

3-2012

Response to Philip Blosser

Joseph M. Isanga

Concordia University School of Law, jisanga@cu-portland.edu


Follow this and additional works at: <http://commons.cu-portland.edu/lawfaculty>

 Part of the [Law and Philosophy Commons](#), [Law and Society Commons](#), [Natural Law Commons](#), and the [Public Law and Legal Theory Commons](#)

CU Commons Citation

Joseph M. Isanga, Response to Blosser, in *St. Paul, the Natural Law, and Contemporary Legal Theory* 131, 143 (Jane Adolphe, Robert Fastiggi, Michael Vacca, eds. 2012).

This Book Chapter is brought to you for free and open access by the School of Law at CU Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of CU Commons. For more information, please contact libraryadmin@cu-portland.edu.



Response to Philip Blosser

Rev. Joseph Isanga
Associate Professor,
Ave Maria School of Law, Naples, Florida

Introduction

Jurisprudential theories provide frameworks for understanding the nature of law and justice. Generally exclusivist, each portrays itself as the only valid explanation of law. Thus, legal positivism¹ portrays itself as antithetical to natural law theory. Legal positivism developed in different directions and inspired a variety of kindred theories, such as legalism/formalism, legal realism, and legal process.² In turn, these ideas attempted to monopolize legal theory, usually at the expense of natural law theory. To an extent, this is understandable because every generation confronts unique challenges, and in crafting solutions, prior theories seem outdated as they relate to different times and problems.

In fact, however, each theory contributes to the understanding of only a specific dimension of law. Therefore, it is important for each school of theorists to ultimately recognize that diverse theories can, and do, complement each other.³ Natural law theory stands for the proposition that there are some unchanging and fundamental rules written in nature, society and the world, accessible by reason, even as society marches forward and meets new challenges. That proposition is common ground for religious and non-religious proponents of the theory.⁴

Yet, natural law has been repressed throughout history by individual nations and the international community, only to receive renewed attention again and again in the wake of horrendous atrocities—during World War II⁵ and those committed in Kosovo, Bosnia⁶ and Rwanda, but even now as nations try to counter violent extremism. The repression of natural law is usually done in self-interest, when adherence to it seems inconvenient or inexpedient. Reverting to the natural law for improvement in times of crisis only underscores its enduring and timeless significance. In an increasingly pluralistic and globalized world, natural law theory is a

valid basis for coming together to uphold universal values.

This article explores the extent to which Pauline literature and the extant non-religious legal philosophies were accommodative and complementary of each other on the subject of natural law, how they were all better for it, and how contemporary society too—confronted as it is by challenges posed by pluralism and globalization—could benefit from similar accommodation. The article first establishes that Paul understood legal philosophy and used it appropriately to solve societal problems. Secondly, it appraises and then critiques a plethora of modern and contemporary philosophies of law to indicate why a complementary approach is imperative. Lastly, it evaluates select legal theories in light of what can be described as Paul's preferred legal theory—natural law.

Earlier Philosophies: Antecedents to Pauline Natural Law Teaching

It is important to note that there were varying contemporaneous theories of law that had an impact on Pauline thinking and literature. Paul drew upon and accommodated his teaching to a variety of Greek philosophical methodologies in a manner subsidiary or tangential to the immediate concerns he addressed.⁷ He was part of Hellenistic culture and his letters were primarily addressed to Gentiles living in the Greek philosophical and cultural milieu.⁸ Although Paul had an immediate religious agenda, Greek society regarded philosophy as an indispensable component of training for public life.⁹ In fact, second century apologists indeed label Christianity as "philosophy." For instance, the account of the arranged debate on the Areopagus between Paul and "certain of the Epicurean and Stoic philosophers" suggests that there is no distinction.¹⁰ Paul's mission was assimilated into these operational patterns of Hellenistic teachers.¹¹ While fundamentally religious, his mission had a public dimension. Paul was trying to fashion local adherents of the new teaching into a new *politeia*, with its own code of political conduct¹² and its own *metropolis* or mother-city.¹³ The 'school of Christ' was not inward looking or enclosed. Continued propagation of the teaching of Christ could then take place within the 'public space' of this new community.¹⁴

Paul's accommodation of his teaching to the contemporaneous teachings also demonstrates that he appreciated the importance of assembling diverse worldviews to solve society's common problems. Today, "interdisciplinarity has helped law understand what, at any point, is its content and its self-conception: law as politics, culture, [or] economics."¹⁵ Although Paul had a religious mission and philosophy, he embraced an essentially secular natural law theory where there were overlapping convergences.

