA THEOLOGIAE* I-II, q. 94, art. 2 (Fathers of the English Dominican Province trans., Benziger 1911)(1265-73). Finnis expresses a similar point, "To understand something possible or actual as good is to understand it has having or giving point, as a 'that for the sake of which . . .', as end."1 JOHN FINNIS, *REASON IN ACTION: COLLECTED ESSAYS*, 161 (2011) [hereinafter CE Vol. I].

²⁴ [Et ideo primum principium in ratione practica est quod fundatur supra rationem boni, quae est, bonum est quod omnia appetunt. Hoc est ergo primum praeceptum . . . , quod bonum est faciendum et prosequendum, et malum vitandum.] THOMAS AQUINAS, *SUMMA THEOLOGIAE* II-II, q.94., art. 2 corp (1265-73).(Author's translations).

Finally, Aquinas draws his conclusion proposing that the natural law is constituted by the operation of this first principle of practical reasoning in light of human persons' naturally grasping objects of the natural inclinations as goods:

Since, however, good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, (*prosequenda*) and their contraries as evil, and objects to avoid (*vitanda*). Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law.²⁵

Moreover, Aquinas immediately follows this with a concrete discussion of some of these naturally grasped goods:

Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law. Secondly, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law, "which nature has taught to all animals" [*Pandect. Just. I, tit. i], such as sexual intercourse, education of offspring and so forth. Thirdly, there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law; for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination.²⁶

Thus, —while full explication of this passage exceeds the scope of this article—for Aquinas and Finnis the natural law arises from our basic human inclinations to preserve being [life]; to form families and live in human communities, and the inclination to acquire knowledge, including knowledge of the ultimate causes [God]. Finnis provides the following exegesis

²⁵ [*Quia vero bonum habet rationem finis, malum autem rationem contrarii, inde est quod omnia illa ad quae homo habet naturalem inclinationem, ratio naturaliter apprehendit ut bona, et per consequens ut opere prosequenda, et contraria eorum ut mala et vitanda. Secundum igitur ordinem inclinationum naturalium, est ordo praeceptorum legis naturae.*]

²⁶ *Id.*

of Aquinas' passage, with particular emphasis on the action-guiding role these principles play in practical reasoning:

Thomas Aquinas, in his formal discussion of the basic forms of good and self-evident primary principles of practical reasoning arranges the precepts in a threefold order: (i) human life is a good to be sustained, and what threatens it is to be prevented; (ii) the coupling of man and woman, and the education their young, etc., is to be favored, and what opposes it is to be avoided; (iii) knowledge (especially the truth about God), sociable life and practical reasonableness are good, and ignorance, offence to others, and practical unreasonableness are to be avoided.²⁷

1.2. FINNIS' BASIC GOODS

The preceding section has elucidated in a concise, general way the salient features of Aquinas' view upon which Finnis grounds his own position; viz., that the principles of natural law are founded upon the experience of natural inclinations toward their objects, insofar as these are grasped by practical reason as perfective (as an "end")²⁸ and rationally grasped as goods to-be-pursued.²⁹ Commenting on Aquinas' view laid out in

²⁷ NLNR (1980), *supra* note 1, at 94.

²⁸ "The essence of goodness consists in this, that it is in some way desirable. Hence the Philosopher says (Ethic. i): 'Goodness is what all desire.' Now it is clear that a thing is desirable only in so far as it is perfect; for all desire their own perfection." [*Ratio enim boni in hoc consistit, quod aliquid sit appetibile, unde philosophus, in I Ethic., dicit quod bonum est quod omnia appetunt. Manifestum est autem quod unumquodque est appetibile secundum quod est perfectum, nam omnia appetunt suam perfectionem.*] THOMAS AQUINAS, *SUMMA THEOLOGIAE* I, q. 5, art. 1. corp. (Fathers of the English Dominican Province trans., Benziger 1911) (1265-73).

²⁹ [T]he principle of voluntary movements must be something naturally willed. Now this is good in general, to which the will tends naturally, as does each power to its object, and again . . . speaking generally, it is all those things which belong to the willer according to his nature. For it is not only things pertaining to the will that the will desires, but also that which pertains to each power, and to the entire man. Wherefore man wills naturally not only the object of the will, but also other things that are appropriate to the other powers; such as the knowledge of truth, which befits the intellect; and to be and to live and other like things which regard the natural well-being; all of which are included in the object of the will, as so many particular goods.

[*Similiter etiam principium motuum voluntariorum oportet esse aliquid naturaliter volitum. Hoc autem est bonum in communi, in quod voluntas naturaliter tendit, sicut etiam quaelibet potentia in suum obiectum, et . . . universaliter omnia illa quae conveniunt volenti secundum suam naturam. Non enim per voluntatem appetimus solum ea quae pertinent ad potentiam voluntatis; sed etiam ea quae pertinent ad singulas potentias, et ad totum hominem. Unde naturaliter homo vult non solum obiectum voluntatis, sed etiam alia quae conveniunt aliis potentiis, ut cognitionem veri, quae convenit intellectui; et esse et vivere et alia huiusmodi, quae respiciunt consistentiam naturalem; quae omnia comprehenduntur sub obiecto voluntatis, sicut quadam particularia bona.*] THOMAS AQUINAS, *SUMMA THEOLOGIAE* I-II, q. 10, art. 1. corp. (Fathers of the English Dominican Province trans., Benziger 1911) (1265-73). Aquinas, in his Commentary on Aristotle's *De Anima*, writes:

For that of which there is a desire, to wit, the object of desire, is the first principle of practical reason. For that which is desired first, is the end from which the

the critical passage cited above, Finnis writes: “The goods identified in these principles are naturally wanted; they are the appropriate objects of the inclinations which pertain to each of the human capacities and a human being’s natural integrity.”³⁰ Elsewhere, Finnis states:

Human persons have natural dispositions toward what will fulfill their potentialities. Some of these dispositions are natural appetites—that is, dispositions of a person’s various parts and powers toward their own actualizations. . . . These natural dispositions, insofar as they are experienced, provide data for the insights in which one knows the first, self-evident principles of practical knowledge corresponding to the substantive goods.³¹

Thus Finnis’ model of practical reason, following Aquinas’ lead, is rooted in “first principles”, i.e., starting points internal to practical reasoning itself. These are engendered not discursively but simply by a rational appreciation of the variety of human goods grasped as to-be-pursued by practical reason itself. Thus, they are natural, and intelligent appreciations of the directiveness of human inclinations to particular goods.³² It is essential to recall, however, that Finnis, throughout his analysis, maintains that these ‘basic goods’ grasped by practical reason as *prima principia*, are not derived or inferred from empirical facts. Rather they are self-evidently known insofar as each

consideration of practical reason commences. Whenever we want to deliberate about things to be done, we first propose an end, and then proceed by mode of inquiry to the things which are means to that end; thus always proceeding from the later to the prior, until finally arriving at that which is to be done immediately. And thus [Aristotle] adds, the last thing attained by practical reason is the beginning of action. (Author’s trans.)

[*Sed illud cuius est appetitus, scilicet appetibile, est principium intellectus practici. Nam illud, quod est primo appetibile, est finis a quo incipit consideratio intellectus practici. Cum enim volumus aliquid deliberare de agendis, primo supponimus finem, deinde procedimus per ordinem ad inquirendum illa, quae sunt propter finem; sic procedentes semper a posteriori ad prius, usque ad illud, quod nobis imminet primo agendum. Et hoc est quod subdit quod ultimum de actione intellectus practici, est principium actionis.*] THOMAS AQUINAS, *DE ANIMA* lib. 3 l, 15, § 821 (Editio Leonina 1953) (n.d.).

³⁰ John Finnis, Practical Reasoning, Human Goods and the End of Man (Jan. 29, 1985), <https://www.academia.edu/9325262>.

³¹ *PPMT*, *supra* note 3, at 108.

³² As Patrick Lee, another collaborator in the NNL project, *see* Lee, *supra* at note 10, has summarized this crucial point:

What Aquinas called the precepts of the natural law, or the specific principles of practical reason, issue from practical insights into experience of conditions or activities. For from the experience of these conditions or activities one comes to understand that, for example, health, knowledge, or harmonious relationships with other people, are of themselves fulfilling and thus worthy of being pursued. An object’s being genuinely fulfilling is the intelligibility under which one sees it as worthy of pursuit. According to Aquinas, and Finnis developing Aquinas, these insights are made into *one’s natural inclinations*. The natural inclinations are data for . . . practical insight (emphasis added).

Patrick Lee, *Comment on John Finnis’s Foundations of Practical Reason Revisited*, 50 AM. J. JURIS 133, 134 (2005).

person's practical reason grasps them directly in and through human experience of these goods as to be pursued. As Finnis aptly captures Aquinas' point, ". . . [P]ractical reasoning begins not by understanding this nature from the outside, . . . but by experiencing one's nature, so to speak, from the inside, in the form of one's inclinations."³³

It follows from this, that each individual practical principle relating to a good of the natural inclinations should not be considered a limitation on the operation of practical reason. Rather, each good serves as a root for the very possibility of practical reasoning itself. Each can be instantiated (rather than 'applied') in indefinitely many, more specific, practical principles and premises. Thus, rather than restrict, these are the very principles which open horizons for all deliberated human activity.³⁴

In *Natural Law and Natural Rights*, Finnis proposes his own list of basic goods and provides substantial commentary. While it is not possible here to do justice to Finnis' elaboration of the meaning of each basic good, the following table lists with some of his main reflections summarized on each.³⁵

Basic Goods	Normative Description
A. Life	Life is to be preserved, the drive for self-preservation. The term life here signifies every aspect of the vitality . . . which put a human being in good shape for self-determination. [L]ife here includes bodily (including cerebral) health and freedom from the pain that betokens organic malfunctioning or injury.
B. Knowledge	Knowledge is to be pursued for its own sake and mistakes and mis-information are to be avoided. Universally the practical principle that truth is a good worth attaining . . . is applied by human beings to whatever form of knowledge-gathering they choose to interest themselves in or commit themselves to.

³³ NLNR (1980), *supra* note 1, at 34.

³⁴ *Id.* at 63.

³⁵ This table is developed from the descriptions these basic goods proposed by Finnis in NLNR (1980), *supra* note 1, at 86-90, and by Finnis with Grisez and Boyle in *PPMT*, *supra* note 3, at 106-107. In describing each basic good, the scope of this article permits room for only a terse summary based on remarks found in these these explications.

Basic Goods	Normative Description
C. Play	Creatively transform the world by work or play. Engaging in performances which have no point beyond the performance itself, enjoyed for its own sake. Play can enter into any human activity.
D. Aesthetic experience	Aesthetic experience, unlike play, need not involve an action of one's own. Sometimes what is sought after and valued for its own sake may simply be the beautiful form 'outside' of oneself and the 'inner' experience of appreciation of its beauty. But often enough the valued experience is found in the creation and/or active appreciation of some work of significant and satisfying form.
E. Socialability (friendship)	Seek peace and harmony in human relationships. This good is found in participating in communities on a large scale as well as the flowering of intimate relationships of full friendship. It is not the instrumental seeking of one's own good, but involves acting for the sake of one's friend's purposes, one's friend's well-being.
F. Practical reasonableness	Seek to bring an intelligent and reasonable order into one's own actions, habits, and practical attitudes. This value is complex, involving freedom, reason, integrity and authenticity.
G. Religion	Strive to think reasonably and (where possible) correctly about questions concerning the origins of cosmic order, human freedom, and reason. Even if the answers are agnostic or negative.

Table 1: Basic goods

As Finnis reiterates in closing his main chapter on basic goods,³⁶ their function—rationally grasped as “to-be-pursued”—constitute the very foundation through which the myriad possibilities for human choice become possible:

So it is that the practical principles which enjoin one to participate in those basic forms of good, through the practically intelligent decisions and free

³⁶ NLNR (1980), *supra* note 1, at 81-99.

actions that constitute one the person one is and is to be, have been called in the Western philosophical tradition the principles of natural law because they lay down for us the outlines of everything one could reasonably want to do, to have, and to be.³⁷

1.3. PRIOR ERRORS ABOUT NATURAL LAW METHOD: THE PURPORTED DERIVATION OF NATURAL LAW FROM HUMAN NATURE AND THE 'NATURALISTIC FALLACY'

The preceding sections of this article have offered a synopsis of Finnis' account of practical reason, culminating, as seen above, in his articulation of seven basic goods. Yet to investigate, however, is the pivotal issue of how Finnis understands the role and interplay between these goods in relation to the possibility of human choice, and especially moral choice.³⁸ Before moving onto that topic, however, it is opportune to consider the manner in which Finnis argues his theory resolves two related problems that have arisen in prior efforts to develop a coherent natural law theory. Each of these two problems relates to similar but differing questions regarding the possibility of 'deriving' by a type of syllogistic reasoning the principles of natural law from purely 'metaphysical' description of human nature.

1.3.1. METAPHYSICAL OR ONTOLOGICAL KNOWLEDGE OF HUMAN NATURE AS THE SOURCE OF KNOWLEDGE OF THE NATURAL LAW.

The first fundamental error Finnis believes his theory responds to, and resolves, is the erroneous attempt by some natural law philosophers to derive the principles of natural law from a prior metaphysical description of human nature and its faculties. Finnis proffers the following passage of a would-be natural law philosopher as a paradigm example of this ostensibly flawed approach:

[T]he theory of natural law which is the basis of St. Thomas' ethics turns on the idea that human nature is constituted by a unique set of properties which can be understood and summed up in a definition. . . .
. . . In outlining man's powers and functions, as he saw them, Aquinas was outlining the *nature of man*, his essential features which make a man what he

³⁷ *Id.* at 97.

³⁸ See *infra* notes 76-100 and accompanying text.

is, namely a rational, animal. And in thus sketching the nature of man he is sketching what is to be the necessary foundation for his moral philosophy.³⁹

According to this mode of analysis, the task of natural law philosophy would simply be to identify the powers and faculties of human nature and then suggest the orientation of those faculties to particular sorts of objects.⁴⁰ This would eo ipso establish an “ought”.⁴¹ For Finnis, however, this approach turns the proper order of inquiry on its head. Again following Aristotle and Aquinas, Finnis proposes that natures themselves can only be known through *prior understanding* of the actions and operations that flow from those natures, understood as the principle of rest and motion in things.⁴²

Aquinas asserts as plainly as possible that the first principles of natural law, which specify the basic forms of good and evil and which can be adequately grasped by anyone of the age of reason . . . , are . . . indemonstrable. They are not inferred from speculative principles. They are not inferred from facts. They are not inferred from metaphysical propositions about human nature, or about the nature of good and evil, or about ‘the function of a human being,

³⁹ Daniel J. O’CONNOR, AQUINAS AND NATURAL LAW 15-6 (1967); cited in NLNR (1980), *supra* note 1, at 34.

⁴⁰ See

[I]f we were to conceive of the nature of man on such a model [geometrically], One might say that it was contrary to the nature of a human being that he should not be characterized by upright posture, . . . or that certain human organs should be put to a use other than their natural use. And proceeding along these lines, one might be tempted to argue that, it being contrary to the nature for a human being, say, to walk on all fours, it is therefore wrong for a human being to do so.

Henry Veatch, *Natural law and the “Is”-“Ought” Question: Queries to Finnis and Grisez*, in 1 NATURAL LAW 302 (John Finnis ed., 1991).

⁴¹ As one philosopher acknowledges:

We . . . concede to Finnis and Grisez . . . that . . . many so-called natural law moralists, particularly in recent years, have, either consciously or unconsciously, fallen into the very bad habit of uncritically construing human nature simply on . . . [a] false geometrical model; and to the extent to which these natural law thinkers did lapse into bad habits of construing human nature in this unfortunate way, then their inferences from “is” to “ought,” or from the natural to the normative, would need to be pronounced to be fallacious.

Id. at 304.

⁴² As Aquinas writes:

I answer that, a power as such is directed to an act. Wherefore we seek to know the nature of a power from the act to which it is directed, and consequently the nature of a power is diversified, as the nature of the act is diversified. Now the nature of an act is diversified according to the various natures of the objects.

[*Respondeo dicendum quod potentia, secundum illud quod est potentia, ordinatur ad actum. Unde oportet rationem potentiae accipi ex actu ad quem ordinatur, et per consequens oportet quod ratio potentiae diversificetur, ut diversificatur ratio actus. Ratio autem actus diversificatur secundum diversam rationem obiecti.*] THOMAS AQUINAS, SUMMA THEOLOGIAE I, q.77,art,3, corp. (Fathers of the English Dominican Province trans., Benziger 1911) (1265-73). Finnis following Aquinas on this point states: “[H]uman nature is known through its capacities, and they are known through their acts, and these are known through their object, and those objects are, for the most part, precisely the basic good identified in the *prima principia* of practical understanding.” CE Vol. I, *supra* note 23 at 166.

nor are they inferred from a teleological conception of nature or any other conception of nature. They are not inferred or derived from anything. They are underived (though not innate).⁴³

For Finnis then, asserting that the moral or practical principles of natural law can merely be “read off” of human nature or its faculties is a *petitio principii* and ultimately nonsensical⁴⁴. Abstract knowledge of human nature—rather than being prior to knowledge of the *prima principia* of natural law—is itself dependent upon that prior practical knowledge of the *prima principia*.

One understands human nature by understanding human capacities, those capacities by understanding human acts, and those acts by understanding their objects. But the objects of humanly chosen acts are precisely the basic purposes . . . , that is, goods . . . with which Aquinas is concerned So the epistemic source of the first practical principles is not . . . a prior, theoretical knowledge of human nature Rather, the epistemic relationship is the reverse; any deep understanding of human nature, that is, of the capacities which will be fulfilled by action which participates in and realizes those goods, those perfections, is an understanding which has amongst its sources our primary, undemonstrated, but genuine practical knowledge of those goods and purposes.⁴⁵

Thus, for Finnis, no complete understanding of human nature can be reached until *after* one has grasped the fundamental goods of practical reason that are the dynamic goods or ends of the human inclinations. This is because, for Finnis, knowledge of the first principles of practical reason is not innate but quasi-spontaneously known through bare reflection upon one’s experience of those very inclinations and the goods toward which

⁴³ NLNR (1980), *supra* note 1, at 33-34. Finnis elaborates on this at times in other writings: “[T]he insights whose content is the self-evident principles of practical knowledge are not intuitions—‘insights’ without data. Rather they are insights whose data are, in the first place natural and sensory appetites and emotional responses.” CE Vol. I, *supra* note 23, at 205; Elsewhere, Finnis writes:

The first principles of practical reason are ‘indemonstrable’ and ‘self-evident.’ This does not mean that they are data-less intuitions, or ‘felt certainties’, or that one cannot be mistaken about them, or that they cannot be defended by rational considerations. On the contrary Aquinas firmly holds that they are understood by what he calls ‘induction’ of principles. by which he means insight into the date of experience (data preserved, after the direct experience, in the memory). “To reach a knowledge of them [first principles, whether of speculative or practical reason] we need sensory experience and memory.”

NLNR (1980), *supra* note 1, at 87-88 (citations omitted).

⁴⁴ NLNR (1980), *supra* note 1, at 43 (“A late [i.e., historically] . . . conception of natural law is the argument . . . that natural functions are never to be frustrated or that human faculties are never to be diverted (“perverted”) from their natural ends. But, as a general premise, in any form strong enough to yield the moral conclusions it has been used to defend, this argument is ridiculous”).

⁴⁵ CE Vol. I, *supra* note 23, at 179.

they direct. Prior to the development of knowledge of these basic goods, which cannot be inferred or derived from metaphysical reflection, no accurate metaphysical knowledge of human nature can be synthesized.⁴⁶

1.3.2. NATURAL LAW AND THE 'IS/UGHT' PROBLEM

The second error asserted by Finnis to be found in some natural law theories—closely tied to but distinct from that just discussed above—is the accusation that natural law theories fall subject to the “is/ought problem.”⁴⁷ In short, even if abstract metaphysical conceptions of human nature could provide a basis for inferring principles of natural law, they would still have the problem of impermissibly attempting to extract an ‘ought’ from an ‘is.’ This problem, sometimes referred to as the ‘naturalistic fallacy,’ has a long and complex history.⁴⁸ The crux of it is a logical category error that occurs when one erroneously draws a conclusion including an ‘ought’ not found in any of the premises.⁴⁹ Finnis describes the error as follows:

⁴⁶ NLNR (1980), *supra* note 1, at 52 (“[W]hat needs to be shown is that the [teleological] conception of human good entertained by these theorists is *dependent* There is much to be said for the view that the order of dependence was precisely the opposite—that the teleological conception of nature was made plausible, indeed conceivable, by analogy with the *introspectively* luminous, self-evident structure of human well-being, practical reasoning, and human purposive action”).

