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Practical Reasonableness and Mental Health Alternatives to Incarceration

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PRACTICAL REASONABLENESS AND MENTAL HEALTH ALTERNATIVES TO INCARCERATION

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PRACTICAL REASONABLENESS AND MENTAL HEALTH ALTERNATIVES TO INCARCERATION

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"We as a Nation have long neglected the mentally ill . . ."[1]

I. INTRODUCTION

Jails have come to replace psychiatric hospitals as repositories for people with mental illness. In New York City, Rikers has become one of the nation's largest inpatient mental health centers, second only to the L.A. County Jail. A disproportionate number of these psychiatrically disabled individuals end up in solitary confinement, doing "Bing time"[2] for rule infractions precipitated by their illness. Resultantly, years of activism by the Jails Action Coalition and two scathing reports commissioned by the New York City Board of Correction have finally spurred efforts to reduce the use of solitary and improve mental health treatment on Rikers.

Queens and Bronx Counties have presented examples of two alternatives to traditional incarceration of offenders afflicted with mental illness. Bronx Mental Health Court[3] is a community-involved initiative that seeks to address treatment needs while also reducing recidivism. Queens TASC Mental Health Diversion Program[4] manages both the Queens Misdemeanor Mental Health Court and the Queens Felony Mental Health Court in order to divert individuals with serious mental illness from current or potential incarceration.

While still not a national protocol, the practice of Mental Health Alternatives to Incarceration ("*MHATI*") is a form of justice that satisfies the standards devised in John Finnis' Natural Law framework for morality. Specifically, Mental Health Alternatives to Incarceration

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[1] Remarks [of President John F. Kennedy] on Proposed Measures To Combat Mental Illness and Mental Retardation, PUB. PAPERS 137, 138 (Feb. 5, 1963)

[2] "Bing time" is jargon used to refer to punitive segregation imposed on prisoners for behavioral infractions during their incarceration.

[3] The Bronx Mental Health Court's state goal is "to prevent mentally ill individuals from committing crimes and to ensure their proper treatment." See http://www.eacinc.org/bronx-tasc-mental-health-court-program (April 5, 2014, 5:13PM).

[4] The Queens TASC Mental Health Diversion Program is provided by the EAC Network, which is motivated as follows: "*Our mission is to respond to human needs with programs and services that protect children, promote healthy families and communities, help seniors and empower individuals to take control of their lives." See* http://www.eacinc.org/about (April 5, 2014, 5:22PM).

properly addresses Finnis' goods of life, knowledge, sociability, and practical reasonableness, and has been developed with the common good and justice in consideration. Accordingly, because *MHATI* meets Finnis' framework, in creation and in practice, for moral justifiability, it stands as good law, in both the moral and legal senses.

A. Department of Corrections: Rikers Island and Mental Health

There are three times as many people with serious mental illness in U.S. jails and prisons than in state psychiatric hospitals—many of them incarcerated for low-level, nonviolent offenses that result from an untreated psychiatric condition.[5] People with mental illness do not fare well in correctional facilities, where they are more likely to be victimized and housed in solitary confinement.[6] Historically, justice systems have been ill-equipped to address the needs of this population due to a lack of adequate treatment services coupled with poor collaboration with community-based health organizations.

The New York City Department Of Correction (DOC) imposes punitive segregation[7] on pretrial detainees and sentenced prisoners for behavioral infractions during their incarceration. They are imposed on adult and adolescent prisoners alike. Prisoners in punitive segregation are locked inside specially designed single-occupancy cells for 23 hours per day, with one hour of recreation and access to daily showers in the housing unit.[8] Despite these strict measures, the

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[5] This provocative conclusion comes from a 2010 study conducted by the Treatment Advocacy Center and National Sheriffs Association. This study focused on a comprehensive study of all 50 states to determine the percentage of individuals with mental health problems who were incarcerated instead of treated for their illness. *See* http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf (April 8, 2014, 7:25 PM).

[6] *See* 7 NYCRR 6, §§ 320.2, 320.4, 320.5 (2014); *cf generally*, NYC.gov staff report regarding conditions for mentally ill adolescents in the prison system. *http://www.nyc.gov/html/boc/downloads/pdf/reports/Three_Adolescents_BOC_staff_report.pdf* (April 8, 2014, 8:38 PM) [hereinafter NYC.GOV STAFF REPORT].

[7] "Punitive segregation" is also known as "solitary confinement," "isolated confinement," the "box," or the "bing."

[8] NYC.GOV STAFF REPORT, *supra* note 6 at iii, n.3.

Minimum Standards at least require access to health care services and visits for prisoners in punitive segregation. However before prisoners are permitted to leave their cells, they must be handcuffed.[9] Often times, incarcerated individuals with mental illness suffer from behavioral infractions during their term in prison.

At Rikers Island, infracted prisoners are placed in one of several punitive segregation units: two punitive segregation units at the RND Complex (the "RNDC"), a Central Punitive Segregation Unit ("CPSU") at the OB Correctional Center, a Restricted Housing Unit ("RHU")[10] at RNDC, and the Mental Health Assessment Unit for Infracted Inmates ("MHAUII")[11] at the GRV Center.[12] RHU And MHAUII are housing units for infracted prisoners with mental illnesses who require more intensive mental health services.[13]

1. Rikers Island: Mental Health Board and Standards

Spurred by a longstanding concern about inmate suicides, the Department of Corrections' Board of Mental Health (the "Board") developed rules and standards in order to promote the delivery of appropriate correctional health and mental health services.[14] The Board held public

[9] 7 NYCRR 10, § 1704 (2014); *See also*, NYC DOC Mental Health Standards, http://www.nyc.gov/html/boc/downloads/pdf/mental_health_minimum_standards.pdf (April 6, 2014, 6:25 PM).

[10] According to the DOC, the Restricted Housing Unit is a housing unit for infracted prisoners with mental illness, and it features a self-paced, multi-phase behavioral modification program provided in a group setting by mental health Staff from the Department of Health and Mental Hygiene. Upon transfer to RHU, prisoners start at level zero and are placed under lock-in 23 hours per day. As they move up in phases, they earn additional out-of-cell time. Prisoners who complete the program may see as much as a 50% reduction of their punitive segregation sentence. *See* NYC.GOV STAFF REPORT, *supra* note 5, at ii.

[11] *Id.* Prisoners in MHAUII are placed under lock-in 23 hours per day and are allowed outside only for limited mandated services and group and individual mental health treatment.

[12] *Id.* All prisoners in CPSU, PS, MHAUII, and RHU are placed in single-occupancy cells in these specialized housing units for pre-determined punitive segregation. The more serious the offense, the greater the punitive segregation sentence. All adolescent prisoners are locked in 23 hours per day and are allowed outside only for limited mandated services. Over time, however, prisoners in RHU may earn more out-of-cell-time.

[13] NYC.GOV STAFF REPORT, *supra* note 5, at ii.

[14] "Promoting the delivery of appropriate correctional health and mental health services" is a critical part of the Board's mission. *See* BOC Mental Health Standards,

hearings in the early 1980s to explore the quality and availability of mental health services provided to prisoners. Thereafter, the Board worked collaboratively with the Departments of Correction, Health, and Mental Health, and the Mayor's Office of Operations, the Office of Management and Budget and contract service providers to develop Mental Health Minimum Standards for the City's jails.

When the Mental Health Standards were implemented in 1985, New York City became the first jurisdiction in the country to *voluntarily* require itself to provide appropriate mental health staffing and other resources.[15] The results were immediate and significant. In 1986, after

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www.nyc.gov.html/boc/html/rules/mental_health.shtml (April 10, 2014 7:52 PM).

[15] New York State Correction Law §2-04 Treatment

(a) Policy.

Adequate mental health care is to be provided to inmates in an environment which facilitates care and treatment, provides for maximum observation, reduces the risk of suicide, and is minimally stressful. Inmates under the care of mental health services, if in all other respects qualified and eligible shall be entitled to the same rights and privileges as every other inmate.

(c) Programs

> (6) Inmates identified as developmentally disabled shall be evaluated within seventy-two hours and mental health services staff shall make a recommendation to the Department of Correction as to whether such developmental disability makes it necessary for the inmate to be placed in special housing or otherwise separated from the general inmate population:
>
> > (i) inmates who suffer from developmental disabilities shall be housed in areas sufficient to ensure their safety;
> >
> > (ii) if it is determined by mental health services that an inmate's developmental disability makes it clinically contraindicated that the inmate be housed in a correctional facility, then the Department of Correction shall immediately notify the court and a written notice shall be filed in the inmate's court papers.

§2-08 Coordination.

(a) Policy.

The Departments of Correction and Health shall consult and coordinate their activities on a regular basis in order to provide for the continued delivery of quality mental health care.

(b) Discipline.

(1) The Departments of Health and Correction shall develop written procedures to provide for mental health services to be informed whenever an inmate in a special housing area for mental observation is charged with an infraction, and to be permitted to participate in the infraction hearing and to review any punitive measures to be taken.

(2) Any inmate to be placed in punitive segregation who has a history of mental or emotional disorders shall be seen by mental health services staff before being moved to punitive segregation. All inmates in

the first full year of the implementation of the Standards, there were three suicides—down from eleven in 1985.

Key elements of the Mental Health Minimum Standards include mental health screening of all incoming prisoners within 24 hours of arrival in DOC custody, training of correctional and medical staff in the recognition of mental and emotional disorders, special housing areas for those inmates with mental or emotional disorders in need of close supervision, 24-hour access to mental health services personnel for emergency psychiatric care, and a prisoner observation aide program that employs trained, carefully-selected inmates to help monitor those inmates identified as potential suicide risks.

2. *Mental Health Alternatives: A Plan for Collaboration in NYC*

In New York City, the proportion of inmates with mental health diagnoses continues to rise. In 2013, 37% of DOC's average daily population had a mental health diagnosis, up from 34% in 2012 and appreciably higher than the percentage a few years ago.[16] Concern about the increasing prevalence and severity of mental illness in the city's inmate population led to the formation of the Mayor's Steering Committee on Citywide Justice and Mental Health in 2012.[17] One of the Committee's recommendations was to establish resource hubs in each of the five

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punitive segregation shall be seen at least once each day by medical staff who shall make referrals to mental health services where appropriate.

[16] According to the Department of Corrections 2013 internal report, the 2013 statistic is significantly higher than 2009, rising 10% from 27% to 37%, in 4 years time. *See* http://www.nyc.gov/html/ops/downloads/pdf/mmr2013/doc.pdf. (April 9, 2014, 11:01 AM).

[17] See NYC.GOV press release, NEWS FROM THE BLUE ROOM: MAYOR BLOOMBERG ANNOUNCES NEW MENTAL HEALTH INITIATIVE, December 23, 2012 http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2012b%2Fpr488-12.html&cc=unused1978&rc=1194&ndi=1 (April 13, 2014, 7:25 PM).

boroughs to divert eligible defendants from jail to treatment in the community. The hope was to establish a hub to operate in each of the five counties of the City within one year's time.[18]

Concomitantly, DOC and the Department of Health and Mental Hygiene ("DOHMH") entered into a joint collaboration to develop two new programs for mentally ill inmates. First, they established the Clinical Alternative to Punitive Segregation (CAPS), for seriously mentally ill inmates who incur infractions.[19] Second, DOC and DOHMH piloted two restrictive housing units for those with non-serious mental health diagnoses who incur infractions.[20] As described above, the RHU is both the place where the penalty of punitive segregation is imposed as well as where clinical staff provides a three-phase behavioral program. Integral to an RHU is the opportunity to earn progressively more out-of-cell time beginning the first week in the program and an early (or conditional) discharge. The RHU is being expanded to serve all infracted non-seriously mentally ill inmates.[21] The hope is to develop a system that appropriately addresses the alternative needs of the growing population of mentally ill placed in incarceration.