The two most popular Hellenistic philosophies antecedent to Pauline teaching were the third and second century B.C.E Stoicism and Epicureanism. Both understood the person as a microcosm of the universe.¹⁶ Paul embraced Stoic and Epi-

curean universalism by stating that Gentiles do not need to be circumcised, indicating that Christianity is not confined to the Jewish people. Paul was so appreciative of Greek philosophy—which he indeed lived—that Acts 17:16-34 portrays him as a second Socrates who engaged the Epicurean and Stoic philosophers of Agora.¹⁷

Socrates reacted to those movements within ancient Greek society, which maintained that “good” and “true” were matters of personal and democratic preference, thus denying the existence of enduring universal truths valid for all time and places. Socrates, instead, insisted on an objective definition of virtue and maintained that virtuous living was to live according to reason.¹⁸ Aristotle reiterated and advanced Socrates’ teaching, arguing, “[o]f political justice part is natural, part legal,—natural that which everywhere has the same force and does not exist by people’s thinking this or that.”¹⁹ The Stoics, too, especially the philosopher Chrysippus of Soli, constructed a systematic natural law theory. According to Stoicism, the whole cosmos is rationally ordered by an active principle. The world, frequently compared to a city, is governed by divine wisdom and providence, and one’s participation in that wisdom is limited by universal law.²⁰ The Stoics maintained that to live virtuously was to live in accord with one’s nature—to live according to right reason. While rational beings are free, the Stoics postulated, there is only one natural law, which absolutely orders and preserves this natural order.²¹ The Stoics sought to solve the problem of distinguishing clearly between what is in our power and what is not.²²

Paul makes use of certain ideas derived from these philosophers, particularly Stoic ethics, as part of his own thinking.²³ He found the natural law doctrine of the Stoics relatively compatible with Christian belief. Thus, while addressing gentile Romans who were ignorant of Mosaic law, Paul argued that they were nevertheless capable of doing “by nature what the law requires,”²⁴ because some of the content of the natural moral law was specified in the Law of Moses. In proposing that non-Jews are subject to God’s law, because “[w]hat the law requires is written in their hearts, to which their own conscience also bears witness,” Paul embraced and accommodated natural law.²⁵ It would be reasonable to suggest that if God were to consign most of humanity to destruction, this punishment would not be without warrant, since the non-Jews failed to decipher his law, which was accessible to them through reason.²⁶

Paul’s appreciation and use of Greek philosophy is reflected in some of his letters. For example, the letter to the Philippians contains elements of Stoic ethics, especially the central notion in Stoic ethics—the *telos*, the ‘end’ of activity, that which is ‘brought about’ by activity.²⁷ The Stoics held the ‘end of action’ to be ‘the good.’ In addition, Paul’s exposure to and critique of law as such is at the center of his Letter to the Romans. In that letter, Paul subscribes to the notion of an inner dialectic in law—the idea of a tension between what it is now and what it is not (but is capable of becoming). Paul makes use of the Greek opposition between potentiality and act. Romans 7:5-6 states, “[f]or when we were in the flesh, the passions

of sin were enacted through the law in our members to bring forth fruit unto death. But now we are de-activated [made inoperative] from the law."²⁸ The inner and outer boundaries of the law appear indiscernible to Paul as he discusses the distinction between Jews and non-Jews—those within the Law of Moses and those outside the law.²⁹ Aristotelian ontology of privation is implicit in this. Aristotle makes a point to distinguish privation from mere absence inasmuch as privation still implies a reference to the being or form deprived, which manifests itself through its lack.³⁰ Law, as such, must be open to development and accommodation.

