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## The Irreducible, Minimal Morality of Law: Reconsidering the Positivist/Natural Law Divide in Light of Legal Purpose and the Rule of Law

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**THE IRREDUCIBLE, MINIMAL MORALITY OF LAW:  
RECONSIDERING THE POSITIVIST/NATURAL LAW DIVIDE IN  
LIGHT OF LEGAL PURPOSE AND THE RULE OF LAW**

BRUCE P. FROHNEN\*

INTRODUCTION

Recent scholarship has emphasized the extent to which the analytic divide separating legal positivism and natural law is less wide than previously portrayed.<sup>1</sup> Indeed, it is worth revisiting questions regarding the analytic importance of the distinction between legal theories emphasizing the separation of law from morals and those tending to identify the two. The question is not whether morality “matters” in the sense of providing criteria for judging the goodness or evil of particular laws; clearly it does. The question is, rather, what difference it makes that, on the one hand, a legal positivist will say “it is law, but it is an immoral law so you, the citizen, should not obey it” and, on the other hand, the natural lawyer says “it is unjust and therefore not a law at all.” The answer, less than one might think, rests on an understanding of laws as intrinsically rooted in more general social institutions and, in particular, shaped by the intrinsic purposes of the rule of law.

My premise is that questions regarding the connection between law and morals are best examined in light of the system or rule of law within which particular laws necessarily exist. I point, here, to no grand theory of law, but rather to the modest fact that the rule of law entails that laws, rather than particular persons, rule<sup>2</sup> and that some rules are inconsistent with the rule of law, properly understood. Recognizing particular laws’ systemic context brings to our attention the fact that for laws to “work” they must have certain basic virtues (clarity, for example). Such recognition also highlights the intrinsic

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1. See, e.g., Leslie Green, *Legal Positivism*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 3, 2003), <http://plato.stanford.edu/archives/fall2009/entrie/legal-positivism>.

2. RONALD A. CASS, *THE RULE OF LAW IN AMERICA 2* (2001) (“The classic conception of the rule of law is captured in the now-familiar language found in David Hume’s *Essays* and in the 1780 Constitution of Massachusetts written by John Adams, both declaring the aspiration to ‘a government of laws and not of men.’”).

purpose of law, namely maintenance of order and the intrinsically, though quite limited, moral nature of this purpose, providing peace and a certain predictability for human beings.

Seen in the light of this overall purpose, both “soft” positivism and traditional natural law—seemingly quite disparate forms of legal theory—in fact share a highly constrained but real and irreducible moral element. Laws must be crafted well, possessing internal virtues, or they will not serve their particular functions (they fail as law), while also undermining the rule of law. Moreover, the very nature and purpose of the rule of law, being bound up with the provision of order, rules out laws aimed at extreme evil; such evil laws, as a practical matter, will lack the virtues necessary to any rule of law. The resulting conception of law, in keeping with both soft positivism and traditional natural law, properly understood, is neither so amoral nor so uncompromisingly moralistic as many on both sides of this divide may wish. Rather, it is one that recognizes a spectrum of law and law-likeness encompassing the possibility of many goals and of many levels of excellence or virtue, down to the nadir of lawlessness.

Part I focuses on the work of H.L.A. Hart, arguing that his form of soft positivism has intimate connections with justice and morality. Part II examines critical texts in the natural law tradition to argue that the common view that, for natural lawyers “an unjust law is no law at all” fundamentally misstates the highly limited nature of the relationship between law and morality within that tradition. Part III extends the argument of Part I to show that soft positivism goes beyond mere connection with morality in that it, like most modern normative legal theory, is rooted in a particular conception of the good, namely individual autonomy. Part IV analyzes contemporary discussions of overlapping consensus and epistemic conceptions of law to show that this commitment to autonomy pervades the very “definition” of law today. Part V uses the concept of virtue to explain law’s irreducible but limited moral element as tied up with the intrinsic purpose of a rule of law—namely order, itself a moral good of a strictly limited nature. Part VI makes clear the moral nature of the rule of law as order by showing its incompatibility with great evil. The Article’s conclusion points out the limits of law’s ability to instantiate moral ends, given its own limited nature.

#### I. POSITIVISM: POWER—AND MORALITY

Discussion of legal positivism may focus on the question of power. Does the mere fact that one holds the sovereign office make one’s commands into intrinsically valid laws? John Austin’s early positivist theory stated something like this, likening law to the command of an armed robber to hand over one’s

money.<sup>3</sup> Thus, in its most extreme form, positivism may be seen as equating law with power, arguably adding little to our understanding of either concept. As is well known, however, this is merely where the positivist (or at least soft positivist) study of law begins. H.L.A. Hart explains in *The Concept of Law* that the word “command” includes more than the raw expression of power involved in a mere “order.”<sup>4</sup> Hart points out that the requirements for a command include a habit of obedience and hierarchy of authority, showing that a system or rule of law, unlike a particular, isolated demand, is a sophisticated construct of an advanced society.<sup>5</sup>

Hart describes law as a system of primary and secondary rules—that is, direct commands requiring that persons do or abstain from certain acts, such as a criminal law forbidding murder, and rules laying out procedures for introducing, modifying, or applying primary rules.<sup>6</sup> There must be actual order to these rules if they are to constitute a viable legal system:

[A]ny method of social control . . . consists primarily of general standards of conduct communicated to classes of persons, who are then expected to understand and conform to the rules without further official direction. If social control of this sort is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective . . . .<sup>7</sup>

Hart discusses the requirements of systems of social control in purely functional terms—if people cannot know and obey the rules, those rules cannot function as guides to conduct and the ruler will fail to achieve any rational ends.<sup>8</sup> The form of secondary rule relevant to legal systems is, of course, the rule of recognition.<sup>9</sup> According to Hart, each state will have a rule of recognition under which those subject to laws will be able to recognize dictates that are to be treated as law.<sup>10</sup> The rule of recognition for any given people may differ in the extreme, and its effectiveness rests explicitly on general acceptance that, say, a presidential signature is necessary to make a bill passed by Congress into a law.<sup>11</sup> Law, on this view, is valid when it is enacted in accordance with accepted (as opposed to “moral”) rules, and the rule of recognition, actively upheld and applied by those sharing legislative power, is

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3. H.L.A. HART, *THE CONCEPT OF LAW* 6 (2d ed. 1994).

4. *Id.* at 19–20.

5. *Id.*

6. *Id.* at 94.

7. *Id.* at 206–07.

8. HART, *supra* note 3, at 94–95.

9. *Id.* at 95.

10. *Id.*

11. U.S. CONST. art. I, § 7, cl. 2.

accepted more or less passively by the general populace, who know little of its particulars.<sup>12</sup>

Whether active or passive, such general acceptance leaves ample room for immoral laws. Hart denies that the rule of recognition has any intrinsic connection to morality.<sup>13</sup> Moreover, on Hart's reasoning even highly immoral laws should be seen as providing justification for a person's actions.<sup>14</sup> Thus, Hart condemns the German court's decision in the famous Grudge Informer Case, in which a woman was convicted for unlawfully denying liberty to her husband by reporting him to authorities under a Nazi statute forbidding criticism of the regime.<sup>15</sup> While the law and the woman's actions both were immoral, Hart insists that the fact that the woman acted in accordance with the law rendered the conviction unwise.<sup>16</sup>

But, in analyzing Hart's putatively non-moral conception of law, we should consider *why* he deems the grudge informer's conviction unwise. In effect, Hart criticizes the court for not taking the formal step of passing retroactive legislation to convict the grudge informer.<sup>17</sup> Why was such a step needed? To make clear that punishing the woman's immoral act, while morally imperative, nonetheless involved the regrettable sacrifice of "a very precious principle of morality endorsed by most legal systems," namely, that an act's legality is a crucial element in the determination whether to punish it.<sup>18</sup>

"Most legal systems" endorse a "principle of morality."<sup>19</sup> Hart, here, is careful not to identify any legal system as by nature embodying a specific moral claim or dictate. After all, he is deeply concerned to oppose the blurring of legal and moral judgment.<sup>20</sup> But his goal in so doing is to maintain the superiority of moral over legal judgment, with moral judgment properly guiding actions in regard to law. Hart makes this prioritization clear, for example, in stating that, once laws reach "a certain degree of iniquity" there is "a plain moral obligation to resist them and to withhold obedience."<sup>21</sup> Hart goes so far as to argue that the disintegration of some societies (for example those "mainly devoted to the cruel persecution of a racial or religious minority") should be welcomed.<sup>22</sup> Indeed, on Hart's view, the very "principles

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12. HART, *supra* note 3, at 116–17.

13. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 626 (1958).

14. *Id.* at 618–19.

15. *Id.* at 619.

16. *Id.*

17. *Id.*

18. *See* Hart, *supra* note 13, at 619–20.

19. *Id.* at 619.

20. *Id.*

21. *Id.* at 617.