The purpose of this Note is to diagram the historical development and present practice of *MHATI*, and to discuss whether the practice is morally justifiable. Part II of this Note traces the origins and illustrates the development of the practice to its present application and interpretation. Part III outlines and analyzes the basic elements of Finnis' Natural Law framework. Then, Part IV analyzes *MHATI* in the structural framework described in Part III. Part V concludes this Note that *MHATI* is just law.

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[18] *Id.*

[19] CAPS is a therapeutic program provided in a secure setting and not a punitive placement. The length of time that a seriously mentally ill inmate remains in the unit is based upon their need for individualized treatment provided by mental health professionals.

[20] See NYC.GOV Mayor's Management Report: Department of Corrections, Fiscal Year 2013, http://www.nyc.gov/html/ops/downloads/pdf/mmr2013/doc.pdf (April 18, 2014, 1:15 PM).

[21] *Id.*

II. HISTORICAL ORIGINS OF *MHATI*

This Part of this Note will examine the historical practice of *MHATI* and trace the doctrine's development to the present day's primary application and interpretation. Dorothea L. Dix, born April 4, 1802, was an American activist on behalf of the indigent mentally ill. Through a vigorous campaign of lobbying state legislatures and U.S. Congress, she was responsible for the creation of the first generation of mental asylums.[22] Notably during 1844, Dorothea traveled to every county jail and almshouse throughout New Jersey in order to determine how the mentally ill were afforded care, if at all. Relying on the findings from her observations, with the support of Senator Joseph S. Dodd, Dorothea Dix founded the first insane asylum with the passage of the New Jersey State Lunatic Asylum of 1845.[23] Dorothea Dix stood for the proposition that the mentally ill deserved to be treated, not punished.

A. Mental Health Recognition in the Law

At the time Dorothea was advocating on behalf of mentally ill persons incarcerated, there was approximately 1 public psychiatric bed available for every 5,000 people in the population.[24] According to the 1850 census, there was roughly 4,730 mentally insane individuals in the total population of 23,261,000 at the time. A century later, in the 1950s, just before the deinstitutionalization of mental patients in the U.S., there was approximately 1 public psychiatric bed for every 300 people in the population.[25] During the 100 years after Dorothea Dix's

[22] *See* Dix, Dorothea L (1843), *Memorial to the Legislature of Massachussetts 1843*, retrieved at http://www.archive.org/stream/memorialtolegisl00dixd#page/n0/mode/1up

[23] The passage of this law established the Trenton State Hospital. *See* The Asylum Project, http://www.asylumprojects.org/index.php?title=Trenton_State_Hospital (April 18, 2014, 7:00 PM).

[24] E. FULLER TORREY AND JUDY MILLER, THE INVISIBLE PLAGUE: THE RISE OF MENTAL ILLNESS FROM 1750 TO THE PRESENT, 218–222, App. C: Table 3 (New Brunswick, N.J.: Rutgers University Press, 2002).

[25] *Id.*

advocacy, the problem of mentally ill persons in jails appeared to drastically reduce—individuals were treated as patients, not criminals, and sent to mental hospitals.

With an eye to mental health incarceration—institutionalization v. criminalization—British Psychiatrist and mathematician Lionel Penrose published a provoking paper in regards to the relationship between psychiatric hospitals and prisons. Coined as the "balloon theory," Penrose postulated that the two populations were inversely correlated. As such, as one decreases, the other increases.[26] Unbeknownst to Penrose, the United States at the beginning of the 1940's decided to embark on a new social experiment – deinstitutionalization—that would give credence to his theory.

1. Deinstitutionalization

One of the most well-intended—but poorly planned—social changes carried on in the United States, deinstitutionalization refers to the emptying out of state mental hospitals.[27] The practice resulted from overcrowding and deterioration of mental hospitals and new medications that significantly improved the symptoms of patients.[28] Deinstitutionalization drew enthusiastic support from fiscal conservatives interested in saving funds by closing state hospitals, as well as civil rights advocates who believed that patients needed to be "liberated."[29]

Notably, California was in the forefront of the deinstitutionalization movement. The emptying of their mental hospitals began in 1950s, but once Ronald Reagan was in office as then-governor in the 1960s, he vowed that all mental hospitals in the state would close

[26] L. Penrose, MENTAL DISEASE AND CRIME: OUTLINE OF A COMPARATIVE STUDY OF EUROPEAN STATISTICS, British Journal of Psychiatry 1938, 18:1–15.
[27] *See* E. FULLER TORREY, NOWHERE TO GO: THE TRAGIC ODYSSEY OF THE HOMELESS MENTALLY ILL (New York: Harper and Row, 1988), chapters 3 and 4
[28] *Id.*
[29] E.g. Ken Kesey, ONE FLEW OVER THE CUCKOOS NEST (1962)

completely.[30] Contemporaneous with his vow, California passed the controversial Lanterman-Petris-Short (LPS) Act in 1967, which virtually abolished involuntary hospitalization except in extreme circumstances.[31]

2. Deinstitutionalization and Imprisonment

By the 1970s, the social experiment of "deinstitutionalization" started to provide credence to Penrose's balloon theory. The emptying of state mental hospitals had resulted in a marked increase in the number of mentally ill individuals in jails and prisons. In 1972 in California, San Mateo County psychiatrist Marc Abramson published his findings that there was a 46% increase in mentally ill prisoners in county jail and a 100% increase in the number of mentally ill individuals adjudged to be incompetent to stand trial. To support his findings, he quoted a state prison psychiatrist who stated, "we are literally drowning in patients. . .Many more men are being sent to prison who have serious mental problems."[32]

As the social experiment of deinstitutionalization spread across the country, countless studies began to issue, bolstering the balloon theory notion. By the 1980s, multiple studies and observations indicated that an increasing number of the discharged mental patients were ending up in jails and prisons. According to a study of 500 mentally ill defendants, published by Gary Whitmer, he concluded that the emptying of hospitals "forced a large number of patients into the criminal justice system.[33] Dr. Richard Lamb and colleagues corroborated this assertion through

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[30] *See* http://www.salon.com/2013/09/29/ronald_reagans_shameful_legacy_violence_the_homeless_mental_illness/ (April 18, 2014, 10:15 PM).

[31] Cal. Welf. & Inst. Code § 5000, et seq.

[32] M. F. ABRAMSON, THE CRIMINALIZATION OF MENTALLY DISORDERED BEHAVIOR: POSSIBLE SIDE-EFFECT OF A NEW MENTAL HEALTH LAW, Hospital and Community Psychiatry, 23:101–105 (1972).

[33] G. E. WHITMER, FROM HOSPITALS TO JAILS: THE FATE OF CALIFORNIA'S DEINSTITUTIONALIZED MENTALLY ILL, American Journal of Orthopsychiatry, 50:65–75 (1980).

two published studies of the problem.[34] By the 90s, there were countless studies conducted in order to determine the pace of deinstitutionalization and its effect upon the criminal justice system.[35]

By 2000, the tides began to shift again and activists demanded the government's attention to the problem. The American Psychiatric Association (the "APA") estimated that about 20% of prisoners were seriously mentally ill, with 5% actively psychotic at any given time.[36] In 2002, the National Commission of Correctional Health Care issued a report to Congress in which it estimated that 17.5 percent of inmates in state prisons had one of three major axis disorders, including schizophrenia, bipolar disorder, or major depression.[37] By 2003, based on their interviews and visits to state and federal prisons, the Human Rights Watch corroborated the APA's data that 20% of inmates were seriously mentally ill.[38] In 2006, the Department of Justice issued its own survey and determined that 24% of jail inmates and 15% of state prison

[34] H. R. LAMB AND R. W. GRANT, THE MENTALLY ILL IN AN URBAN COUNTY JAIL, Archives of General Psychiatry,39:17–22 (1982); H. R. LAMB AND R. W. GRANT, MENTALLY ILL WOMEN IN A COUNTY JAIL, Archives of General Psychiatry, 40:363–368 (1983).

[35] *See e.g.* L. A. TEPLIN, THE PREVALENCE OF SEVERE MENTAL DISORDER AMONG MALE URBAN JAIL DETAINEES: COMPARISON WITH EPIDEMIOLOGIC CATCHMENT AREA PROGRAM, American Journal of Public Health, 80:663–669 (1990); E. FULLER TORREY, JOAN STIEBER, JONATHAN EZEKIEL ET AL., CRIMINALIZING THE SERIOUSLY MENTALLY ILL: THE ABUSE OF JAILS AS MENTAL HOSPITALS, Public Citizen's Health Research Group and the National Alliance for the Mentally Ill (1992); J. R. BELCHER, ARE JAILS REPLACING THE MENTAL HEALTH SYSTEM FOR THE HOMELESS MENTALLY ILL?, Community Mental Health Journal, 24:185–195 (1988); P. M. DITTON, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS, Bureau of Justice Statistics Special Report (July 1999).

[36] AMERICAN PSYCHIATRIC ASSOCIATION, PSYCHIATRIC SERVICES IN JAILS AND PRISONS, 2nd ed., Introduction, xix, (Washington, D.C., 2000).

[37] NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS, vol. 1, p. 22 (March 2002). The cited data are based on B. M. VEYSEY AND G.BICHLER-ROBERTSON, PREVALENCE ESTIMATES OF PSYCHIATRIC DISORDERS IN CORRECTIONAL SETTINGS, THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS, vol. 2 (April 2002), at http://www.ncchc.org/pubs/pubs_stbr.vol2.html. (April 18, 2014, 11:05 PM)

[38] HUMAN RIGHTS WATCH, ILL EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS (Washington, D.C.: Human Rights Watch, 2003).

inmates reported at least one symptom of a psychotic disorder.[39] Thus, at the start of the new millennia, there were numerous reports that all concluded that between 15% and 20% of inmates had a serious mental disorder. A 2009 survey of mental illness among jail inmates revealed that out of a total of 822 inmates (in five jails between New York and Maryland), a total of 16.6% prisoners met the criteria consistent with higher rates of mental illness.[40] Remarkably, a survey conducted by the National Alliance for the Mentally Ill[41] reported that 40% of mentally ill family members had been in jail at some point in their lives.[42] Based on the data, one can conclude that in spite of the great work of advocates such as Dorothea Dix, jails and prisons have once again become America's mental hospitals.

B. Scholarship in the Law Related to Mental Health

Three traditions have dominated mental health law scholarship: "doctrinal constitutional scholarship focusing on rights, therapeutic jurisprudence scholarship focusing on the therapeutic implications of different laws, and theoretical scholarship focusing on philosophical issues underpinning mental health law."[43] This Note focuses primarily on the interaction between mental illness and the law. This section addresses the doctrines created by the Supreme Court and implemented by lower courts, federal and state legislation that enables or hinders the participation of the mentally ill in society, new institutional forms and their effects on the mentally ill, and underlying conceptual constructs about the nature of criminal punishment,

[39] D. J. JAMES AND L. E. GLAZE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, (Dec. 2006).
[40] H. J. STEADMAN, F. C. OSHER, P. C. ROBBINS ET AL., PREVALENCE OF SERIOUS MENTAL ILLNESS AMONG JAIL INMATES, Psychiatric Services, 60:761–765 (2009).
[41] NAMI is an advocacy group for families of individuals with serious mental illnesses.
[42] DONALD M. STEINWACHS, JUDITH D. KASPER, ELIZABETH A. SKINNER, FINAL REPORT: NAMI FAMILY SURVEY (Arlington, Va.: National Alliance for the Mentally Ill, 1992).
[43] ELYN R. SAKS, MENTAL HEALTH LAW: THREE SCHOLARLY TRADITIONS, 74 S. CAL. L. REV. 295, 296 (2000).

competency, and active participation in society. This Note recognizes the law's impact on and therapeutic potential for the mentally ill, a nontrivial portion of the general population.