Beyond Greek influence, reference should also be made to Roman philosophical expositions of the time. The Roman, Cicero, took up the Stoic ideas and defined natural law:

[T]rue law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. There will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times.³¹

This is a succinct statement of natural law. Cicero's ideas are in keeping with the fact that Roman law came to be identified with *jus gentium* and even *jus naturale* as the Roman Empire embraced diverse peoples and Roman citizenship came to be extended to all free inhabitants of the Roman Empire. Paul was familiar with Roman law and appreciated its characteristics—its claim to rootedness in a universal and natural ethic. The Acts of the Apostles documents that when arrested and brought before the Roman Tribunal, Paul claimed his rights as a Roman citizen³² by appealing to Caesar to avoid being handed over to the Jewish authorities.³³

Modern and Contemporary De-Emphasis of Natural Law

The natural law ethic to which Paul subscribed was subsequently embraced and elaborated upon at various times, but also repressed at other times by key theorists. The relationship between positive law and natural law has been a subject of much contention. According to Thomas Aquinas, "every human law has just so much of the nature of law, as it is derived from the law of nature"³⁴ and there is necessary participation of natural law in the divine and eternal laws.³⁵ Hugo Grotius argued, however, that the same relationship between positive law and natural law could be established without subscribing to religious criteria, because natural law is the body of rules which can be discovered through reason.³⁶ John Finnis would argue, however, that unless God is included in this analysis, it is not possible to understand why nature is normative or possesses obligatory force of law for anyone.³⁷

The following critical analysis shows that none of the theories that try to displace or repress the natural law can perfectly explain the nature of law or account for its obligatory character or legitimacy, even if they remain useful for explain-

ing certain other aspects of law.

The theory that portrays itself as most directly in opposition to natural law is legal positivism. This theory, which appears in various forms, flourished in the seventeenth and eighteenth centuries, thanks to English philosophers such as Thomas Hobbes and John Locke. By origin and definition, legal positivism—the view that the legitimacy of law depends on its being posited and obeyed and that its moral worth is a separate inquiry—was aimed at promoting the immediate interests of emerging nation-states,³⁸ and not global or universal values which were perceived as being stumbling blocks. Thus, John Austin would say “[n]ow, to say that human laws which conflict with the divine law are not binding, that is not laws, is . . . stark nonsense. The most pernicious laws . . . opposed to the divine will of God, have been and are continually enforced as [binding] laws by judicial tribunals.”³⁹ With regard to the moral worth of positive law, Austin argued for a hard separability thesis, insisting that the existence of the law is one thing, its merits or demerits is another, and a law which actually exists is law, even if one dislikes it. More contemporary exponents of legal positivism, like Hans Kelsen⁴⁰ and H.L.A. Hart, tried to strike a nuanced and moderate position, without going as far as accepting the necessity of substantive moral criteria for the validation of positive law. Thus, Hart’s Rule of Recognition (rules provided in a Constitution, for example, for determining which rules are and which are not part of the legal system) can include moral criteria, as a conventional matter, for the validity of laws in a particular legal system.⁴¹

Natural Law theory was subsequently repressed or excluded by kindred theories—utilitarianism, pragmatism, law and economics, legalism/formalism, legal realism, historical school,⁴² sociological jurisprudence⁴³ and postmodernism, among others. Legal positivists, like Austin, were also Utilitarians. The principle of utility, based on balancing pleasure and pain (the felicific calculus), provides that in making law or judicial decisions, the guiding principle should be “the greatest happiness of the greatest number,” because a law is a good law only if it makes people happy and a bad law if it makes people miserable.⁴⁴ As Robin West notes, utilitarianism is consequentialist rather than “deontic” because it rejects the notion that a law should be evaluated by determining whether or not it can be universalized or whether or not it is in accord with God’s command or natural law.⁴⁵ Thus, utilitarianism rejects deontology—the idea that a thing or action is inherently right or wrong. This utilitarian ideal is present in contemporary secular democracies, which contest the existence of objective truth and reduce the qualification of an act as right or wrong to consensus.⁴⁶ Some have argued, for instance, that,

[w]e should select our economic and political systems on the basis of what seems to produce the greatest material good for the greatest number, and leave theology out it . . . in a democracy . . . *bonos mores* are going to be the *mores* of the society [and] [u]ltimately . . . what the majority decides shall be the rights of minori-

lies is what their rights are, under that legal system.⁴⁷

But this amounts to tyranny of the majority.⁴⁸ Contemporary societies are fascinated by the idea of democracy to the point of a total, uncompromising submission to the system. But positive law, even if it is the product of democratic consensus, must have definite limits that it shall not overstep. These limits are determined by the law of nature—otherwise democracy degenerates into ‘ochlocracy’ (domination by the populace).⁴⁹