22. H.L.A. HART, *LAW, LIBERTY AND MORALITY* 19 (1963).

of legality” are to be “valued so far only as they contribute to human happiness or other substantive moral aims of the law.”<sup>23</sup> Hart’s moral imperative is clear: “Law is not morality; do not let it supplant morality.”<sup>24</sup> But what does this tell us about the moral status or content of law itself? Despite his concern to distinguish the two, it remains the case that, for Hart, law and morality are intimately associated. Firstly, Hart recognizes that justice is a relevant criterion to be used in evaluating laws; for Hart, “natural procedural justice,” or procedural due process, is a necessary means of achieving the legal imperative of treating like cases alike.<sup>25</sup> Justice is a mere subset of morality<sup>26</sup> and as such cannot determine the validity of rules any more than can morality itself. Further, we should remember that the very principles of legality are, in Hart’s view, “compatible with very great iniquity.”<sup>27</sup> Nonetheless, according to Hart, “[T]he normal generality of law is desirable not only for reasons of economy but because it will enable individuals to predict the future and . . . this is a powerful contribution to human liberty and happiness.”<sup>28</sup> Thus, while it is true that, for Hart, laws do not necessarily “reproduce . . . [the] demands of morality,”<sup>29</sup> he recognizes that there is something “in the very notion of law consisting of general rules” which prevents us from treating it as lacking necessary contact with moral principles.<sup>30</sup>

It would be too much to say that Hart explicitly recognizes law as a moral enterprise. According to Hart, a law can be both immoral and, because enacted in accordance with the rule of recognition, legally valid.<sup>31</sup> He also explicitly states that a law’s validity tells the citizen nothing about whether it should be obeyed.<sup>32</sup> But, as Jeremy Waldron has argued, examination of Hart’s work shows that, for him, there is “some criterial connection between legality and law” and “that principles of legality do have moral significance.”<sup>33</sup> In addition, we should not lose sight of the fact that, in Hart’s schema, the rule of law itself holds the status of a high, ordering value.<sup>34</sup> That is, the rule of law is more valuable than, and should guide us in judging the value of, any particular law.<sup>35</sup>

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23. H.L.A. Hart, Book Review, 78 HARV. L. REV. 1281, 1291 (1965) (reviewing LON L. FULLER, *THE MORALITY OF LAW* (1964)).

24. Hart, *supra* note 13, at 618.

25. *Id.* at 624.

26. HART, *supra* note 3, at 157.

27. *Id.* at 207.

28. Hart, *supra* note 23, at 1291.

29. HART, *supra* note 3, at 186.

30. Hart, *supra* note 13, at 623–24.

31. *Id.* at 618.

32. *See id.*

33. Jeremy Waldron, *Positivism and Legality: Hart’s Equivocal Response to Fuller*, 83 N.Y.U. L. REV. 1135, 1168 (2008).

34. Hart, *supra* note 13, at 619.

35. *Id.* at 620.

Rules that fail the test of generality, for example violating natural justice, are, in fact, failing a test—they are to be judged flawed because they undermine the legal system.<sup>36</sup> Moreover, the very existence of the rule of recognition, hence of the rule of law, for Hart depends on judges recognizing and enforcing among themselves a “common standard of correct judicial decision.”<sup>37</sup> Lacking such commonality (and it would appear, though Hart never says so, a recognition by judges of their moral duty to maintain it),<sup>38</sup> citizens would face “chaos” amid the loss of consistent judicial orders.<sup>39</sup>

David Dyzenhaus has claimed that Hart’s reasoning reduces judges under immoral legal systems to “cog[s] in a vicious administrative regime.”<sup>40</sup> Still, as Dyzenhaus concedes, Hart argues that judges should use the considerable discretion afforded by the open texture of law to serve policy ends deemed just.<sup>41</sup> It remains relevant, here, that the kind of reasoning for which Hart calls in discretionary judicial decision making is, by his own account, not legal.<sup>42</sup> Moral questions, for Hart, are policy questions, into which a judge may, even should, enter.<sup>43</sup> But they are not legal questions; they do not provide legal criteria by which to analyze and evaluate law.<sup>44</sup> That said, at least among the juridical elites, morals are to guide legal actors in two ways: in urging them to maintain the rule of law, and in guiding them in using their discretion to instantiate the proper moral policies.<sup>45</sup> That is, where the law does not dictate a particular outcome, Hart’s judge, within the constraints of the law as it is, should interstitially legislate according to “his own beliefs and values.”<sup>46</sup>

We see then, in Hart’s soft positivism, at least, a moral imperative behind the rule of law and moral duties assigned to legal elites. The question remains whether morality is or should be, despite Hart’s separability thesis, an essential element in law itself, and if so in what ways. I leave this further question for Part III, first turning to the contrasting view of law and morality underlying natural law reasoning.

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36. HART, *supra* note 3, at 115–16.

37. *Id.* at 116.

38. *See id.* at 146. I would note, here, Hart’s statement, that a generalized refusal on the part of judges to abide by the rule of recognition “would be treated by a preponderant majority as a subject of serious criticism and as wrong” and would constitute a change of regime. *Id.*

39. *Id.* at 116.

40. David Dyzenhaus, *The Grudge Informer Case Revisited*, 83 N.Y.U. L. REV. 1000, 1017 (2008).

41. *Id.* at 1023.

42. *Id.*

43. *Id.*

44. *See id.*

45. HART, *supra* note 3, at 273.

46. *Id.*

## II. NATURAL LAW: NOT JUST JUSTICE

At the other end of the spectrum from legal positivism regarding morality and the rule of law is “thick” modern natural law reasoning. This modern natural law, with its roots in the thought of Immanuel Kant and the demand that individual autonomy be assured through legal means, is quite rigorous in juridical terms; those subscribing to this view demand that only truly just ruling directives be recognized as laws, and even that societies be transformed to make the rule of law meaningful.<sup>47</sup> There is, for example, the statement of the Delhi Congress of the International Commission of Jurists, which declared that the concept of the rule of law “should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised.”<sup>48</sup>

Joseph Raz has criticized this statement for identifying the rule of law with popular political ideals, at the same time seeming to take in all moral concerns:

If the rule of law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph.<sup>49</sup>

If “law” means moral “goodness” then the term seems to add nothing to our understanding of either morality or law.

Of course this extreme, easily caricatured, version of natural law is not the only one available. Rather than produce, here, a taxonomy of natural laws, I will examine in detail the traditional form of natural law represented by thinkers such as Aristotle and Thomas Aquinas. I do so because, as I will show in Part V, this form of natural law provides the most radical contrast to the goals and assumptions of positivism while at the same time providing the necessary moral element found in both modern positivism and modern natural law.

Traditional natural law assumes that people, being rational creatures, are capable of recognizing (though not predestined to recognize) the structure or order of reality and, within limits, to guide their conduct in accordance with that structure.<sup>50</sup> The basic, universal precepts to be followed in seeking to act in this way may be called “natural law”; more importantly, for our purposes,

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47. HEINRICH A. ROMMEN, *THE NATURAL LAW* 88–90 (Thomas R. Hanley trans., 1998). See also RUSSELL HITTINGER, *A CRITIQUE OF THE NEW NATURAL LAW THEORY* (1987). I leave aside, for current purposes, the “New Natural Law” theory propounded by John Finnis and his followers.

48. T.R.S. ALLAN, *LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM* 26 n.3 (1993).

49. JOSEPH RAZ, *THE AUTHORITY OF LAW* 211 (1979).

50. ROMMEN, *supra* note 47, at 11.



they dictate action that properly can be called “virtuous.”<sup>51</sup> In narrow terms virtue simply means “excellence”; more generally, one who is virtuous acts as one ought, meeting standards of good or right conduct derived from the rational nature of reality (“right reason”) and the nature of the person as a rational being.<sup>52</sup>

Traditional natural law is grounded in a specific understanding of both law and the person as intrinsically oriented toward action in accordance with the natural order.<sup>53</sup> On this view, law properly embodies natural standards of excellence or virtue.<sup>54</sup> The person is at his or her best, and improved, when acting in accord with natural goods (such as honesty, justice, and love), and law serves its natural function, moving toward its proper end, when it encourages virtue and discourages vice.<sup>55</sup>

Traditional natural law theories are in disrepute among academics on account of their violating contemporary assertions of our inevitable uncertainty concerning the nature of being and of the good—and therefore of the substantive (or “policy”) goals of law.<sup>56</sup> Traditional natural law also is problematic for contemporary critics in that it goes against the widespread conviction that one cannot derive an “ought” regarding moral conduct from the “is” of the way reality or some aspect thereof happens to be structured.<sup>57</sup> Hart finds natural law teleology in particular “somewhat comic” and easy to caricature.<sup>58</sup> Hart criticizes the natural law view that the person has both a nature and a natural end because in his view it ignores the reality of human choice—that what makes a possible, particular end a person’s end is that person’s choosing it as such.<sup>59</sup> That is, for Hart, a goal such as wisdom becomes my end because I choose to pursue it, not because wisdom is by nature the proper end I will pursue if not corrupted by, say, the vice of greed or sloth. As important, for Hart, is that traditional natural law inappropriately supplements what he deems the obvious, because almost universal, good of survival with other, supposedly higher ends such as cultivation of the

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51. *Id.* at 172.