1. The Federal Sentencing Guidelines and Mentally Ill Offenders

An estimated 26.2% of Americans aged eighteen years and older suffer from a diagnosable mental disorder in a given year.[44] The criminal justice system has become home to many mentally ill individuals.[45] Society has often failed to craft and interpret the law in ways that are cognizant of mental illness and sympathetic to mentally ill individuals.[46]

The Sentencing Reform Act of 1984[47] (SRA) created the U.S. Sentencing Commission to promulgate binding sentencing guidelines in response to a regime of indeterminate sentencing characterized by broad judicial discretion over sentencing and the possibility of parole.[48] The Act sought to create a transparent, certain, and proportionate sentencing system, free of "unwarranted disparity" and able to "control crime through deterrence, incapacitation, and the rehabilitation of offenders"[49] by sharing power over sentencing policy and individual sentencing outcomes among Congress, the federal courts, the Justice Department, and probation officers.

The heart of the Guidelines is a one-page table: the vertical axis is a forty-three point scale of offense levels, the horizontal axis lists six categories of criminal history, and the body provides the ranges of months of imprisonment for each combination of offense and criminal

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[44] RONALD C. KESSLER ET AL., PREVALENCE, SEVERITY, AND COMORBIDITY OF 12-MONTH DSM-IV DISORDERS IN THE NATIONAL COMORBIDITY SURVEY REPLICATION, 62 ARCHIVES OF GEN. PSYCHIATRY 617, 617 (2005).
[45] *See* Fox Butterfield, Prisons Replace Hospitals for the Nation's Mentally Ill, N.Y. TIMES, Mar. 5, 1998, at A1.
[46] *See supra* Part II.A.1
[47] Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.)
[48] *See Mistretta v. United States*, 488 U.S. 361, 363 (1989).
[49] U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING, at iv (2004), available at http://www.ussc.gov/15_year/executive_summary_and_preface.pdf (April 8, 2014, 1:25PM).

history.[50] A sentencing judge is meant to use the guidelines, policy statements, and commentaries contained in the other 600-plus pages of the Guidelines Manual to identify the relevant offense and history levels, and then refer to the table to identify the proper sentencing range.[51] In certain circumstances the Guidelines allow for both upward and downward departures from the sentence that would otherwise be recommended, even though in all cases a sentence must be at or below the maximum sentence authorized by statute for the offense.

Few circumstances for departure involve the mental illness of an offender. Instead, the Guidelines deal explicitly with mentally ill offenders in only a limited way.[52] Section 5H1.3 of the Guidelines states, "[m]ental and emotional conditions are not ordinarily relevant in determining whether a departure [from the Guideline range of sentences] is warranted, except as provided in [the Guidelines sections governing grounds for departure]."[53] Generally, that section permits departure from the Guidelines if there is an aggravating or mitigating circumstance "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines," and if the departure advances the objectives set out in 18 U.S.C § 3553(a)(2), which include elements of incapacitation, deterrence, rehabilitation, and retribution.[54] Downward departure is allowed when an offender suffers from a "significantly reduced mental capacity" and neither violence in the offense nor the offender's criminal history indicates a need to protect the public.[55]

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[50] U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, at 394 (2012)
[51] See id. § 1B1.1
[52] Interestingly, the Guidelines deal more extensively with crimes against the mentally ill, providing for heightened sentences for those committing crimes against victims deemed incompetent because of mental illness. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(10)(D) & cmt. n.20(B).
[53] id. § 5H1.3.
[54] Id. § 5K2.0(a)(1).
[55] U.S. SENTENCING GUIDELINES MANUAL § 5K2.13. Although there is no necessary connection between a violent offense and future risk to the public, most courts construing section 5K2.13 have taken the position that an offense involving violence or the threat of violence disqualifies an offender from a

Moreover, the Guidelines were crafted to ensure that drug dependence, which is perhaps most reasonably viewed as mental illness, would not act to mitigate sentences.[56] These factors coincided with the rise of the idea that punishment should be measured by offenders' dangerousness and not merely their culpability.[57] A key implication of the Guidelines' silence on mental illness was that downward departures for the mentally ill, and hence the dangerous or drug addicted among them, were rarely permitted.

Along with discouraging downward departure in cases of mental illness, prior to *Booker*,[58] the Guidelines only allowed upward departure on the basis of mental illness under section 5K2.0, for extraordinary circumstances not otherwise taken into account by the Guidelines.[59] Courts were left to determine what manifestations of mental illness counted as sufficiently extraordinary.

2. Judicial Discretion from the Guidelines for Mental Health

In the 1990s, the attempted assassination threats against then-President Bush provides a noteworthy example of sentencing an individual with mental illness. The Ninth Circuit's decision in *United States v. Hines*[60] suggested that lurid details and the specter of dangerousness

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downward departure under this section. *See* EVA E. SUBOTNIK, Note, PAST VIOLENCE, FUTURE DANGER?: RETHINKING DIMINISHED CAPACITY DEPARTURES UNDER FEDERAL SENTENCING GUIDELINES SECTION 5K2.13, 102 COLUM. L. REV. 1340, 1340–43, 1354–57 (2002)

[56] See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 5H1.4 ("Drug or alcohol dependence or abuse is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime.").

[57] Paul H. Robinson, Commentary, PUNISHING DANGEROUSNESS: CLOAKING PREVENTIVE DETENTION AS CRIMINAL JUSTICE, 114 HARV. L. REV. 1429, 1429–31 (2001).

[58] *United States v. Booker*, 543 U.S. 220 (2005).

[59] *Booker* dealt a strong blow to a system of federal sentencing guidelines (that many viewed as unfair and unsuccessful), granting judges more discretion. Permitting judges greater reliance on 18 U.S.C. § 3553(a), the federal sentencing regime post-*Booker* allows for prison sentences for violent mentally ill offenders longer than those suggested by the Federal Sentencing Guidelines. In particular, longer sentences are not imposed because of the mental illness, but instead because judges impose sentences beyond what the Guidelines recommend on some mentally ill offenders that they view as dangerous or in need of treatment.

[60] 26 F.3d 1469 (9th Cir. 1994)

fueled by mental illness might, in combination, count as "extraordinary circumstances." Roger Hines was convicted of making threats against the President and being a felon in possession of a firearm.[61] In addition to traveling to Washington, D.C., apparently in hopes of killing President George H.W. Bush, Hines kept a diary and wrote letters in which he claimed to have molested and killed children.[62] At sentencing, the court gave Hines an upward departure because of his "extraordinarily dangerous mental state" and "significant likelihood that he [would] commit additional serious crimes."[63] Although upward departures based on a need for psychiatric treatment are barred, the Ninth Circuit upheld the sentence arguing that the sentencing court had departed not to treat Hines but because "Hines posed an 'extraordinary danger' to the community because of his serious emotional and psychiatric disorders.'"[64]

Conversely, the Sixth Circuit in *United States v. Moses*[65] opined that mental illness made poor grounds for extraordinary departures. Defendant Moses, a paranoid schizophrenic who held "strange violent fantasies" was "preoccupied with weapons" and had "overtly threatened the killings of several people, and fantasized the slaughter of still more." Despite being adjudicated as "mental defective," he was convicted for making false statements in order to purchase guns and subsequently receiving them. The sentencing court subsequently sentenced him to six times greater than the Guidelines recommended sentence for his offense and criminal history. Accordingly, the sentencing court was motivated by the belief that Moses would cease taking his

[61] *Id.* at 1473
[62] *Id.* at 1472. However investigators did not find evidence to corroborate this claim.
[63] *Id.* at 1473. The court justified this additional departure by reference both to Guidelines section 5K2.0 and to section 4A1.3, which allows departures where defendants' criminal histories do not adequately reflect their dangerousness. *Hines*, 26 F.3d at 1477. *But cf.* U.S. Sentencing Guidelines Manual § 4A1.3 (2007) (enumerating the circumstances, which do not include mental illness, that may justify departures on these grounds).
[64] *Hines*, 26 F.3d at 1477.
[65] 106 F.3d 1273 (6th Cir. 1997)

medications under which his condition had improved while he was in custody.[66] The Sixth Circuit responded by vacating the sentence stating that, given the inclusion of section 5H1.3, upward departures for circumstances not taken into account in the drafting of the Guidelines did not apply to Moses.[67] Instead, civil commitment, rather than an upward departure, was the appropriate mechanism for protecting the public.[68]

3. Civil Commitments

The most obvious alternative to upward departures and variances for violent mentally ill offenders is civil commitment following prison. In the ideal, at least, commitment keeps the mentally ill confined and in treatment only so long as they display the symptoms that make them dangerous to the public. Indeed, there is a federal commitment statute, 18 U.S.C. § 4246, that provides for the commitment of a "person in the custody of the Bureau of Prisons whose sentence is about to expire" who "is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another."[69]

Civil commitment following prison may not, however, be a perfect solution for dealing with violent mentally ill offenders. Perhaps, to society — and to judges — a violent mentally ill person who has served out a Guidelines sentence is not blameless. Perhaps once an individual is deemed blameworthy, all that follows, even treatment and incapacitation for the public safety, is

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[66] *Id.* at 1277

[67] *Id.* at 1278-81.

[68] *Id*. at 1280; *cf. United States v. Fonner*, 920 F.2d 1330, 1334 (7th Cir. 1990) (noting that "mental health is not a solid basis on which to depart upward" and that upward departures on the basis of a convict's potential to commit future crimes – perhaps due to mental illness—may impermissibly overlap with the recidivism penalties already included in the Guidelines.). Additionally, the Sixth Circuit noted that a civil commitment statute, 18 U.S.C. §4246 (2000), was "directly designed to forestall [the danger to the community created by a convict's mental illness] through continued commitment after completion of the sentence." *Moses*, 106 F.3d at 1280.

[69] 18 U.S.C. § 4246(A) (2000).

tarred by the initial retributive purpose. Evidence for this possibility can be found in the text of §3553, which plainly allows incarceration, rather than commitment, in order to protect the public and treat the offender.

Second, commitment is itself complicated.[70] For instance, it is not clear that a violent mentally ill offender would actually be committed and, if committed, receive treatment. Commitment statutes are, with good reason, designed at least as much to avoid committing the sane as to provide an alternative to prison for the dangerously insane. A commitment statute is constitutionally sustainable if it combines "proof of serious difficulty in controlling behavior"[71] and "proof of dangerousness [coupled] with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'"[72] Moreover, no one besides the director of the facility in which the offender is held before the end of his sentence can petition to have the offender committed.[73] An offender who is still dangerous or might become dangerous immediately after release might not be committed in light of these protections, perhaps most plausibly in a case where an offender's symptoms improve while being treated in custody but worsen when the offender ceases treatment post-release.[74] In addition, offenders who are committed will not always get treatment, removing some of whatever difference exists between commitment and

[70] This complication does not extend to whether commitment may immediately follow a prison sentence. So long as the commitment is not intended to punish or deter the offender and normal requirements for commitment are met, the commitment is civil and thus does not violate the Constitution's prohibition on double jeopardy. *See Kansas v. Hendricks*, 521 U.S. 346, 370 (1975). The Supreme Court willingly posited that commitment statutes for the mentally ill are not intended to deter, since persons with a mental abnormality are unlikely to be deterred by the threat of confinement. *See id.* at 361–63.