Pragmatism, which is closely linked to utilitarianism, argues that legislators and judicial officials should be guided by expediency and effectiveness—they should do whatever works.⁵⁰ As William James said, the truth of an idea is not a stagnant property inherent in it; truth happens to an idea, or an idea becomes true. Truth is “the expedient in our way of thinking just as the right is only the expedient in our way of behaving.”⁵¹ Pragmatic adjudication was highly influential throughout the 1920s and 1930s, but fell in disfavor during World War II. However, its appeal has not entirely disappeared. In moments of crisis and national calamity, it has been reverted to as a compelling justification theory in place of established legal and moral standards.

A modern and operational form of utilitarianism and pragmatism is the law and economics theory arguing that law should be guided by efficiency (wealth-maximization) on the basis of a cost-benefit analysis.⁵² Economic analysis has guided modern market-based systems. Deontologists argue that judicial, policy and legal decisions are good only if they are principled, and not just because they make economic sense. Wealth is not the only end judges and legislators should pursue. Instead, or in addition, they should be guided by humanitarian and equitable principles.

Legalism argues that law consists of a set of discoverable rules laid down at some time in the past and that legal justice is the fair application of those pre-existing rules in similar situations.⁵³ Legalism and formalism—the latter an extreme version of the former⁵⁴—are characteristically positivistic. A more contemporary version of formalism is textualism, which, in the words of Justice Scalia, argues that “[w]ords do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.”⁵⁵

For all their merits, critical jurisprudence—which consists of critical legal studies, feminist legal jurisprudence,⁵⁶ critical race theory,⁵⁷ and postmodernism, to name a few—would argue that legalism and formalism are moderate propositions because their criteria for legal justice lack legitimacy to the extent they fail to render substantive justice in concrete situations. Critical jurisprudence, in turn, does not capture all aspects of reality or the entirety of some fundamental aspects of the human person, because it stresses some dimensions of social life at the expense of others. For example, the view of postmodernism that there is a surplus of meaning and that truth is contextual, or contingent, borders on relativism and makes it impossible to speak of universal values.

Critical Legal Studies and Legal Realism target legalism. Legal realism argues that law is a matter of prophecy or prediction of what judges will do, as opposed to what they say, because reasons for judicial decision are mere *post hoc* rationalizations.⁵⁸ The real reasons may be comprised of the judge's own biases and sense of fairness based on non-legal considerations, such as prevailing social or economic policy. In insisting on the centrality of the power of the judge, Legal Realism made him/her a sovereign, unanswerable to superseding principles and to that extent this theory is characteristically positivist. Critical Legal Studies maintains that law is an instrument of political power and an expression of the interests of the privileged who relied on legalism to create a complacent and uncritical attitude in the unprivileged in order to protect the status quo.⁵⁹

The Resilience and Enduring Significance of Natural Law

Jurisprudential theories can be further critiqued through the lens of Paul's preferred theory—natural law—and applications made to select contemporary challenges. Paul critiqued aspects of legal positivism and its "look-alikes" or derivatives, such as legalism or formalism and legal realism. He rejected the oppression implied by slavish, literal fulfillment of the Mosaic Law and the way the Jews interpreted that law based on his conviction that the content of the natural moral law is specified in, but not exhausted by, the Law of Moses.⁶⁰ Paul lived in Roman society in which the aristocracy controlled the legal system, and he challenged the complacency or helplessness created by the positivist legal system. He taught that there could be no distinctions based on gender, race or class, or as he put it: between Greek and Jew, male and female, slave or free.⁶¹ Paul's opponents scourged him, and before Roman courts his teaching was used to prove that he was a threat to the social order.⁶² He did not give in, on the contrary, he claimed his civil rights as a Roman citizen, and was brought before a Roman tribunal. In the Letter to Philemon he undermines the institution of slavery by making it clear that all men are "radically equal," which was extremely innovative at the time.