⁴⁷ See Anthony J. Lisska, *Bentham and Recent Work in Natural Law: Toward Reconstructing an Unstilted Theory*, 51 CURRENT LEGAL PROBS. 299, 302 (1998).

⁴⁸ Hume, is perhaps one of the first philosophers to explicitly raise the issue: Much debate has risen in relation to the meaning of Hume’s *locus classicus* found in Book III of his *Treatise of Human Nature* 1739-40:

In every system of morality, which I have hitherto met with, . . . the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz’d to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with *an ought*, or *an ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, ’tis necessary that it shou’d be observ’d and explain’d; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely difference from it [A]nd I am persuaded, that this small attention wou’d subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv’d by reason.

DAVID HUME, A TREATISE OF HUMAN NATURE 521 (Mossner ed., Penguin 1969) (1739). For a short history of the influence of Hume’s problem, see Lisska, *supra* note 47, pp. 302-303.

⁴⁹ As an example of a this logical error consider the following hypothetical syllogism *assuming* the truth of the following two premises: Factual Major Premise: The Second Amendment guarantees all U.S. Citizens the right to own a weapon. Factual Minor Premise: Daniel is a U.S. Citizen. Conclusion: Daniel ought to (or should) own a weapon. Even if both the major and minor premises are true facts, the conclusion that Daniel, or any, American “*ought to*” or “*should*” own a weapon does not follow and is a category error. The proper conclusion would be simply: “The Second Amendment guarantees Daniel the right to own a weapon.” The erroneous conclusion seeks to import a term into the conclusion not entailed by the premises.

[M]oral ought cannot be derived from the is of theoretical truth—for example, of metaphysical and/or philosophical anthropology . . . [F]rom a set of theoretical premises, one cannot logically derive any practical truth, since sound reasoning does not introduce what is not in the premises. And the relationship of principles to conclusions is a logical one among propositions.⁵⁰

Finnis' retort to such a charge if brought against his natural law theory is categorically to deny what he terms the "common erroneous view". . . natural-law theory . . . entails . . . propositions about man's duties and obligations . . . inferred from propositions about his nature" (emphasis added).⁵¹ Relying again on Aquinas' account of natural inclinations and the character of the *prima principia* as described in the preceding section, Finnis explains again that the *prima principia* of natural law are not inferences drawn from abstract metaphysical theories about human nature or a list of human faculties and powers.⁵²

Rather, the principles of the natural law are quasi-spontaneous manifestations of the first principle of practical reason operating on, one might say synthesizing, the natural inclinations. Thus, practical reason intelligently begets a principle, i.e., a norm, which incorporates the directiveness which practical reason "sees" is proper to each inclination as to a basic good.⁵³ As explained above, Aquinas understands the "first principle of practical reason," operating in all its phases as directing that good is "to be done" and evil "to be avoided." Thus, each individual precept of the natural law generated by practical reason includes its own general directiveness of '*faciendum et prosequendum*'. As Finnis observes, following Aquinas, the "ought" of the natural precepts is found in the fact that they direct human action with respect to what "is to be done and pursued."

Hence, Finnis argues that his account of the principles of natural law does not fall subject to the 'is-ought' critique. For the principles of natural law are not derivations from metaphysical or descriptive accounts (i.e., factual, static aspects) of human nature. Rather, the *prima principia* in themselves provide 'oughts', independent of metaphysical propositions, inferences, etc. because each practical principle:

⁵⁰ *PPMT*, *supra* note 3, at 102.

⁵¹ NLNR (1980), *supra* note 1, at 33.

⁵² See *supra* note 42.

⁵³ [P]ractical reasoning . . . begins . . . by experiencing one's nature . . . , from the inside, in the form of one's inclinations. . . . [B]y a simple act of non-inferential understanding one grasps that the object of the inclination which one experiences is an instance of a general form of good, for oneself (and others like one).

NLNR (1980), *supra* note 1, at 34.

[I]s an ought that directs me to the good I am to (should, even if in fact I don't) choose and try to achieve.—an 'am to' which is not predictive but normative, not future indicative but gerundive, action-guiding by making sense of action by making it intelligible as the means to an intelligible purpose. And the purpose or objective is intelligible precisely as beneficial, as the attaining, instantiating, actualizing of an intelligible good. . . . [o]ughts that are truly directive or normative⁵⁴

It is critical, however, at this juncture, to note that Finnis denies that the ought generated through each of the *prima principia*, directly constitutes a moral 'ought': "This ought is intelligible in a sense which is not moral."⁵⁵ As will be explored below,⁵⁶ Finnis suggestively adds without further elaboration, that "the 'ought' of the first principles is incipiently or '*virtually*' but not yet actually, moral in its directiveness or normativity" (emphasis added).⁵⁷

Having laid out the general foundations of Finnis' theory of basic goods and the principles of practical reason, it remains to investigate how these various first principles become *actually* effective in constituting the human person as moral; how the various principles synthesize into a coherent system of personal responsibility for acts of moral good or evil.

2. HUMAN CHOICE WITHIN THE MATRIX OF BASIC GOODS

It is not evident, from the preceding considerations, how a person is to guide the exercise of practical reason in light of the multiplicity of basic goods and the manifold purposes that can be discovered in each of them.⁵⁸ Further, it is unclear, insofar as Finnis maintains that each basic good is experienced as some sort of an "ought" to which a person is inclined by a principle of practical reason,⁵⁹ how is one properly to choose between these basic goods? The answer to this question lies in Finnis' account of choice, and in particular moral choice. In other words, having traced his account of the basic goods, the inquiry

⁵⁴ CE Vol. I, *supra* note 42, at 3-4. "This *ought* is intelligible in a sense which is not *moral*"

⁵⁵ JOHN FINNIS, *AQUINAS: MORAL, POLITICAL AND LEGAL THEORY* 86 (1998) [hereinafter *AQUINAS*].

⁵⁶ See *infra* note 79 and accompanying and following text.

⁵⁷ *AQUINAS*, *supra* note 55, at 87.

⁵⁸ See *infra* note 76 and accompanying text.

⁵⁹ See *supra* note 54 and accompanying text.

comes back to the point of departure for Finnis' entire theory: the question of free choice and its possibility.⁶⁰

2.1. CONDITIONS REQUIRED FOR THE POSSIBILITY OF FREE CHOICE

The first point Finnis makes with respect to the possibility of choice is to step back from discussion of the individual basic goods and propose that all of them, in themselves, are equally basic. They are irreducible to one-another. “[E]ach is self-evidently a form of good. . . . [N]one can be analytically reduced to being merely an aspect of any of the others, or . . . to being merely instrumental in the pursuit of any of the others.”⁶¹ At times Finnis expresses this line of thought simply by referring to basic goods as being “incommensurable” with one another.⁶² Each offers its own distinct promise of fulfillment for human persons not offered by pursuit of any other basic good.⁶³ The upshot here is that no intrinsic hierarchy exists among basic goods; each good is capable, when focused on alone, and depending on circumstances facing the person, of seeming more important than all the others.⁶⁴ While one might ask whether they are or not all reducible to one quality, viz. ‘desirability’ or ‘goodness’? Finnis responds that while it is true that they are all “desired for some reason,”⁶⁵ the basis for each good’s desirability distinguishes it from others. “They differ in desirability because there is no single reason underlying every purpose for the sake of which one acts. The basic goods of diverse categories are called “good” only by analogy.”⁶⁶

⁶⁰ See *supra* note 12 and accompanying text.

⁶¹ NLNR (1980), *supra* note 1, at 92.

⁶² Since [the basic goods] are primary principles, the goods of the diverse categories are incommensurable with one another. . . . For if they were commensurable . . . they would have to be . . . reducible to something prior by which they could be measured. . . . If they were reducible to something prior, they would not be primary principles.

PPMT, *supra* note 3, at 110.

⁶³ AQUINAS, *supra* note 55, at 91. “[T]he goods to which practical reason’s first principles direct us are not abstract, ‘ideal’ or ‘quasi –Platonic forms’. They are perfections, aspects of the *fulfillment*, flourishing, completion, full-being, of the flesh-and-blood human beings . . . in whom they can be instantiated.” AQUINAS, *supra* note 55, at 91. Elsewhere he writes, “Any creature which acts is . . . not fully given at the outset; it has possibilities which can be realized only through its acting. The basic goods are basic reasons for acting because they are aspects of the fulfillment of persons, whose action is rationally motivated by these reasons.” *PPMT*, *supra* note 3, at 114.

⁶⁴ E.g., “If one is drowning, or, again, if one is thinking about one’s child who died soon after birth, one is inclined to shift one’s focus to the value of life simply as such [L]ife will not be regarded as a mere pre-condition of anything else; rather, play and knowledge. and religion will seem secondary, even rather optional extras”. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 92-93 (2011) [hereinafter NLNR (2011)].

⁶⁵ *PPMT*, *supra* note 3, at 114.

⁶⁶ *Id.*

It is precisely this incommensurability between basic goods—the unique desirability of each— which creates the possibility of free choice. If basic goods were commensurable, i.e., reducible to some univocal standard or measure (*x-ness*) by which instantiations of other basic goods could be evaluated and compared within and across categories, no person could choose freely. If *x-ness* were the only criterion that counted in guiding deliberation for choice,⁶⁷ on what basis could a person choose one option containing less of 'x' when a second option contained all the 'x' of the first option and more x?

[W]hen technical reasonings identify one option as uniquely correct, that is, as dominant, they do so by demonstrating that it offers all that the other options offer and some more, it is unqualifiedly better. The other options then lack rational appeal. Such deliberation ends not in choice . . . but rather in insight, 'decision' (not choice, but rationally compelled judgment), and action.⁶⁸

'Free choice', however, as understood by Finnis to be required for moral responsibility, which he calls free choice in the "strong" sense, demands incommensurable alternatives. For in such cases, selection between one or other of the options can only be settled by that very 'free choice' itself:

[W]e refer to free choices in the strong sense— where one really does have reasons for alternative choices but these reasons are not determinative (i.e., are necessary but not sufficient conditions for making one or the other choice), so that no factor but the choosing itself settles which alternative is chosen.⁶⁹

Thus, eliminating not only physical material determinism of thoughts and judgments as an adequate basis for *real* choice, Finnis also rejects any conception of psychological or intellectual determinism as a sufficient basis for explaining choice that is truly free. Ultimately there can be no sufficient reason for a choice, if it is free, other than the choice itself. No judgments of the mind, whatever their origin, prior to one's actual choice itself can definitively settle a choice that is authentically free. Rather the final selection—resolving deliberation between two irreducible options—is found only in the

⁶⁷ [F]or consequentialist [i.e., commensurable] assessments . . . the alternatives must be compared in terms of some conception of good common to them, in virtue of which, . . . one alternative can be judged better (or less bad) than the other(s). And if *that* can be done the greater good will contain all the goodness in the lesser, and some more . . .

NUCLEAR DETERRENCE, *supra* note 3, at 256.

⁶⁸ CE Vol. I, *supra* note 23, at 225.

⁶⁹ See, e.g., NUCLEAR DETERRENCE, *supra* note 3, at 256; "Choice . . . is a matter of preferring *one* amongst alternative proposals *both or all* of which win one's assent as promising benefit and so remain interesting." AQUINAS, *supra* note 55, at 66.

choice itself, a final, coextensive act of both will and judgment of reason. As Finnis explains this concept in greater detail:

We have to choose when, however long we deliberate, we do not conclude that one proposal is ‘dominant, i.e, offers all the benefits of alternatives plus more benefits. In the absence of such a conclusion, our deliberating (reasoning) is brought to an end only by will, *by the act of choosing*. . . . In choosing, one not only intends the intelligible benefits . . . one is adopting One also . . . is bringing one’s rational deliberations to a close in a final judgement, a judgement of preference which can be called *iudicium electionis* the judgement ‘of’, i.e, in, the very choosing (emphasis added).⁷⁰

Finally, it is appropriate to note in this context, and by way of introduction to the next section, that Finnis’ strong notion of choice as a free, original, and creative act of a human agent itself constitutes the ground of personal identity and character. Free choices—not *determined* but made possible by incommensurable alternatives grasped in deliberation by practical reason—lay the foundation for self-constituting personal responsibility. “[T]his creativity is also self-creative, self-determining, more or less self-constitutive. One more or less transforms oneself by making the choice, and by carrying it out. . . . One’s choice in fact lasts in, and as part of, one’s character.”⁷¹ In short, by making real choices, especially choices of moral significance about what to do as discussed in the section below, a person makes himself or herself the moral type of person they are.

2.2. MORAL CHOICE

As Finnis points out: “We have in the abstract no reason to leave any of the basic goods out of account. But we do have good reason to choose commitments, projects, and actions, knowing that choice effectively rules out many alternative reasonable or possible commitment(s), project(s), and actions(s).”⁷² He further submits that the ability to choose between commitment to one basic good rather than another “is the primary respect in which we can call ourselves both free and responsible.”⁷³

Thus, as explained above,⁷⁴ each basic good is incommensurable with other basic goods—and, even particular instantiations of the same basic good can be

⁷⁰ AQUINAS, *supra* note 55, at 67. For Further elucidation of this critical insight see also Finnis collaborator Joseph Boyle, *Free Choice, Incomparably Valuable Options, and Incommensurable Categories of Good*, 47 AM. J. JURIS 123, 139-40 (2002).

⁷¹ CE Vol. I, *supra* note 42, at 239.

⁷² NLNR (2011), *supra* note 64, at 100.

⁷³ *Id.*

⁷⁴ See *supra* Part II.A.1., note 59 and accompanying text.

incommensurable with one another.⁷⁵ Selection between alternatives can only be resolved by choice that is free in the strong sense. But still unanswered is the question of what is to guide free-choice between these incommensurables? As Finnis poses the question anticipating its moral significance: “By disclosing a horizon of attractive possibilities for us, our grasp of the basic values thus creates, not answers the problem of intelligent decision: What *is to be* done? What *may be* left undone: What *is not to be* done?” (emphasis added).⁷⁶

2.2.1. THE FIRST PRINCIPLE OF MORALS: THE INTEGRAL DIRECTIVENESS OF PRACTICAL REASON

Having examined Finnis’ conceptions of incommensurability, choice, and responsibility, it is now possible to turn to his particular understanding of moral choice. As alluded to above,⁷⁷ but not developed, Finnis proposes that ‘moral obligation’ has its foundations in, but cannot be identified with, the “ought” proposed by each individual principle of practical reason, as constituted by practical reason’s grasp of the basic goods. Developing this thought in more detail, and concluding with a comment noted earlier,⁷⁸ Finnis states:

The moral sense of ‘ought’ is reached . . . when the absolutely first practical principle is followed through, in its relationship to all the other first principles, with a reasonableness which is unrestricted and undeflected by any subrational factor such as distracting emotion. In that sense, the ‘ought’ of the first principles is incipiently or ‘virtually’ but not yet actually, moral in its directiveness or normativity.⁷⁹

The remaining portion of this section on moral choice will attempt to clarify Finnis’ thought in this challenging paragraph.

This quoted passage proposes that moral ‘ought’ is achieved only when the first principle of practical reasoning—(*bonum faciendum et prosequendum et malum*

⁷⁵ There is another ground for the incommensurability of options, namely the fact that instances of the same good may instantiate it in ways that are not commensurable. The reasons for action which a human good motivationally underlies give reason for actions and goals so diverse that the generic similarity of the benefits is not sufficient for comparison . . . [A] family’s deliberation about the venue for a family vacation, taken for the good of family community and healthy relaxation, discovers no common measure for the instantiation of these goods in one location rather than another.

Boyle, *supra* note 70, at 139-140.

⁷⁶ NLNR (2011), *supra* note 64, at 100.

⁷⁷ See *supra* notes 55-58 and accompanying text.

⁷⁸ See *supra* note 57 and accompanying text.

⁷⁹ *Id.*

vitandum)⁸⁰—is consistently applied (“followed through”) against the background of *all* the practical principles; Further, no “subrational” factor may be permitted to “deflect” or impair this intelligent, active process. Postponing, for the moment, what ‘subrational factors’ refers to, in *Natural Law and Natural Rights* Finnis refers to this process of “following through” as a distinct basic good, i.e., the ‘good of practical reason’: “. . . [A]mongst the basic forms of good . . . is the good of practical reasonableness, which is participated in precisely by shaping one’s participation in the other basic goods, by guiding one’s commitments, one selection of project(s), and what one does in carrying them out.”⁸¹ Here Finnis’ description suggests that the moral sense of ‘ought’ refers to some type of “harmonization” in deliberation between the first principle of practical reasoning (with, through, and in?) all the other human goods grasped by practical reason.

Asserting that his statement of the good of practical reasonableness in *Natural Law and Natural Rights*—partially identified by the quote above,⁸²—was not adequately descriptive, Finnis has provided a number of alternative formulations.⁸³ For ease of analysis, and without belaboring the differences,⁸⁴ the following discussion will consider one of his most recent formulations.

Before turning to that, however, it is necessary to add one further development to the theory of basic goods that is essential for understanding Finnis’ conception of the moral application of practical reason.⁸⁵ Finnis, in a number of his writings notes that the grasp of the basic goods and the practical principles directing us to them are not egoistic in their understanding or in application; one does not grasp them as referring solely to one’s own individual good or benefit:

[A] feature of all the basic human goods and all the first practical principles [is] that they are good also for others like us and that the principles direct each of us to have an interest in the attaining and instantiating of the relevant good not only in our own life but in the lives of *anyone*.⁸⁶

⁸⁰ “Good is to be done and pursued and evil avoided.” See *supra* note 24 and accompanying text.

⁸¹ NLNR (2011), *supra* note 64, at 100.

⁸² CE Vol. I, *supra* note 23, at 4.

⁸³ See *id.* for references. “The version of the first principle most commonly invoked by Finnis is that stated in terms of integral human fulfillment.” Joseph Boyle, *On the Most Fundamental Principle of Morality* in REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS, 69 (John Keown & Robert P. George eds., 2013). In this article, I will follow Joseph Boyle in preferring Finnis’ alternative description of it as consistent with ‘integral directiveness of practical reason,’ rather than ‘integral human fulfillment’. See *id.* at 69-72.

⁸⁴ For a discussion of the various statements of Finnis and his collaborators about the ‘first principle of morality’ see Christopher Tollefsen, *Natural Law, Basic Goods and Practical Reason*, in THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE 133, 148-53 (George Duke & Robert P. George eds., 2017).

⁸⁵ Delayed introduction of this topic was chosen to emphasize its pivotal place in Finnis’ moral theory.

⁸⁶ CE Vol. I, *supra* note 23, at 4.

Adding this essential aspect of practical reason's grasp of a *shared* participation in basic goods by all human persons, it is possible to consider one of Finnis' latest discussions of the first moral principle of practical reason.⁸⁷

As noted, Finnis observes that the inclusive understanding of the goods of practical reason encompasses "all persons like us" and involves a thoroughgoing application of practical reasoning, which itself constitutes a distinct basic good: "Here practical reasonableness comes into view as a further basic intelligible good to which a distinct practical first principle directs us."⁸⁸

He then notes the complex interpersonal and intelligible contexts in which moral deliberations, the practical principles, and choices become relevant:

The limitations and vulnerabilities of one's life and capacities . . . demand that one adjudicate the normative claims of each and all of the first practical principles in their bearing on the ways one's own choices and actions might affect the future existence and flourishing of oneself and others. That such an adjudication be reasonable is obviously good not only as a means to realizing any of the other intrinsic goods but also in itself.⁸⁹

Choices and actions that have moral import are those by which we effect in our own and others' lives, growth or diminishment in flourishing in *all* human goods. Elaborating this point Finnis states:

This architectonic good—of pursuing the other goods in one's own and others' lives *well*, fully reasonably, without deflection or distortion by sub-rational motivations—is the matrix of all normativity that is not merely practical but specifically *moral* (ethical). Its formal demand is that one be reasonable.⁹⁰

Prior to exploring in more detail this conception of the first principle of moral reasoning, some attention must be given to the requirement, reflected in the passages above, that a properly moral functioning of practical reason must be "unrestricted and undeflected by any subrational factor such as distracting emotion."⁹¹ Apparently, subrational factors negatively affect practical deliberation by finding a deficient justification in practical reasoning itself, one that in some manner, draws upon basic goods themselves. Finnis provides a helpful example of a desire for revenge caused by hatred or anger, an action opposed to the basic good of sociability.⁹² If the desire for revenge arises, it is possible to

⁸⁷ The following discussion is drawn from his *Introduction* to CE Vol. I, *supra* note 23.