[71] *Kansas v. Crane*, 534 U.S. 407, 413 (2002). In *Hendricks*, the Court suggested that a finding of mental illness would be sufficient "to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." 521 U.S. at 358. In *Crane*, it modified this position to include a specific volitional element so as to limit commitment to the seriously mentally ill, rather than the "dangerous but typical recidivist." 534 U.S. at 413. At issue in *Hendricks*, *Crane*, and much scholarship on civil commitment was the post-prison commitment of sex offenders.

[72] *Hendricks*, 521 U.S. at 358.

[73] See *United States v. Moses*, *Supra* at note 64.

[74] *See generally Id.*

imprisonment.[75] Commitment without treatment may last indefinitely, a result far harsher than a fixed prison term.

C. Rehabilitative v. Punitive: Mental Health Alternatives to Incarceration

In the last decade, diversionary programs known as mental health courts ("MHCs") have been created all over the country, different than the practices of incarceration or civil commitments.[76] These programs work at the local level to divert mentally ill chronic reoffenders away from the traditional criminal justice system and into treatment.[77] As MHCs become more widespread and their effectiveness becomes broadly recognized, their sources of support have grown.[78] Recently, the Department of Justice promoted (and funded)[79] MHCs as part of a bipartisan effort jointly sponsored by the President and Congress to increase access to mental

[75] A state need not provide treatment to an individual who has been committed if that individual suffers from an untreatable condition.
See Hendricks, 521 U.S. at 367; SAUL J. FAERSTEIN, SEXUALLY DANGEROUS PREDATORS AND POST-PRISON COMMITMENT LAWS, 31 LOY. L.A. L. REV. 895, 897 (1998)

[76] Bronx Mental Health Court and Queens TASC Mental Health Diversion Program, *Supra* Part I, are two such examples of local diversionary programs.

[77] Mental Health Courts have the following combination of goals: (1) improve public safety; (2) reduce length of time in jail or prison for offenders with mental illness; (3) use overtaxed criminal justice resources more efficiently; (4) improve courts ability to identify, assess and monitor offenders with mental illness; (5) improve quality of life for people with mental illness; (6) improve coordination between the mental health and criminal justice systems. *See* NY Courts mission. Available at https://www.nycourts.gov/courts/problem_solving/mh/mission_goals.shtml (April 19, 2014, 11:00pm).

[78] Mental Health Courts require collaboration among a broad-based group of stakeholders: judges, court administrators, prosecutors, defense attorneys, public mental health and substance abuse agencies, community-based providers of mental health treatment, substance abuse treatment and related services, law enforcement, corrections and probation agencies, people with mental illness, their family members and mental health advocates, crime victims, and other community members. Involvement of these stakeholders in the planning and operations of a Mental Health Court helps ensure that the resources and activities of the court are coordinated with those of other criminal justice and mental health agencies working with offenders with mental illness.

[79] Attendant costs can include outpatient individual counseling, group counseling, residential treatment, durg abuse treatment, job readiness classes, life skills classes, prosecutors and defense attorneys. *See* SHELLI ROSSMAN, ET AL., CRIMINAL JUSTICE INTERVENTIONS FOR OFFENDERS WITH MENTAL ILLNESS: EVALUATION OF THE MENTAL HEALTH COURTS IN BRONX AND BROOKLYN, NEW YORK, 130 U.S. DEPARTMENT OF JUSTICE (APRIL 2012)

health services.[80] No longer simply a few scattered programs, MHCs have now become a national project providing mentally ill individuals a way out of repeated imprisonment.

Because of their unconventional nature, MHCs may also prove to be a window into the evolution of America's criminal justice system. Historically, the prevailing theory of punishment has moved from retribution to rehabilitation to retribution and now back again.[81] Since the mid-1970s, retribution has been the norm. Along with it have come overflowing prisons and an incarceration level higher than that of nearly all other developed countries.[82] Recent popularity, success, and widespread acceptance of MHCs and other problem-solving courts,[83] with their focus on treatment and probation instead of incarceration and punishment, indicates that an important step has been taken toward a more rehabilitation-focused justice system as a whole.

1. Mental Health Courts: An Overview

America's court system has long struggled with the question of how to provide justice for mentally ill defendants. Are they to be treated like the rest of the population, tried, convicted, and confined without regard to their mental status? Or does their mental illness place them in a separate category? According to Chief Judge Lippman, "we've learned that [mentally ill] offenders do not do well in prison. . . . [T]heir illnesses just get worse. And what happens when they are released without having received effective treatment? They get recycled right back into

[80] In 2000, Congress enacted the America's Law Enforcement and Mental Health Project (ALEMHP) Act, Pub. L. No. 106-515, 114 Stat. 2399 (codified at 42 U.S.C. §§ 3796ii to 3796ii-7 (2000)). The ALEMHP Act would have created up to 100 new MHCs by 2004. However, funding was not immediately appropriated.

[81] *See supra*, Part II (a).

[82] JUSTICE KENNEDY COMM'N, AMERICAN BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 4 (2004) [hereinafter KENNEDY COMM'N], available at http://www.abanet.org/media/kencomm/rep121a.pdf (April 19, 2014, 4:34 PM)

[83] Problem-solving courts are criminal judicial proceedings that attempt to address defendants' actions at a causal level by imposing remedial discipline rather than retributive punishment. Such courts include drug courts, domestic violence courts, MHCs, and others. See BRUCE WINICK & DAVID WEXLER, INTRODUCTION TO JUDGING IN A THERAPEUTIC KEY 3–5 (Winick & Wexler eds., 2003).

the system. Everyone loses."[84] Mentally ill defendants whose offenses are linked to their conditions are unlikely to receive treatment in prison, and very likely to reoffend quickly after their sentences are over.[85] This situation presents a challenge to judges, prosecutors, and legislators alike: if there is a treatable mental condition at the root of a series of recidivist offenses, does the criminal justice system have the right, or perhaps the responsibility, to attempt to intervene at that root level?

In the last ten years, MHCs have developed in order to take on this challenge. Combining aspects of adversarial courts and other diversionary programs under the supervision of criminal court judges, MHCs actively seek out repeat offenders whose offenses are linked to mental illness and divert such individuals from the normal criminal process. Arresting officers, defense counsel, the judge or even the prosecution flagged these individuals for the program so that cases are adjudicated in an MHC. The hope is that this will provide granting offenders a way out of the *cycle* of recidivism. When identified as possible candidates for an MHC, defendants are given psychiatric evaluations and, if diagnosed with a mental illness that contributed to their offense, are offered "long-term treatment as an alternative to incarceration."[86]

In general, for example in the Bronx, defendants are referred to the program, screened for eligibility, enter the court through a formal plea process, are matched with community-based

[84] Jonathan Lippman, Achieving Better Outcomes for Litigants in the New York State Courts, 34 FORDHAM URB. L.J. 813, 826 (2007). Judge Lippman is an advocate for MHCs.

[85] Only 17% of all mentally ill inmates receive any sort of treatment during their incarceration, which leaves thousands of untreated individuals, their diseases possibly worsened by their jail experience, to be released onto the streets — and often rearrested within months. *See* DEREK DENCKLA & GREG BERMAN, CTR. FOR CT. INNOVATION, RETHINKING THE REVOLVING DOOR: A LOOK AT MENTAL ILLNESS IN THE COURTS 3–4 (2003), available at http://www.courtinnovation.org/_uploads/ documents/rethinkingtherevolvingdoor.pdf. Forty-nine percent of mentally ill inmates have three or more prior arrests, as opposed to only 28% of non–mentally ill inmates. *Id.* at 4

[86] Lippman, *supra* note 80, at 826. A defendant must often plead guilty to the underlying offense in order to participate in some MHCs.

treatment, and then participate in court monitoring, case management, and treatment services.[87] The duration of participation can vary based on charge and mental illness characteristics. There is a minimum six-month treatment mandate for misdemeanor crimes, while treatment mandates for felony crimes typically last 18 to 24 months. The mandated length of treatment begins upon entry into a treatment program, rather than the plea date. Since it can often take a significant amount of time to find an appropriate and available treatment program, participants may be under court supervision for longer periods of time than the treatment mandate.

In order to exit out of the program, stakeholders look for measurable outcomes to determine program success. For example in Brooklyn MHC, program success is defined by multiple factors such as cessation of drug abuse, no re-arrests, and adherence to the treatment mandates.[88] To graduate, participants must pass through the courts four stages successfully: adjustment, engagement, progress and preparing to graduate, while remaining arrest-free. Graduation generally results in dismissal of charges for misdemeanors and non-violent, first time offenders. Predicate offenders and individuals who commit first-time violent felonies will have their charges reduced to a misdemeanor plea and receive a period of probation. Individuals who fail will be sentenced to a term of imprisonment in jail or prison, in accordance with their plea agreement.[89]

2. Mental Health Courts: A Fundamental Shift in the Criminal Justice System

The recent growth of MHCs is illustrative of a broader trend — or, perhaps, the reversal of a trend. In 2003, Justice Kennedy spoke to the American Bar Association urging legal practitioners not to forget that the criminal justice system is more than "the process for

[87] SHELLI ROSSMAN, ET AL., CRIMINAL JUSTICE INTERVENTIONS FOR OFFENDERS WITH MENTAL ILLNESS: EVALUATION OF THE MENTAL HEALTH COURTS IN BRONX AND BROOKLYN, NEW YORK
[88] *Id.*
[89] *Id.*

determining guilt or innocence."[90] Instead, "[a]s a profession, and as a people, [lawyers] should know what happens after the prisoner is taken away."[91] He continued that, though "[p]revention and incapacitation are often legitimate goals," it is nevertheless important "to bridge the gap between proper skepticism about rehabilitation on the one hand and the improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose minds and spirits we must try to reach."[92]

III. JOHN FINNIS' APPROACH TO JUSTIFIED MORAL JUDGMENTS

The purpose of this Part is to introduce and outline John Finnis' Natural Law approach to making justified moral judgments. A professor of law for both the University of Notre Dame School of Law and Oxford University, Finnis teaches courses in jurisprudence as well as Social-Political-Legal theories of Aquinas and Shakespeare.[93] Although Finnis has numerous publications, *Natural Law & Natural Rights* serves as the primary source of Finnis' natural law framework.[94]

By first contending for, and labeling, the existence of seven irreducible, fundamental, and basic goods or values, Finnis develops his theory of "the good" in *Natural Law & Natural Rights*.[95] Of the seven goods, Finnis especially elaborates on knowledge and practical reasonableness—with nine requirements of its own—since those goods are illustrative to understanding the fundamental and absolute nature of all seven goods.[96] Next, Finnis explains the importance of community, communities, and the common good in conjunction with making

[90] KENNEDY COMM'N, supra note 3, at 3.
[91] *Id.*
[92] *Id.* at 5–6.
[93] *John M. Finnis*, UNIV. OF NOTRE DAME THE L. SCHOOL (Apr. 19, 2014, 8:11 PM), https://law.nd.edu/directory/john-finnis/.
[94] *See generally* JOHN FINNIS, NATURALLAW & NATURAL RIGHTS (Paul Craig ed., 2d ed. 2011).
[95] *See generally id.* at 59–127.
[96] *See generally id.* at 59–75, 100–27.

moral judgments, followed by discussions regarding justice, rights, authority, law, obligation, and unjust laws.[97]

A. Finnis' Seven Irreducible Basic Goods

Drawing upon the philosophies of Aristotle and Aquinas, Finnis offers a list of basic goods[98] for human beings. They are: life, knowledge, play, aesthetic experience, sociability or friendship, practical reasonableness and religion.[99] These basic goods are self-evidently 'good' and cannot be deduced from other premises. He appeals to anthropology to make a strong case for the universality of these basic goods. "All human societies, show a concern for the value of human life. . .and in none is the killing of other human beings permitted without some fairly definite justifications." Though not referring to self-evidence at this point, instead, Finnis finds support for his 'self-evident' principle by alluding to Aquinas' theory that basic human goods are *indemonstrabilia*, not capable of being demonstrated. Thus "the good of knowledge cannot be demonstrated, but equally it needs no demonstration." These goods are meant for all and they can be realized by all people who take into consideration what is right and wrong to do.