Natural law, which Paul argues is written on the heart of man (and is, consequently, even today accessible), informs all natural rights and justice discourses. Natural Law brings forth more particular ideas of justice regarding the legal rights and duties of mankind.⁶³ But in today's legal discourse, legal positivism is widespread. Legislation is often decided by striking a balance between competing interests,⁶⁴ and important lessons of history are thus forgotten. After World War II, the international community rejected the notion of absolute state sovereignty and recognized the universal and fundamental equality and dignity of all human beings, nationality notwithstanding. Thus, the United Nations Charter declared the respect for human rights,⁶⁵ the Universal Declaration of Human Rights (1948) recognized the "inherent dignity" of all human beings and declared that "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and

conscience . . ."⁶⁶ and a plethora of substantive international human rights instruments fleshed out or elaborated that recognition.⁶⁷ At the national level, such developments were replicated.⁶⁸

Yet, in spite of some authentic advancements through the globalization of human rights, challenges remain in the form of racial discrimination and xenophobia, with negative consequences for governance, sustainable development, social justice, democracy and peace in the world. The genocides in Rwanda, Kosovo, and the ongoing conflict in Darfur (Sudan) are examples, as are the persistence of human trafficking, harassment of irregular immigrants, social, economic and political exclusion, and stereotyping.⁶⁹ In this latter regard, there is a persistent and dichotomous conception of international human rights, which has relegated economic, social and cultural rights to secondary status, only to reveal a prioritization of civil and political criteria and an insufficient recognition of universal solidarity for the less privileged. This problem recently prompted a representative of the Holy See to the United Nations to argue that the current global economic crisis has demonstrated "how too often racism and poverty are inter-related in a destructive combination"⁷⁰ and how too often international relations are characterized by the "paradox of a multilateral consensus...subordinated to the decisions of a few."⁷¹

But it does not have to be that way. The G20⁷² recently put aside ideological differences and demonstrated unprecedented cooperation in committing member-states to inject a \$1.1 trillion global package⁷³ into the international financial institutions in order to prevent a colossal collapse of the world economy.

In specific regard to civil and political rights, the universalist natural law to which Paul subscribed has been adhered to through the spread of freedom, democracy, and human rights throughout the world. Many regional, political, human rights and intergovernmental organizations have increasingly conditioned membership on rule of law and democracy and condemn extra-constitutional usurpation of political power. States have recognized that international law is based on "good faith" and the doctrine of *pacta sunt servanda* ("agreements must be kept"),⁷⁴ suggesting that it is subject to natural law. In its origin, international law was seen as an outgrowth of universal values and norms, largely derived from Roman law (*the ius gentium*, which applied to all peoples) and religious institutions (the law of the Roman Catholic Church, or canon law).⁷⁵ Unfortunately, the doctrine of state sovereignty continues to dominate, as if states owe no allegiance to a superseding moral order,⁷⁶ and to that extent international human rights have suffered a great deal. Classical writers, such as Hugo de Groot ("Grotius") (1583-1645), warned of the dangers of the excesses of sovereignty, democratic ethos, and legal positivism in international law, and emphasized that moral imperatives between nations were part of law.⁷⁷ But in response to current crises and challenges, some nations have expressed doubt in those notions. After the terrorist attacks of September 11, 2001, for example, there were disturbing developments in many countries trying to adopt

anti-terrorism laws and policies that threaten to reverse longstanding international human rights conceptions. Positivist or kindred theories were often invoked for justification. With time, however, many have understood that the challenges of terrorism can best be met by more, not less, international cooperation and greater respect for human rights.⁷⁸

Conclusion

In a world that is becoming increasingly globalized, appreciation and adherence to the natural law as articulated by St. Paul is the best road to developing a comprehensive legal theory or jurisprudence. Every strategy must ratify the fundamental principles of right and wrong, which remain vital to any sustainable effort to solve the most daunting global and national challenges, if mistakes are to be avoided.

Notes

1. See Harold J. Berman, "Toward an Integrative Jurisprudence: Politics, Morality, History" *California Law Review* 76 (1988), 779-780). Legal positivism treats law as a body of rules "posited" by the state. These rules have a separate and independent character from morality. Natural law theory provides that reason shapes legal rules and moral principles. As moral purposes are implicitly found in legal norms, the latter must be interpreted and applied in light of the former.