52. *Id.* at 19.

53. FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT (Oliver O’Donovan & Joan Lockwood O’Donovan eds., 1999).

54. *Id.* at 299.

55. ROMMEN, *supra* note 47, at 19.

56. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 118–19 (2004).

57. Hart, *supra* note 23, at 1285–86.

58. HART, *supra* note 3, at 189–90. This blanket objection to a teleological understanding of law (and of being itself) has produced an ironic situation in which seemingly any argument for judging laws in moral terms in recent decades has been labeled “natural law.” ROMMEN, *supra* note 47, at 172 (thus my references to “modern natural law”).

59. HART, *supra* note 3, at 190.

intellect.<sup>60</sup> Our almost universal desire for the good of survival is enough, for Hart, to explain even the need to reject iniquitous laws because, as he quotes Hume, “Human nature cannot by any means subsist without the association of individuals; and that association never could have place were no regard paid to the laws of equity and justice.”<sup>61</sup>

The most important problem with traditional natural law, in contemporary terms, is that it seeks a substantive good—usually defined as the common good, bound up with the dignity of the person, and this requires that the law reform vice and encourage virtue.<sup>62</sup> The fear is that natural law demands that the government dictate a specific code of conduct, punishing all deviations from it. The result, on this view, would be a violation of personal privacy and demands for strict religious observance, sexual morality, and the like.<sup>63</sup>

Like all substantive goals, natural law conceptions of the common good may lead to overbearing moral, political, and legal demands. Natural law rests on the claim that there is an objective, knowable order to reality and that action in accordance with that order is morally good.<sup>64</sup> Law, as a central regulatory institution for social life, is necessary in this pursuit, properly (that is, according to its true nature) helping people achieve the good by upholding and encouraging justice; indeed, it has often been said that, according to natural law, “an unjust law is no law at all.”<sup>65</sup>

But traditional natural law is neither so rigid nor so confident in law’s power to produce virtue, as its critics appear to believe. Perhaps most important, a more proper rendering of the natural law view of unjust laws would be that “that which is not just seems to be no law at all.”<sup>66</sup> In thus quoting Augustine, Aquinas in the *Summa Theologica* explains that “the force of a law depends on the extent of its justice.”<sup>67</sup> That is, law is not simply just or unjust, law or not law. Rather, a law may be more or less just: “[E]very human law has just so much of the nature of law, as it is derived from the law of nature.”<sup>68</sup> Law’s nature is just—in accord with the law of nature, but that

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60. *Id.* at 191.

61. *Id.*

62. MARCUS TULLIUS CICERO, *THE REPUBLIC AND THE LAWS* ix (Niall Rudd trans., 1998).

63. William N. Eskridge, *The Marriage Cases—Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CALIF. L. REV. 1785, 1790 (2009).

64. ROMMEN, *supra* note 47, at 20.

65. O’Donovan & O’Donovan, *supra* note 53, at 113.

66. THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. I-II, Q. 95, Art. 2 (Fathers of the English Dominican Province trans., Benziger Bros. 1947), available at <http://www.ccel.org/ccel/aquinas/summa.toc.html> (quoting Augustine: “non videtur esse lex, quae iusta non fuerit”).

67. *Id.* (“inquantum habet de iustitia, intantum habet de virtute legis”).

68. *Id.* (“omnis lex humanitus posita intantum habet de ratione legis, inquantum a lege naturae derivatur”).

nature can be diluted by elements that are unjust because derived from improper precepts or goals.

Aquinas may be seen as giving an absolute twist to this last statement when he follows it with the further comment that “if in any point [the law] deflects from the law of nature, it is no longer a law but a perversion of law.”<sup>69</sup> But two things merit our attention, here. First, where the standard, Dominican translation here reads “perversion,” the Latin word is “*corruptum*”—a word more literally translated as “corruption.” Corruption denotes more clearly than perversion the sense in which the deflection from natural law mixes injustice into the intrinsic justice of law, bringing us back to the matter of degrees of justice and injustice.<sup>70</sup> Alternatively, if one chooses to maintain “perversion” as Aquinas’s meaning, even here we see the sense in which the extent of the law’s disagreement with the natural law moves that law from its true course—either more or less far from its natural target depending on the extent of the deflection.<sup>71</sup> Second, “deflects from” is not, in actuality, a literal translation of the Latin term, *discordet*, which might be taken to mean “is discordant with” or “disagrees with.” But “discordant with” maintains the sense of deviation from, and other translations also pick up on the sense in which an unjust law misses the mark of justice—with some laws coming closer to that mark than others. For example, one translation not irrationally renders Aquinas’s Latin “[a] tyrannical law is not according to reason, and therefore is not straightforwardly a law, but rather a sort of crooked law.”<sup>72</sup> “Crooked,” here, captures the practical sense in which a bad law is malformed and hence ill suited to its purpose. In any of these cases, the law is not purely bad on account of its failure to fully derive its points from the natural law; it is only bad, unjust, corrupt or perverse to the extent that it is improperly derived from right reason.<sup>73</sup>

69. *Id.* (“Si vero in aliquo, a lege naturali discordet, iam non erit lex sed legis corruptio.”).

70. *See id.* at pt. I-II, Q. 94, Art. 5. It is relevant, here, that the Dominican translation also uses “perversion” as a translation of “*corruptio*” where Aquinas observes that the written law may be said to be given “for the correction of the natural law” “because the natural law was perverted in the hearts of some men, as to certain matters, so that they esteemed those things good which are naturally evil; which perversion stood in need of correction.” In the Latin: “Ad primum ergo dicendum quod lex scripta dicitur esse data ad correctionem legis naturae, vel quia per legem scriptam suppletum est quod legi naturae deerat, vel quia lex naturae in aliquorum cordibus, quantum ad aliqua, corrupta erat intantum ut existimarent esse bona quae naturaliter sunt mala; et talis corruptio correctione indigebat.”

71. AQUINAS, *supra* note 66, at pt. I-II, Q. 92, Art. 1. It is interesting to note, here, Aquinas uses the word “*perversitas*” in a highly similar context, showing the affinity of the two terms for laws deflected from the law of nature.

72. O’Donovan & O’Donovan, *supra* note 53, at 345.

73. AQUINAS, *supra* note 66, at pt. I-II, Q. 93, Art. 3 (“Human law has the nature of law in so far as it partakes of right reason; and it is clear that, in this respect, it is derived from the eternal law. But in so far as it deviates from reason, it is called an unjust law, and has the nature,

Some laws have no justice at all, and therefore are not law. Aquinas refers to “tyrannical government, which is altogether corrupt, and which, therefore, has no corresponding law.”<sup>74</sup> But most laws and regimes are not altogether corrupt. Aquinas notes that laws may be unjust “by being contrary to human good,” imposing excessive burdens for the good only of the rulers, or being imposed by those without authority to do so.<sup>75</sup> He then states that “[t]he like are acts of violence rather than laws.”<sup>76</sup> But, again, we should not be too quick to take this as an absolute formulation of law versus non-law. The Latin here is, “*Et huiusmodi magis sunt violentiae quam leges.*” A literal translation of this sentence would be, “And such things are more acts of violence than laws.” That is, we have here, again, the notion of quantity or proportion of more or less justice and injustice, translating into a law that is more or less aberrant. Moreover, even laws that definitively are unjust still may bind our conscience, according to Aquinas, because the individual himself or herself has a duty to act in a just manner in regard to the social ends of a system of law (that is, the rule of law), taking into account the possibility of scandal or tumult potentially caused by disobedience.<sup>77</sup> Thus, at least for Aquinas, law exists on a continuum from just to unjust, true to perverse or crooked, pure to corrupt, as does the individual’s response to that law—and as does the law, taken as an overall system, or rule of law (such as the non-law of tyranny).

As not all “bad” laws should be ignored, so not all possible “good” laws should be promulgated. Prudence is necessary to shape laws that will serve their proper, universal end of promoting virtue in the context of a particular people’s habits, beliefs, and circumstances. For example, Aquinas specifically

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not of law but of violence. Nevertheless even an unjust law, in so far as it retains some appearance of law, though being framed by one who is in power, is derived from the eternal law; since all power is from the Lord God, according to Rom[ans] 13:1.” In the Latin: “*Ad secundum dicendum quod lex humana in quantum habet rationem legis, in quantum est secundum rationem rectam, et secundum hoc manifestum est quod a lege aeterna derivatur. In quantum vero a ratione recedit, sic dicitur lex iniqua, et sic non habet rationem legis, sed magis violentiae cuiusdam. Et tamen in ipsa lege iniqua in quantum servatur aliquid de similitudine legis propter ordinem potestatis eius qui legem fert, secundum hoc etiam derivatur a lege aeterna, omnis enim potestas a domino Deo est, ut dicitur Rom. XIII.*” Here, again, we see the notion of extent or depth of injustice corrupting or turning to violence something, law, that is by its nature just.).