⁸⁸ *Id.* at 4.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ AQUINAS, *supra* note 55, at 87.

⁹² See *supra* note 35 and accompanying table in text.

find reasons for revenge: “one can find reasons which enable one to anticipate certain benefits from taking revenge—for example, that it will discourage future provocations and so make for more peaceful relations (“He’ll never do that again!” or “that failure to take revenge would be unjust.”)⁹³

Of course, it becomes obvious to most persons in the course of a life, that choices aimed at satisfying subrational desires motivated by mere appetitive drives, detrimental habits, illness of mind or body, etc., can be supported by *selective* rationality. The impact of these influences can interfere with the natural course that one’s own or another person’s deliberations and choices would take if unaffected by such deflecting, “distorting” or “restraining” factors.⁹⁴ Feelings can impair the rational directiveness of reason “by proposing goals whose pursuit can be made into a purpose of rationally guided action, but only by a free choice that fetters reason and limits its directiveness.”⁹⁵ And it is precisely in these circumstances, where the experience of moral obligation surfaces. One who does not choose to allow the full directiveness of reason to apply in practical deliberations, is aware of the breach of the moral principle by flouting the ‘ought’ inspired by the full directiveness of practical reason.

Speaking directly to this grasp of moral obligation, Finnis writes:

When practical knowledge is confronted with the tendency of feeling to restrict it by urging a possibility whose choice would fetter it, the is-to-be of practical knowledge becomes ought-to-be. The *directiveness* of practical knowledge becomes *normativity* because what is to be might not actually come to be and yet still rationally is to be.⁹⁶

The force of this “ought” generated by the integral directiveness of reason provides a person with a reason to “override” both the intensity of any emotional factors drawing practical reason aside, as well as to overcome the selective reasoning which has been brought forth in support of the fettering option.⁹⁷

⁹³ PPMT, *supra* note 3, at 123.

⁹⁴ For our makeup as choosers and doers is complex. Feeling and emotion . . . may compete with and undermine intelligence and reasonableness. Always I am liable to be deflected from pursuit of the understood good into pursuit of the good which promises me some satisfactions, here and now, for me.

JOHN FINNIS, FUNDAMENTALS OF ETHICS 73. For a thorough consideration of the complex variations of how reason can be deflected or fettered by feelings or emotions, See Joseph Boyle, *On the Most Fundamental Principle of Morality*, in REASON, MORALITY AND LAW: THE PHILOSOPHY OF JOHN FINNIS 56, 65-69 (John Keown & Robert P. George eds., Oxford University Press, 2013). ; See also PPMT, *supra* note 3, at 123-125.

⁹⁵ PPMT, *supra* note 3, at 125.

⁹⁶ BOYLE, *supra* note 94, at 63.

⁹⁷ Elaborating the force of this obligation, Boyle writes,

[T]he judgment to which a selective use of practical reason leads remains directive, and indeed it is possible that a person will choose the option thus recommended. These goods *ought not*, however, to be pursued in choices responding to this result of

In sum, Finnis argues that the first principle of *moral* reasoning then is not a restrictive precept limiting choices in accordance with one “good-making” criterion. As seen above, basic goods individually open up a full horizon of innumerable options for choice, all desirable in one way or other in view of the basic goods. By definitively establishing that each of the practical principles founded on the basic goods “state what ought to be (is-to-be) rather than what is or will be, and though they cannot be reduced to “speculative”, i.e., non-practical principles, they are true (not false) and direct us to the basic goods as *true goods*.”⁹⁸ Hence, the moral principle—the “architectonic” directive of practical reason—guides a person to choose goods grasped in light of any of these true goods, but only so long as one fully considers those alternatives alive in one’s deliberations in light of *all* the rational goods. Finnis, thus, proposes that moral reasoning is simply the full operation of practical reason “unfettered” by any obstacle interfering with it.⁹⁹

As one Finnis collaborator summarizes the benefit of reasoning and choosing in a manner consistent with the *integral* directiveness of the basic goods:

Carrying that process through to its end allows a fully rational assessment of the options for choosing. All the impacts on goods of all aspects of the options will be considered, not just noted theoretically. Their rational appeal is given voice and attention as human power allows. A free choice responsive to such an outcome of deliberation will be as reasonable as a choice can be, since it will be responsive to all that is reasonable and to nothing besides that . . .¹⁰⁰

From one perspective, then the application of the integral directiveness of practical reason is simply an expression of a basic maxim often employed by Aquinas:

selective deliberation. The rational force of that obligation is rooted in the integral directiveness of practical reason; that force gives one reason to override not only the de facto urgency of the desire, but also the prescriptivity of the good that remains in the option one sets aside because of the selectivity of the deliberation supporting it.

⁹⁸ AQUINAS, *supra* note 55, at 87. On this point, some natural law philosophers receptive to Finnis et al’s efforts have stated with respect to the first principle of morality as self-evident, similar to the other first principles, [T]he cognitive awareness of the first principle [of morality] seems to be just an agent’s rational grasp of the goodness of all the goods. An agent in whom reason grasps the first principle is thus one with a sufficient awareness of practical reasons; the appeal of those reasons just is, in some sense, the content of the first principle of morality, known by the agent without deliberation, and thus without choice.

See Tollefsen, *supra* note 84, at 152-153.

⁹⁹ “[T]he first moral principle makes it clear that to be morally good is precisely to be completely reasonable. *Right reason* is nothing but *unfettered reason* working throughout deliberation and receiving full attention.” PPMT, *supra* note 3, at 121.

¹⁰⁰ BOYLE, *supra* note 94, at 63. CE Vol. I, *supra* note 42.

“[G]ood results from the entire cause [ex integra causa], evil from each particular defect. [ex quocumque defectu]”¹⁰¹ Moral truth, i.e., moral rectitude, is found when all the principles of practical reason are brought to bear in one’s deliberations and choice. Moral evil is found when one or more of these basic principles are excluded from consideration about what is to be done.

As Finnis states with reference to Aquinas’ maxim:

A choice is right if and only if it satisfies all the requirements of practical reasonableness, that is, *all* relevant moral requirements. . . The scholastics had an untranslatable maxim to make this simple point: *bonum ex integra causa, malum ex quocumque defectu*, an act will be morally good (right) if what goes into it is entirely good, but will be morally bad (wrong) if it is defective in *any* morally relevant respect . . .¹⁰²

While the preceding analyses may seem abstract and detached from typical moral reasoning about choices and conduct, Finnis’ theory offers further, more concrete elaborations of how to achieve integral directiveness, i.e., proper moral reasoning. The following section considers some of these instrumental principles aiding in the application of Finnis’ first principle of moral reasoning.

2.2.2. MORAL GOOD AND THE INTERMEDIATE PRINCIPLES

One useful approach to gaining clearer insight, ‘putting flesh on the bones,’ so to speak, of the operation of this first principle of morality—the “integral directiveness of practical reason”—is to consider its ‘intermediate specifications’ as proposed by Finnis. According to Finnis, these intermediate moral principles, “identify, and direct one away from, ways of cutting back on being fully reasonable.”¹⁰³ Elsewhere, he writes, “[e]ach of these requirements concerns what one *must* do, or think, or be if one is to participate in the basic value of practical reasonableness.”¹⁰⁴ While Finnis has posited a number of these

¹⁰¹ “[B]onum causatur ex integra causa, malum autem ex singularibus defectibus.” THOMAS AQUINAS, *SUMMA THEOLOGIAE* I-II, q.19, a.6, ad 1 (Fathers of the English Dominican Province trans., Benziger 1911) (1265-73).

¹⁰² 3 John Finnis, *War and Peace in the Natural Law Tradition*, in *HUMAN RIGHTS AND COMMON GOOD: COLLECTED ESSAYS* 183, 87 (2011).

¹⁰³ JOHN FINNIS, *MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH* 44 (CUA 1991).

principles whose full analysis is beyond the scope of this article,¹⁰⁵ the following section will take up only three of them.¹⁰⁶

2.2.2.1. NO ARBITRARY PREFERENCES AMONGST VALUES

“[T]here must be no leaving out of account, or arbitrary discounting or exaggeration, of any of the basic human values.”¹⁰⁷ As Finnis explains, any reasonable choice of life is going to concentrate on and instantiate certain basic goods more than others, often at the expense of other forms of good, either for certain periods of time or perhaps permanently. Forfeiting certain basic goods, however, will be reasonable only if it is based on an accurate estimation of one’s capacities, circumstances in life, and one’s individual tastes. It will be unreasonable if that choice of life is based on an exaggerated preference for one basic good because of its mere instrumental value.

Thus, it would be unreasonable if one were to become a physician not out of a commitment to the basic good of life as such, but in truth because one sought the instrumental goods of money and reputation. A person can also act unreasonably in overzealous pursuit of one good to the entire neglect the other basic goods:

If a statesman or father or any self-directing individual treats truth or friendship or play or any of the other basic forms of good as of no account, and never asks himself whether his life-plan(s) makes reasonable allowance for participation in those intrinsic human values . . . then he can be properly accused both of irrationality and of stunting or mutilating himself and those in his care.¹⁰⁸

Any full human life should be devoted in some part (i.e. as much as possible) to each of the basic human goods.

¹⁰⁵ In FINNIS, *supra* note 94, at 75, Finnis explicitly proposes nine of these intermediate principles; In *PPMT*, *supra* note 3, at 128. it is stated the following way. “These intermediate moral principles . . . do not refer to any specific kinds of acts, they are more specific than the first principle of morality, because they specify . . . how any action must be willed if it is to comply with the first principle of morality.”

¹⁰⁶ As with the basic goods, there is no hierarchy among these principles and “each is fundamental, underived, irreducible and hence is capable when focused upon of seeming the most important.” NLNR (2011), *supra* note 64, at 102.

¹⁰⁷ *Id.* at 105-110. In FINNIS, *supra* note 94, at 75, he describes this principle as “(2) do not leave out of account , or arbitrarily discount or exaggerate, any of the basic goods.”

¹⁰⁸ NLNR (2011), *supra* note 64, at 107.

2.2.2.2. NO ARBITRARY PREFERENCES AMONGST PERSONS

Sometimes referred to simply as “avoiding unfairness,” this intermediate principle of practical reason proposes that one should give proper respect in deliberating and making choices to others’ right to share in basic goods, i.e., to flourish as human persons.¹⁰⁹ Finnis asserts that no *reason* justifies an actor evaluating one’s own well-being differently from any other person’s.¹¹⁰ While Finnis acknowledges that this principle does not prevent *reasonable* preference for one’s own good or the good of those who are “near and dear,”¹¹¹ it does, however, prohibit preferences “. . . motivated only by desires, aversions, or hostilities which do not correspond to intelligible aspects of the real reasons for action, the basic human goods . . .”.

This requirement, therefore, directs persons against unreasonable self-preference in the pursuit of basic goods, i.e., against selectively choosing goods for one’s own sake or perhaps for related persons based on exaggerated emotions of care and affection or, the opposite, to spite one’s opponents. This principle would disallow unreasonably *interfering* with others pursuit of such goods, and certainly any self-preference in choice that unreasonably *prevents* others’ pursuit of those goods. Finnis specifically mentions a few types of reasoning that should be rejected: “selfishness, special pleading, double standards, hypocrisy, indifference to the good of others whom one could easily help . . . and all the other manifold forms of egoistic and group bias.”¹¹² One could, then, presumably include in this list nepotism and cronyism. Jealousy and envy could be added as well, i.e., begrudging one’s “neighbor” their success in realizing instantiations of various basic goods (e.g., loving spouse, rich communal family life, fulfilling occupation, solid friendships, etc.) Finnis goes on to note that this intermediate principle is captured by the “Golden Rule” recognized in both the Christian gospel and sacred texts of the Jews: ‘Do to (of for) others what you would have them do to (or for) you.’¹¹³

2.2.2.3. RESPECT FOR EVERY BASIC VALUE IN EVERY ACT.

Finnis, as has been reflected in this study of his thought, believes that to live a human life is to pursue human flourishing through choices that instantiate basic goods.¹¹⁴ At the

¹⁰⁹ *Id.* at 106-109; In FINNIS, *supra* note 103, at 75, Finnis describes this principle as: “(3) do not leave out of account, or arbitrarily discount or exaggerate, the goodness of other people’s participation in human goods.”

¹¹⁰ NLNR (2011), *supra* note 64, at 107.

¹¹¹ I assume here Finnis has in mind various obligations a person might have to oneself or one’s family that limit due to physical circumstances and other factors, how much a person can share goods with third parties.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ NLNR (2011), *supra* note 64, at 109-125.

same time, however, this foreseeably and unavoidably results in other instantiations of basic goods being left unchosen and undeveloped, even if one appreciates their value. "If one is to act intelligently at all one must choose to realize and participate in some basic value or values rather than others and this inevitable concentration of effort will indirectly impoverish, inhibit, or interfere with the realization of those other values."¹¹⁵ This result is simply a condition of human existence and is often entirely reasonable.¹¹⁶

Finnis finds nothing objectionable in this type of "indirect" damage to basic goods. He does, however, contrast this permissible form of indirect "damage" to basic goods with another objectionable type of damage to basic goods, direct and immediate. This permissible/ impermissible contrast between 'indirect damage' and 'direct, immediate damage' is laid down in the following crucial paragraph (broken down here for ease of analysis):

[T]o indirectly damage any basic good (by choosing an act that directly and immediately promotes either that basic good in some other aspect or participation, or some other basic good or goods). . . . is obviously quite different, rationally and thus morally, from . . . directly and immediately damaging a basic good in some aspect or participation by choosing an act which in and of itself simply (or, we should now add, primarily) damages consistent with the moral principle "integral directiveness of practical reason" because such damage is inherent in virtually every choice, which necessarily leaves other options for instantiations of good unfulfilled.

Direct and immediate damage to basic goods, however, is not consistent with that good in some aspect or participation but which indirectly, via the mediation of expected consequences, is to promote either that good in some other aspect or participation, or some other basic good(s.) (emphasis added).¹¹⁷

The first type of damage, i.e., indirect, occurs when an actor "promotes or pursues" one instantiation of a basic good, and insofar as they are busy promoting that instantiation, they cannot simultaneously pursue and promote instantiations in other basic goods. This for Finnis can be consistent with the fullness of integral practical reason, even though the point of the damaging action, or any immoral choice, will always be to bring about a

¹¹⁵ *Id.* at 120; "We have, in the abstract, no reason to leave any of the basic goods out of account. But we do have good reason to choose commitments, projects, and actions, knowing that choice effectively rules out many alternative reason-able possible commitment(s), project(s), and action(s)." *Id.* at 100.

¹¹⁶ "But there are many such basic forms of human good; . . . [a]nd each of them can be participated in, and promoted, in an inexhaustible variety of ways and with an inexhaustible variety of combinations of emphasis, concentration, and specialization. . . . But our life is short." *Id.*

¹¹⁷ *Id.* at 120.

good in some aspect or some other basic good. Finnis observes that even *immoral* choices will be directed at some basic good, insofar as all choices in some way correspond to the first practical principle ‘do good and avoid evil.’ “For anyone who rises above the level of impulse and acts deliberately must be seeking to promote some form of good . . .”.¹¹⁸

The basis for the immorality of directly damaging a basic good, is that it strikes at the very heart of human rationality itself, as it is existentially known and experienced in, and lived through, the first and intermediate practical principles. It is important to remember that here one is not referring to mere technical mathematical or scientific principles gained through speculative inquiry. Rather these practical principles form a vital constitutive part of one’s very psyche as a conscious acting person. Thus, when a person chooses to damage or destroy an instantiation of one of the basic goods, one experiences its clash with and contradiction to the moral ‘ought’ inscribed in the integral directiveness of practical reason itself. For actors who are sensitive to the demands of the integral directiveness of practical reason, the experience of such choices, can only be understood as a deformation of the human personality. In *Natural Law and Natural Rights* Finnis makes a similar but distinct point:

[N]o sufficient reason can be found for treating any act as immune for the only direction which we have, viz., the direction afforded by the basic practical principles. These each direct that a form of good is to be pursued and done; and each of them bears not only on all our large-scale choices . . . but also on each and every choice of an act which is a complete act The incommensurable value of an aspect of personal full-being (and its corresponding primary principle) can never be rightly subordinated to any project or commitment. But such an act of subordination inescapably occurs at least whenever a distinct choice-of-act has in *itself* no meaning save that of damaging that basic value (thus violating that primary principle).¹¹⁹

Thus, Finnis establishes the ground for defending the intermediate principle currently under consideration: “Respect for Every Basic Value in Every Act.”¹²⁰ Or as he rephrases it: “[O]ne should not choose to do any act which of itself does nothing but damage or impede a realization or participation of any one or more of the basic forms of good.”¹²¹

Finnis provides the following example of direct damage to a basic good: “This is especially obvious when a blackmailer’s price for sparing his hostages is ‘killing’ that

¹¹⁸ *Id.* at 119.

¹¹⁹ *Id.* at 121.

¹²⁰ *Id.* at 118.

¹²¹ *Id.*

man,”¹²² i.e., the blackmailer agrees to release hostages only if one hostage kills another innocent hostage. Finnis observes that in this situation, “the person who complies with the demand, in order to save the lives of the many, cannot deny that he is choosing an act which of itself does nothing but kill.”¹²³ The act of the hostage-murderer in these circumstances is wrong because it involves the actor in violating this intermediate principle. “Do not choose directly against a basic value.”¹²⁴

All the intermediate principles articulate various ways of acting immorally by failing to include in one’s deliberations adequate attention to one or other of the basic goods of integral practical reason. However, the last intermediate principle considered above—‘do not choose directly against a basic value’—is arguably the most egregious departure from integral practical reason. This is so because violation of *this* intermediate principle, involves not just neglect or diminished attention to one or more basic goods, but refers to situations where instantiations of basic goods are purposely damaged or destroyed.

Given Finnis’ suggestion that ‘killing a man’ can—as he contends with respect to the hostage case just described—be a paradigm case of impermissible damage to a basic good, it is appropriate to consider how Finnis distinguishes between ‘killing a man’ in a manner that constitutes a direct attack on the basic good of life, and when it does not. As Finnis regularly highlights, his theory of basic goods cannot absolutely prohibit causing all damage to basic goods. “Every choice and action has some more or less immediate or remote negative impact—in some way tends to destroy, damage, or impede —some instantiations(s) of basic human goods. . .”¹²⁵ The unpredictable nature and complexity of human motivations, actions and circumstances of the physical world often conspire to bring forth negative consequences from even one’s most well intentioned actions. So, Finnis observes, “one can never avoid *harming* some instances of human goods.”¹²⁶ Accordingly, Finnis posits that it would be irrational to propose as an intermediate practical principle: “Do not cause harm even as a side effect.”¹²⁷

¹²² *Id.* at 123.

¹²³ *Id.* For further discussion of an act which is nothing other than, in and of itself, an act of damaging a basic good which is one basis for distinguishing murder from permissible killing, *See Id.* at 122-124.

¹²⁴ *Id.* at 123.

¹²⁵ FINNIS, *supra* note 103, at 71.

¹²⁶ *Id.* “Since it is inevitable that here will be some such harm, it cannot be excluded by reason’s norms of action. For moral norms exclude irrationality, . . . but they do not exclude accepting the inevitable limits we face as rational agents.”

¹²⁷ *Id.* at 71.