All of the seven basic goods are equally fundamental. They are incommensurable meaning thereby one cannot measure one against another. Accordingly, Finnis states that people should pursue all the goods and should not ignore any one of them. This does not preclude an individual to give emphasis to one good over another, however none of these goods should be excluded. By using the word "good," Finnis does not only refer to a specific objective or goal, but also refers to a general accomplishment of the same goods realizable through indefinite forms. According to Finnis, each of the basic goods are intrinsic goods, meaning they are worth

[97] *See generally id*. at 134–367.
[98] *See generally id*. at 59–127.
[99] *Id.* at 81–99.

having for their own ends, and not as a means for obtaining other types of goods. These basic goods are not 'morally good' or 'moral values', but objective goods, the things that make the life worthwhile; qualities which render activities and forms of life desirable. On this understanding they may be understood as a set of conditions which enable the members of a community to attain for themselves reasonable objectives and make people's personal plans and projects of life a possibility. It is these goods that form the basis for Finnis's account of practical reason and thus for his theory of justice, rights and law. In sum, humans should pursue all seven goods with every endeavor and avoid evil or values contrary to such goods.

1. Knowledge

The first good that Finnis derives is *knowledge*.[100] Finnis derives knowledge from the general human inclination to be curious, ask questions, and attempt to acquire information. Accordingly, Finnis concludes that knowledge is self-evidently an objective good.

Finnis appeals to self-evidence because human beings cannot describe a precise, extraneous source (absent a deity) of proof that knowledge is an absolute good.[101] While initially questionable, Finnis illustrates the validity of self-evidence for the purposes of deriving knowledge as one of the seven basic goods. Citing examples, Finnis explains that principles of sound empirical judgment—including standard logic and reason—are self-evident and, without acceptance of such principles, any objection is self-defeating or self-refuting. Since any assertion or reflection on any topic necessarily seeks to provide or capture knowledge, the good inherent in that process is self-evident.

[100] *Id.* at 59–80.
[101] FINNIS, *supra* note 94, at 64–69.

Like the other goods, knowledge is an intrinsic good because it is valuable for its own sake and is not simply a means of obtaining other goods.[102] Knowledge is accomplished—realized or ascertained—distinguishable from beliefs, since it cannot be false in the way a belief can be false. Accordingly, knowledge of the truth is always worth pursuing and possessing for its own sake. The pursuit of knowledge makes intelligible any particular instance of human activity and commitment involved in such pursuit. As being well-informed and clear-headed is good in itself, ignorance is to be avoided, since it is contrary to knowledge of the truth.

2. Practical Reasonableness

The second, and perhaps most important good for the purposes of making moral judgments, is *practical reasonableness*.[103] Finnis defines this good as the ability "to bring one's own intelligence to bear effectively (in practical reasoning that issues in action) on the problems of choosing one's actions and lifestyle and shaping one's own character."[104] This good has two aspects: an internal element and an external element. Internally, one must strive to control his emotions and dispositions, and bring them into harmony, creating a legitimate peace of mind. Externally, one must strive to make his actions, that have effects on the outside world, genuine realizations of his own freely ordered determinations.

Understanding practical reasonableness is crucial to Finnis' entire moral judgment framework because practical reasonableness is the good by which humans choose appropriate courses of action.[105] As a product of free will, freedom, and personal autonomy, human beings have, and make, choices between commitments that concentrate upon one value over another. Practical reasonableness is the good that guides decision-making, selection of particular acts, and

[102] *Id.*
[103] *Id.* at 88–89, 100–34.
[104] *Id.* at 88.
[105] *Id.* at 100–03.

which value to concentrate on at a particular moment. Thus, practical reasonableness is not only a good in itself, it is the means of acting in a way that pursues and nourishes the other six fundamental goods.

To clarify how one is to act practically reasonable, Finnis delineates nine requirements.[106] These are: (1) a coherent plan for life; (2) no arbitrary preferences amongst values; (3) no arbitrary preferences amongst persons; (4) detachment; (5) commitment; (6) reasonably limiting relevance of consequences; (7) respect for every basic value in every act; (8) consideration of the common good; and (9) following one's conscience. The following paragraphs will elaborate on each requirement in turn.

The first requirement for a practically reasonable judgment is that it corresponds with a *coherent plan of life*.[107] Finnis, citing what John Rawls would call "a rational plan of life," states that commitments made to any particular value must be effective. By this, Finnis charges that one is not acting practically reasonable if he lives merely from moment to moment. Further, it is irrational to devote one's attention exclusively to specific projects that can be carried out only for his own accomplishment. Rather, humans should see their lives in one whole with particular activities rationally fitting as episodes in a single series. Accordingly this is a liberal theory; it allows each of us to formulate different plans having focus on some objective goods more than others. Finnis does not want that we must have the perfect life with the perfect balance to participate in all the basic goods. In other words, he does not want each of us to be the ideal college applicant with all the right extra-curricular activities. All that a coherent life plan insists upon is that we should remain open to the value of all the basic goods regardless of what the focus of our national plan of life is.

[106] *Id.* at 100–33.
[107] FINNIS, *supra* note 94, at 103–05.

The second requirement of practical reasonableness is that humans should *not have arbitrary preferences amongst values*.[108] Simply stated, one cannot fail to consider, arbitrarily discontinue or exaggerate, or disregard any of the seven irreducible goods. "There must be no leaving out account, or arbitrary discounting or exaggeration of any of the basic human goods." According to Finnis, any coherent plan of life will involve concentration on some objective goods at the expense of others, but what is required is that such a plan should be rational. One must choose a coherent plan of life on the basis of one's capacities, circumstances, and even one's tastes. But it would be unreasonable if it either gives too much value to instrumental goods like wealth, opportunity, reputation or pleasure or is based on some devaluation of a basic human good. Related to a coherent plan of life, any commitment will involve some degree of concentration on one or some of the basic goods at the expense of other goods. Such a sacrifice or concentration is justifiable as long as it is not *arbitrary*—the concentration or sacrifice of any good must be in accordance with the coherent plan of life. Thus, based on circumstances, tastes, preferences, and capability, particular goods will rise or fall above others in priority, but this is permissible when the prioritization is not arbitrary.

The third requirement of practical reasonableness is that one must *not have arbitrary preferences amongst persons*.[109] Each human, as a free individual, is constantly in pursuit of the good in some form or another. Although one human's survival, self-determination, and all-around flourishing may not be of any concern to another human being, another human must still regard that one human impartially among all human subjects whom partake in pursuit of the seven fundamental goods. This requirement of practical reasonableness follows along the lines of the golden rule "do unto others as they unto you." The basic goods are capable of being

[108] *Id.* at 105–06.
[109] *Id.* at 106–09.

pursued and enjoyed by any human being and they are equally good when enjoyed by some other person as when enjoyed by myself. The essence of the third requirement is that one should not have obsessive concern with another's survival, knowledge, creativity, or pursuit of any of the other basic goods. This does not necessarily mean that one cannot favor one's own self-interest. Similar to the second requirement, favoring of any human being over another must not be arbitrary. Accordingly, in correspondence with a coherent plan of life, one can effectively choose some people over others with whom to share their pursuit of the good based on any particular set of circumstances, capacities, and legitimate preferences.

As the fourth and fifth requirements of practical reasonableness, namely detachment and commitment relate to each other and also to the requirement of a coherent plan for life, Finnis puts them together. The fourth basic requirement of practical reasonableness is *detachment*.[110] Finnis explains that, for a coherent plan of life, one must have a certain detachment from all the specific and limited projects he undertakes. Essentially, Finnis requires that each person have perspective on what any particular action or decision has within the scope of his entire life. For instance, if a particular project fails, one would likely not consider one's life drained of all meaning. Such an overreaction would irrationally devalue and treat as meaningless the basic human good of authentic and reasonable self-determination. Accordingly, no person should be fanatical about any particular decision.

Similar to detachment, the fifth requirement of practical reasonableness is *commitment*.[111] Considered the opposite, or the balance, to detachment, commitment requires that one be reasonably bound to any particular undertaking. Finnis requires fidelity to obligations. So, if a decision, project, action, or pursuit is not bearing as much fruit as anticipated, such pursuit

[110] *Id.* at 109–10.
[111] *Id.*

should not be abandoned lightly. Rather, within the scope of a coherent life plan, one should stay with a particular course of action, but carefully never breach the threshold of obsession or fanaticism (thereby violating detachment). Together, with detachment, commitment provides a metric by which humans must remain with decisions in a flexible, but balanced, manner.

The sixth requirement for making practically reasonable judgments is that one reasonably and efficiently give *limited relevance to consequences* [efficiency within reason].[112] One should be efficient in his action in trying to carry out the basic goods. So, in determining whether a choice is reasonable, particular circumstances surrounding that choice may warrant the weighing of particular costs and benefits.[113]

Generally speaking, cost-benefit analysis should usually not hold dispositive weight for a moral judgment.[114] However, such analysis may be appropriate where currency or a marketable value is determinable. Where a moral judgment revolves around choosing the most cost-effective project, then it is practically reasonable to use a cost-benefit analysis for that scenario. However, if a particular problem does not involve the use of currency, but rather a particular fundamental good, then weighing the consequences through a cost-benefit analysis would be inappropriate. For example, the traditional moral dilemma of sacrificing one life to save multiple lives would not be an appropriate scenario for a cost-benefit analysis under Finnis' framework. Unless a non-moral denominator can serve as currency for a particular decision, comparing the consequences as a means of making a moral judgment is not practically reasonable. Overall, Finnis contends that Consequentialistic calculus has a place in practically reasonable determinations, but only in a limited sphere.

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[112] *Id.* at 111–118.
[113] Though Finnis criticizes Utilitarianism and consequentialism, he still appreciates that in a limited capacity, consequences can be relevant in practically reasonable determinations.
[114] FINNIS, *supra* note 94, at 111–12.

The seventh requirement of practical reasonableness is that one must *respect every basic value in every act*.[115] It essentially states that one should not choose to do an act which, of itself, does nothing but block, damage, or impede the pursuit of any one or more of the basic goods. This requirement epitomises the maxim: the end does not justify the means. Finnis acknowledges that one might act in contradiction of a basic good, but only because perceived consequences outweigh the destructive effect on that basic good. For example, it may seem justified to kill a crazed man wielding an axe if it appears he is attempting to murder innocent bystanders. Although it would appear the consequences of such an act would be the safety of others, Finnis contends that weighing the basic good of life for some over others is always necessarily arbitrary and delusive. Finnis simply remarks that the ends cannot justify the means in this context. Rather, Finnis might propose that a non-lethal form of self-defense be exercised, which preserves all of the seven irreducible goods, if possible. Similarly, walking away from family obligations would not be justified, as it directly damages the basic good of sociability. To the contrary, if a scholar works on a Sunday to meet an important deadline, he is not guilty of a violation of the seventh requirement; damage caused to the family life, which is the basic good of sociability, is not the result of a direct decision to harm his family. There is no doubt that his overtime decision indirectly damages the basic good of sociability, but it also enhances the good of knowledge.