74. *Id.* at pt. I-II, Q. 95, Art. 4 (“*Aliud autem est tyrannicum, quod est omnino corruptum, unde ex hoc non sumitur aliqua lex.*”).

75. *Id.* at pt. I-II, Q. 96, Art. 4.

76. *Id.*

77. *Id.* See also ROMMEN, *supra* note 47, at 227–28 (noting that it would be incorrect to see natural law as dictating a purely utilitarian weighing of costs and benefits arising from disobedience to a law and pointing out that, for disobedience to be licit, the law in question must not merely be unjust as, say, a law imposing high taxes for the funding of foolish projects might be deemed unjust, such that only a law that undermines the fundamental order of society is unjust in the true, full sense).

rejected the notion that the state can or should outlaw prostitution.<sup>78</sup> Such laws, Aquinas reasoned, citing Augustine, would succeed only in undermining other important relations and public goods through enforcement efforts and their unintended consequences.<sup>79</sup>

Thus, at the least, there is room within traditional natural law theory for much disagreement over what particular laws are necessary or beneficial to achieve the common good.<sup>80</sup> All natural law can provide is a mode of reasoning—including philosophical precepts of “right reason” and a conception of prudence rooted in recognition of a moral common good. Jurists, legislators, and citizens may choose whether to use this mode of reasoning in evaluating the extent of justice and legitimacy possessed by laws and proposed laws.

It remains the case that, in contemporary terms, traditional natural law is dangerous on account of its attachment to a specific account of the good—the life of virtue.<sup>81</sup> It would be wrong to claim, however, that modern theorists do not demand a specific set of structures and policies—in the name of justice and the rule of law, but also as constituting a substantive good. As will be argued in the next section, modern theories, whether positivistic or moralistic, simply choose a particular “thin” goal of law, namely autonomy.

### III. AUTONOMY AS THE MORALITY OF MODERN LAW

Morality remains at the heart, or at least the root, of our legal discourse. It is the *vocabulary* of moral discourse that has lain in disrepute for some time. Hart famously refused to put forward any “moral” good as the proper end of the rule of law.<sup>82</sup> Rather, Hart argued, the rule of law should be seen as merely allowing for establishment and maintenance of the minimum level of peace and stability necessary for each of us to pursue our own ends while living in common with our fellows.<sup>83</sup> But Hart’s demands of law are in fact extensive and moralistic. In discussing the view that certain enactments of the Nazi regime were too unjust to be treated as law, Hart opines that, whereas the Germans had allowed positivist views of law to take on a “sinister character,” in English history the view that “law is law” in fact went along with the most

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78. AQUINAS, *supra* note 66, at pt. II-II, Q. 10, Art. 11.

79. *Id.*

80. ROMMEN, *supra* note 47, at 47.

81. In this way traditional natural law is different from the autonomy-based modern law of Immanuel Kant, whose “universal Law of Right” produced the formula: “Act externally in such a manner that the free exercise of thy [w]ill may be able to co-exist with the Freedom of all others, according to a universal Law.” See IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 46 (W. Hastie trans., 1887).

82. HART, *supra* note 22, at 17–23.

83. *See id.* at 21–22.

enlightened “liberal attitudes.”<sup>84</sup> In the more enlightened, “truly liberal” English tradition, according to Hart, it was well known that something’s being the law does not determine whether it should be obeyed; rather, the *morality* of the law would determine whether it should be obeyed.<sup>85</sup>

Far from rendering laws self-justifying, then, Hart’s theory sets up a very high moral bar for law’s legitimacy—though one rooted in a particular (English liberal) set of cultural habits and values. Hart’s most explicit and extensive elaboration of this position appears in *Law, Liberty, and Morality*, a book in which he argues that “the use of legal coercion by any society calls for justification as something *prima facie* objectionable to be tolerated only for the sake of some countervailing good.”<sup>86</sup> Laws exert power—they not only punish those who violate them, but also restrain those who obey them.<sup>87</sup> This means that they inflict “a special form of suffering—often very acute—on those whose desires are frustrated by the fear of punishment.”<sup>88</sup> That is, Hart held a quintessentially liberal conception of the good as relatively unconstrained autonomy, with this good being dictated by the freedom-loving nature of the person. Hart’s basic level of peace may be seen as moral in the sense that it is a common good to be desired and pursued because it makes possible a good life for human persons—a life of autonomous individual flourishing.

It is because they refuse to posit a more concrete, substantive end that modern theorists claim to be maintaining a separation between law and morality. Refusing to identify any one good or good life for persons, they seem to believe, they are leaving us to pursue our own desires as free, autonomous selves.<sup>89</sup> That the life of individual choice and pursuit of self-chosen goods is itself a kind of good life, requiring specific social structures and both demanding and ruling out many kinds of activities has been pointed out many times.<sup>90</sup> As important, all such theories require that people act with at least a kind of virtue, such as, for example, emotional independence.<sup>91</sup> Moreover, this virtue cannot be merely individual; it requires social expression and social institutions, including some corresponding version of the rule of law.

Most moralistic (modern “natural law”) and non-moralistic (“positivistic”) legal theorists today share a common moral goal: autonomy. To prioritize individual autonomy is to posit a common good and demand that society be structured for its promotion. We see this, for example, in contemporary

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84. Hart, *supra* note 13, at 618.

85. *Id.*

86. Hart, *supra* note 22, at 20.

87. *Id.* at 21.

88. *Id.* at 22.

89. ROMMEN, *supra* note 47, at 88.

90. TAMANAHA, *supra* note 56, at 102–04.

91. CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 38–39 (1991).

marriage law, which allows either spouse to demand a unilateral “no-fault” divorce, prioritizing the autonomy of the departing spouse over the other spouse’s desire for community and stability.<sup>92</sup> Autonomy in the sense of self-actualization and self-definition is taken as a metaphysical highest good (or right), ordering other, lesser goods (or rights). As the U.S. Supreme Court mused in its decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>93</sup> We can and should, on this view, define and choose the nature and meaning of our own existence. And the Constitution, which is interpreted principally as a protection for individual liberty, must uphold this choice making by forbidding laws that might intrude thereon.<sup>94</sup>

Thus, there appears to be at least one knowable common good for modern legal theorists: maximum individual autonomy. Moreover, this moral good is found through implicit rejection of the fact/value distinction. To prioritize individual autonomy is to derive the “ought” of choice maximization from the “is” of the capacity to make free choices. Because we are capable of making choices relatively unconstrained by history and tradition, as well as external coercion, does not necessarily mean that we ought to exercise that capability to its full extent, or that it should be respected as such by the state. Only if we assume that choice making is central to our nature—our essence, as it were—can such a view make sense. In other words, the justification for individual autonomy is moral at its core. Human flourishing may be recognized all but universally as a good, but again this recognition is an “is” not an “ought” and, as important, to claim that human flourishing requires individual autonomy is to make a claim about the nature of the person and our moral duty to act in accordance with that nature.<sup>95</sup>

Hart, of course, states his moral convictions as mere observations, but the result is extremely close, at least, to an argument that human nature demands that law incorporate respect for human dignity. For example, Hart reflects that “so deeply embedded in modern man is the principle that prima facie human beings are entitled to be treated alike that almost universally where the laws do discriminate by reference to such matters as colour and race, lip-service at least is still widely paid to this principle.”<sup>96</sup> Ironically, Hart’s descriptive

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92. Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy*, 24 ST. LOUIS U. PUB. L. REV. 169, 171 (2005).

93. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

94. Academics, too, insist on the link between autonomy and human dignity; Neumann, for example, insists on the necessity of privacy rights for human dignity, though he denies that this is a moral claim. See MICHAEL NEUMANN, *THE RULE OF LAW: POLITICIZING ETHICS* 56–57 (2002).

95. See TAYLOR, *supra* note 91, at 17–18.

96. HART, *supra* note 3, at 162.

methodology ends up rendering his arguments all the closer to a grounding of both law and morals in human nature:

[T]he social morality of societies which have reached the state where this can be distinguished from its law, always includes certain obligations and duties, requiring the sacrifice of private inclination or interest which is essential to the survival of any society, so long as men and the world in which they live retain some of their most familiar and obvious characteristics.<sup>97</sup>

Further, without basic rules, for example restricting free use of violence and requiring certain forms of fair dealing, “we should be doubtful of the description of the group as a society, and certain that it could not endure for long.”<sup>98</sup> The implication is clear, including to Hart, that “in all communities there is a partial overlap in content between legal and moral obligation.”<sup>99</sup>

#### IV. “EPISTEMIC” LEGAL MORALITY

In pointing out the moral element in all but the most reductionist versions of the rule of law, this Article is not intended to engage in some meaningless game of “gotcha.” Nor is it intended to argue for any all-encompassing, utopian moral theory. Rather, the point is that attempts to “de-moralize” the rule of law, understandable as they are in the face of social philosophies masquerading as jurisprudence, miss the (limited) nature of specifically legal morality. Such attempts thus obscure the rule of law’s moral nature and the sense in which it is necessary for any reasonable social order and, hence, for even a moderate opportunity for human flourishing.