3. INTENTION AND CHOICE

It is now possible, at this point in the analysis, to inquire more deeply into Finnis' account of choice discussed above.¹²⁸ Considerations in that earlier section clarified that choice is always a selection between incommensurable alternatives of basic goods made intelligible through deliberation, which selection is settled only by the very choice itself¹²⁹ Finnis' more developed account of choice, however, explicitly includes a description of the essential role played by *intention*:

Moral analysis, rightly employed, uses a . . . precise and stable conception of intention. This conception is tightly linked to the moral significance of choice. To choose is essentially to *adopt a plan or proposal* that one has devised and put to oneself in one's practical reasoning and deliberation on the merits of alternative options, that is, plans or proposals. Whatever, then, is included within one's chosen plan or proposal, whether as its end or as a means to that end, is *intended*, that is, is included within one's intention(s).¹³⁰

To have an 'intention' has to two-fold character. First it requires a person to set one's volitional "sight," so to speak, o a volitionally desired object as to-be-pursued (grasped by practical reason as 'an end' arose' or 'good' because it instantiates a basic good);¹³¹ and, second, an intention requires a person also to select the preferred means that he believes will lead to achieving that end, which means is grasped as good for that very reason. This proposal, a 'means-end' complex, provides practical reason with its intelligible form constituting, with the accompanying volitional act, one's choice, i.e., the bringing about of 'what is-to-be'.

Based on the description above about what makes voluntarily damaging a basic good morally wrong, it naturally follows for Finnis that that one should never *intend and*

¹²⁸ See *supra* § II.A., note 60 and accompanying text.

¹²⁹ See *supra* note 69 and accompanying text.

¹³⁰ CE Vol. II, *supra* note 3, at 143. Elsewhere he develops the same idea in more precise, technical language:

The conception of intention used in moral and legal reasoning, properly understood, is tightly linked to [a] sense . . . of 'desire' precisely because it is linked to the moral significance of *choice*. To choose, in the relevantly rich sense of 'choice,' is essentially to *adopt a plan or proposal* which one has put to oneself in one's practical reasoning and deliberation on the merits of alternative options, that is, of alternative plans or proposals which one see some reason to adopt, this is, understands as desirable. Whatever, then, is included within one chosen plan or proposal, whether as its end or as a means to that end, is *intended*, that is included within one's intention(s). What one does is done 'with intent to X' (or: 'with intent that X') if X is a state of affairs which is *part of one's plan* either as its end (or a part of its end, or one of its ends) or as a means.

Id. at 176.

¹³¹ See *supra* notes 13-16 and accompanying text.

choose the causing of harm to an instantiation of a basic good; or as he phrases it 'do not choose directly against a basic value.' In the context of 'man-killing' he describes the proscription as: "do not intend harm to a human being, either as an end or a means."¹³² Returning to that hostage scenario, the intention, proposal, or plan of the killer (the co-hostage murderer) is clear. First, the 'end' is the intelligible, desirable good of obtaining release for himself and other hostages; second, the 'means' is his 'killing a man' (the hostage-taker has made it clear that the hostage must be made dead not just injured). Here, the basic good of life participated by and instantiated in the victim's existence is utterly, completely and intentionally annihilated by the killer. This is a clear example of a violation of the intermediate principle at issue; and, through the self-determination of character formed by one's choices, the co-hostage makes himself into a man-killer.¹³³

3.1. INTENTION, CHOICE AND SIDE EFFECTS

But what about situations when a person has a plan or proposal that does not include 'killing a man,' the conduct is intentionally chosen entirely for other reasons. At the same time, however, the conduct *does* have 'killing a man' as a foreseeable result, perhaps even with substantial certainty? Finnis is emphatic that such consequences, playing no role in one's plan or proposal, are not intended:

[S]tates of affairs which are connected, perhaps even very closely and directly, with the carrying out and the outcome of one's action, but which are neither needed nor wanted as part of one's way of bringing about what one proposes to do and bring about, are unintended effects, *side effects*. Though they are caused by one's choice and action, they are not chosen, that is, are not intended, even if they are foreseen (even foreseen as certain). Rather they are permitted, that is . . . *accepted*.¹³⁴

In support of this claim, he provides two stark hypotheticals illustrating his position: "The first is the blowing up of an aircraft in flight in order to collect the cargo or hull insurance, thereby killing the pilot; this it is said is a clear case of . . . intending to kill." Finnis' response is sobering:

¹³² FINNIS, *supra* note 103, at 71.

¹³³ For further elaboration of this point, see Lyons, *In Incognito: The Principle of Double Effect in American Constitutional Law*, *supra* note 6, at 469, 496, 498.

¹³⁴ FINNIS, *supra* note 103, at 70-71.

It is in no sense a case of intending to kill, intention to ill, or intent to kill [T]he bomb's effects on the pilot, . . . are not intended. For they are no part of the accused's end or means as these figure in the proposal he adopted by choosing to blow up the plane. They are side effects in the morally relevant sense.¹³⁵

He adds a second aircraft example:

Terrorists hijack a plane. One of them is carrying a timing device primed to detonate a bomb in a city; the instrument can be destroyed only by free-fall from a great height. The terrorist's call for a parachute to be prepared, so that the woman among them can exit during the flight. The steward selects two parachutes and cuts off the ripcord of one of them, planning (a) to give over the dud parachute if the exiting terrorist is carrying the timing device, but (b) *to give over the good parachute* if she is not; the steward's concern is that the timing device be destroyed. . . . [T]he terrorist who asks for the parachute is carrying the device, so she is given the dud chute and falls to her death.¹³⁶

Finnis concludes “[M]y story’s steward . . . manifestly did not intend to kill the terrorist, though he foresaw and accepted that his own choice would certainly bring about her death. Her free-fall and death are side effects of the steward’s plan to destroy the timing device.”¹³⁷

In both these examples, the death cause played no role in the specific proposal of the plotters or the stewards as an end or means. As one scholar comments in this context “[T]he harm . . . is not part of the proposal I adopt by choice; although the physical action of harming . . . is included in my physical act . . . , bringing about this harm is not a reason for action (either intrinsic or instrumental).”¹³⁸ Unlike the death in the hostage example, which itself is chosen as the precise means to promised release, *deaths* of the pilot and the hijacker-terrorist play no role in the plans or proposals of those causing these killings. The deaths are unintended, foreseeable consequences of doing what they are intentionally doing.

Here, two points require further clarification:

¹³⁵ CE Vol. II, *supra* note 3, at 184. Finnis appends to this conclusion a semantic note: “One must immediately add, however, that by a nuance of our language, it is a case in which the accused cannot be said to have killed *unintentionally*—for ‘unintentionally’ connotes accident or mistake or lack of foresight.” Adopting this awkward linguistic usage—without changing any of the foregoing analysis—it could consistently be said, that though the killing was not intended, it was not *unintentional* because it was not an accident, or mistake, or due to a lack of foresight—”. *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Patrick Lee, *Distinguishing Between What is Intended and Foreseen Side Effects* 62 AM. J. JURIS. 231, 234 (2017).

3.2. INTENTION AND 'SUBSTANTIAL CERTAINTY'

First, for those trained in common law, it may prove difficult to discard the view that intent is established if the actor causes an unlawful effect with "substantial certainty." The Restatement (Second) of Torts, for example, provides, "The word "intent" is used throughout the Restatement of [Torts] to denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it" (emphasis added).¹³⁹

In Commentary to this section, the Restatement drafters clearly concede that defining "substantial certainty" as intent is pure legal fiction:

All consequences which the actor desires to bring about are intended, as the word is used in this Restatement. Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, the law treats him as if he had in fact desired to produce the result (emphasis added).¹⁴⁰

But treating 'substantial certainty' as if it were intent, the drafters in principle acknowledge a clear distinction between the volitional desire (*intent*) to achieve some end and the knowledge that such a result will occur. Whatever practical rationales may exist for defining intent so expansively (e.g., evidentiary considerations),¹⁴¹ this fiction does not comport with the properly philosophical understanding of 'intent' as described by Finnis above.¹⁴²

3.3. SIDE EFFECTS AND CULPABILITY

Second, by concluding the two aircraft hypotheticals with the assertion that the deaths caused are not intended, Finnis does not mean to suggest that the actors are not culpable and have no moral or legal responsibility for causing those side effects. On the contrary, he states: "Certainly one has moral responsibility for what one thus knowingly and "deliberately" causes or brings about. But that responsibility is not the same as one's

¹³⁹ Restatement (Second) of Torts, § 8A (Am. Law Inst., 1965).

¹⁴⁰ *Id.*, § 8A cmt. b.

¹⁴¹ Lyons, *In Incognito: The Principle of Double Effect in American Constitutional Law*, *supra* note 6, at 518-525.

¹⁴² Restatement (Third) of Torts, Phys. & Emot. Harm § 1 (Am. Law Inst., 2010) follows the same pattern, although it replaces the 'desire to cause the consequences' to 'acts with the purpose of producing that consequence.' A person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result.

responsibility for what one chooses (intends) as part (whether as end or means) of one's proposal.¹⁴³ In short, Finnis recognizes that asserting that a result was not intended, may, as J.L. Austin warned about excuses, only get one "out of the fire into the frying pan."¹⁴⁴

In such cases, however, the wrongfulness, if it is wrongful, of causing the side effect, does not have superadded to it the same moral blameworthiness as it would had the harm been caused intentionally. Though the actor may be culpable because he or she caused an unintended side effect, she was not the type of person that brought that effect about because she *wanted and chose it*, i.e., intended it.

Before considering in more detail the morality of unintended but foreseeable deaths caused in the aircraft hypotheticals, it will be useful to consider two real-life situations in which Finnis believes that causing foreseen killings as side effects of action carries no moral culpability.

3.3.1. MORALLY ACCEPTABLE SIDE EFFECTS

3.3.1.1. SELF-DEFENSE

Finnis' account of self-defense, generally coincides with the general pattern of the defense proposed by Thomas Aquinas (1225-1274) and thus is informed by what has come to be known as the 'Principle of Double Effect.'¹⁴⁵ (PDE) As seen in the following excerpt from Aquinas' *locus classicus* for PDE, the justification for the morality of causing death in the case of defending oneself is rooted in the very distinction between intent and side effects adopted by Finnis.¹⁴⁶ Prior to consideration of Aquinas' text, however, it is necessary to note that he maintained that it was always impermissible for a private individual *to intend* the death of another person, unless sanctioned by the state. "[I]t is not lawful for a man to intend killing a man in self-defense, except for such as have public authority."¹⁴⁷

In his *Summa Theologiae*, Aquinas proposes that one act can have two effects: one effect is intended and the other not intended. As long as there is a reasonable proportion between the good objective (i.e., the focus of the actor's intent and choice) and the

¹⁴³ Killing of FINNIS, *supra* note 103, at 71.

¹⁴⁴ J.L. Austin, *A Plea for Excuses*, 57 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 13 (1957).

¹⁴⁵ See Lyons, *In Incognito: The Principle of Double Effect in American Constitutional Law*, *supra* note 6, at 482-484; For a comprehensive review of the PDE covering its understanding, application, and history see CAVANAUGH, *supra* note 6.

¹⁴⁶ See *supra* § III.A.1., note 135 and accompanying text.

¹⁴⁷ "Illicitum est quod homo intendat occidere hominem ut seipsum defendat, nisi ei qui habet publicam auctoritatem." THOMAS AQUINAS, *SUMMA THEOLOGIAE* II-II, q. 64, art. 7. corp. (Fathers of the English Dominican Province trans., Benziger 1911) (1265-73).

unintended side effect, (usually some form of foreseeable harm), the requirements of morality are satisfied and causing the unintended side effect(s) is justified:

It is to be stated that nothing prevents there from being two effects of one act, of which only one is in intention [*in intentione*] and the other outside intention [*praeter intentionem*]. Moral acts, however, receive their character from what is intended and not from what is outside of intention. . . . From the act of defending oneself, therefore, two effects may follow: one being preservation of one's life and the other the killing of an attacker. Now an act of this type, insofar as the preservation of one's own life is intended, is not illicit since it is natural for every being to keep itself alive to the extent possible It is not necessary . . . that a man refrain from carrying out a measured act of defense to avoid the killing of another. A person has a greater obligation to provide for his own life than for that of another.¹⁴⁸

Thus, for Aquinas, causing the "death of the attacker" plays no part in the agent's intention when properly acting in self-defense.¹⁴⁹ The victim does not *ipso facto* "intend" to kill just because he can keep himself alive only by engaging in conduct to stop the attacker that is so forceful that it also has the foreseen effect of causing the attacker's death. In such instance, the actor's conduct is permissible and justified precisely because the death resulting from repelling the attack is unintended, and the intention to protect one's life is a significant enough good to justify conduct that causes the foreseeable death of the attacker as an unintended side effect.

As Finnis summarizes all this:

Aquinas denies that one who is defending himself may rightly intend the death of his assailant, even as a means of self-defense, though one may, if necessary, adopt a means of self-defense, which one knows will cause death as an unintended side effect. Quite a few in the tradition have disagreed, but many have agreed, as I do.¹⁵⁰

¹⁴⁸ *Id.* [*Dicendum quod nihil prohibet unius actus esse duos effectus, quorum alter solum sit in intentione, alius vero sit praeter intentionem. Morales autem actus recipiunt speciem secundum id quod intenditur, non autem ab eo quod est praeter intentionem. . . . Ex actu igitur alicuius seipsum defendentis duplex effectus sequipotes: unus quidem conservatio propriae vitae; alius autem occisio invadentis. Actus igitur huiusmodi ex hoc quod intenditur conservatio propriae vitae, non habet rationem illiciti: cum hoc sit cuilibet naturale quod se conservet in esse quantum potest. . . . Nec est necessarium . . . ut homo actum moderatae tutelae praetermittat ad evitandum occisionem alterius, quia plus tenetur homo vitae sua eprovidere quam vitae aliena.*]

¹⁴⁹ Of course it is often possible, or even probable, that some persons do in self-defense intend the death of an assailant. This, as indicated above, *see supra* note 148, Aquinas excludes as always illicit. For Finnis of course, intending the death of any person would always be proscribed by the intermediate principle, "Do not choose directly against a basic value." *See supra* note 125 and accompanying text.

¹⁵⁰ FINNIS, *supra* note 103, at 78.

3.3.1.2. KILLING OF NON-COMBATANTS IN ARMED CONFLICT

Given the pervasive inflow of televised battlefield reportage, it is a commonly known fact that military adversaries often place assets of military value near, or embedded in, non-combatant populations. In situations of military conflict, opposing forces may attempt to destroy such facilities, often through aerial bombing. This has led to some countries efforts to limit, as far as possible, such ‘collateral damage.’ This concept has been defined as, “Unintentional or incidental injury or damage to persons or objects that would not be lawful military targets . . . Such damage is not unlawful so long as it is not excessive in light of the overall military advantage anticipated from the attack.”¹⁵¹ One author describes the thinking about “not unlawful” collateral damage as follows:

In this scenario of foreseen, but unintentional killing, the military has set a certain level of acceptable risk for collateral damage death or injury. Attempts to reduce the number of civilians harmed will be made. But the operation may be allowed to proceed on the judgment that the civilian losses are justified in light of the value of the military objective . . . and that there was no other way to be effective¹⁵²

In general, this example of restrained tactical bombing follows the general pattern of lawful self-defense described in the preceding section. Military air command determines that destruction of some military installation is reasonably necessary in light of its goal of victory against its opponents. The intention is not to damage the lives of surrounding civilians, but only to destroy the enemy’s war-making power. Assuming there is a truthful balancing of harm between the good intended (the value of the destruction of enemy facilities) and the unintended harm (damage and injury to civilians), generally the damage to civilians (even death), if necessary to the achieving a serious legitimate military goal, has been regarded as morally ‘justified.’

Thus, both in self-defense and this type of restricted tactical bombing scenario there need be no intent to bring about the death of the assailant, in the first, and the civilians, in the second. What is intended is whatever force is necessary to stop the attack or destroy the military facility. Although the death of the assailant, on the one hand, and the death of innocent civilians, on the other, may be risked or foreseen, and perchance foreseen with substantial certainty, those deaths need play no part in the practical reasoning of the actor, but may reasonably be regarded, though tragic, as unintended foreseeable side effects of the action they did intend. It follows, of course,

¹⁵¹ NETA C. CRAWFORD, ACCOUNTABILITY FOR KILLING: MORAL RESPONSIBILITY FOR COLLATERAL DAMAGE IN AMERICA’S POST 9/11 WARS 16-17 (2013) (citing U.S. AIR FORCE, TARGETING: AIR FORCE DOCTRINE DOCUMENT 2-1.9, at 113 (2006)).

¹⁵² *Id.* at 19-20.

that military operations such as *strategic* bombing—where massive deaths of civilians and demoralization of the enemy, are chosen precisely as the intended means to victory—would not be justified under either Aquinas' or Finnis' application of PDE.¹⁵³

3.3.2. MORALLY UNACCEPTABLE SIDE EFFECTS?

Returning to the two aircraft examples of unintended causing of death described by Finnis above,¹⁵⁴ It is appropriate to consider whether similar exculpatory conclusions can be reached regarding the deaths caused in these other scenarios.

With respect to the first hypothetical—in which the pilot was killed as a side effect of a bomber blowing up an aircraft in order to collect insurance on it—Finnis states very clearly, “[T]he pilot killed by the cargo bombers . . . is treated with gross injustice.”¹⁵⁵ Relating this wrong back to the intermediate principles of practical reason, he explains that the bomber violates the second intermediate principle proscribing “arbitrary preferences amongst persons.”¹⁵⁶ Finnis observes, “[T]he bomber violates the Golden Rule since he would not wish his own life to be thus willfully destroyed by others acting not pursuant to any moral responsibility (for example, of defense of self or others) but to desire for gain.”¹⁵⁷ By rejecting practical reason's grasp of another's basic good of life as similar to one's own—and shared equally by oneself and the other—the cargo bomber acts unfairly in willingly¹⁵⁸, if not intentionally, causing the foreseen destruction of the other's (the pilot's) basic good of life.

In further elaborating the injustice done to the cargo pilot, Finnis adds “his life is simply treated as if it were of less value than the insurance money gained by the

¹⁵³ Consider Finnis' comments on the bombing of Hiroshima:

[T]he reason for selecting Hiroshima for atomic attack was not that its modest military installation challenged the US or its forces It was rather that Hiroshima met the requirement that some Japanese city be destroyed, without warning, by an attack designed to maximize the shock of destruction of people and structures, and so overcome Japanese willingness to continue the war The morally significant intent of those who planned and ordered the operation against Hiroshima was not merely to destroy the military target but rather to destroy the city and many of its inhabitants.

NUCLEAR DETERRENCE, *supra* note 3, at 93.

¹⁵⁴ See *supra* § III.3.A.1, notes 136-139 and accompanying text.

¹⁵⁵ CE Vol. II, *supra* note 3, at 184.

¹⁵⁶ See *supra* notes 110-114 and accompanying text.

¹⁵⁷ CE Vol. II, *supra* note 3, at 184. Here Finnis tacitly concedes that at times an actor can and must recognize the rights of others to interfere with one's own pursuit of basic goods.

¹⁵⁸ Finnis uses 'willfully' here in the same sense as “not unintentionally” which he uses to mean unintended, but not the result of accident, mistake, or lack of foresight. “By another nuance of our language, is it also a case, I think, of ‘willfully’ killing—for ‘willfully’, to my ear, means not unintentionally. *Id.* See *supra* note 135.

bomber.”¹⁵⁹ Here, his language suggests that he sees the cargo bomber’s conduct as also violating the intermediate principle proscribing “arbitrary preferences amongst values.”¹⁶⁰ As noted in prior discussion of this principle, Finnis writes, “[T]here must be no leaving out of account, or arbitrary discounting or exaggeration, of any of the basic human values.”¹⁶¹ The cargo bomber’s preference, however, for a mere instrumental good, i.e., money, (perhaps desired as a means to enhance his own basic good of life) entirely disregards the value of the pilot’s basic good of life. As noted in discussion of this principle above, it is unreasonable to pursue one basic good to the total exclusion of other basic goods. Knowingly, even if not intentionally, causing destruction of an instantiation of the basic good of life as a side effect, without proper justification is not justified. To cause as a side effect, the complete destruction of another’s participation in the basic good of life, for the sake of an intentional choice of a limited instrumental good, e.g., money, could never be rationally justified by the directiveness of practical reason toward all the basic goods.