2. See generally Anthony J. Sebok, "Legal Positivism in American Jurisprudence," in *Cambridge Studies in Philosophy and Law*, (1998) (arguing that legal process is an instantiation of legal positivism).

3. Berman, 779 (arguing the case for an integrative jurisprudence which is "premised on the belief that each of these three competing schools has isolated a single important dimension of law, and that it is both possible and important to bring the several dimensions together into a common focus").

4. See Pope Benedict XVI, Address To Participants in The International Congress in Natural Moral Law (12 Feb. 2007), available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2007/february/documents/hf_ben-xvi_spe_20070212_pui_en.html (last visited May 29, 2009) (arguing that "[o]n this basis it is possible to develop a fruitful dialogue between believers and non-believers; between theologians, philosophers, jurists[,] and scientists").

5. See *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, 14 Nov. 1945-1 Oct. 1946 (1947) Vol. 1., reprinted in *American Journal of International Law* 41 (1947), 172. In response to the positivist defense *nullum crimen sine lege* (no punishment of crime without a pre-existing, posited law), the Tribunal responded, "in such circumstances the attacker must know what he is doing is wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."

6. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. General List No. 91 (Feb. 26). The ICJ stated, "[t]he origins of the

Convention [on genocide] show that it was the intention of the United Nations to condemn and punish genocide as a 'crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is *contrary to the moral law*. . . The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation," *ibid.* [Emphasis added].

7. David E. Aune, "Human Nature and Ethics in Hellenistic Philosophical Traditions and Paul: Some Issues and Problems," in *Paul in His Hellenistic Context* ed. Troels Engberg-Pedersen (Minneapolis: Fortress Press, 1994), 291.

8. *Ibid.*, xvi-xxi.

9. See Alexander Loveday, "Paul and the Hellenistic Schools: The Evidence of Galen" in *Paul in his Hellenistic Context*, 60, 74.

10. *Ibid.*, 79. See also Acts 17:18 (Catholic Revised Standard Version).

11. Loveday, 79. Like contemporary Greek philosophers, Paul traveled with a 'disciple circle' or 'retinue' from place to place, created new disciple circles, and left behind a number of supporters in the local communities.

12. See Philippians 1:27.

13. Philippians 3:20; Ephesians 2.19; Hebrews 12:22-23.

14. Loveday, 79.

15. Tawia Ansah, "Reinterpretations of St. Paul's Concept of Law" (2008); available at: http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=tawia_ansah (last visited May 27, 2009).

16. Aune, 303.

17. See generally 1 Corinthians 8:1-13. Another example of Greek philosophy influencing Paul's views is with regard to the problem of idol food. Stoics expressed uneasiness with the declaration that the person who has the power to do whatever he wishes is free, and he corrects it by arguing that it is not permissible to do mean and unprofitable things.

18. See generally *Plato, The Trial and Death of Socrates* 2nd ed. trans. G.M.A. Grube (Indianapolis: Hackett Publishing, 1975), 22-44. Plato's *Apologia* describes Socrates' fruitless attempts to convince the Greek citizenry that truth is paramount to understanding the law.

19. Stephen E. Gottlieb et al., *Jurisprudence Cases and Materials: An Introduction to the Philosophy of Law and Its Applications* 2nd ed. (Albany, N.Y.: Lexis Nexis/Matthew Bender, 2006), 61; citing Aristotle, *Nicomachean Ethics*, Book V, reprinted in *The Complete Works of Aristotle* ed. Jonathan Barnes (Princeton: Princeton University Press, 1984).

20. Abraham J. Malherbe, "Determinism and Free Will in Paul: The Argument of 1 Corinthians 8 and 9" in *Paul in his Hellenistic Context*, 231, 244-45.

21. *Ibid.* at 245.

22. Troels Engberg-Pedersen, "Stoicism in Phillipians," in *Paul in his Hellenistic Context*, 256

23. *Ibid.*

24. Romans 2:14.

25. Romans 2:15.

26. Alan F. Segal, "Universalism in Judaism and Christianity," in *Paul in his Hel-*

lenistic Context, 1, 11.