Of course, it may be argued that only a caricatured view of legal positivism ignores morality, and that more sophisticated contemporary philosophies of law recognize the relevance of individual moral standards to law, while seeking to limit their capacity to undermine public peace, or, in Rawls’s terms, the “overlapping consensus” crucial to the survival of liberal democracy.<sup>100</sup> Rawls’s highly influential explication of the rule of law seeks to abstract political justice (and hence legal legitimacy) from particular conceptions of the good. His theory is rooted specifically in political liberalism, a structure itself committed to gaining “the support of an overlapping consensus of reasonable religious, philosophical, and moral doctrines in a society regulated by” Rawls’s political conception of justice.<sup>101</sup> His goal is a system in which “citizens, who remain deeply divided on religious, philosophical, and moral doctrines, can still maintain a just and stable democratic society.”<sup>102</sup> And such a society

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97. *Id.* at 171–72.

98. *See id.* at 172.

99. *Id.* at 171.

100. JOHN RAWLS, POLITICAL LIBERALISM 394–95 (2005).

101. *Id.* at 10.

102. *Id.*



requires that “citizens’ reasoning in the public forum about constitutional essentials and basic questions of justice [be] guided by a political conception the principles and values of which all citizens can endorse.”<sup>103</sup>

Such rational principles constitute “public reason” and demand that religious reasons and faith claims, as well as all systemic conceptions of the good that cannot be explained in terms accessible to people holding different moral values, be left outside the public square.<sup>104</sup> The influence of Rawlsian-style public reason on jurisprudence is made clear in recent substantive due process decisions. Legislative and judicial judgments must not be “arbitrary and capricious” but rather must be supported by a reasonable legal basis.<sup>105</sup> Laws, if they are to be upheld within our liberal democratic system, must be justified by public reasons. To be deemed in accordance with our fundamental rights and hence just, a law must make only minimal impositions on individual moral choice, such that all rational citizens would say that the law is consistent with their own freedom and equality.<sup>106</sup> This is not surprising, given the primacy of liberty in Rawls’s theory.<sup>107</sup>

As a result of this form of reasoning, individual autonomy is taken as a fundamental, grounding ideal (one might say a *grundnorm*), the implications of which are to be unpacked by judges, but the further bases of which are not open to question.<sup>108</sup> This point is further heightened by arguments in favor of public reason grounding its justification in liberal democracy itself. As one commentator argues: “A liberal state exists in good part to accommodate a variety of people irrespective of their special preference for one kind of life over another.”<sup>109</sup> Overlapping consensus is portrayed as the *raison d’etre* of liberal democracy. And this means that to question the validity of public reason is to question the legitimacy of liberal democracy itself.

A view that grounds the legitimacy of public reason and autonomy on their being essential to liberal democracy seems problematic in an era in which liberal democracy itself has been portrayed as dangerous to the rights of non-Western peoples.<sup>110</sup> Failing to justify liberal democracy’s fundamental principle seems as politically unwise as it is philosophically unsatisfying in an era of cultural and political conflict. Moreover, Rawlsian public reason fails to

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103. *Id.*

104. *See id.*

105. Edward C. Lyons, *Reason’s Freedom and the Dialectic of Ordered Liberty*, 55 CLEV. ST. L. REV. 157, 160 (2007).

106. *Id.* at 181–82.

107. JOHN RAWLS, A THEORY OF JUSTICE 60 (1971).

108. Lyons, *supra* note 105, at 190–91.

109. ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE 152 (1997).

110. Todd J. Moss, *U.S. Policy and Democratisation in Africa: The Limits of Liberal Universalism*, 33 J. MODERN AFR. STUD. 189, 193–94 (1995).

provide criteria by which we may judge, domestically, concrete burdens on individual liberty either legitimate or illegitimate.<sup>111</sup> “Mere overlapping consensus with respect to a general rational conception of justice as fairness,” with fairness defined as liberty’s being restrained only “by the naked ‘categorical’ demands of public reason,” is “vacuous as a standard for devising any actual, concrete public order.”<sup>112</sup> This is so because “any rational principle that *could* be forwarded as a valid *specific* limitation of autonomy” would be dismissed as a comprehensive, idiosyncratic view of what is good or bad, hence violating “the demands of public reason.”<sup>113</sup>

Rawls, then, ends by prioritizing his good (autonomy) over any concrete theory of the just because his good can be limited only by itself. That is, autonomy can only be limited when and to the extent it impedes autonomy.<sup>114</sup> Rawls’s autonomy, the value of which he does not justify save to say that its undue restraint would be unjust, ends up trumping—even ruling out—full legal reasoning.

How, then, are modern legal theorists to explain liberal democracy as a legal system without recourse to morality as its essential and pervasive motivating principle? One response to Rawls’s problem has been further elaboration of epistemic analysis—or further unpacking of what we mean by the term “law”—in an attempt to flesh out the implications of legal norms. Such an approach is, of course, in keeping with Hart’s stated concern to define rather than morally justify law and legal systems. I will take one example here—that of Michael Neumann—not because it is the best known, but because it provides a particularly thorough treatment of the implications of an epistemic understanding of law and thus provides a full view of its inevitable moral presumptions.

Neumann defines laws as rules addressed to intelligent beings.<sup>115</sup> Thus, a rule that leaves people without the power to choose (autonomously) whether to obey or disobey (that is, one the sanctions of which are unavoidable) violates the rule of law.<sup>116</sup> Neumann claims this is an epistemic rather than a moral distinction.<sup>117</sup> That is, he claims that laws violating his principles, whether moral or not, simply do not meet the definition of law.<sup>118</sup> In arguing that his is a non-moral vision of law, Neumann points out that the substance of laws meeting his “avoidability” criterion still may be immoral—may, for example,

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111. Lyons, *supra* note 105, at 193.

112. *Id.*

113. *Id.*

114. *Id.* at 194.

115. NEUMANN, *supra* note 94, at 72.

116. *Id.*

117. *Id.*

118. *Id.*

deny people liberal rights and freedoms.<sup>119</sup> But autonomy is a deeper, more fundamental moral value than even the liberal rights, such as freedom of speech, that it supports. And Neumann's commitment to this autonomy is built into his rule of law through his definition of constraints. A purported law, the sanctions of which are unavoidable (for example, a law imposing the death penalty for walking on one's feet rather than one's hands), is not a law, according to Neumann; it is simply an imposition of punishment.<sup>120</sup> Of course, many laws impose constraints that we cannot avoid if we wish to avoid penalties. For example, a provision that "walking on the grass in Central Park will result in a fine" constrains us from walking on the grass in Central Park, lest we be fined. But this does not necessarily undermine the provision's status as law. Indeed, laws inevitably constrain individual autonomy. According to Neumann, however, at some point constraints become uncomfortable or dehumanizing enough to constitute punishments.<sup>121</sup> According to this view, rules imposing excessive restraints ("drink ditch water or die," for example) should be seen, in essence, as punishments imposed without actual law (that is, a rule one may choose to obey or disobey). Neumann would seem, then, to be making a distinction between acceptable laws and unacceptable (in this case "imposing excessive unavoidable constraints") non-laws—more in keeping with the understanding of natural law critiqued here than with any form of positivism.

Neumann would consider such a charge inaccurate because his rule of law is violated only by punishing constraints that are both unavoidable *and non-universal*. A law requiring that all persons, without distinction, drink ditch water, though dehumanizing and hence immoral, would meet the demands of Neumann's rule of law.<sup>122</sup> Thus, Neumann somewhat surreptitiously introduces another primary moral value—equality—into his definition of the rule of law. To demand that everyone drink ditch water on pain of death is dehumanizing. But if the law is promulgated properly and is universal in scope, Neumann argues, it remains in accord with the rule of law. Only if some people are excused from suffering—the unavoidable punishment of drinking ditch water—is the law not a law.<sup>123</sup>

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119. *Id.* at 72.

120. NEUMANN, *supra* note 94, at 60.

121. *Id.* at 61.

122. *Id.* at 60.

123. Neumann does say that he is willing to allow that some distinctions in application of laws may comport with the rule of law. Age restrictions on driving, for example, may "stand in" for ability to drive in a safe manner. But this merely gets to the larger point he implicitly rejects: all laws make distinctions and, hence, create inequalities and fail to be universal. *See* NEUMANN, *supra* note 94, at 64 (the question is whether the distinction is in accordance with justice and the common good (e.g., driving ages) or just harmful (e.g., race)).