Turning to the second aircraft hypothetical—where the steward gives a disabled parachute to the bomb-laden hijacker-terrorist foreseeing that she would fall to certain death—Finnis states without elaboration, “the steward’s treatment of the hijacker-terrorist “does the terrorist no injustice; one going about to kill others is not treated unfairly by lethal counter measures.”¹⁶² Here Finnis is clearly referring to the exculpatory analyses illustrated in the self-defense and tactical-bombing situations presented above.¹⁶³ Under that analysis, following Aquinas, a person unjustly subject to a threat of death or serious harm by another may act to protect themselves by using force, even deadly force to stop the threat. Without entailing any intention on the part of the actor to kill, the actor’s efforts and the force required to ‘terminate the threat,’ may permissibly cause, understood as a side effect, the death of the person(s) creating the threat.

Finnis’ conclusion then proposes that the steward, who disabled the parachute thus causing the female terrorist’s foreseen death is guiltless of any moral fault. The steward’s actions are entirely justified by the threat posed by the hijacker, and the intended protection of threatened persons. The cargo bomber, of course, has no such defense.

¹⁵⁹ CE Vol. II, *supra* note 3, at 186.

¹⁶⁰ See *supra* notes 107-115 and accompanying text.

¹⁶¹ See *supra* note 110 and accompanying text.

¹⁶² CE Vol. II, *supra* note 3, at 186.

¹⁶³ See *supra* § III.A.3.a, notes 149-153 and accompanying text.

3.3.2.1. LEGAL PENALTY FOR CAUSING FINNIS' MORALLY UNACCEPTABLE, UNINTENDED SIDE EFFECTS

So what is the appropriate treatment for the bomber in this situation? Finnis does not hesitate to assign him the highest form of criminal liability, i.e., murder. He, however, notes a problem given the limited and restricted categories available to his prosecutors in homicide cases:

In a legal system which divides all criminal homicide into two sharply distinguished categories—murder and manslaughter—ranked in gravity, it is easy to sympathize with the pressure to assign the cargo bomber to the more serious category, notwithstanding that the categorization centres on the distinction between the intended and the non-intended but reckless or culpably negligent causing of death, that that the cargo bomber's killing is not a case of intending to cause death.¹⁶⁴

Finnis here clearly expresses dissatisfaction with his envisioned options for legal prosecution of the cargo-bomber. Although the pilot's death for Finnis, is—strictly understood—an unintended, albeit foreseen, side effect, no justification exists for the cargo-bomber's willingly¹⁶⁵ causing that death. As seen in both the self-defense and tactical-bombing situations, proportionate goods were intended that balanced and justified the unintended causing of deaths in those scenarios. The cargo-bomber's killing of the pilot, however, is not similarly justified. Accordingly, Finnis does not hesitate to assert that the cargo-bomber is deserving of conviction for homicide at the highest level of culpability and punishment, i.e., murder.

Finnis' prosecutor, however, has only one type of homicide that can be prosecuted for murder: intentional homicide. Therefore,—because the pilot's death was, *ex hypothesi*, not intended—the cargo-bomber cannot be charged with murder. The only options, then, that remain for Finnis' prosecutor are, manslaughter for recklessness, or the third level of homicide for criminal negligence. None of these, however, satisfy Finnis given the “pressure” to mete out a proper punishment due the egregious nature of the cargo-bomber's conduct.

In response to this dissatisfaction, Finnis proposes as an alternative: “[T]he clear headed way of acceding to this pressure is, I suggest to broaden the definition of murder to include not only (a) killing with intent to kill but also (b) doing without lawful justification or excuse an act which one is sure will kill.”¹⁶⁶ Of course, the option of a

¹⁶⁴ CE Vol. II, *supra* note 3, at 185.

¹⁶⁵ For Finnis' use of 'willingly' as including 'not intended' see *supra* note 158.

¹⁶⁶ CE Vol. II, *supra* note 3, at 185.

murder prosecution under section (b) of Finnis' proposed statute would apply to the cargo-bomber. In view of his unlawful act of blowing up the aircraft for money, knowing the pilot would indubitably perish. The cargo-bomber would have no justification or excuse defense. The aircraft-steward on the other hand, if charged with murder, would presumably be entitled to the 'defense of others' justification defense.

Finnis' plight, however, would be fully resolved by the Model Penal Code sections dealing with murder, and its corresponding grades and definitions.¹⁶⁷ MPC § 210 begins with a general definition of homicide: "Criminal Homicide. (1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being." Subsection (2) adds "Criminal homicide is murder, manslaughter, or negligent homicide." This, of course, is generally consistent with Finnis' account of homicide stated above, where the options are murder, manslaughter, or negligent homicide. The advantage of the MPC provisions, however, is found in its specification of multiple culpability states of mind (*mens rea*) sufficient for indictment and conviction for murder. § 210.2. Murder provides:

(1) Criminal homicide constitutes murder when:

(a) it is committed purposely or knowingly; or

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life.

The crucial issues, of course, relate to how the MPC defines its terms. The relevant definition of "knowingly" applicable to the MPC provides:

§2.02.(b) Knowingly

A person acts knowingly with respect to a material element of an offense when: (ii) if the element involves a result of his conduct, *he is aware that it is practically certain that his conduct will cause such a result* (emphasis added).¹⁶⁸

In short, the MPC murder provision solves all of Finnis' concerns. It would appear, for example that a prosecutor could proceed, confident of conviction, directly against the Cargo-bomber for murder under § 210.2.(1)(a) 'knowingly' prong.

The preceding section has illustrated that Finnis' account of intention and side effects does not do away with culpability for side effects, in fact he clearly indicates that punishment, even punishment for murders brought about as foreseen side effects, can be appropriate. "[O]ne who inflicts death, even as a side effect, in order to effect such an instrumentalization of another has in the fullest sense, 'no excuse' for thus knowingly

¹⁶⁷ See Model Penal Code, §2.02 and §210.2 (Am. Law Inst, 1985).

¹⁶⁸ *Id.*, §2.02.

causing death. We should not complain if both law and common moral thought treat this as murder.”¹⁶⁹

At the same time, however, Finnis cautions that—while it may be appropriate to treat unintended, but unfairly accepted foreseen deaths as *murder*—this should not be an occasion to warp the authentic and philosophically correct concept of ‘intent.’ The cargo bomber’s knowledge that the pilot’s death would follow with practical certainty, though a valid basis for a murder charge in that case, does not make, and should not be understood to imply, that such knowledge is in reality a form of intent. As Finnis writes, referring to situations where “knowingly” will support a murder conviction: “[N]or should we distort our understanding of intention so as to bring this within the category of murder supposed, too casually, to be limited to *intent* to kill (or seriously harm).”¹⁷⁰ Thus, while accepting in principle any definition of murder, like the MPC’s, as able to be committed either “purposely or knowingly,” Finnis seeks to emphasize that they are not one and the same and should not be conflated.

4. OVERVIEW

The foregoing sections of this article have elaborated central facets of Finnis’ natural law theory. To recap, Finnis proposes that human life is, among others, a basic good of practical reason, and thus can never be intentionally damaged or destroyed. To do so would generate cognitive schizophrenia, pitting a person against his own natural inclinations and first principles of action, which in their integral directiveness establish the experience of ‘moral ought.’ His theory of intention and choice highlights the importance of a meticulously precise understanding of intentions as bearing on one’s rationally and freely chosen ends and means. By means of forming intentions, i.e., the integral parts of their plans or proposals adopted by choice, actors reflexively determine their own moral character.

At the same time, as a corollary to these previous insights, Finnis clarifies the often overlooked role played in moral philosophy by side effects, i.e., consequences of choices and actions that are not intended but which are often foreseen with greater or lesser certitude. Finnis, unsurprisingly, does not approve of every harmful action simply because its bad consequences may be unintended. Rather, given the complexity of human life, with its threats and dangers, he offers a resolution to the dilemma that would

¹⁶⁹ CE Vol. II, *supra* note 3, at 194.

¹⁷⁰ *Id.*

be created by prohibiting any and all damage to basic goods, a human impossibility. He proposes an equitable resolution to any such absolutist norm. Causing evil, even death of another person, may at times, permissibly be caused as a foreseen or foreseeable side effect, i.e., when the death itself does not play any role in an actor's plans or purpose; when the actor does not choose the death as an end or a means. Following Aquinas, he adds the requirement that there must be a reasonable proportion between the good intended and the unintended evil caused; reflection must be given to the intended good of the action weighed against the seriousness of the unintended harm brought about.

5. CONDITIONAL INTENTIONS

In this concluding part of the present article, consideration will be given to Finnis' account of "conditional intentions." He elaborates this concept in reference to two pivotal English spring-gun cases noted in the Introduction: *Ilott v. Wilkes* (King's Bench 1820)¹⁷¹ and its progeny *Bird v. Holbrook* (Court of Common Pleas 1828).¹⁷² Both examine claims brought with respect to the controversial use of these potentially lethal "man-traps" set to deter would-be trespassers.

As will become clear in the ensuing reflections, Finnis contends that an actor who engages in this sort of defensive practice is, albeit conditionally, just *intending*, i.e., *choosing directly against a basic good*, in causing trespassers to be shot and either killed or severely wounded. Finnis contends that even if the landowner has no desire to harm (in fact there may be a desire not to harm), the harm if it should occur would be intended, conditionally, on the part of the actor.

Finnis describes the practice at issue in the following manner:

The typical mantrap was in fact a spring gun: a heavily loaded shot-gun, its trigger attached to springs and wires arranged in hidden lines along which the blast of shot would travel when anybody tripped them. Typically, such guns were set in woods and gardens to deter, disable, and punish persons who under the law of the day were no more than trespassers.¹⁷³

Sustained discussion of this issue is found in his *Intention in Tort Law* essay, and commences with allusion to Justice Holmes' comments in the well-known 1922 "attractive nuisance"

¹⁷¹ (1820) 106 E. R. 674 (K.B.) (U.K.).

¹⁷² (1828) 130 E. R. 911 (C.P.) (U.K.).

¹⁷³ *Id.*

case, *United Zinc Chemical Co. v Britt*.¹⁷⁴ In *Britt*, contrasting situations where adults, rather than children, are injured upon trespass, Holmes wrote, “If the children had been adults they would have had no case. They would have been trespassers and the owner of the land would have owed no duty to remove even hidden danger; it would have been entitled to assume that they would obey the law and not trespass.”¹⁷⁵ If, however, the landowner prepares a hidden trap for the trespasser, Holmes notes the difference: “The liability for spring guns and mantraps arises from the fact that the defendant has . . . expected the trespasser and prepared an injury that is no more justified than if he had held the gun and fired it.”¹⁷⁶

5.1. NUTS, TULIPS, PEACOCKS, AND SHOTGUNS

Finnis’ discussion, however, immediately turns to consideration of the important English tort case decided just over 100 years before *United Zinc*.

5.1.1. *ILOTT V. WILKES* CLASHES OVER INTENT: CONDITIONAL OR OTHERWISE

In this case, the plaintiff Ilott trespassed during daylight hours with a companion onto defendant Wilkes’ 50 to 60 acre private wood.¹⁷⁷ Their purpose was to gather nuts. The private wood was situated along a public way, and Wilkes had placed nine or ten spring guns at various hidden locations on his property concealed by trip wires.¹⁷⁸ In addition, “[s]everal boards were affixed, containing notice to the public that such instruments were so placed.”¹⁷⁹ Ilott’s companion specifically warned him about the presence of the guns, and refused to enter unless Ilott proceeded first. They entered onto the property and Ilott was injured when he tread upon a wire connected to one of the spring-guns.¹⁸⁰ At the end of trial in this case, the judges unanimously rejected plaintiff Ilott’s arguments, and found that no action could be maintained against defendant landowner Wilkes.

¹⁷⁴ *United Zinc. & Chemical Co. v Britt*, 258 U.S. 268 (1922).

¹⁷⁵ *Id.* at 275.

¹⁷⁶ *Id.*

¹⁷⁷ (1820) 106 E.R. 674 (K.B.) (U.K.).

¹⁷⁸ “Defendant . . . had set a certain spring-gun charged with gun-powder and leaden shot, in a certain part of said wood and premises, near those parts over which the right of way extended, with a certain wire communicating with the lock and other parts of the said spring-gun by the treading on or touching of which wire, the said gun could be let off and fired” *Id.* at 675.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

In his article, *Intention in Tort Law*,¹⁸¹ Finnis provides a critique of the various judges' opinions in *lloft*. He introduces his discussion, however, with consideration of some contemporaneous editorial comments on the case offered by Sydney Smith,¹⁸² a popular 19th century English editorialist. Smith's comments along with Finnis' added emphasis set the tone and nicely encapsulate Finnis' critique of the *lloft* opinion:

I do not say that the setter of the trap or gun allures the trespasser into it; but I say that the punishment he *intends* for the man who trespasses after notice is death. He covers his spring gun with furze and heath, and gives it the most natural appearance he can, and in that gun he places slugs by which he means to kill the trespasser. The killing of an unchallenged, unresisting person, I really cannot help considering to be as much murder as if the proprietor had shot the trespasser with his gun . . . Does it [matter] whose hand or whose foot pulls the string which moves the trigger?—the real murderer is he who *prepares* the instrument of death, and places it in a position that such hand or foot may touch it, *for the purposes of destruction*.”¹⁸³

Finnis, fully endorsing Smith's editorial opinion, restates it in the following way

Put strictly in the language of intent, . . . just as personally shooting a trespasser engaged in no act or threat of violence is simply killing or wounding with intent to kill or wound. So too setting a spring gun involves intending (conditionally but really) to do the same 'without firing the shot.' And what one cannot, lawfully, with intent, accomplish 'directly' (in person) one cannot, with the same intent, accomplish 'indirectly' (mechanically) (emphasis added).¹⁸⁴

Thus, Finnis summarizes in one short paragraph the argument that, as he states, “was in fact put squarely by the plaintiff's counsel . . . and unanimously rejected by four well-regarded judges of the Court of King's Bench. Expressly contrary, however, to Finnis' contention that Wilkes had a conditional intention to kill or seriously injure trespassers, the judges of the court unanimously held that *lloft's* injury was not caused

¹⁸¹ See, e.g., Finnis, *supra* note 2.

¹⁸² See, e.g., “Sydney Smith, (born June 3, 1771, Woodford, Essex, Eng.—died Feb. 22, 1845, London), one of the foremost English preachers of his day, and a champion of parliamentary reform. . . . Smith was also famous for his wit and charm.” *Sydney Smith*, ENCYCLOPEDIA BRITANNICA <https://www.britannica.com/biography/Sydney-Smith>.

¹⁸³ Finnis, *Intention in Tort Law*, *supra* note 2, at 230-231.

¹⁸⁴ *Id.* at 231.

intentionally by Wilkes, and therefore *Ilott* could maintain no legal action against Wilkes for his injury.¹⁸⁵

Based on various aspects of Finnis theory of intent and choice considered above, and based on various statements of the judges in *Ilott* and its progeny *Bird v. Holbrook*,¹⁸⁶ good reasons support the conclusion that Finnis simply begs the question when he concludes—as in the quote above—that a person who sets a spring gun necessarily intends to kill conditionally, i.e., *if* a trespasser should disregard warnings and enter. In order to draw out reasons in support of this conclusion, it will be necessary to consider the actual reasoning found in the judges' opinions.

In the opening paragraphs of *Ilott*, a short opinion authored by Chief Justice Abbott, the judge first notes that the case does not require the court to decide “whether a trespasser sustaining an injury from a latent engine of mischief, placed in a wood or in grounds where he had no reason to apprehend personal danger, may or may not maintain an action.”¹⁸⁷ While Abbott expresses his belief that the use of such engines is inhumane, he nevertheless adds, “at the same time I cannot but admit that repeated and increasing acts of aggression to property may perhaps reasonably call for increased means of defense and protection.”¹⁸⁸

After this introductory remark, Abbott proposes:

I believe that many persons who cause engines of this description to be placed on their grounds do not do so with the intention of injuring any one, but really believe that the notices they give of such engines being there, will prevent any injury from occurring, and that no person who sees the notice will be weak and foolish enough to expose himself to the perilous consequence likely to ensue from his trespass.¹⁸⁹

In response to this judicial finding of no intent, Finnis counters: “The fallacies about intention are in each case clear enough . . . [U]nless he was supposing a high degree of ignorance or self-deception about the frequent ‘accidents’ involving spring guns, [Abbott] clearly confuses intending with *hoping*.”¹⁹⁰ Here Finnis suggests that Abbott erroneously believed that when landowners set spring guns they subjectively *hoped* that

¹⁸⁵ See, e.g., Abbott’s concluding sentence and final holding: “I am of the opinion that this action cannot be maintained.” *Ilott* at 677.

¹⁸⁶ See (1828) 130 E.R. 911 (C.P.) (U.K.).

¹⁸⁷ This question was not in play, because *Ilott*, as noted in the recitation of facts, was on actual notice that guns were placed on the property. The question, however, was decided in *Bird v. Holbrook* eight years after *Ilott*. As will be shown *infra* see notes 220 and 221 and accompanying text the question is relevant to the consideration of the *Ilott* holding.

¹⁸⁸ *Id.*

¹⁸⁹ *Ilott*, at 676.

¹⁹⁰ FINNIS, *Intention in Tort Law*, *supra* note 2, at 232.

no trespasser would be killed. According to Finnis, however, Abbott was wrong, and the landowners in fact intended to kill trespassers. As Finnis explains: “Landowners of this kind [Abbott] envisages may well both desire and hope that no one will trespass and thus that no one will be shot, yet they clearly do intend that those (if any) who do trespass will be shot.”¹⁹¹

Moving on to Sydney Smith’s direct comments concerning Abbott’s statements on the subject of the the landowners’ beliefs, Smith writes:

But if this be the real belief of the engineer—if he think the mere notice will keep people away—then he must think it a mere inutility that the guns should be placed at all: If he think that many will be deterred, and a few come, then he must *mean* to shoot those few. He who believes his gun will never be called upon to do its duty, need set no gun, and trust to rumour of their being set, or being loaded, for his protection He who sets a *loaded* gun *means* it should go off if it is touched.¹⁹²

Here Finnis, again approvingly adopts Smith’s logic: “Means to’ is another synonym for ‘intends to’.”¹⁹³

A few remarks regarding Smith’s comments are in order. First, Smith’s point hinges on the belief that the population of surreptitious trespassers and poachers was gullible and easily hoodwinked. Yet, these qualities are not often attributed to persons of such stealthy ilk. Presumably, if the facts played out as suggested by Smith, it would arguably not take long for the ruse to be discovered, spread by “rumour,” and the faux-deterrent rendered impotent. With respect to necessity of the placement and concealment of the guns for purposes of deterrence, Justice Bayley observes:

The [plaintiff’s] declaration states that the plaintiff had no notice of the places or of the direction in which the guns themselves were placed, or where the wires communicating with the guns were placed; but it is not necessary to give notice to the public that guns are placed in such particular spots in such particular fields; *for that would deprive the property of the intended protection*. . . . It is sufficient for a party generally to say, “There are spring guns in this wood” (emphasis added).¹⁹⁴

Here Bayley illustrates his clear understanding that it is the concealment of the guns, combined with the posting of warnings that functions as the deterrent against unlawful

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Ilott*, at 677.

entry onto the premises. The most secure way for a landowner to guarantee the efficacy of this deterrent against trespass (for whatever reason)—and dispel any public doubt about the reality of the warnings— would be to actually load and set the guns (perhaps in the presence of trustworthy citizens). Smith's and Finnis' proposed subterfuge reeks of glib cleverness exuded by upper class city gentlemen who have no gardens or fields to protect from trespass.

Of course, the principal issue before the court, as evidenced by the judges' laserlike focus on the question of intent, is whether Smith is correct when he states, 'He who sets a loaded gun means it should go off if it is touched;' and, whether Finnis, is correct in adding 'Means to' is another synonym for 'intends to'.¹⁹⁵ These statements of Smith and Finnis, however, in point of fact, appear to miss the entire object of the spring-gun deterrent as it functions in *Ilott*. This point did not escape the judges hearing the case. Justice Bayley wrote:

Such instruments may be undoubtedly placed without any intention of doing injury, and for the mere purpose of protecting property by means of terror; and it is extremely probable that the defendant in this case will feel as much regret as any man for the injury that the plaintiff has sustained.¹⁹⁶

With respect to Bayley's point here, Finnis responds that it "fails to recall that one intends not only one's ultimate ends (say, protecting one's property) but also all the means one has chosen to further those ends (say, injuring or killing poachers as a punishment, and as a deterrent to and disablement from future poaching). One chosen means are indeed, one's proximate ends."¹⁹⁷

¹⁹⁵ FINNIS, *Intention in Tort Law*, supra note 2, at 232.