Finnis differentiates between *directly* diminishing basic goods (never practically reasonable) and *indirectly* diminishing basic goods (may be practically reasonable).[116] If one is to act intelligently, one must reasonably choose to act in a manner that favors particular goods over other goods, and such a decision will indirectly interfere with the realization of another

[115] *Id.* at 118–25.
[116] *Id.* at 121–25.

value. Finnis explains that opportunity costs exist where one concentrates on some goods at the expense of others. Similar to the requirement of a coherent plan of life, one may act practically reasonable even though some goods face an indirect detriment from a particular course of action.

To clarify when an act *indirectly* attacks a good, as opposed to *directly*, Finnis describes four conditions of the potential "double effect"—meaning the promotion of one good at the expense of another.[117] The first is that the act itself must not be an intrinsic wrong. Secondly, the intention of the actor must be "upright"—in good faith promotion of a good. Thirdly, the consequences of the act must be realized simultaneously. Lastly, the harm must be proportionate to the good achieved. When these four conditions are met, an indirect harm to a good is justifiable.

The eighth requirement for practically reasonable judgments is that one's conduct favor the *common good*.[118] This serves as the basis for our "common moral responsibilities," obligations, and duties. It assumes that participating in the common good is to realize what would enhance the participation in goods of both one's neighbor and of himself. In short, Finnis requires that one must foster the common good of one's community or communities in every action. This requirement, and how it relates to *MHATI*, will be more thoroughly discussed below.

The ninth and final requirement of practical reasonableness is that one must *follow one's conscience*.[119] Finnis states the one should only do what one thinks he or she should, or ought to do, and similarly, that one should avoid doing what one judges ought not to be done. Simply, one must act in accordance with one's conscience. One should not do what one judges or thinks

[117] *Id.*
[118] *Id.* at 125.
[119] FINNIS, *supra* note 94, at 125–26.

or ‘feels’ all in all should not be done. In other words, practical reasonableness requires that one acts in accordance with one's conscience.

Overall, taking all nine requirements of practical reasonableness together, the end product of obliging by these requirements is *morality*.[120] Although not every requirement may have a direct role in every moral judgment, some moral judgments do require consideration of all of the nine requirements discussed above. Essentially, although the nine requirements do not comprise a moral calculus, the harmony of all the requirements, along with the recognition of all the basic goods, serves as the formula for making moral judgments. Thus, if one is practical reasonable, which is a good in itself, one can be confident that his or her judgments are morally justifiable.

3. Remaining Values: Life, Play, Aesthetic Experience, Sociability, and Religion

Finnis’ five remaining goods are: (1) life; (2) play; (3) aesthetic experience; (4) sociability or friendship; and (5) religion.[121] Combined with the knowledge and practical reasonableness, these seven goods comprise the exhaustive list of goods, with each being equally fundamental.

The third good is the basic value of *life*.[122] Here, the term “life” represents every aspect of vitality that puts a human being in a good position to achieve self-determination. Life is not simply self-preservation, but includes health, freedom from pain, and prevention of malfunctioning of organs. Finnis also remarks that procreation, not simply the urge to copulate, is a form of protecting the basic good of life. Simply stated, Finnis states that there are an indefinite number of forms that recognition of this good could take, from emergency surgery to establishment of traffic safety laws.

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[120] *Id.* at 126–27.
[121] *Id.* at 81–100.
[122] *Id.* at 86.

The fourth good is *play*.[123] Finnis defines play as the act of "engaging in performances which have no point beyond the performance itself, enjoyed for its own sake."[124] Like the recognition or pursuit of any other good, pursuit of play is limitless. Performance of play may be "solitary or social, intellectual or physical, strenuous or relaxed, highly structured or relatively informal, conventional or *ad hoc* in its pattern . . ."[125] It is readily apparent that play has and is its own value amongst the seven goods.

The fifth good is *aesthetic experience*.[126] This good is closely related to play because beauty is not an indispensable element of play. But, unlike play, aesthetic experience does not require activity from the observer. Rather, what is "beautiful" is valued for its own sake for the experience and appreciation on behalf of the observer. Often, the valued experience is found in the creation or active appreciation of something with significant and satisfying properties.

The sixth good is *sociability*, meaning friendship.[127] In its weakest form, humans can recognize minimal friendship in the forms of peace, harmony, and safe community. Of course, in its strongest form, friendship may include full friendship and even love. Friendship involves acting for the sake of another friend's purposes and well-being. Accordingly, friendship is relevant when Finnis discusses community and the common good, which is analyzed below.

The seventh, and final irreducible good, is *religion*.[128] By using the term "religion," Finnis is not referring to any particular worship. Rather, Finnis uses religion as a blanket term describing humans' tendency to reflect on the basic values and the role such values and orders play on a universal/theological transcendental scope. Essentially, this good refers to the

[123] FINNIS, *supra* note 94, at 87.
[124] *Id.* at 87.
[125] *Id.* at 87
[126] *Id.* at 87–88.
[127] *Id.* at 88.
[128] *Id.* at 89.

understanding and search for origins and the "universal order-of-things" that brings meaning to human existence and activity.

B. The Common Good, Justice, Rights, Authority, Law, Obligation, and Unjust Laws

After discussing the seven fundamental goods, Finnis uses the rest of *Natural Law & Natural Rights* to explain how his seven irreducible goods are strongly tied to the common good, justice, rights, authority, law, and obligations.

Appreciation for communities, community, and the common good is crucial in Finnis' framework for moral judgments.[129] As part of the nine requirements of practical reasonableness,[130] the common good must be considered when deriving one's moral responsibilities. Accordingly, moral judgments necessarily involve the exploration of one's rational self-interest—relationship to one's own well-being—and that of the well-being of others. There is a requirement that the "basic values be always respected not only in one's own but other's participation in them."[131] Assessing the network of relationships under which everyone lives is indispensable for all subsequent assessments of justice, rights, authority, laws, and obligations.

Finnis describes community as having several forms, with true friendship being the most intense form.[132] There are different types of relationships aside from true friendship, such as business communities and play communities. Whether it be biological, through understanding, through culture, or by order of action, whatever the uniting principle is, communities are some form of friendship. As such, from the vantage point of friendship, one can realize that one's own good and the good of one's friend are equal.

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[129] *Id.* at 134–56.
[130] *See supra* Part III.A.2.
[131] FINNIS, *supra* note 94, at 134.
[132] *Id.* at 134–144.

More broadly speaking, Finnis also contends that there is a "complete community," which refers to achievement of the good for all individuals in the context of the international community.[133] The common good refers, in every form of association, to the coordination of life plans of individuals. Accordingly, the same principles of practical reasonableness that govern individual morality amongst personal friends are the same that govern relationships amongst nations. Thus, the focal meaning of politics and law, in light of the nations that create them, concerns the complete community.

Related to community and the common good, Finnis discusses justice.[134] Justice is defined as an important element of practical reasonableness because humans seek to realize and respect goods in common with each other, not merely for their own individual purposes. Accordingly, justice has three necessary and sufficient requirements: (1) Other Directedness—meaning it involves relationships; (2) Duty; and (3) Equality. Bearing these three requirements in mind, in consideration of their relationship with the community, justice requires that all persons undertake their duty to respect the rights and goods of others. Further, each person is to be treated proportionally equally, not arithmetically.

D*istributive justice* and *commutative justice* are terms necessary to Finnis' theory of justice.[135] Distributive justice is the allocation or distribution of limited goods for the sake of the common good. Further, Finnis outlines five criteria for distributive justice: (1) need; (2) function; (3) capacity; (4) merit of contribution; and (5) creation of avoidable risks. In consideration of these criteria, the common good requires the exercise of authority and discretion to properly appropriate limited resources. Conversely, commutative justice refers to the resolution of disputes amongst individuals. So, a judge, by presiding over a dispute, owes a duty

[133] FINNIS, *supra* note 94, at 147–50.
[134] *Id.* at 161–93.
[135] *Id.* at 165–87.

to apply commutative justice for finding a just and equitable solution. The laws that govern the fair process and procedures of the legal system would bear the principles of Finnis' commutative justice.

Moving beyond justice, Finnis next elaborates on his perspective on *rights*.[136] "Natural rights" are used synonymously with the term "human rights." Where the source of particular rights, especially legal rights, does not always cleanly fit into any particular requirement of practical reasonableness, Finnis still extrapolated "absolute human rights."[137] These absolute human rights stem from the seventh requirement of practical reasonableness, namely that "it is always unreasonable to choose directly against any basic value."[138] Further, the seven basic values are not merely abstractions, rather, they are aspects of the real well-being of humans. Accordingly, respect for these goods creates exceptionless claim-rights (as opposed to liberty, power, or immunity rights) for every person. The obvious examples of these rights include the right to life, information, reproductive rights, and the right to be heard. Since these rights are directly tied to practical reasonableness, they are absolute.

As a necessary foundation for his philosophical framework, Finnis shifts his discussion to *authority*,[139] which is necessary to achieve the common good. Authority addresses two problems in any community: the coordination problem and recalcitrance. Instead of acting in random, possibly harmful manners, the coordination problem justifies authority simply to have all members within a group acting in a coordinated effort. Where unanimous agreement could also serve as a solution to the coordination problem, reality dictates that unanimity is simply too rare, or perhaps impossible, to govern. Coordination problems are never fully solved once-and-for-

[136] *Id.* at 198–230.
[137] *Id.* at 225.
[138] *Id.* at 132.
[139] *Id.* at 231–54.

all, but authority can effectively reconcile conflicts over the individual's exercises of what are otherwise basic goods and rights.

Finnis also differentiates practical judgments from descriptive or empirical judgments, which are not really judgments at all.[140] A practical judgment, labeled S_1, bears the form of assertion of what is good reason. S_1 assertions are valid assertions of authority because the speaker treats the authority of the assertion universally, to both the listeners and himself. S_2 are the descriptive judgments and S_3, the empirical judgments, the less noble assertions, in Finnis' eyes. An S_2 assertion states what a particular group considers a good reason. Similarly, an S_3 assertion states what is good reason from another's S_1 perspective. By their nature, these descriptive and empirical judgments do not have a binding effect on the speaker because they do not speak from a position of what actually is reason, but instead from what other perspectives consider reason. Accordingly, the speaker, and anyone else, is in a position to object to an S_2 or S_3 assertion's binding effect by removing themselves from the particular perspective. Thus the primary type of statement about authority must be an S_1 statement, because citizens must share in rulership, possess knowledge and capacity for ruling and being ruled, and always contribute to the common good. Only under an S_1 assertion of authority is the common good properly considered.

Next Finnis addresses how *law* fits into his natural law framework.[141] The purpose of law is to provide "comprehensive and supreme direction for human behavior" in a particular community.[142] It is necessary for ensuring the common good. Additionally, law's purpose is to grant validity to all other normative arrangements affecting members of the community, enabling a mechanism for the legitimate recognition of resolutions to coordination problems. To be

[140] FINNIS, *supra* note 94, at 240–43.
[141] *Id.* at 260–90.
[142] *Id.* at 260.

effective, Finnis contends that law relies on justice, which may need to be secured by force to otherwise avoid recalcitrance. Failure to comply with legal stipulations must be reconciled, as is common in legal systems, because such failures can be rooted in obstinate self-centeredness, careless indifference, or in deliberate opposition, all which in some way violate requirements of practical reasonableness.