This is not to say that for Neumann equality must be enforced perfectly in all laws if they are to meet the rule of law; he allows for corruption and even class-based differences in the administration of justice and punishment, provided both predictability and the general applicability of law are maintained.<sup>124</sup> That is, at some point, corruption and class-based distinctions will eviscerate the law by making it apply only to those less favored.<sup>125</sup> The core distinction, here, is one of race versus class. That is, on Neumann's reasoning, income levels can be said to exist on account of some direct or indirect form of chosen conduct, whereas race cannot. Hence, constraints placed on race are unavoidable whereas those based on class are not.<sup>126</sup>

Many would reject Neumann's drawing of the line between avoidable and unavoidable distinctions. Particularly problematic for many would be the class/race distinction as regards those brought up in disadvantageous surroundings. Rawls, for example, rejects the ownership by persons of their talents, abilities, and even character, thus imposing a principle of fundamental material equality as integral to justice.<sup>127</sup> But if one accepts Neumann's view of chosen conduct as a justification for distinctions, then it would appear that only distinctions based on non-universal, unavoidable criteria (such as race) lie outside the definition of the rule of law.<sup>128</sup>

Non-universal and unavoidable constraints violate Neumann's criteria for the rule of law because they punish people for something they cannot help but "do"—that is, "be" African American, Hispanic, Caucasian, or whatever race or other unavoidable category may be involved.<sup>129</sup> Given Neumann's valuation of autonomy and equality, this argument makes sense,<sup>130</sup> but it clearly is a moral, not an epistemic argument. A constraint (such as a rule requiring all persons of one category to drink only ditch water, on pain of death) clearly may be morally evil, as a violation of human dignity. But what makes it "not law"? For Neumann, it is not the (immoral) dehumanizing impact of being forced to drink ditch water, nor is it the epistemic consequence of categorization in and of itself (he defends many such categorizations as necessary for the public good).<sup>131</sup> Rather, it is the combination of the dehumanizing effect of the unavoidable conduct (serious enough for Neumann to deem it a punishment) and the dehumanizing effect of a law that punishes

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124. *Id.* at 47–48.

125. *Id.* at 48.

126. *Id.* at 58.

127. RAWLS, *supra* note 107, at 311.

128. NEUMANN, *supra* note 94, at 37.

129. *Id.* at 58–59.

130. It may be useful to point out at this point that one cannot "help" but be human either, such that even a truly "universal" law is dehumanizing on Neumann's terms in that it would seem to punish people for something they cannot avoid "being."

131. NEUMANN, *supra* note 94, at 66.

some, but not all, people on account of something they cannot help but do (or be)—an objection itself rooted in the value of autonomy (choice) as well as equality.

Neumann's rule of law is clearly and intimately bound up with his conception of human dignity. Non-universal rules that impose unavoidable punishments are simply too dehumanizing for him to denote as laws.<sup>132</sup> He makes the moral nature of his viewpoint clear by explaining how a society under the rule of law achieves the status of a "civilization."<sup>133</sup> It does so by treating all its citizens "like persons whose conduct is to be regulated by mutually understood arrangements, not like dumb mute things to be worked on."<sup>134</sup>

Agreeing with Neumann's sentiments, it is necessary to point out that his reasoning is irreducibly moral. Neumann's criteria for law are met within a civilization that embodies, in part through its laws, respect for the dignity of all persons as equal, autonomous selves.<sup>135</sup> Instructive here is Neumann's own critique of Joseph Raz, another theorist claiming to operate on non-moral ground.<sup>136</sup> Neumann rightly criticizes Raz for claiming to proffer a "thin" theory of the rule of law while including within it, as an essential feature, observation of "the principles of natural justice."<sup>137</sup> This demand for "natural justice" undermines Raz's claim to be forwarding no moral theory as to the purpose of the rule of law. How so? Raz claims to be demanding only correct application of the law, and that only out of concern that law provide predictability.<sup>138</sup> But such predictability can be provided by incorrect or even arbitrary application of the law—so long as it is predictable. If all the rule of law intends, by nature, to accomplish is the predictable direction of human action through rules, those rules need not be applied with substantial fairness, but only with consistency—all people with red hair may always lose in court, and will be able to plan accordingly. A tyrant can maintain the rule of law, even if he or she applies the law badly, so long as his or her subjects have predictable (not fair or correct) guidance as to what is demanded of them.<sup>139</sup> What is missing in such a rule is not law, but justice; as Hart recognized, such

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132. *Id.* at 64.

133. *Id.* at 55.

134. *Id.* at 56.

135. *See id.* Neumann also implicitly recognizes that law and justice exist on a spectrum. There is a scale of "law-likeness," as there is a scale of the level of civilization for a given society. Both laws and civilizations can be better or less well adapted to achieve their natural end—they can be more true or more corrupted. But the spectrum is a moral one, measuring the extent to which the natural end of law in promoting the dignity of the person is achieved.

136. NEUMANN, *supra* note 94, at 9–10.

137. *Id.* at 10.

138. *Id.* at 11.

139. *Id.*

a rule will undermine the rule of law, but does not, in itself, mean that it does not exist as law.<sup>140</sup>

Thus, there is even in the demand for procedural accuracy (and especially fairness) a demand for a kind of legal goodness or virtue.<sup>141</sup> Neumann rejects Raz's conception of natural justice as unnecessary for the rule of law,<sup>142</sup> but he insists on predictability and avoidability/universality.<sup>143</sup> In this way, he imposes a requirement that, while a law's particular goal may be immoral, its formulation must embody or evince a certain virtue or morality if it is to be law at all.

Neumann's (and Rawls's) commitment to building into the law his essential goods of equality and autonomy without admitting their moral nature thus leads him to a familiar category mistake: that of "morally good law" for law, *simpliciter*.<sup>144</sup> It is simply incorrect to deny that the rule of law allows for unequal laws including, alas, race-based categories, or that it may include laws that impose restrictions that are so severe, immoral, and unjust as to be categorized as punishments by Neumann (and perhaps others). Bad, corrupt or perverse laws nonetheless are laws so long as, and to the extent that, they bear a resemblance to, or take the form of, law.

#### V. RECONSIDERING LAW: CONSIDERING LEGAL VIRTUE

This Part argues that law, particularly when viewed at the systemic level, as the rule of law, contains an irreducible, essential moral element. Law must have an internal, intrinsic virtue if it is to be coherent and serve its function. That is, unless laws are formed properly, they will not provide predictable order. Moreover, as will be argued, the pursuit of some goals (such as mass murder) is intrinsically insusceptible to law. As important, conceptually, is that law exists on a spectrum. Both laws that are ill-formed—that is, fail to provide predictable rules—and those imposing unjust categories and unjust constraints are corrupt or perverse. They undermine the proper goal of law, which is the maintenance of social order through rational rules.<sup>145</sup> And they do so more or less severely according to how well or ill made they are, and how well or ill chosen their particular goals may be.

Laws, properly so called, are characterized by a kind of internal virtue or morality.<sup>146</sup> This virtue is efficacious in that it enables laws to serve their ends;

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140. Hart, *supra* note 13, at 624.

141. NEUMANN, *supra* note 94, at 12.

142. *Id.* at 10.

143. *Id.* at 11, 27.

144. *Id.* at 58.

145. Kristen Rundle, *The Impossibility of Exterminatory Legality: Law and the Holocaust*, 59 U. TORONTO L.J. 65, 89 (2009).

146. LON L. FULLER, *THE MORALITY OF LAW* 47 (1964).

it is moral in the sense that it recognizes the dignity of the human person as subject only to rules that have been properly formed and enacted—itsself a moral good.<sup>147</sup> And while this internal morality does not necessarily entail specific moral goals, it nonetheless, on the whole, shapes the law toward external morality as well. Aquinas termed law “a dictate of practical reason”;<sup>148</sup> thus it is, in an important sense, a tool for ends outside itself. But this tool is implicated by morality in that it must have its own, internal virtue if it is to serve properly its ends, and the more general ends of the rule of law.

Lon Fuller was perhaps the most famous exponent of the view that a legal system, if it is to be such in anything but name, must meet a set of criteria that constitute an internal morality.<sup>149</sup> That is, for Fuller the rule of law requires that laws be characterized by a set of virtues, and these virtues are distinct from the substantive criteria of morality embedded in most natural law systems, which demand that laws encourage virtue and discourage vice in the people. Fuller thus distinguished between a natural law of institutions and procedures and a natural law of substantive aims.