¹⁹⁶ *Ilott*, at 677.

¹⁹⁷ *Id.* Here Finnis, again following Aquinas, notes that a chosen a means to some end, may itself become a proximate end, which in turn may require deliberation and choice about the means by which that intermediate end is to be achieved.

[I]ntention regards the end as a terminus of the movement of the will. Now a terminus of movement may be taken in two ways. First, the very last terminus, when the movement comes to a stop; this is the terminus of the whole movement. Secondly, some point midway, which is the beginning of one part of the movement, and the end or terminus of the other. Thus in the movement from A to C through B, C is the last terminus, while B is a terminus, but not the last. And intention can be of both. Consequently though intention is always of the end, it need not be always of the last end.

[Intentio respicit finem secundum quod est terminus motus voluntatis. In motu autem potest accipi terminus dupliciter, uno modo, ipse terminus ultimus, in quo quiescitur, qui est terminus totius motus; alio modo, aliquod medium, quod est principium unius partis motus, et finis vel terminus alterius. Sicut in motu quo itur de a in c per b, c est terminus ultimus, b autem est terminus, sed non ultimus. Et utriusque potest esse intentio. Unde etsi semper sit finis, non tamen oportet quod semper sit ultimi finis.] THOMAS AQUINAS, *SUMMA THEOLOGIAE* I-II, q. 12, art. 2. corp. (Fathers of the English Dominican Province trans., Benziger 1911) (1265-73).

Here, Finnis reveals his clearest assessment of how a landowner's practical reasoning unfolds. Apparently, as he envisions it, the landowner begins his practical deliberation with a grasp of the benefit of protecting his property from trespass, poaching, theft, etc. Then, having volitionally set that as his end, he proceeds to deliberate about means, i.e., how he can achieve that protection. At the end of this deliberative process, according to Finnis, the landowner chooses 'to kill or injure poachers' as *the means*, (i.e., punishment, deterrent and disablement of trespassers) to that end.

Finnis' conclusion here, however, openly impugns the unanimous factual findings of the court's members in *Ilott*. That the judges highlight the question of intent confirms that there was no confusion about the critical issue: whether the landowner intended to kill or injure as *a means* to protect their property. They all concluded he did not have any such intention. For Finnis of course, as explained above,¹⁹⁸ having the intention that he attributes to the landowners, to kill or injure to protect property, requires landowners to *choose* the setting of spring-guns precisely '*in order to kill or injure*' as the means to that end.¹⁹⁹ To repeat Finnis' position on intent, choice, and means:

What consequences, results, outcomes of one's choosing and doing are to be judged intended is settled simply by considering why one is doing what one is doing, counting as within the proposal one has adopted by choice, everything which one wants for its own sake [end] or for the sake of what one wants for its own sake [means to end].²⁰⁰

Therefore, on Finnis' account of the landowners' intention, in answer to the question of why the landowners set the spring-guns, they, if truthful, must answer: 'I want to protect my property from trespassers by means of killing or seriously injuring them.' If this adequately describes the plan or proposal of the landowners, in Finnis' mind this would indeed entail a conditional intention to kill or injure, if they trespass. Of course, based on Finnis' theory of choice this would also entail that the landowners must be understood to choose in a very precise and specific way—the very *deaths* or serious injury of the trespassers—as an integral part of their plan and proposal to protect their property from trespassers.

Justice Bayley in *Ilott*, however, in the act of holding that landowners who set up the spring-guns do so "without any intention of doing injury . . .", immediately adds "for the mere purpose of protecting property *by means of terror* (emphasis added)." If, however, as Baley affirms, a landowner who sets up a loaded spring-gun has no intention to injure,

¹⁹⁸ See *supra* § III.A, note 129 and accompanying text.

¹⁹⁹ See esp. *supra* note 131 and text.

²⁰⁰ CE Vol. II, *supra* note 3, at 171.

how can the judge simultaneously affirm in the same breath that the landowner's true intent is "protecting property *by means of terror*?" If a landowner's intent is not to injure or kill, how then could setting spring-guns achieve its deterrent purpose, as Justice Baley himself proposes, "by means of terror?"

A close review of the *Ilott* opinions reveals the clear answer to this question—an answer to which Finnis devotes scant attention. In the course of their individual opinions the judges repeatedly emphasize that their holding rests solidly upon the fact that *notice* of the presence of spring-guns was clearly communicated to *Ilott* and the public at large. In short, the judges conclude that *Ilott* has no action against Wilkes based on his intentional, voluntary decision to enter onto the property despite knowing the character of the risk. The judges go on to explain this triggers two distinct but related legal grounds for absolving Wilkes of responsibility: 1) given the notices, *Ilott* voluntarily assumed the risk of death or serious injury; and 2) *Ilott*'s intentional choice to enter the property, having been apprised of the danger, is the 'proximate cause' of his own injuries, thus cutting off any liability of Wilkes.

5.1.1.1. ILOTT'S ASSUMPTION OF THE RISK

In support of *Ilott*'s 'assumption of the risk' (*volenti non fit injuria*) "to the willing there is no injury" doctrine, consider the following statements of the judges:

It is sufficient for a party generally to say "There are spring-guns in the wood;" and if another then takes upon himself to go into the wood, knowing that he is in the hazard of meeting with the injury which the guns are calculated to produce, it seems to me that he does it at his own peril; and must take the consequences of his own act. The maxim of law, *volenti non fit injuria* applies, for he voluntarily exposes himself to the mischief which has happened.²⁰¹

In this case it is found by the jury that the plaintiff actually knew that the spring guns were set in this wood. . . . [W]e cannot say that an action may be maintained against the defendant for doing an act like the one in question.²⁰²

The jury have found that the plaintiff (before he entered the wood) knew that engines like that by which he suffered in consequence of his trespass were placed there; to him therefore, they ceased be latent engines of mischief.²⁰³

²⁰¹ *Ilott*, at 677.

²⁰² *Id.* at 676.

²⁰³ *Id.*

Considering the present action merely on the ground of notice, and leaving untouched the general question as to the liability incurred by placing such engines as these where no notice is brought home to the party injured, I am of opinion that this action cannot be maintained.²⁰⁴

Where a man . . . is actually apprised before he enters that the guns are there, he cannot afterward complain that there has not been a proper and sufficient notice given.²⁰⁵

[T]he party who so enters, with full knowledge of the danger, is himself the cause of the mischief that ensues and falls within the principle of law, *volenti non fit injuria*, for as he knew that the spring guns were placed, there, he can have no right of action for an injury which resulted from his own act alone.²⁰⁶

[I]t cannot be unlawful to set spring-guns in an enclosed field, at a distance for any road, giving such notice that they are set, as to render it, in the highest degree, probable, that all persons in the neighbourhood must know that they are so set.²⁰⁷

5.1.1.2. NO PROXIMATE CAUSE

In support of a finding of no ‘proximate cause’ between Wilkes’ conduct and Ilott’s injuries consider the following court statements:

The only doubt which I have entertained during the course of the argument arises out of that maxim of law, that a man cannot do that indirectly which he cannot do directly. I am now, however, satisfied, that that principle has no application to the present case, where the plaintiff had express notice that the spring-guns were placed on premises where he wrongfully entered; . . . in that case the act of firing off the gun, which was the cause of the injury, was his act, and not the act of the person who placed the gun there.²⁰⁸

Now in the present case, in order to make the firing off of this gun the act of the person who placed it there, we must consider him as doing indirectly the same thing as if he had taken up the gun at the time and shot the plaintiff; and we must consider the latter as a mere instrument, not an actor. If he had seen the wires and trod on them with the intention of firing off the gun, it is clear that that would have been his own act. Here he entered the wood

²⁰⁴ *Id.* at 677.

²⁰⁵ *Id.* at 678.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 680.

²⁰⁸ *Id.* at 678.

with full notice that those engines were placed there, and with the knowledge, therefore, that the danger was unavoidable. So far as was concerned, the cause of the mischief could not be considered as latent, and the act of letting off the gun, which was the consequence of his treading on the wire, must be considered wholly as his act, and not the act of the person who placed the gun there.²⁰⁹

The judges' insistent focus on the role of notice, viz., the posted warnings, in pronouncing Wilkes' innocence, clarifies that they envisioned the "terror" by which the landowners lawfully intended to deter trespassers and poachers, was not—as Finnis contends—the intentional 'killing' of such persons. Rather, the conclusion most consistent with the finding of the judges and common sense was that first and foremost, the landowners' true plan was to protect their property by intentionally generating as a deterrent a great fear of death (i.e., terror). This, it is suggested, is a more plausible account of the landowner's intent. Rather than intending to kill, they intended to deter trespassers by both setting real guns and then adequately warning, as Wilkes did, about their lethal presence. That this was their intention, and not killing, is evidenced precisely by the fact that warnings were posted, as was explicitly recognized by all the judges of the King's Bench in *Ilott*. If the landowners' true intention in setting up spring guns was to deter by killing or seriously injuring trespassers, they would not have posted warnings.

In order to confirm this interpretation of *Ilott v. Wilkes*, it will be useful to briefly consider its companion case which arose eight years after the decision in *Ilott* and in which no notices of hidden spring guns were posted.

5.1.2. BIRD V. HOLBROOK (1828)

In this case²¹⁰, Holbrook, the defendant, had rented a "walled garden" and was growing and selling "valuable flower-roots, particularly tulips, of the choicest and most expensive description."²¹¹ Holbrook and his wife lived in a small summer-house in the middle of the garden. Holbrook had been robbed, shortly before the events giving rise to the litigation, of flowers and roots valued at 20£.²¹² Soon after that theft and in order to protect his property, Holbrook with the aid of another man:

²⁰⁹ *Id.* at 679.

²¹⁰ See also (1828) 130 E. R. 911 (C.P.) (U.K.).

²¹¹ *Bird*, at 912.

²¹² See, e.g., 20£ Pounds Sterling in 1828 was the equivalent of \$1,136 U.S. dollars in 2019. Calculated at <https://www.uwyo.edu/numimage/currency.htm>.

placed in the property a spring gun, the wires connected with which were made to pass from the doorway of the summer house to some tulip beds, at the height of about fifteen inches from the ground, and across three or four of the garden paths, which wires were visible from all parts of the garden or the garden wall; but it was admitted by the Defendant, that the Plaintiff had not seen them, and that he had no notice of the spring gun and the wires being there; and that the Plaintiff had gone into the garden for an innocent purpose, to get back a pea-fowl [peacock] that had strayed.²¹³

It was also proved at trial that Holbrook had been asked by two persons on two separate occasions prior to the incident whether he had put up any notice of the spring guns; one person advised him to do so. Holbrook, however, responded that he did not “conceive that there was any law to oblige him to do so,” and the Defendant desired such person not to mention to anyone that the gun was set, “lest the villain should not be detected.”²¹⁴ On the evening of March 21, 1825, a neighbor’s peacock flew into Holbrook’s garden. Bird, a 19 year-old male, climbed Holbrook’s garden wall to help a servant of that neighbor retrieve the peacock. After calling out to see if anyone was in the garden and receiving no answer, Bird jumped down into the garden. “And the boy’s foot coming in contact with . . . the wires, close to . . . where the gun was set, it was thereby discharged, and . . . its contents, consisting of large . . . shot, were lodged in . . . his knee-joint, and caused a severe wound.”²¹⁵

In *Ilott*, as noted above, Chief Justice Abbott had specifically observed that that case did not require the court to decide “whether a trespasser sustaining an injury from a latent engine of mischief, placed in a wood or in grounds where he had no reason to apprehend personal danger, may or may not maintain an action.”²¹⁶ This question, as can be gleaned from the facts related above, was the precise issue raised by Bird’s action against Holbrook. In this case, which neither Chief Justice Abbott nor Justice Bayley participated in, the court unanimously held, citing reasoning in *Ilott v. Wilkes*, that an action could be maintained by Bird against Holbrook.

Without belaboring the details of the court’s analysis, the following statement in Bird of Chief Justice Best, who did participate in *Ilott*, suffices to summarize its main line of reasoning. After quoting a number of statements from *Ilott* relating to the requirement that notice of spring-guns be posted by landowners if they are to avoid liability, Chief Justice Best writes:

²¹³ *Bird*, at 912.

²¹⁴ *Id.* at 912-913.

²¹⁵ *Id.* at 913.

²¹⁶ See *supra* note 178 and accompanying text.

I am, therefore, clearly of the opinion that he who sets spring guns, without giving notice, is guilty of an inhuman act, and that if injurious consequences ensue, he is liable to yield redress to the sufferer. But this case stands on ground distinct from any that have preceded it. In general, spring guns have been set for the purpose of deterring; the Defendant placed his for the express purpose of doing injury; for when called on to give notice, he said, "If I give notice, I shall not catch him." He intended therefore, that the gun should be discharged, and that the contents should be lodged in the body of this victim, for he could not be caught in any other way." ²¹⁷

Bird thus confirms that when no posted warnings are provided, all the views of Finnis about the setting of spring guns and conditional intentions to kill if a trespasser enters are verified. Finnis is correct that the landowner must intend that *if a person enters* the property, the intruder will be severely injured or killed. To what other motivation, apart from gross carelessness, can a conscious failure to post warnings be attributed?

6. SPRING-GUNS, DEATH AND SIDE EFFECTS

Having explored the contours of the judges' logic in their opinions in *Ilott* and *Bird*, it is possible to respond directly to Sydney Smith's and Finnis' argument that, "He who sets a *loaded* gun *means* it should go off if touched." And Finnis immediately adds '[m]eans to' is another synonym for 'intends to.' "²¹⁸ It is relevant and proper to inquire how the landowner in *Ilott* would respond to the accusation or better the question, "what *did* you intend by setting a loaded gun that will go off if it is touched? For, if loading the gun was part of the landowner's plan or proposal he should be able to provide some explanation.

7. SPRING-GUNS, CONDITIONAL INTENTIONS, AND SIDE EFFECTS

The preceding statement of Chief Justice Best in *Bird* sheds, as described with a term dear to Finnis,²¹⁹ "diaphanous" light on *Ilott*. As explained above, the judges in *Bird*, a

²¹⁷ *Bird*, at 916

²¹⁸ *Id.*

²¹⁹ See generally Finnis, *Intention in Tort Law*, *supra* note 2, at 233.

case of first impression,²²⁰ clearly reject Finnis' contention that setting spring guns necessarily entails a conditional intention to kill. Rather, as argued above with respect to *Ilott*, the judges unanimously interpreted the posting of clear warnings as evidence that the injury caused by the spring-gun was not intended; but instead the spring-guns were "set for the purpose of deterring"—not by killing as Finnis would have it—but by means of terror and fear. The court goes on to find, contrariwise, that *Holbrook*, by failing to give warning, "placed his [guns] for the express purpose of doing injury." Continuing and tying the failure to warn with its proper implication, the court found that defendant *Holbrook* "intended therefore that the gun should be discharged, and that the contents should be lodged in the body of the victim."

7.1. CONDITIONAL INTENTIONS TO KILL AND INTENT TO DETER BY FEAR AND TERROR

These dicta in *Bird* confirm the plausibility of the preceding interpretation of *Ilott* offered in response to Smith's and Finnis' query above. In answer to the question "why" set loaded guns, the judges in both *Ilott* and *Bird* appreciated that Wilkes' setting the spring-guns need not, as Finnis vigorously maintains, entail an intention, even conditionally, 'to kill' as a *means* to ensure protection of property. Instead—having given abundant notice of the presence of the lethal guns which had been set—his intention in setting spring-guns can coherently be interpreted as being solely "for the purpose of deterring" by *means* of fear and terror, not a conditional intention to deter by killing as is clearly the case in *Bird*.

Accordingly, the response to Sydney Smith and Finnis' question would be simply to propose that the question is a non-sequitur. The landowners' real intention in 'setting a spring-gun-cum-warning' is precisely that no one enter the property to begin with, not to seize or disable the trespasser for capture as in *Bird*. The further response that could be given, as considered above,²²¹ would be for the landowner to explain that to be effective the guns must actually be loaded and concealed in order—not to kill—but to make the warning believable to the occupants of the community, efficacious to deter trespassers out of real terror and fear. As such, the intent of the landowners in reality is that their deterrent prevent would-be trespassers from entering the property. Wilkes' intention was that the terror of the hidden guns and warnings, with townspeople confirming their lethal nature, would effectively scare trespassers off. Stated in terms of Finnis' account of intention, the landowner could respond : 'my plan or proposal was

²²⁰ See *Bird* at 916, "[T]his case stands on ground distinct from ant that have preceded it."

²²¹ See *supra* notes 196-197 and accompanying text.

that by letting neighbors clearly observe that the guns were actually loaded and by placing abundant warnings, word would spread. I would be able to protect my property by intimidating away intruders by fear and terror of certain death or serious injury.' If a landowner executes conduct in accord with this proposal—a plan that should reasonably deter trespassers from entering in the first place—it is disingenuous then to accuse him of *intending, as part of his plan or proposal*, that “if someone *does* come on the land” they be killed or seriously injured. Their plan or proposal was that the deterrent would be effective, and no trespasser enter onto the land.

7.1.1. KILLINGS NECESSARY FOR THE DETERRENT TO BECOME EFFECTIVE?

While this interpretation of *Ilott* is consistent with the reasoning of the court in *Ilott* and *Bird*, before moving on, it is necessary to consider yet one final argument of Finnis seeking to establish killing of trespassers is part of the landowners' intent i.e., part of their 'plan or proposal,' in setting spring-guns: Finnis writes “The deterrent 'object' (intent) will be attained only by the infliction of injury or death on at least a few trespassers, culpable or innocent: such injury is thus intended as a means to achieving the deterrent object”.²²²

Finnis, here proposes that in order for the bona fides of the deterrent to be established, at least a few persons, presumably either on the owner's land or another's, would have to attempt trespass and be killed or injured in their efforts. And so, *pace* Finnis, those deaths must be intended. This last reprise of Finnis—again contrary to the findings of the judges in *Ilott* and *Bird*—works off the question-begging supposition, argued against above, that the landowners have a conditional intention to kill.

Without any evidence supporting this assertion, Finnis assumes as fact what is in reality a purely contingent, and perhaps doubtful, matter, i.e., that trespassers would not believe the truth of the posted warnings until a few were actually killed or injured by the guns. In point of fact, most trespassers, regardless of recent history, would be aware that spring-guns, like any shot-guns, are extremely dangerous and, at the least, capable of seriously maiming, if not killing. This knowledge of the reality of the deterrent to any would-be trespassers could also be gained, if the landowner took, as suggested above, reasonable measures to ensure knowledge of the truth of the threat. In short, it is mere speculation that the “object” intended as a deterrent could “be attained *only by the infliction of injury or death upon a few trespassers.*”

²²² FINNIS, *Intention in Tort Law*, *supra* note 2, at 233.

On the other hand, on Finnis' behalf, it is not unrealistic to foresee—that with many landowners employing spring-guns—some rash trespassers and poachers might venture their fortunes and despite posted warnings, breach the close and be injured or killed by activation of spring-guns. Does this confirm Finnis' point? Does the landowner's plan or proposal include a conditional 'intent to injure or kill' at least a few in order for the deterrent to be taken seriously? One cannot, of course, deny that the death of trespassers by spring-guns despite the posted warnings is an associated *risk* of employing that mode of deterrence. But, even assuming a particular landowner might foresee that possibility with greater or lesser certainty, does this prove Finnis' contention that such deaths are therefore conditionally intended by the landowner?

This article has argued—consistent with the judges' holdings in both *Ilott* and in *Bird*—that landowners who set spring-guns with adequate warnings need have no intent to kill, conditionally or otherwise. Rather, their intention, i.e., their plan or proposal, is to deter trespassers by means of genuine terror achieved by setting guns actually loaded with powder and shot, and by posting clear warnings of their lethal presence. In this situation, if an intruder recklessly ignores the warnings and proceeds to enter the land and is killed or seriously injured, would it not be appropriate, given Finnis' own theory, to regard these injuries not as intended but rather as foreseen yet unintended side effects of the landowner's conduct.