In describing how a legal system ought to be, Finnis classifies five features of legal order.[143] First, law brings specificity, clarity, and predictability into all human interactions by way of rules and institutions. Secondly, any legal rule is valid in force or in existence, and must be treated as so, until it is formally repealed. Thirdly, rules of law regulate the conditions under which a private individual can modify the incidence or application of the rules—how the law applies to him through institutions and actions, such as contracts. Fourthly, the law gives reasons for acting in the present based on what had happened in the past. It gives *now* sufficiently and exclusionary reason for acting in a way *then* provided for. More simply stated, legal systems bear some form of *stare decisis*. Fifth, and lastly, all legal systems will have gaps but they still fundamentally establish the source of authority in any given system to decide open questions. In most systems, this would be the judiciary courts.

In closing his discussion about law, Finnis defines the "Rule of Law."[144] A requirement of justice, the Rule of Law provides a basis for criticism of rules and the underlying legal system itself. Legal systems exemplify the Rule of Law so that rules are promulgated, clear, coherent, sufficiently stable to allow people the capacity to be guided by the substance of the rules, applicable to particular and limited situations, and prospective (as opposed to retroactive). If those who have authority are accountable for their compliance with the rules and actually

[143] *Id.*
[144] *Id.*

administer the law consistently, then a legal system appropriately meets the Rule of Law. Lastly, Finnis states that other *desiderata*,[145] such as the independence and openness of the judiciary, are necessary for a legal system to properly and justifiably operate within the Rule of Law. Overall, the purpose of these requirements for legal systems is to secure subjects of authority the dignity of self-direction and freedom from manipulation. A legal system must conform to the Rule of Law in order to be just.

Apart from the Rule of Law, Finnis distinguishes Natural Law from legal systems.[146] Legal systems bear parts of natural law and positive law. Natural law is the set of principles of practical reasonableness in ordering human life and human community—essentially this is synonymous with natural rights, intrinsic morality, and natural reason. Positive law is the law that exists simply because it is indoctrinated, written, or established. All laws have some elements of positive law, but not all laws within a legal system will reflect natural law principles.

Since there is a difference between law, in the human practice, and natural law, Finnis defines what a practically reasonable person's *obligations* are with respect to laws, rights, and morality.[147] Obligation signifies things one has a duty to do; what one must do. As is a requirement of practical reasonableness, obligation is a demand upon one's conscience. To explain obligation, Finnis explores forms of rational necessity as the derivative requirements of practical reasonableness. First, there are promissory obligations, or obligations undertaken through promises and understanding amongst individuals and in the community. Humans foster the common good when they meet their promissory obligations—i.e., keeping their word—because rights created through a promise have reciprocal duties. When all duties are fulfilled or completed, trust is established, which allows a community to function. Individuals in a

[145] *Id.* at 274.
[146] *Id.*
[147] *Id.* at 297–343.

community depend on one another, so with trust comes the confidence of well-being for the entire community.

Invariant obligations, such as legal obligations, are separate and distinct from promissory obligations are.[148] Many legal obligations are variable in content and incidence, but the directive force of the law or obligation cannot be reduced or bargained from. Finnis contends that one has a moral obligation, in terms of practical reasonableness, to obey the law because it is necessary for the common good, one must always be law abiding, and as law it is obligatory. This obligation is presumptive, but ultimately defeasible.

In the event that a law is an *unjust law*, a citizen is bound by the obligation and the penalty nonetheless, even though, as Finnis argues the law is not morally binding.[149] Unjust laws can be categorized into four groups: laws intended exclusively for the benefit of the ruler and his or her compatriots; laws which are beyond the authority of the law maker; laws which violate the Rule of Law (made outside of the proper procedure); and unfair laws that do not conform to distributive nor commutative justice. In ultimately distinguishing moral obligation and legal obligation, Finnis remarks that for the sake of the common good, one's moral obligation to obey the law, at minimum, is to act in way that avoids weakening a righteous Rule of Law and the legal system as a whole.

C. Summary of Finnis' Natural Law Framework

Overall, in *Natural Law & Natural Rights*, Finnis develops his theory of "the good" by labeling the existence of seven irreducible, fundamental, and basic goods or values: (1) knowledge; (2) practical reasonableness; (3) life; (4) play; (5) aesthetic experience; (6)

[148] *Id.* at 314–43.
[149] *Id.* at 351–66.

friendship; and (7) religion.[150] Of the seven goods, Finnis elaborates on knowledge and practical reasonableness since those goods are illustrative to understanding the fundamental and absolute nature of all seven goods.[151] Further, Finnis explains the importance of community, communities, and the common good in conjunction with practical reasonableness since consideration of the common good is a sub-requirement of all practically reasonable decisions. Next, Finnis elaborates how justice, rights, authority, law, obligation, and unjust laws fit into the framework of practical reasonableness.[152] From this framework, Finnis creates a pervasively useful tool to making sound, legitimate, and justified moral judgments.

IV. CONSIDERATION OF FINNIS' NATURAL LAW FRAMEWORK APPLIED TO *MHATI*

This Part will apply the relevant aspects of Finnis' natural law framework to *MHATI*. Ultimately, after applying Finnis' requirements of practical reasonableness, and considering all of Finnis' seven fundamental goods, *MHATI* is a just practice, in both creation and its application. *MHATI* is a practically reasonable judicial tool that justifiably outfits communities with the discretion to divert mentally ill offenders to therapeutic measures as opposed to incarceration. Element by element, this Part will discuss how *MHATI* meets each requirement of practical reasonableness and how it was created in line with Finnis' fundamental goods.

A. Goods Involved in a MHATI Determination

Not every good will be implicated in a discussion about the moral justifiability of *MHATI*. Of Finnis' seven intrinsic goods, the following are affected in a meaningful way: (1) life; (2) knowledge; (3) sociability; and (4) practical reasonableness. While the remaining goods could arguably be served or disserved one way or another, such a discussion could distract the

[150] *See generally id.* at 59–127.
[151] *See generally id.* at 59–75, 100–27.
[152] *See generally id*. at 134–367.

analysis with a discussion about indirect effects and hypothetical predictions of future results. As Finnis clarifies, such a discussion is not appropriate for a morality determination.

1. MHATI promotes the Basic Good of Life

MHATI at its essence promotes the basic good of life.[153] As described above, diversionary practices in the criminal justice system enables and restores mentally ill defendants' self-determination. Through therapeutic treatments, life skill training, and post-rehabilitation re-entry programs, MHATI, at its core, respects the vitality of human life; of human dignity. As described above, MHCs promote remedial discipline rather than retributive punishment.[154]

As Chief Judge Lipman cautioned, mentally ill defendants whose offenses are linked to their conditions are unlikely to receive treatment in prison, and very likely to reoffend quickly after their sentences are over.[155] Incarcerated mentally ill offenders receive long bouts of solitary confinement—"Bing" time—. lock-ins, and segregation. MHATI, however, promotes treatment of the illness and encourages inclusion—group therapy—in order to address the cause of the problem.[156] Additionally, the participants receive life-skill training, aside from treatment plans, in order to prepare them for re-entry into the community while also treating their condition. MHATI values the individual behind the offense, as opposed to regard the offense instead of the person. Whereas *MHATI* seeks therapeutic measures, mentally ill incarcerated individuals are evaluated as the threats they *may* pose and thus subject to further punitive measures while imprisoned for things such as behavioral infractions.[157] Subjected to hours of isolation, mentally ill offenders in prison are treated more like animals rather than human beings.

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[153] *See supra* Part III.A.3
[154] *Supra* note 83.
[155] *Supra* note 84.
[156] *See supra* Part II.C.
[157] *See supra* Part I.A.; Individuals may be subject to "bing" time based on any behavioral infractions they may have will incarcerated.

As described by the establishment of the DOC Board of Health's Minimum Standards, the need to address the unique needs of the mentally was warranted because of patient suicides.[158] At its core, the proper treatment of mentally ill offenders, as *MHATI* advocates, mandates a respect for life. Thus, by encouraging treatment—not punishment—out of respect for human dignity, *MHATI* promotes the basic good of life.

2. MHATI Serves the Basic Good of Knowledge

MHATI serves the basic good of knowledge because the underlying purpose of the practice seeks informed decision making about mentally ill offenders. Preliminarily, for diversion, the system needs to determine whether an individual has a mental illness in order to decide how to best address the needs of the individual as well as the community.[159] In the most basic sense, diversion seeks facts and information in order to cultivate the most meaningful diversion program. Once charged with offensive conduct, defendants are screened with a battery of psychological tests to determine the presence of mental illness. Next, if referred into *MHATI,* the diversion program gathers facts about the offensive conduct and the community resources to determine the most appropriate treatment plan. As part of the program, defendants rely on the community provided resources to learn social skills and work readiness training.[160] Since *MHATI*, at its core, works with participants to help them understand and change criminal behaviors caused by their mental illness,[161] the practice directly serves this basic human good of knowledge.

For instance, once courts learn that an individual has an axis-related disorder such as bipolar, he can be referred into an MHC. Upon a conditional plea of guilt for admission into the

[158] *Supra* Part I.A.1.
[159] *See Supra* Part II.C.1.
[160] *Id.*
[161] *See e.g.* Brooklyn Mental Health Diversion Program. http://www.eacinc.org/brooklyn-justice-mental-health-collaboration (April 19, 2014 11:15 pm).

program, medical personnel provide therapy sessions as well as medicine, while community workers teach participants social skills. Finally, after work readiness training, once a mentally ill offender is considered qualified for the program exit, he can enter into the community again, relying upon his newly-acquired skills to succeed. In sum, a participant exits out of the program because he has demonstrated successful skills necessary to be a functioning member of the community.

Overall, *MHATI* best serves the good of knowledge. In purpose and in practice, application of the doctrine leads to finding the most truth about an offender with mental illness, as well as the relevant needs of the affected community, and therefore knowledge is pursued from the onset of the act.

3. MHATI Promotes Sociability

The next good that *MHATI* promotes is sociability. Here, *MHATI* does not serve friendship necessarily between particular individuals, but rather serves to promote the community and common good. The most applicable element of the practice that appeals to community is the use of community resources to change criminal behavior and thinking. For example, participants are required to attend socialization re-training as part of the diversionary program.[162] Furthermore, group therapy sessions tend to be a common practice in *MHATI*. Essentially learning new skills and succeeding through the diversion is premised upon the basic of sociability.

The dissent might argue that removing an individual from the general population and subjecting him to individualized treatment serves to alienate the mentally ill defendant, as opposed to supporting the good of sociability. While one might give credence to the dissent's view that personal therapy sessions are individually tailored, the reliance upon community

[162] *See infra* note 164.

resources and support, as well as the goal of re-entry (without resort to traditional criminal punishments) supports the reality that *MHATI* serves the good of sociability.

In sum, *MHATI* directly pursues the good of sociability since a court, in making a diversionary recommendation must consider the impact on the community from which the mentally ill individual will be diverted. Objections to this proposition necessarily rest in Consequentialist thinking or fail to consider the nature of the court's role handling mentally ill offenders.

4. MHATI is a Practically Reasonable Practice

MHATI is a practically reasonable legal doctrine because it meets all nine of Finnis' enumerated requirements. First, the doctrine of *MHATI* properly fits within a coherent plan of "life" for the court system. An essential consideration of all rules and laws, not just this doctrine, is to establish structure for the betterment of the legal system as a whole. *MHATI* seeks to organize how courts handle mentally ill offenders, and strengthen the courts' ability to make the legal system more predictable, efficient, and clear in accordance with Finnis' Rule of Law. Whether the doctrine, in practice, is always properly applied is a separate issue. But, on its face, the practice serves the whole community. Since the doctrine does not allow for arbitrary retention or referral of cases, this requirement of practical reasonableness is met.

MHATI also meets the second requirement to not arbitrarily prefer some values over others. While the primary focus of the doctrine concentrates on knowledge, sociability, life, and practical reasonableness, such a concentration is not arbitrary. Other goods not directly involved are not detrimentally affected in any way by the existence of the practice.