Fuller summarizes the procedural law of nature in terms of criteria meant to guide law making to meet the requirements of the rule of law.<sup>150</sup> These criteria can be summed up in eight canons: there must be general rules; the rules must be promulgated; the rules must typically be prospective, rather than retroactive; the rules must be clear; the rules must not require contradictory actions; the rules must not require actions that are impossible to perform; the rules must remain relatively constant over time; and there must be a congruence between the rules as declared and the rules as administered.<sup>151</sup>

Substantive natural law, on the other hand, sets criteria that are not necessary to and may even undermine establishment of the rule of law. Such criteria “might include such diverse assertions as . . . no tax can be just that takes from the citizen more than the equivalent of what government renders to him; any attempt to restrict the free sexual life of responsible adults is a

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147. Rundle, *supra* note 145, at 109, 118 (“[T]he conception of the person implicit in legality—as a responsible agent, capable of following rules, and answerable for his defaults—does make a real moral difference to the lives of those who live within the constraints of law.”).

148. AQUINAS, *supra* note 66, at pt. I-II, Q. 91, Art. 1 (“[L]ex est quoddam dictamen practicae rationis”).

149. FULLER, *supra* note 146, at 4.

150. This is not to say that Fuller was alone or among the first to so argue. Aquinas quotes Isidore of Seville’s ETYMOLOGIES (V, 21): “Law shall be virtuous, just, possible to nature, according to the custom of the country, suitable to place and time, necessary, useful; clearly expressed, lest by its obscurity it lead to misunderstanding; framed for no private benefit, but for the common good.” AQUINAS, *supra* note 66, at pt. I-II, Q. 95, Art. 3.

151. FULLER, *supra* note 146, at 46–49.

violation of the principle of individual freedom.”<sup>152</sup> These criteria, which I have argued in Part III do not properly belong to traditional natural law, aim at goods external to the law. They concern goods toward which the lawmaker should (on some views) exert his or her efforts. They aim at the moral good (such as tax rates commensurate with individualized governmental benefits or autonomous choice in sexual conduct) of the people, not of the law itself.

Hart recognizes the dual nature of Fuller’s schema in accepting his inner morality of law as accurate, though insisting that it is “compatible with very great iniquity.”<sup>153</sup> Hart also seizes on Fuller’s recognition of the distinction between law’s internal and external morality to deny the moral character of the legal enterprise. On Hart’s view, Fuller’s canons concern only the efficacy of law. He argues that:

[Fuller’s] insistence on classifying these principles of legality as a “morality” is a source of confusion both for him and his readers. . . . [T]he crucial objection to the designation of these principles of good legal craftsmanship as morality, in spite of the qualification “inner,” is that it perpetrates a confusion between two notions that it is vital to hold apart: the notions of purposive activity and morality. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. (“Avoid poisons however lethal if they cause the victim to vomit,” or “Avoid poisons however lethal if their shape, color, or size is likely to attract notice.”) But to call these principles of the poisoner’s art “the morality of poisoning” would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned.<sup>154</sup>

This charge both deserves and requires a substantive response. To begin, not every purposive action is equally valid or capable of being described in terms of virtue. Hart himself uses the term “virtue” in the limited sense of judges’ best practices in interpreting laws so as to maintain legal principles—that is, of practical excellence in achieving an important end.<sup>155</sup> This is in keeping with our long-held views concerning virtue; as Aristotle observed, “[N]ot every action or feeling admits of the mean [or virtue]. For the names of some automatically include baseness—for instance, spite, shamelessness, envy, . . . and adultery, theft, murder . . . . [T]hey themselves, not their excesses or deficiencies, are base.”<sup>156</sup> We would refer to an accomplished poisoner as cunning or skilled, but not virtuous.

152. KENNETH I. WINSTON, *Introduction* to THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 25, 46 (Kenneth I. Winston ed., Hart Publ’g rev. ed. 2001) (1981).

153. HART, *supra* note 3, at 207.

154. Hart, *supra* note 23, at 1285–86.

155. HART, *supra* note 3, at 204–05.

156. ARISTOTLE, NICOMACHEAN ETHICS bk. II, at 25 (Terence Irwin trans., Hackett Publ’g Co. 2d ed. 1999).



One might respond that Aristotle is making a moral judgment regarding ends being sought. But this is precisely the point. As Hart sees law's good as the provision of peace and stability so as to facilitate autonomous individual action, so Fuller's position has been described as one in which "legal structures embody moral aspirations and define moral relationships."<sup>157</sup> Legal systems are defined by their animating purpose—according to Hart provision of stability so as to enhance autonomous choice and according to Fuller the impartial resolution of disputes on the basis of authoritative precepts.<sup>158</sup> Fuller's point is that there is an intrinsic purpose to law—the settling of disputes according to rules accepted as authoritative by all—that properly should be seen as a moral good. A society's common good is served, indeed made possible, by the rule of law.

There is, of course, much disagreement concerning the nature and even existence of higher common goods (such as religious salvation, substantive equality, or everlasting peace).<sup>159</sup> But there is an abiding consensus, obscured but not erased in contemporary debates and attested to by Neumann among many others, that the rule of law provides the moral good of order. Without order there will be no society,<sup>160</sup> hence no social order capable of providing the minimal rules even Hart deems necessary for meaningful individual autonomous action. With order the society may be a bad one, but at the least the rule of law will constrain the government's discretion in pursuing its bad aims, providing stability and predictability.<sup>161</sup>

The limits of the good the rule of law can provide should come as no surprise given law's intrinsically limited nature. Law is not an abstract, universal construct of pure mind; it is the product of craft, hence of practical virtue.<sup>162</sup> The craftsman becomes good or bad by engaging well or ill in his or her craft.<sup>163</sup> As a builder becomes a good or a bad builder by building well or badly,<sup>164</sup> a lawmaker or judge becomes a good or bad lawmaker or interpreter by drafting or interpreting well or badly, developing good or bad habits in the crafting or interpretation of laws. Thus, Fuller notes that his canons are and should be implicit, resting on tacit assumptions rather than rulebook strictures

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157. WINSTON, *supra* note 152, at 28.

158. *Id.* at 45–46.

159. CASS, *supra* note 2, at 21.

160. See RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* 3 (4th ed. 2003) (stating a person "must know order" before living tolerably with himself or others).

161. CASS, *supra* note 2, at xi.

162. AQUINAS, *supra* note 66, at pt. II-II, Q. 57, Art. 1.

163. ARISTOTLE, *supra* note 156, bk. II, at 18–19.

164. *Id.* at 19.

because good laws rest on sometimes almost instinctive readings of particular circumstances and requirements.<sup>165</sup>

The virtue developed through good craftsmanship enables the craftsman to produce better buildings, laws, or interpretations. And those buildings, laws, or interpretations, because they are better constructed (more just than unjust, or straight than crooked), will perform their functions well:

[E]very virtue causes its possessors to be in a good state and to perform their functions well. The virtue of eyes, for instance, makes the eyes and their functioning excellent, because it makes us see well; and similarly, the virtue of a horse makes the horse excellent, and thereby good at galloping, at carrying its rider, and at standing steady in the face of the enemy.<sup>166</sup>

Aristotle saw law as by nature aimed at promoting virtue and suppressing vice; in addition, he recognized that laws would fulfill their function better or worse according to how well they were crafted—according to the level of practical virtue used in their making.<sup>167</sup> On the other hand, as Fuller points out, at some point a system in which the laws are crafted improperly will no longer function. People cannot, for example, obey secret rules.<sup>168</sup>

Fuller emphasizes the moral nature of the predicament faced by citizens of a state in which laws have been formulated in violation of his canons. For him, it is important to point out that the people have no obligation to follow laws that are excessively ill-formed. Why not? Because ill-formed, “inefficacious” laws fail to establish any rule that citizens can know, predict, and follow, and “there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted.”<sup>169</sup> Of course, the issue of whether a particular regime’s rules are binding must be addressed in the concrete and in the context of the just/unjust spectrum on which laws and legal systems fall. But at some point variance from one or more canons will make the regime unlawful because it demands what is not possible (obedience to unknown rules) and so punishes unjustly—that is, against moral standards of right conduct.

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165. LON L. FULLER, *The Implicit Laws of Lawmaking*, in THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER, *supra* note 152, at 176.

166. ARISTOTLE, *supra* note 156, bk. II, at 23–24.

167. ARISTOTLE, *supra* note 156, bk. V, at 68 (“Now the law instructs us to do the actions of a brave person—for instance, not to leave the battle-line, or to flee, or to throw away our weapons; of a temperate person—not to commit adultery or wanton aggression; of a mild person—not to strike or revile another; and similarly requires actions in accord with the other virtues, and prohibits actions in accord with the vices. The correctly established law does this correctly, and the less carefully framed one does this worse.”).

168. Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 L. & PHIL. 239, 241 (2005).

169. Fuller, *supra* note 146, at 39.

If the rulers fail in their essential “legal” task of establishing rules for the governance of human action, then the people cannot be expected to follow the resulting dictates, even if these dictates are called “laws.” That said, so long as the laws comport tolerably well with the internal morality of law—so long as they have the virtues of law reasonably delineated by Fuller’s canons—the people have a reason, and an obligation, to obey. This is true even if the people disagree with the policies furthered by those laws.<sup>170</sup> Thus, discussion of legal efficacy is moral by nature—it attaches moral authority to rules on account of their concordance with human dignity—but the moral element is restricted to a zone defined by the intrinsic goal of law, namely order.