In proposing the argument that such killings or injuries must necessarily be intended, Finnis appears to have disregarded his own central thesis regarding the relationship between intent and foreseeable consequences—including deaths foreseeably caused even with certainty. It is difficult to envision why a landowner in these circumstances could not be understood to be situated in a way at least analogous to those described by Finnis above with respect to the cargo bomber, terrorist-hijacker, and commander ordering tactical bombing.²²³ In each of those scenarios, Finnis had no difficulty in concluding that the deaths—which were directly caused by the actors and foreseen by them with substantial certainty—were not caused intentionally; but rather, willingly caused as *unintended side effects*.²²⁴

The same reasoning applies to situations where there may be killings or injury caused by spring-guns with adequate warnings posted. Is it not plausible that the death or serious injury of a trespasser plays no part in the plan or proposal chosen by the landowner? The landowner does not want or need trespassers to be 'made dead' or seriously injured in order to attain the goal of property protection. All he needs to

²²³ See generally *supra* § III.A.1, notes 135-139 and accompanying text.

²²⁴ For the non-intentional sense of 'willingly' used here, see *supra* note 158.

protect his property is to avert, divert, or forestall entry. His intention, according to a fair reading of the esteemed judges' opinions in *Ilott* and *Bird*, was solely to deter unlicensed entrance (trespass) onto property by means of fear and terror, not by means of killing. Thus, on this analysis any deaths which might foreseeably occur, though tragic, would not occur as part of the landowners plan or proposal. Stated in terms of Finnis' own theory, it would only be fair to construe them as unintended side effects. As Finnis aptly summarizes all this in another context:

Whatever consequences lie *outside* one's proposal, because neither wanted for their own sake nor needed as a means, are *not* synthesized into one's will. Though one may foresee these results and accept that one will be causing them, or the risk of them, one is not adopting them. They are side effects, incidentals.²²⁵

7.1.2. A FEW DEATHS WILL STRENGTHEN THE DETERRENT EFFECT

On the other hand, one might ask, what is the implication if any unintended deaths that might occur are welcomed by the landowner insofar as they will increase the deterrent effect of spring-guns? Would this change the evaluation of the landowner's intent?

Precisely such a question is considered by Finnis with respect to the tactical bombing scenario developed above.²²⁶ Recall that in that situation, the deaths of civilians—living or working in proximity to military installations to be bombed—might be foreseen with substantial certainty. Yet, those deaths would be unintended, and come about as a side effect. As was explained, in certain situations, if the military objective is significant enough, such unintended deaths are often regarded as morally justified. Of course, for Finnis, the intentional bombing of *innocent* civilians to lower and demoralize an enemy and undermine its determination to fight, would always be wrong as an intentional destruction of instantiations of the basic good of life, thus violating various intermediate principles.²²⁷ The question posed here, however, considers the situation where morally permissible unintended deaths of civilians caused by such bombing have the further consequence of weakening the morale of the enemy, and play an incremental, albeit critical role in achieving victory for the side of the tactical bombers. As Finnis describes it: “The commanders of a bombing force may regard civilian

²²⁵ FINNIS, *Intention in Tort Law*, *supra* note 2, at 213.

²²⁶ See *supra* § III.A.3.a.ii, notes 152-154 and accompanying text.

²²⁷ See *supra* § II.A.2.b., note 104 and accompanying text.

casualties and the consequent demoralization and highway-obstructing civilian refugee columns as a welcome bonus, yet not intend them.”²²⁸

Does that bonus benefit, possibly foreseeable, of the unintended deaths of civilians, which would be immoral if caused intentionally by strategic bombing, cause the bombing deaths to be deemed intentional? Finnis’ response is consistent with his theory of intention and choice:

Any who welcome and rejoice in an effect of their actions, but who in *no* way adapt their practical reasoning (and thus the plan they adopt and execute) with a view to bringing about that effect, do not intend it . . . [S]uch bonus side effects can be genuinely side effects even when foreseen (if they are in no way provided for in the chosen proposal) . . .²²⁹

Accordingly, even if tragic but unintended deaths of trespassers occur and thereby ensure, to the satisfaction of the landowner, a greater efficacy of the deterrent created by the posted warnings and setting of spring-guns, this would not make those deaths indirectly intended. So long as the landowners did not incorporate achieving this benefit into their practical plan or proposal, this beneficial but unintended side effect would, one might say, remain the unintended side effect of unintended side effects.

7.2. CONDITIONAL INTENTIONS ‘TO KILL’ AND INTENDING TO ‘STOP THE TRESPASS’

The preceding section offered one possible defense of the view, supported by the unanimous findings of judges in *Ilott* and *Bird*, that landowners who set loaded spring-guns with warnings had no intention, conditionally or otherwise, to kill or injure. Rather, it was argued the landowners intended to deter solely by fear and terror. Further, it was reasoned that if any trespasser flouted the warnings, their deaths could be understood as unintended side effects of the landowner’s conduct.

One additional retort, however, can be brought against Finnis’ and Smith’s sustained effort to impute *intentional* killing to landowners. Whether or not one finds plausible the arguments offered above asserting that the plan or proposal of the

²²⁸ CE Vol. II, *supra* note 3, at 205.

²²⁹ *Id.* at 182; Elaborating this point Finnis states:

This is possible, provided that (a) they do not regard civilian casualties and their welcome effects as even a secondary aim, and (b) they select only military targets, calibrate the bombs and plan the bombing runs *exclusively* for the purpose of destroying those targets, and desist from bombing areas containing civilians as soon as the military targets are removed.

Id. at 205.

landowner is primarily inspired by an intention to defend property by *means of fear and terror*, not by killing, still one other another approach can be proposed. If a trespasser actually begins the process of unlawful physical intrusion, scorning the posted warnings, the guns might be placed by the landowners as a last defensive resort, to 'stop in its tracks' so to speak, an attempted trespass.

The principal plan or proposal of the landowner would be primarily to deter all such persons out of fear and terror of being shot given the presence of the warnings and *actually loaded* guns. In the event that this deterrent fails, however, and the trespasser actually begins to enter, the reserve plan of the landowner might be that the activation of the guns will achieve the final defense of the property, either by injuring or killing the trespasser.

Of course, this may appear a direct capitulation to Finnis' argument that the killing or injuring would be "conditionally intentional" *if* the trespasser enters. The critical question, however, is whether this second type of defensive injuring or killing *must*, in these circumstances, be considered *intentional*?

Here, however, it is again possible, using Finnis' own logic, to argue that the landowner's causing of harm to the trespassers in this situation be understood as not intended. Applying intention in the strict sense he proposes,²³⁰ the landowner's intention could be construed as aimed solely to 'defend against' or 'stop unlawful intrusion.' If all this plays out—a would-be trespasser ignores all posted deterrent warnings, begins to enter, and is killed or seriously injured—must it be concluded that the trespasser was intentionally killed or injured by the landowner? For Finnis the answer is absolute and unproblematic: "Put strictly in the language of intent, . . . just as personally shooting a trespasser engaged in no act or threat of violence is simply killing or wounding with intent to kill or wound. So too setting a spring gun involves intending (conditionally but really) to do the same 'without firing the shot.'"²³¹

At this point, however, it is opportune to consider very precisely whether Finnis' contention here is consistent with the implications of his endorsement of the unintended nature of the killing of the cargo plane's pilot, the hijacker-terrorist,²³² assailants in justified self-defense, and civilians by the tactical bomber.²³³ In each of these situations, Finnis describes the killings as *unintended*. Consider again Aquinas' account of PDE as it operates in self-defense:

²³⁰ See *supra* § III.A.1., note 135 and accompanying text.

²³¹ CE Vol. II, *supra* note 3, at 200.

²³² See *supra* § III.A.3.a.ii, notes 152-154 and accompanying text.

²³³ *Id.*

It is to be stated that nothing prevents there from being two effects of one act, of which only one is in intention [*in intentione*] and the other outside intention [*praeter intentionem*]. Moral acts, however, receive their character from what is intended and not from what is outside of intention. . . . From the act of defending oneself, therefore, two effects may follow: one being preservation of one's life and the other the killing of an attacker.²³⁴

What prevents this same line of analysis from applying in the spring-gun/trespasser situation? Similar to the person exercising self-defense who seeks, while employing lethal self-defense, only to 'stop the attack,' so too, whether the landowner stands at the edge of his property warning the trespasser not to enter, or the landowner places the spring-gun with warnings on the edge of his property, can't his intention be understood as solely to 'stop the invasion.' Would it not be entirely consistent for the landowner to assert, analogous to the case of self-defense, that *death* or *serious injury* of the trespasser plays no part of his plan or proposal and brings him no benefit. All the landowner may have as an intention by use of lethal force is to 'stop the invasion'. Having disregarded the deterrent warning, there would be no other way to prevent the trespasser from entering.

Applying Aquinas' self-defense analysis *mutatis mutandis* to the trespasser situation, the activation of the spring-gun, or the direct shooting after warning in person, would have two simultaneous effects: first, within the intention [*in intentione*] of the landowner, it would 'directly thwart and prevent unlawful entry onto one's property;' the other effect, outside the landowner's intention, [*praeter intentionem*] 'foreseeable harm to the trespasser.' Here, unlike the earlier example of the hostage killing, the act of the landowner would not be one which "of itself does nothing but damage or impede a realization of or participation in . . . a basic form of human good."²³⁵ From one indivisible act of defending one's property with lethal force from unlawful invasion, two effects immediately follow; first: (the good effect) the protection of land and possessions from illegal invasion; second: (the evil effect) unintended but foreseen injury or killing of the would-be trespasser.

7.3. 'A MAN CANNOT DO INDIRECTLY WHICH HE CANNOT DO DIRECTLY'

At this point, it is appropriate to return to the departure point with which this article commenced. In his article, *Intention in Tort Law*, Finnis introduced his theme with

²³⁴ THOMAS AQUINAS, *SUMMA THEOLOGIAE* II-II, q. 64, art. 7. corp. (Fathers of the English Dominican Province trans., Benziger 1911) (1265-73); see also *supra* note 149 and accompanying text.

²³⁵ NLNR (2011), *supra* note 64, at 118-19.

discussion of Justice Holmes' comments in *United Zinc Chemical Co. v Britt*.²³⁶ There, Holmes states: "liability for spring-guns and mantraps arises from the fact that the defendant has . . . expected the trespasser and prepared an injury that is no more justified than if he had held the gun and fired it."²³⁷ Here of course, Holmes is explicitly referring to the well-known maxim of English property law, mentioned in both *Ilott* and *Bird*. In *Ilott*, Judge Holroyd wrote: "a man cannot do indirectly which he cannot do directly;"²³⁸ and Justice Best, "you cannot do, indirectly, what you are not permitted to do directly."²³⁹ Both of these judges, however, denied applicability of the maxim in *Ilott*, based on plaintiff *Ilott*'s assumption of the risk and proximate cause analysis.²⁴⁰ In *Bird*, however, where the defendant posted no warnings, and admitted to setting the gun for the purpose of catching the trespasser, Plaintiff *Bird*'s attorney Sergeant Wilde argued:

[I]t is clear . . . that such conduct would have been illegal, if the Defendant had been present, and had seen the Plaintiff enter his garden. . . . No man is permitted to do indirectly that which it is unlawful for him to do directly. The Plaintiff was not attacking the Defendant's person, he was not attempting a felony; at the utmost, he was a bare trespasser: The Defendant, if he had been present, could not have apprehended, much less have shot him for the trespass.²⁴¹

Justice Borrough in *Bird*, adopted this same reasoning, "The Plaintiff was only a trespasser: if the Defendant had been present, he would not have been authorized even in taking him into custody, and no man can do indirectly that which he is forbidden to do directly."²⁴²

Plaintiff's counsel in *Ilott* presented a similar but ultimately unsuccessful statement of the same law on behalf of his client *Ilott*.

[A] man shall not do indirectly that which he cannot do directly. The circumstance of the plaintiff's having notice that the guns were fixed in this wood, can make no difference; for, if the defendant had himself stood at the entrance with a loaded gun, and given notice to a trespasser that he would shoot at him if he entered, such an act would not therefore be justifiable.²⁴³

[T]he law has assigned certain specific remedies for the protection of property; and even if they were insufficient, is it not competent to an

²³⁶ See *United Zinc*, 258 U.S. at 268; See also *supra* notes 175-177 and accompanying text.

²³⁷ *Id.*

²³⁸ *Ilott*, at 678.

²³⁹ *Id.* at 680.

²⁴⁰ See *supra* § IV.A. 1.a. i) and ii), note 203 and accompanying and following text.

²⁴¹ *Bird*, at 914.

²⁴² *Id.* at 917.

²⁴³ *Ilott*, at 676.

individual to have recourse to a contrivance, the effect of which may be to inflict wounds, or even death, upon a mere trespasser.²⁴⁴

Of course, applying the maxim to the facts of *Bird* brings out its sense most lucidly. A landowner may not hide spring-guns and provide no warnings with the express intention of catching trespassers by killing or injuring. In these circumstances, the meaning of the injunction: ‘a man shall not do indirectly that which he cannot do directly’ is clear. Just as intentionally killing or injuring a trespasser is wrongful because unjustified, so too, intentionally, i.e., purposely, killing or injuring him mechanically is just as wrongful. In such a case, *Holbrook*’s conduct entails, i.e., necessarily involves, an intent to kill or injure trespassers.

7.4. THE MAXIM AND UNINTENDED EFFECTS.

But how would the maxim apply in view of this article’s claim that a landowner’s causing death or injury to the trespasser can plausibly be interpreted as unintended? Summarizing again the main arguments of this section: first, it was argued, consistent with the holdings of the judges in *Ilott* and *Bird*, that landowners who post warnings did not have an intention to kill or seriously injure trespassers but solely to deter them by means of fear and terror;²⁴⁵ second, it was argued that setting a spring-gun or even directly shooting at a trespasser after giving a warning not to enter, may be understood—along the lines suggested by Finnis’ adoption of Aquinas’ account of self-defense—as causing only the unintended side effects of injury or death.

Both actions could be carried out solely with the intention of ‘stopping the invasion’ not in order to kill or injure. Hence the landowner’s chosen plan or proposal, i.e., his intention, would not entail an intention to cause death or serious injury as means or end. For, to recap, the landowner has no need for the trespasser to be injured or killed, only that the invasion be halted. Therefore, whether such halting results directly from a shot fired by the landowner in person, or indirectly and mechanically with a spring-gun, if warnings are given, harm to the trespasser could be understood as brought about as an unintended side effect.²⁴⁶ And thus, on Finnis’ own terms, his contention that the injury or killing caused by spring-guns *must be intended*, conditionally or otherwise, is falsified.

Rephrasing the maxim to take into account the possibility here discussed, i.e., that the harms are unintended, it would read: ‘One cannot indirectly cause as an

²⁴⁴ *Id.*

²⁴⁵ See *supra* § IV.B.1., note 222 and accompanying text.

²⁴⁶ See *supra* § IV.B.2.

unintended side effect, what one cannot directly cause as an unintended side effect.' The critical question that remains, then, is whether it is *permissible* to directly cause as an unintended side effect the injury or death of a mere trespasser. Discussion up to this point of the article has focused exclusively on refuting Finnis' specific claim that the use of spring-guns necessarily entailed an *intention* to kill or injure. This article has argued that, on Finnis' own principles, no such intention is entailed. The fundamental moral question, however, still remains, i.e., whether such unintended injury or killing would be morally permissible.

8. DEFENSE OF PROPERTY AND UNINTENDED KILLINGS CAUSED AS SIDE EFFECTS

As discussed above in light of Aquinas' full account of self-defense—causing unintended side effects, standing alone—does not *ipso facto* legally or morally vindicate the conduct and its unintended effect. As Aquinas wrote, in considering the permissibility of causing the unintended death or injury of an assailant:

Now an act of this type, insofar as the preservation of one's own life is intended, is not illicit since it is natural for every being to keep itself alive to the extent possible. . . . It is not necessary . . . that a man refrain from carrying out a measured act of defense to avoid the killing of another. A person has a greater obligation to provide for his own life than for that of another.²⁴⁷

In order to determine whether the unintended injury or death caused to a trespasser either directly by shooting or indirectly by a spring-gun set with warnings may be justified—applying Aquinas' PDE analysis of two effects—it is necessary to compare the nature of the good intended (*in intentione*) by landowners in light of the unintended (*praeter intentionem*) evil effect. In other words, in order to justify causing the unintended "evil effect" (serious harm or death of the trespasser), it is necessary to consider whether the importance of the intended effect (protection of property from unlawful entry, poaching, and theft) provides a reasonable justification for causing such unintended harm. The following section will explore whether common law has provided a resolution to this question.

²⁴⁷ See *supra* note 149 and accompanying text.

8.1. THE VALUE OF HUMAN LIFE UNDER COMMON LAW

As seen in the preceding sections,²⁴⁸ under common law, it was not permissible intentionally to use force to repel a mere trespass involving no threat to the household or person of the owner.²⁴⁹ Yet, scant attention is given in either *Ilott* or *Bird* by way of explanation for this expansive protection given to trespassers. The 1877 American case, *Simpson v. State*,²⁵⁰ however, is useful on this score:

It is a settled principle of our law, that everyone has the right to defend his person, and property, against unlawful violence, and may employ as much force as is necessary to prevent its invasion. . . . But when it is said a man may rightfully use as much force as is necessary for the protection of his person and property, it must be recollected the principle is subject to this most important qualification, that he shall not, except in extreme cases inflict great bodily harm, or endanger human life. The preservation of human life, and of limb and member from grievous harm, is of more importance to society than the protection of property. Compensation may be made for injuries to, or the destruction of property; but for the deprivation of life there is no recompense; and for grievous bodily harm, at most, but a poor equivalent. It is an inflexible principle of the criminal law of this State, and we believe of all the States, as it is of the common law, that for the prevention of a bare trespass upon property . . . human life cannot be taken, nor grievous bodily harm inflicted.²⁵¹

These statements describing common law limitations on the use of force in ‘defense of property’ and its rationale, in context of the present discussion, can be summarized as follows: a landowner, in defense of his property involving a trespasser who poses no threat to the person of the landowner or who is committing no other felony, cannot lawfully injure or even apprehend the trespasser, much less kill him. Under common law, it was never permissible to inflict serious harm or threaten human life, much less kill, in order solely to protect one’s property. The value of human life and the protection of bodily integrity are superior to any mere property interest.

²⁴⁸ See generally *supra* § IV.B.3., note 238-243 and accompanying text.

²⁴⁹ *Id.*

²⁵⁰ *Simpson v. State*, 59 Ala. 1, 9 (1877).

²⁵¹ *Id.* at 9.

8.2. CULPABILITY FOR CAUSING UNINTENDED INJURY OR DEATH TO PROTECT PROPERTY.

8.2.1. MORAL CULPABILITY

The common law interest in subordinating the value and protection of property to the good of human life interfaces neatly with Finnis' understanding of the basic good of life and the various intermediate principles of morality proposed by him.²⁵² Of course, at the same time, none of these considerations of the value of human life explicitly take up the permissibility *vel non* of causing *unintended* harm. Nevertheless, when considering the moral evaluation of willingly causing side effects, the following remarks of Finnis are clearly germane:

Moral responsibility and consequent legal liability for intentional infliction of harm are paradigmatic, exemplary. Avoiding such wrongs is only a necessary, not a sufficient condition of acting justly. But the same respect for each individual whom one might have harmed as a means to an end [i.e., as part of one's plan or proposal; intentionally] carries over into, and informs, the quite different principle of fairness. Here one encounters the quite different principle of commutative injustice involved in the imposing of harmful foreseen side effects by persons who in their actions or omissions fail to comply with rational principles such as the Golden Rule.²⁵³

Applying this to the preceding considerations, it is evident that causing serious injury or death to a person who is a bare trespasser—even if such consequences occur as unintended side effects—could never be justified by appeal to the intended good of mere 'protection of property'.

For Finnis, commutative justice "rectifies or remedies inequalities which arise in dealings . . . between individuals. These 'dealings' may be either voluntary . . . or involuntary, as where one man 'deals with' another by stealing from him, murdering him, or defaming him."²⁵⁴ Based on the lack of proportion between the good intended 'protection of property,' and the serious harms caused by a landowner who, with warnings, directly shoots a trespasser or sets a spring-guns, such action is clearly unjustified. And this is true, even if the consequences of such actions are—strictly analyzed—properly understood as unintended. Such damage to a trespasser's life and bodily integrity cannot be justified as a legitimate means for protection of property.