With regard to arbitrary preference amongst persons, the doctrine would appear, facially, to benefit defendants, since the doctrine can be invoked to divert the defendant from the

traditional legal system. However, communities also receive a presumptive benefit since the diverted individual is required to make a conditional plea of guilt before he can participate in the program. However, the key to this requirement is the term "arbitrary." The legal system is built in accordance with a coherent plan of life—to manage disputes where there are violations of the law. Accordingly, as part of the system, there are communities with harms from offensive conduct that have the right to seek retribution and mentally ill defendants who, in turn possess reciprocal but different rights to be treated fairly by the laws[163] and practices that have been developed within American jurisprudence. So, while it may seem that, facially, the doctrine arbitrarily supports defendants in some fashion, or communities in another, such preferences are not arbitrary. Rather, the preferences are made in accordance with what Finnis would describe as the Rule of Law.

Further, considering that anyone in the judicial process can equally request MHATI—defense lawyers, judges, or even prosecutors—the diversion program is not arrived at arbitrarily, but instead on the specific circumstances and needs of the community and mentally ill individual. For the consideration of the community, such a preference is not arbitrary since the safety of the members of the community is directly implicated if there is recidivism.

Thus the requirement that a court must not make arbitrary preferences amongst persons is met. Mentally ill offenders in need of treatment are diverted for reasons related to the illness as well as in consideration of the impact on all parties (the community and the defendant) because the practice of *MHATI* promotes all of their particular rights and obligations and matches a coherent plan of "life" for the legal system.

For the fourth and fifth requirements of practical reasonableness, detachment and commitment, local courts can demonstrate whether detachment or commitment to a case is

[163] *See e.g.* U.S. Const. amend. VIII (guaranteeing a freedom from cruel and unusual punishments).

appropriate by deciding whether or not to divert the offender. Generally, to decide whether to place a mentally ill defendant, the community has to learn more about the individual through a psychological screening process. In a narrower sense, the system has to become personally familiar with the individual to decide if he is an appropriate case for *MHATI*. Alternatively, if the system decides to detach from the individual, he will go through the traditional court system. The actual process of deciding whether *MHATI* is appropriate is an exercise of determining whether the case ought to be detached or committed into the system. A community will detach itself when it finds that the therapeutic system will not be able to appropriately address recidivism, or commit to the case where it finds that diversion is appropriate for treating the illness causing the offensive conduct. Accordingly, these two requirements of practical reasonableness are met by the doctrine.

As discussed above, and with regard to the sixth requirement of practical reasonableness, *MHATI* gives a limited but appropriate degree of relevance to consequences. This is demonstrated through the balance of community's and defendant's needs as the system considers diversion. In MHCs, defendants receive therapeutic support in the form of not just psychiatric treatment, but also socialization skills and work readiness.[164] Additionally, the programs require a balancing of the community's ability to provide the resources to support treatment plans, such as housing, for the appropriate individuals. Finally, as defendants transition out of the diversion, the use of exit programs and group sessions illustrates that courts are willing to consider the direct effects of their decisions, such as a graduate's job readiness and housing situation once diversion is completed.

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[164] *See* Queens TASC Mental Health Diversion Program. "Typically, services include intensive psychiatric monitoring, psychotropic medication, medical coverage, financial support, socialization skills and work readiness training. In addition, about half of these defendants are in need of housing, thus requiring placement in residential facilities that provide board and treatment."
http://www.eacinc.org/queens-tasc-mental-health-diversion-program (April 2, 2014, 5:20 PM).

These considerations are limited by the financial impact to the community since MHCs are generally municipality funded. However, barring a complete absence of funds, diversion programs are not focused on each individual defendant's personal cost to the program. Instead, if there are resources available, the system will refer a qualified individual for diversion. Overall, this refusal to measure each defendant's economic drain on the diversionary programs, but instead focus on the resources available relevant to the needs of defendants, demonstrates the doctrine's limited relevance of consequences, and therefore the doctrine meets that requirement of practical reasonableness.

As alluded to previously in this Note, *MHATI* respects every basic value in its application. In discussing the above goods served by *MHATI*, it is clear that concentration falls on life, knowledge, sociability, and practical reasonableness. Such concentration is far from arbitrary and no other basic value is in any way directly detrimentally affected. Rather, any good indirectly negatively affected is not affected simultaneously as the good that is pursued by the doctrine, thereby defeating the necessity to consider potential double effect. Instead, every good that may be negatively implicated is both indirect and non-simultaneous. Negative effects may only occur as an indirect consequence of the application of the doctrine, which is justifiable under Finnis' framework. Therefore, this requirement of practical reasonableness is met.

The eight requirement of practical reasonableness is fostering the common good. In the above discussion on sociability, this requirement is addressed and fully met by the doctrine.[165] *MHATI* directly pursues the good of sociability since a court's determination to divert must consider the impact on the community for which the court sits. Objections to this proposition necessarily rest in Consequentialist thinking or fail to consider the nature of the court's role in resolving disputes.

[165] *See supra* Part IV.A.3.

Lastly, *MHATI* meets the ninth requirement of practical reasonableness that one follow one's conscience. MHCs afford all parties involved broad discretion in determining whether to recommend diversion.[166] Hence, courts have the authority—because *MHATI* is flexible and equitable in nature—to weigh the unique circumstances tied to each case. Unlike particularly strict laws, which bind a court to particular ruling or course of action, *MHATI* is flexible, allowing a human being (the judge) to determine, based on the psychiatric reports, the offensive conduct, and the needs of the community, whether diversion is necessary. Further, because defendants must give a conditional guilty plea based on successful completion of the program, the referring judge can appropriately weigh the facts of the case on his or her conscience. Accordingly, no judge's hand is forced if a diversion does not "seem right." Thus, this requirement is met.

In total, based on the nine requirements discussed above, *MHATI* properly serves practical reasonableness as it also serves the goods of knowledge and sociability. Therefore, taking the product of the Finnis' goods, and through the scope of practical reasonableness, *MHATI* is a justifiable practice. The doctrine is moral and applies in accordance with Finnis' Natural Law framework.

B. Considerations of the Community, Justice, Rights, Authority, and Obligation

From Finnis' goods and requirements of practical reasonableness, *MHATI* holds to be morally justifiable. Still, it is useful to discuss some additional elements of the doctrine in terms of some of Finnis' sub-topics within practical reasonableness. Each of these topics will be addressed in turn below.

With regard to community, this Note has well established that diversion effectively takes the community into consideration. Courts, in applying *MHATI*, consider the community in

[166] *See supra* part II.C.1.

which the offenses occurred, as well as the community resources for the diversion, and the parties involved in the dispute. Further, the doctrine involves the "complete community" since *MHATI* primarily operates to prevent recidivism and restore the defendant into the community. Properly treating the mental illness that contributes to the offensive conduct that harmed the community and repairing the relationship between defendants and the community to enable entry enter back into the community thereby contributes to the "complete community."

In terms of justice, the practice of *MHATI* does not adjudicate the substantive merits of a criminal infraction. Whereas participants are required to enter a conditional plea of guilty in order to work through the diversion program, once the program is complete a judge reviews the case and dismisses the legal charges or reduces the charge to a lesser offense.[167] A lack of substantive determination, however, does not mean that justice is not implicated by the doctrine. Rather, the discretion and authority exercised by supervising judges demonstrates the practice's applicability to commutative justice. Judges, in presiding over a *MHATI* case, must reach a fair and equitable solution based on the needs of the defendant and the community. This proper management of disputes serves as commutative justice for the parties involved as well the broader communities discussed above. As for distributive justice, the overall concern for the impact to the community demonstrates the proportionate concern for everyone involved in the dispute. The parties to the offense, having the most at stake, are afforded the largest voices. However, the surrounding community is considered for purposes of resources, entry and exit plans, as well as other burdens imposed. The fact that each relevant member of every one of the court's community receives some proportionate degree of consideration and weight in the analysis illustrates that *MHATI* serves distributive justice as well.

[167] *See supra* note II.C.1.

Strongly connected to justice, the doctrine properly respects several elemental human rights. For instance, the right to information and the right to be heard are directly involved in a *MHATI* determination. The underlying purpose of the doctrine is to foster decisions by all the appropriate parties and to divert mentally ill individuals into programs that are appropriate treatment, based on their offensive conduct and mental illness. Accordingly, when deciding the referral, courts are deciding whether the defendant meets the psychological criteria and whether the needs of the community would be better served by therapeutic measures as opposed to punitive. While a harmed community criminally has a right to seek retribution, the mentally ill defendant has a reciprocal right to be punished in a manner that does not penalize him for his mental impairment. Ultimately, every party is heard and the most information is extracted in the process.

Further, *MHATI* comports with Finnis' defined Rule of Law. The practice is coherent, sufficiently stable as to allow persons to be directed by its guidelines, and effectuated by accountable and consistent judges—officials bound by *stare decisis* and appellate courts. Additionally, although there are nuanced issues surrounding the practice, (such as whether everyone with mental illness should be diverted or only certain qualified candidates), on the whole the procedure is quite clear. Interested parties recommending or requesting diversion understand *MHATI* and frequently bring their requests for the appropriate individuals for the benefit of both the offemder and the community equally. Overall, *MHATI* comports with the Rule of Law. Therefore, the doctrine is practically reasonable in this sense.

Lastly, with the justifiable nature of *MHATI* clearly established, the last element of Finnis' framework that relevantly applies is obligation. Here, municipalities and varying jurisdictions have undertaken their legal obligations to address the needs of the mentally ill

offender in the population. Further, courts have fulfilled their commutative justice obligations by developing the doctrine with Finnis' goods and practical reasonableness in mind. As the DOJ, the American Psychiatric Association, and the National Commission of Correctional Health Care studies discussed, at the beginning of the twenty-first century, there were burdens and issues surrounding the overcrowding of mentally ill offenders in prison.[168] In fulfillment of its obligation to establish humane laws, municipalities with the bi-partisan support of the government,[169] established therapeutic courts and diversion programs. Now, with the practice established, judges, prosecutors, defense attorneys and other interested partiese within the community exercise similar obligations in properly requesting and relying on *MHATI* as the community has bound them to use.

Ultimately, in consideration of all of Finnis' goods, requirements of practical reasonableness, and considerations of sub-topics with those requirements, *MHATI* stands as a morally justifiable doctrine.

V. CONCLUSION

Despite fluctuating awareness for mental illness in the judicial system, *MHATI* has developed as a substantially useful practice tailored to support the needs of the mentally ill offenders as well as the community. Though the needs of mentally ill individuals has been challenged through the years, pioneers such as Dorothea Dix have contributed to the proper attention to this portion of the population. Deinstitutionalization contributed to a near epidemic overloading the prison system with mentally ill offenders. Concomitant with the balloon theory, however, as awareness grew and advocates such as Judge Lipman charged the bar to rise to the problem, MHCs began to gain in popularity and implementation. Though "[p]revention and

[168] *Supra* Note II.A.2.
[169] *Supra* Note II.C.

incapacitation are often legitimate goals," *MHATI* stands for the proposition that it is essential "to bridge the gap between proper skepticism about rehabilitation on the one hand and the improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose minds and spirits we must try to reach."[170]

The doctrine of diversion is firmly established on Finnis' natural law framework for morality. Specifically, *MHATI* properly addresses Finnis' goods of knowledge, sociability, and practical reasonableness. Further, the doctrine has been developed with the common good and commutative justice in consideration. Accordingly, because *MHATI* meets Finnis' framework for moral justifiability, *MHATI* stands as good law, in both the moral and legal senses.

[170] *Id. supra* note 92.