#### VI. EVIL LAWS AND THEIR LIMITATIONS

There may be non-legal reasons for disobeying a law that is truly evil in its intent and/or practice. As Aristotle noted, a decent person will be better than a person whose justice derives solely from being a stickler for the letter of the law because decency may not be captured by the law—indeed, it may be impossible for a rule to make for true decency given the diversity of human experience.<sup>171</sup> Moral enormities, whether genocide in the literal sense or, for example, forcing religious groups to affirmatively violate central commandments of their faith,<sup>172</sup> cannot bind the conscience, even if instituted through well-crafted laws.

But the fact that these moral concerns are extra-legal limits, rather than eliminates, the moral element in law *qua* law. Law by nature aims at order, order cabins power, and evil demands that power be given free rein. There is significant historical evidence of the conflict between the internal morality of law and the use of law to achieve the most evil of ends. The legal institution of slavery undermined specific constitutional protections in a manner that endangered the rights of all Americans.<sup>173</sup> The battles over due process rights and their sacrifice by the Fugitive Slave Laws, which in the end could only be enforced by putting free Africans at risk of simple kidnapping and being “returned” to slavery without the most basic legal procedures, were a significant cause of the Civil War.<sup>174</sup> The various Black Codes of the pre-Civil War era attest to the impact of the drive to maintain unchecked dominion over

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170. Murphy, *supra* note 168, at 243.

171. ARISTOTLE, *supra* note 156, bk. V, at 83 (“[What is] decent is just, but is not the legally just, but a rectification of it. This is because all law is universal, but in some areas no universal rule can be correct; and so where a universal rule has to be made, but cannot be correct, the law chooses the [universal rule] that is usually [correct], well aware of the error being made.”).

172. See AQUINAS, *supra* note 66, at pt. II-II, Q. 89, Art. 7.

173. H. ROBERT BAKER, *THE RESCUE OF JOSHUA GLOVER* 45 (2006).

174. Arthur Schlesinger, Jr., *The Inevitability of Violence*, in *THE CAUSES OF THE CIVIL WAR* 162, 165 (Kenneth M. Stampp ed., Touchstone 3d rev. ed. 1991).

one group of people on the rights of all.<sup>175</sup> Alabama's Slave Code, for example, bound all slave owning men to regular service on patrol, carrying out such functions as breaking up slave assemblies, searching for escaped slaves, whipping slaves they deemed to have committed crimes, and searching various buildings and outbuildings, all including activities on and regarding the properties of whites and all without need for warrants.<sup>176</sup> Later, under the regime of segregation, it was seen that mere law could not keep African Americans in their subservient position, such that lynching—extra-legal murders intended to instill sufficient terror to ensure obedience to unjust laws—became frequent.<sup>177</sup>

Another example is provided by the original anti-Jewish laws enacted under the National Socialist regime. These laws clearly aimed at bad ends; the Nuremberg Laws (1935–1939) regulated Jewish activities in Germany, disenfranchising Jews and forbidding them to have marital relations with non-Jews.<sup>178</sup> These Nazi laws were discriminatory and punitive, but did have the form of law; thus their evil effects, while real and deplorable, were limited.<sup>179</sup> Only after Kristallnacht did the Nazis aim specifically at the extermination of Jews, and they did so through non-legal means.<sup>180</sup> For example, the Star of David decree granted the relevant functionaries authority to employ “additional police measures” and “more severe punishments” against Jews at their discretion.<sup>181</sup> Thus, the Nazis both aimed specifically at the most evil of ends (genocide) and abandoned the use of proper laws at about the same time. As noted by a Nazi legal bureaucrat, even the Nuremberg Laws posed an impediment and barrier to the extermination of the Jews because they were “an annoying reminder that the continuing persecution was ‘illegal.’”<sup>182</sup> Law then, by nature, calls those in power to at least a minimal virtue. The call may be ignored, but then so is the law.

None of this is to say that the Nuremberg Laws were not evil and worthy of resistance; they were. But it is too easy to dismiss as unintended consequences of law what are in fact the intrinsic qualities of law's internal morality. Laws meeting the criteria of internal morality provide order and deny to the state the terrorizing power of unpredictability.<sup>183</sup> Explicit statements of

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175. PETER WALLENSTEIN, *BLUE LAWS AND BLACK CODES: CONFLICTS, COURTS, AND CHANGE IN TWENTIETH-CENTURY VIRGINIA* 2–3 (2004).

176. *A DOCUMENTARY HISTORY OF SLAVERY IN NORTH AMERICA 178–81* (Willie Lee Rose ed., 1976).

177. JOY HAKIM, *FREEDOM: A HISTORY OF US* 299 (2003).

178. Rundle, *supra* note 145, at 71.

179. *See id.* (noting that the consequences of breaching discriminatory laws were punitive).

180. *Id.* at 92–93, 97–98.

181. *Id.* at 75.

182. *Id.* at 95–96.

183. Murphy, *supra* note 168, at 252–53.

abhorrent ends also tend to undermine the regime's legitimacy—putting all the people on notice of the moral enormities it intends, leaving these people unable to claim ignorance, and making them face the reality of what is being done to their fellows.<sup>184</sup> Moreover, those actually doing the injustice—for example murdering Jews or, in apartheid South Africa, torturing members of the African National Congress—operate more freely if they can do so without laws. Without laws, as one South African apartheid-era security official noted, “There are no lines drawn to mark where you cannot cross. So you can go very low—I mean very low—and it still doesn't hit you.”<sup>185</sup> Law constricts evil because people by nature hesitate to cross clear, legal lines even in the midst of committing evil acts.<sup>186</sup>

### CONCLUSION

Morality is connected intimately to the law—both in its internal structure and as its aspiration or goal. Even bad laws, so long as they are characterized by the virtues of internal morality, restrict the practice of evil. Thus, those pursuing evil will destroy or nullify them if they can. What, then, does this tell us of the moral limits of law? For example, it would seem to follow that an ideal law is one that is perfectly crafted to achieve a perfect end.<sup>187</sup> But can such a law exist? And if we attempt to promulgate and enforce it, would this require tyranny in the application? Moreover, has this article not already argued that to reject as “not truly law” those laws that fail to meet perfectly demands for internal morality, or the service of external morality, would be to deny to ourselves the very real good guaranteed by the rule of law—order—and bring chaos?

Here it is necessary to remember the nature of laws as rules. As this Article has sought to show, rules are not mere tools in the sense of having no moral import; they are an integral part of the intrinsically moral pursuit of an ordered social life. However, morality cannot be reduced to rules. As the internal morality of law must in large measure remain a set of unwritten practices, so the proper goals of law often lie outside the scope of rules themselves. We cannot lay down rules that will succeed in forcing men and women to be good.<sup>188</sup> Fuller addresses this issue by distinguishing between the morality of aspiration (best seen in aesthetic terms, for him) and the morality of duty, for which law serves as the best analogy.<sup>189</sup>

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184. *Id.*

185. *Id.* at 253.

186. *Id.* at 257–58.

187. ARISTOTLE, *supra* note 156, bk. V, at 68.

188. FULLER, *supra* note 146, at 9–11.

189. *Id.* at 15.

Certainly some legal orders are better and some worse than others—the spectrum from just to unjust remains with us. But good, to say nothing of “best,” regimes are not purely the product of law. Indeed, too much reliance on law may undermine essential elements of a good society.<sup>190</sup>

Thus, while some (evil) ends will destroy the internal morality of law, we cannot use the tool of law to achieve perfect virtue (or freedom, or any other moral good). We can only do our best to develop practical lawmaking and to interpret virtues such that the laws we make will be efficacious in spelling out and enforcing duties in such a way as to, perhaps, encourage people to pursue virtue (or virtues, whether autonomy, tolerance, or even magnanimity) in the other institutions of social life. In this light the pursuit of the best regime purely through law, and in particular through “better” interpretation and application of existing laws, may be seen as undermining law’s true function.<sup>191</sup> This is true, not because law is merely a mindless tool, but because it is part of a network of understandings and goals that point outside itself. There is, then, no inherent, strict separation of law and morality, but neither are law and morality the same thing; each impacts and influences the other. Law, a deeply practical craft, cannot bear the full weight of morality. However, without the substance of moral ends it will dissipate, to be replaced by the desires of those with power.

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190. Note, for example, the discussion in Part II of the damage that laws against prostitution might bring to society.

191. See Alan Hunt, *The Critique of Law: What is ‘Critical’ About Critical Legal Theory?*, 14 J.L.S. 5, 5 (1987) (arguing that the CLS movement is in search of a theory that may not be possible or desirable).