27. Engberg-Pedersen, 269. See also Philippians 4:10-13.

28. Romans 7:5-6.

29. Giorgio Agamben, *The Time That Remains: A Commentary on the Letter to the Romans* trans. Patricia Dailey (Palo Alto, CA: Stanford University Press, 2005), 104.

30. Aristotle, *Metaphysics* trans. W. D. Ross; available at <http://classics.mit.edu/Aristotle/metaphysics.mb.txt> (last visited on May 4, 2009).

31. Cicero, *On the Commonwealth*, in *On the Common Wealth and On the Laws* ed. James E.G. Zetzel (Cambridge: Cambridge University Press, 2002), 1, 63-73.

32. See John W. Mauck, *Paul on Trial: The Book of Acts as a Defense of Christianity* (Nashville: Thomas Nelson, 2001), 3. Luke wrote the Book of Acts as a legal "brief" to defend Paul and essentially all Christians, as many claimed that Christianity was an illegal religion (the charges mainly related to unlawful assembly-inciting riots by preaching a false religion).

33. Acts 25:11.

34. Thomas Aquinas, *Summa Theologica*, I-II, Q. 95, art. 2, <http://www.newadvent.org/summa/2095.htm> (last visited Jan. 18, 2010).

35. *Ibid.*

36. See generally Hugo Grotius, *De Jure Belli Ac Pacis* [On the Law of War and Peace] (1625) (arguing that "[t]he law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined" (I.1.10.1), adding that "[w]hat we have been saying would have a degree of validity even if we should concede [*etiamsi daremus*] that which cannot be conceded without the utmost wickedness, that there is no God." According to Grotius, instead of emerging from or being otherwise dependent on God, the fundamental principles of ethics, politics and law obtain in virtue of nature. As he says, "the mother of right — that is, of natural law — is human nature" (Prol. §16).

37. See John Finnis, "On the Incoherence of Legal Positivism," *Notre Dame Law Review* 75 (2000), 1597, 1599.

38. See George C. Christie and Patrick H. Martin, *Jurisprudence: Text and Readings on the Philosophy of Law* (Egan, MN: Thomson and West 3d ed. 2008), 496. Legal positivism tries to legitimize the sovereign and secular state as separate from the constraints of natural law as well as divine authority personified by ecclesiastical authorities that previously enthroned secular leaders and criticized their promulgated laws. But, as discussed earlier, see Grotius *supra* note 36, it is arguable that the natural law exists even in a non-religious context. Several contemporary natural law theories have argued that there exists a 'secular natural law,' and that it should be recognized. See e.g., Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1965), 96 (rejecting substantive moral constraints on positive law and arguing for a procedural natural law, or an internal morality of law. Fuller also believed that natural law had no relation to "any brooding omnipresence in the skies . . . [nor the] . . . higher laws").

39. John Austin, *The Province of Jurisprudence Determined* (Indianapolis: Hackett, 1995), 158.

40. See generally Hans Kelsen, "What is the Pure Theory of Law?" *Tulane Law Review* 34 (1960), 269 (1960) (arguing that Austin's command theory was inadequate-it ar-

gued that laws are only valid if there is a commander who is never disobeyed, but this fails to explain the continuity of law. Instead, he proposed that valid laws depend on a basic or *grund* norm—a presupposed norm that is found at the basis of every legal system, making all norms in that system valid.

41. H.L.A. Hart, *The Concept of Law* (Gloucestershire, UK: Clarendon Press 2d ed., 1994), 103. According to Hart, “to say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition.”

42. Berman, 780-81. The Historical School finds current laws to be a combination of historically developing social attitudes of a particular society. The theorists argue that law is found in the national character, culture, and historical traditions of that society. *Ibid.*

43. See generally Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, *Harvard Law Review* 24 (1910-1911) 591, 595-96. Sociological Jurisprudence is a futuristic and instrumentalist view of law, arguing that law is a tool for social engineering and legal reform. Law, they argue, already exists in society and is not created by legislators. The legislators merely represent the State recognizing the need to match the law on the books with the law already present in society.

44. Jeremy Bentham, *On The Principles of Morals and Legislation*, cited in Robin West, “The Other Utilitarians,” in *Analyzing Law: New Essays in Legal Theory* ed. Brian Bix (New York: Oxford University Press, 1998), 197, 199.