²⁵² See *supra* § II.A.2b., note 103 and accompanying and following text.

²⁵³ CE Vol. II, *supra* note 3, at 215.

²⁵⁴ NLNR (2011), *supra* note 64, at 178.

Such conduct is clearly a violation of commutative justice: “Compensation may be made for injuries to, or the destruction of property; but for the deprivation of life there is no recompense; and for grievous bodily harm, at most, but a poor equivalent.”²⁵⁵

Under a revised version of the maxim, its corollary, it then follows that a landowner cannot ‘indirectly (with a spring-gun) cause to a mere trespasser as unintended damage what he could not directly (by shooting him in person) cause to him as unintended damage. Therefore, just as directly shooting a trespasser with a warning ‘in order stop the ‘trespass ‘ would be wrong, even if its results were unintended, so too, indirectly causing the same unintended result by setting a spring-gun is wrong, i.e., is a violation of the Golden Rule and commutative justice.

Finnis confirmed in his discussion of the cargo bomber that causing foreseen serious harm or death, even if unintended, can violate the Golden Rule against “arbitrary preferences amongst persons.”²⁵⁶ Applying those considerations here, one would presumably not want oneself or one’s loved ones to be subject to unintended serious injury or death for a bare trespass solely in order to allow a landowner to protect his property. By failing to respect practical reason’s grasp of a trespasser’s basic good of bodily integrity, an instantiation of the basic good of life, landowners would willingly act unfairly.²⁵⁷

Similarly, as in the cargo bomber case, causing unintended harm to mere trespassers would violate Finnis’ intermediate principle barring “arbitrary preferences amongst values.”²⁵⁸ The landowner may view the protection of property as a means of promoting and ensuring his own well-being from dissipation due to poaching or theft; or, perhaps as vindicated by the sham rational that by “allowing trespassers to go unpunished would be unjust. It would encourage trespass and be a personal failure to exercise my duty as a citizen to aid in enforcement of the law.” Here, the landowner would violate this intermediate principle, by exaggerating the value of his own financial wellbeing and social reputation. These goods, however, are not desirable in themselves as instantiations of a basic good, but are purely instrumental goods beneficial for promoting various subordinate goods of life. In no case would it be appropriate to offer defense of property as a justification for seriously wounding or killing a mere trespasser, even if those consequences are unintended.

²⁵⁵ See *supra* note 251, *Simpson v. State*, at 9.

²⁵⁶ *Supra* notes 110-114 and accompanying text.

²⁵⁷ Finnis uses ‘willfully’ here in the same sense as “not unintentionally” which he uses to mean unintended, but not the result of accident, mistake, or lack of foresight. “By another nuance of our language, is it also a case, I think, of ‘willfully’ killing—for ‘willfully’, to my ear, means not unintentionally. CE Vol. II, *supra* note 3, at 184. *Supra* note 136.

²⁵⁸ *Supra* § II.A.2.b. i), notes 103-109 and accompanying text.

Accordingly, with respect to the breach of both these intermediate principles, a landowner's decision to set spring guns to shoot or risk shooting a trespasser, even with a warning, would not be in harmony with the first principle of morality: 'the integral directiveness of practical reason.' For to voluntarily engage in such conduct—causing unintended harm to the goods of life and bodily integrity of a mere trespasser—landowners must “fetter” and “deflect”²⁵⁹ the integral directiveness of practical reason. They do so by unreasonably exaggerating the value of their own participation in the basic good of life and its instrumental necessities (property, wealth, etc.) and by freely excluding practical reason's appreciation of the other's interest in the same goods.

8.2.2. LEGAL CULPABILITY

In earlier considerations relating to the search for a just criminal punishment for the cargo bomber's causing of the unintended but foreseeably certain death to the pilot, it was noted how Finnis proposed that the most grievous form of homicide should be charged, viz., murder.²⁶⁰ Examining the Model Penal Code it was determined that the most fitting charge for the cargo-bomber would be murder pursuant to § 210.2(1)(a) for 'knowingly' causing homicide without adequate justification. As Finnis stated in that context: “[O]ne who inflicts death, even as a side effect, in order to effect such an instrumentalization of another has in the fullest sense, 'no excuse' for thus knowingly causing death. We should not complain if both law and common moral thought treat this as murder.”²⁶¹

What of the landowners causing unintended harm, either by shooting directly at a trespasser in order to 'stop the invasion,' or, alternatively, the landowner who sets a spring gun intending to deter by fear and terror? Given the serious violation of commutative justice in both cases, and Finnis' expressed proclivity for homicide in this context, what charge, if any, could be brought against such landowners under MPC §210? Of course, in this context it is necessary to disregard the judge's conclusion that Wilkes was free from guilt due to the fact that Ilott assumed the risk or proximately caused his own damages. As Finnis states: “It is the sort of conduct, the sort of transaction between persons, which cannot be justified by alleged assumption of risk or by appeal to the maxim *volenti non fit injuria*.”²⁶²

²⁵⁹ *Supra* notes 88-94 and accompanying text.

²⁶⁰ *See* CE Vol. II, *supra* note 3, at 194.

²⁶¹ *Id.*

²⁶² *Id.* at 202.

To repeat, MPC § 210 provides:

- (1) Criminal homicide constitutes murder when:
 - (a) it is committed purposely or knowingly; or
 - (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life.

Applying this provision to the current hypotheticals yields varying results. For the landowner who shoots directly at the trespasser without intent to kill, as described above, but only to ‘stop the trespass’²⁶³ presumably a ‘purposely’ state of mind would be excluded. If the landowner aimed and shot at a vital spot of the trespasser as the most effective way to stop the trespass, a murder charge might be brought under § 210.2(1)(a) “knowingly” because he arguably would know with “practical certainty” that the trespasser would be killed. This result is even more likely given the MPC’s further provision in § 2.02(7): “Requirement of Knowledge Satisfied by Knowledge of High Probability”. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence [.]” Thus even if the landowner does not know with practical certainty that the death of the trespasser would occur, he can be charged and convicted of murder if the landowner knows when he shoots that the trespasser’s death is highly probable.

On the other hand, if he does not aim at a vital spot, he cannot know with practical certainty that death will ensue. In this case, this hypothetical would be assimilated to the other hypothetical where the landowner sets a spring-gun, and it ends up causing unintended harm or death to the trespasser. For in both these scenarios it is neither the landowner’s purpose to kill nor does he know with practical certainty that the trespasser will die. In fact, in the spring gun case, the landowner doesn’t even know with certainty whether a trespasser will come at all. The landlord should be viewed only as risking the death of the trespasser. In such case, the only remaining option for a murder charge being brought against the landowner would be 210.2(b) for recklessly causing homicide:

- 210.2. Murder.
- (1) Criminal homicide constitutes murder when: . . .
 - (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life.

The crucial issue, of course, again relates to how the MPC defines its terms. The relevant definition of “murder” under MPC § 2.02(1)(b) is for recklessness manifesting “extreme

²⁶³ See *supra* § IV.B.2, note 234 and accompanying text.

indifference to the value of human life.” The MPC defines recklessly in the following manner.

Recklessly. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element . . . will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.²⁶⁴

Official commentary to this section explains that § 210.2 (1)(b) was adopted to capture a kind of recklessness more culpable than that required for mere ‘reckless manslaughter.’ “This provision reflects the judgment that there is a kind of reckless homicide that cannot fairly be distinguished in grading terms from homicides committed purposely or knowingly.”²⁶⁵ MPC commentary further notes that this subsection was adopted to capture common law “depraved heart” murder.²⁶⁶

The commentary clarifies that the critical distinction between reckless murder and the lower graded reckless manslaughter relates to the nature of the risk created and consciously appreciated by the actor given the nature of his conduct, i.e., the seriousness of the “substantial and unjustifiable risk.” The commentary states that a distinction between the recklessness required for manslaughter versus that for “extreme indifference” recklessness murder, “is a matter of degree and the motives for risk creation may be infinite in variation.”²⁶⁷ Accordingly, the MPC provides that the distinction between the recklessness *mens rea* justifying conviction for murder versus manslaughter cannot be defined more precisely. “. . . [I]t must be left directly to the trier of fact under instructions which make it clear that recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter.”²⁶⁸

Here, even assuming, as just argued above, that the killings were not practically certain to follow but were risked as unintended side effects, they would have been utterly

²⁶⁴ Model Penal Code, § 2.02(2)(c) (Am. Law Inst, 1985). As applied to homicide, the commentary indicates that it requires a finding that “presupposes an awareness of the creation of a substantial homicidal risk too great to be deemed justifiable by any valid purpose that the actor’s conduct serves.”

²⁶⁵ Model Penal Code, § 2.02(2) cmt. 4 (Am. Law Inst, 1985).

²⁶⁶ “Insofar as Subsection (1)(b) includes within the murder category cases of homicide caused by extreme recklessness, though without purpose to kill, it reflects both the common law and much pre-existing statutory treatment usually cast in terms of conduct evidencing a “depraved heart regardless of human life” or similar words.” *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

unjustified. And given that a serious unjustified risk of causing death would rank very high on a culpability scale, it would clearly involve “a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”²⁶⁹ The callous and ruthless disregard for trespassers’ lives and their bodily integrity, combined with lack of any truly justifying considerations, makes this scenario a paradigmatic illustration of ‘extreme indifference to the value of human life’ or ‘depraved heart’ murder.

Accordingly, notwithstanding Finnis’ resolute efforts to attribute culpability to landowners based on their purportedly *intended* killing when they shoot trespassers directly or set spring-guns, in fact the preceding analysis has shown that on his own principles it would make little difference in terms of moral or legal culpability. As explained above, the cargo bomber’s unintended causing of the death of the aircraft pilot was deserving of the highest form of moral censure and the highest levels of legal culpability (murder). So too, foreseeably causing, or risking causing, without justification, trespasser deaths—plausibly construed on Finnis’ own principles as unintended side effects—would rightly be condemned as morally corrupt and deserving of the most severe criminal punishment for murder by “depraved heart.”

CONCLUSION

The central purpose of the preceding article, as stated in the introduction, has been to challenge Finnis’ contention that a landowner who sets a spring-gun or uses other lethal force to deter a trespasser, even if the landowner has posted clear warnings, entails that the landowner intentionally kills or seriously injures that trespasser. Defense of the thesis, challenging Finnis’ contention, culminates in the arguments presented in the last part, Part IV. These concluding arguments propose, employing Finnis’ own principles, that threatening a trespasser with lethal force, either by a hidden spring-gun, or by directly shooting at him solely in order to ‘stop the trespass’ can—by analogy to Aquinas’ account of self-defense— cause consequences that can be regarded as *unintended side effects*, aimed solely and defensively at ‘stopping the invasion’ i.e., the trespass. While causing such unintended side effects would be deserving of the most severe criminal punishment, this article has been devoted to arguing, a fine but critical point, viz., that, in keeping with the Judges’ opinions in *Ilott* and *Bird* and based on Finnis’ own principles, they are not necessarily intentional or part of the actor’s intention.

²⁶⁹ Model Penal Code, §2.02(2)(c) (Am. Law Inst, 1985).

More specifically, this thesis is dependent upon the considerations developed in earlier parts of this article. Fundamentally, all these considerations flow from analysis of Finnis' natural law theory of basic goods. For, as Finnis explains, these basic goods provide incipiently all the reasons for whatever a person may rationally choose and do. This theory of the basic goods, in turn, leads Finnis to his first principle of morality, the integral directiveness of practical reason. This principle, naturally grasped by practical reason in view of all the basic goods, taken integrally, requires a person in all their deliberations and choices to respect each of those basic goods. Taken together, in their entirety, they engender a 'moral' sense of 'ought' in the practical cognition of a human person. This moral ought, however, is violated whenever a person chooses, not from robust deliberations taking into account all the basic goods, but in circumstances where one has willingly permitted the fullness of practical reason to be 'fettered' due to the influence of feelings or other truncated considerations. In these situations, the person acts unreasonably, i.e., immorally by failing to apply all of one's naturally grasped rational principles.

At the same time, Finnis recognizes that it is impossible to act in the world without causing some harm, even to instantiations of basic goods. The principle he develops to account for this is the maxim "Respect for Every Basic Value in Every Act." Accordingly, this maxim functions as a prohibition only on *intentionally* causing damage or destruction to an instantiation of any one of the basic goods. For choosing to intentionally destroy or seriously damage an instantiation of a basic good would be to deny and pervert one's very identity as a rational acting person, thus creating a moral schizophrenia and making oneself to be the kind of person who voluntarily acts immorally. As Finnis writes: Thus one who *intends* to destroy, damage, or impede some instantiation of a basic human good necessarily acts contrary to reason."²⁷⁰

This article, of course, has been primarily concerned with damage to the basic good of 'life.' While the intermediate principle prohibits all direct intentional damage or destruction of basic goods, it does not, and from a practical point of view cannot, absolutely forbid causing harm to basic goods, even the good of life. Finnis resolves this problem by developing a very precise conception of intention and choice. In particular he posits that an intention bears precisely on what one chooses as part of one's plan or proposal in acting. Anything caused by one's conduct that is outside of that plan or proposal comes about as an unintended side effect. Of course, Finnis following Aquinas, recognizes that just because something is unintended on this schema, does not make it

²⁷⁰ CE Vol. II, *supra* note 3, at 195.

morally permissible. Rather, causing or accepting unintended side effects, can and must be justified only in terms of the good one does intend.

The concluding arguments of this article employ Finnis' own very precise account of intention and choice. Building upon his general natural law theory, it proposes that using lethal force against a trespasser in order to 'stop a trespass,' can by analogy to Aquinas' account of self-defense, as adopted by Finnis, be regarded as an unintended side effect *praeter intentionem* (outside one's intention). As Finnis puts this critical point, "Whatever consequences lie *outside* one's proposal, because neither wanted for their own sake or needed as a means, are *not* synthesized into one's will They are side effects, incidentals."

Of course Finnis also points out that simply because some consequences of conduct lie outside one's plan or proposal and can properly be understood as unintended, does not *eo ipso* settle the question of whether that conduct is permissible, i.e., moral. Referring to unintended side effects, Finnis states: "One may well be culpable in accepting them. But the ground of culpability will not be that one intended them, but that one wrongly, for example unfairly, accepted them as incidents of what one did intend."²⁷¹

This article, applying these critical points, argues, in keeping with the opinions of the judges in *Ilott* and *Bird*, that a landowner's intention in setting spring-guns with warnings is not necessarily to kill or injure, even conditionally, but instead to use the real threat of lethal force to deter by terror and fear. Further, this article contends that if that deterrent fails, even the direct application of lethal force 'to stop the trespass' and its subsequent causing of serious harm or death could be viewed on Finnis' own principles as unintended. A landowner does not need the trespasser to be made dead or seriously injured to protect his property. He only needs to scare him off. Further, just as in Aquinas' self-defense argument, the victim does not need the death of an assailant, but even so is entitled to use deadly force to 'stop the attack.' The lethal consequence need play no part in his plan or proposal. So too, death or serious injury of the trespasser is not necessary for the landowner to accomplish his goal of protecting his property. All he needs is to 'stop the trespass' to 'stop the invasion.' Thus, if any killing or serious injury occurs, caused by the landowner's conduct, albeit immoral and unlawful, could be understood as unintended.

These are the main arguments proposed by this article in support of the view that Finnis has erred in maintaining that a landowner's use of lethal force, backed up by warnings, *must* include a conditional intention to kill or seriously injure, if the trespassers enter.

²⁷¹ *Id.* at 213.

Yet, even if this article is successful in putting Finnis' main thesis into doubt, i.e., if the arguments presented above plausibly undermine his thesis, there is an important point of convergence. For whether one understands, as Finnis does, the triggering of the guns and injury or death to the trespasser as part of the landowner's plan or proposal, i.e., as his intention; or whether one interprets the triggering of the weapons as an unintended side effect, either option would represent instances of conduct whose consequences would be unlawful and grievously immoral. As the article also argues, under common law, no adequation exists between the good of protecting property and causing death or serious bodily harm, even if unintended, to trespassers who pose no threat to the landowner's person. As was stated in *Simpson v. State*,²⁷² "Compensation may be made for injuries to, or the destruction of property; but for the deprivation of life there is no recompense; and for grievous bodily harm, at most, but a poor equivalent."²⁷³

In fact, the penal result under either approach may not differ in substantial degree. Both would describe landowners who are prime candidates for murder charges under Model Penal Code § 210.2. A landowner who intentionally kills or injures will be liable for "purposely" killing under § 210.2(1)(a). The landowner who causes such unjustified killing as unintended side effects, should appropriately be charged with "depraved heart killing," pursuant to § 210.2(1)(b), for recklessness manifesting "extreme indifference to the value of human life."

The distinction between Finnis' theory of these mantrap cases and that advocated by this article may seem of little consequence. But its significance can be best appreciated by considering Finnis' discussion of the difference for one's moral character between on the one hand choosing, and thus intending, to harm a basic good directly, and, on the other, causing such damage as an unintended side-effect.

[C]ommon morality is not indifferent to outcomes. But it includes among the significant outcomes the impact of choosing and intending upon the character of the chooser. It attends to the fact that *choices last*. The proposal which one adopts by choice in forming an intention, together with the reasoning which in one's deliberation made that proposal intelligently attractive, *remains*, persists, in one's will, one's disposition to act. The proposal (and thus the intention) is, so to speak, synthesized into one's will, one's practical orientation and stance in the world.²⁷⁴

²⁷² See generally *Simpson*, 59 Ala. 1.

²⁷³ *Id.* at 9.

²⁷⁴ CE Vol. II, *supra* note 3, at 213.

The actor who conditionally intends the death of a person as part of their plan or proposal, either as an end or as a means to an end, is the kind of person who chooses to subordinate all the good in that person completely to the interest of another. This kind of person reflexively makes themselves to be a murderer, of the worst kind.

On the other hand, one may act culpably, but without any intention to kill or seriously injure the trespasser. In this case, one acts wrongfully in accepting that side effect when there is no justifying reason.

Whatever consequences lie *outside* one's proposal, because neither wanted for their own sake nor needed as a means, are not synthesized into one's will. Though one may foresee these results and accept that one will be causing them, or the risk of them, one is not adopting them. But the ground of culpability will not be that one intended them, but that one wrongly, for example unfairly, accepted them as incidents of what did intend. The effect on one's character of accepting them is not like the dynamic, shaping effect that forming an intention (even a reluctant intention) has.²⁷⁵

One has committed a wrong, and perhaps a serious wrong. Yet, one has not reflexively constituted one's own self, one's basic character, into that of a killer, but less culpably, a reckless person. While this distinction may fade in importance to some, at least the reckless person has some residual, perhaps tenuous, attachment to the basic good of life, an attachment that remains and can be used to correct their moral compass. The direct man-killer on the other hand, like Aristotle's intemperate man, has lost the first principle by which he could work to amend his character. A true man-killer is one who has lost sight of and appreciation for the basic good of life.

One scholar, providing commentary on a pertinent passage from Aristotle—appropriate for summing up and closing the present study—describes the Greek philosopher's assessment of the devastating impact on a person's moral character that occurs when one loses the first principle of right action, i.e., Aristotle's intemperate man:

The intemperate man, for example, does not suffer regret and his actions are fully in conformity with his choice. Indeed, lack of regret is his salient feature. . . . His ruling principle has been destroyed and so he no longer cares about being virtuous. As a result, he experiences no psychological turmoil. His soul, like that of the virtuous, is harmonious; his reason and his desires drive him in the same vicious direction. He is clear-headed about his actions even though,

²⁷⁵ *Id.*

because he is morally obtuse, their ultimate import eludes him. As Rorty puts it, 'he has ends—he is the sort of person who can act in the light of his ends—but he has the wrong ends.' Because his reason is corrupt, the intemperate person is . . . neither pardonable nor curable.²⁷⁶

²⁷⁶ David Roochnik, *Aristotle's account of the Vicious: A Forgivable Inconsistency*, 24 *HIST. PHIL. Q.* 209 (2007) (Internal cites to Aristotle omitted), commenting on a passage from Book VII of the *Nicomachean Ethics*. In this passage he is quoting Amélie Oksenberg Rorty, *Akrasia and Pleasure*, in *ESSAYS ON ARISTOTLE'S ETHICS* 267, 271 (Amélie Oksenberg Rorty ed., University of California Press, 1980).