45. See generally Robin West, 197-222.

46. William H. Rehnquist, “The Notion of a Living Constitution,” *Texas Law Review* 54 (1976) 693, 704 (arguing that democracy is the moral basis of law and that the constitutional protections of individual liberties “assume a general social acceptance neither because of any intrinsic worth nor because of any unique origins in someone’s idea of natural justice but instead simply because they have been incorporated in a constitution by the people.”

47. Antonin Scalia, “The Common Christian Good” in *Symposium, Left, Right, and the Common Good* (June 13, 1996), available at <http://www.catholicnews.com/data/stories/cns/960613.htm> (last visited Jan. 18, 2010).

48. See generally Pew Research Center, “The Religious Dimensions of the Torture Debate” (Apr. 30, 2009), available at <http://pewresearch.org/pubs/1210/torture-opinion-religious-differences> (last visited on May 28, 2009) (discussing the contemporary popular notions regarding the torture of suspected terrorists. A survey found that 54 percent of people who attend Church services at least once a week believe that the use of torture against suspected terrorists is “often” or “sometimes” justified, *ibid.*). But see Pontifical Council for the Justice and Peace, *Compendium of the Social Doctrine of the Church*, 404, (June 29, 2004), available at http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html (last visited Jan. 18, 2010). The Catholic Church teaches that the regulation against the use of torture, no matter how serious the allegation or crime, must be strictly observed: “Christ’s disciple refuses every recourse to such methods, which nothing could justify and in which the dignity of man is as much debased in his torturer as in the torturer’s victim.” International juridical instruments concerning human rights indicate a prohibition against torture as a principle that cannot ever be contravened.

49. See generally Pope John Paul II, *Memory and Identity: Conversations at the Dawn*

of a Millennium (New York: Rizzoli, 2005).

50. Recently emerging views that torture is tolerable because it generates important information are basically pragmatist and instrumentalist. The proponents claim that the end justifies the means and ignore its intrinsic moral baseness.

51. See generally James, William, *The Meaning of Truth: A Sequel to 'Pragmatism'* (New York: Prometheus Books, 1997) [originally published, 1909].

52. See generally Richard A. Posner, "The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication," *Hofstra Law Review* 8 (1980), 487. Posner argues, for example, that judges should base their decisions on efficiency and wealth maximization. See also Bentham.

53. See generally Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1964), 1-2, 8-16

54. See generally Anthony Kronman, "The Lost Lawyer: Failing Ideals of the Legal Profession" in Gottlieb, 366. Christopher Langdell argued, for example, that the answers to all legal questions can be derived from a limited number of preexisting principles, found in classic legal cases. This analysis would put law on a scientific basis—the idea that positivists essentially advocate.

55. See generally Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1998), 23-25 .

56. See e.g., Catherine A. Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987), 48-62 (noting that feminists proclaim that women and men are equally different but not equally powerful and that men use the law to dominate women). Feminist legal jurisprudence argues that by focusing on a neutral application of legal rules, legalism does not understand that law contains biases that subordinate and dominate women, *ibid.* See also Wendy W. Williams, "Notes from a First Generation," *University of Chicago Legal Forum* (1989), 99 (arguing that although males and females are equal to the state, laws contain sex-based distinctions favoring males).

57. See, e.g., Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), 1-7 (arguing that judges exonerate themselves by saying that they are not responsible for the content of law, but only for its application). In addition, critical race theorists argue that, for all its insistence on neutrality, legalism lacks legitimacy because it does not recognize racial bias in the law. *Ibid.*

58. See generally Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown and Company, 1963), 5, 31-32.

59. See Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 Fla. St. U. L. Rev. 195, 198-215 (1987) (arguing that the goal of Critical Legal Studies (CLS) is to transform the legal system to create a society less intensively ordered by hierarchies and class status, and to combat the resolve that society can't change, *ibid.* In particular, CLS addresses civil rights, believing that they protect both the oppressor and oppressed alike. However, beyond criticizing rights, CLS proposes no alternatives. *Ibid.*

60. Jose M. Casciaro, *The Navarre Bible 27: Romans and Galatians* trans. Michael Adams (Dublin: Four Courts Press, 1993).

61. Galatians 3:24-28.

62. Mauck, 126.

63. Pope Benedict XVI, Address To Participants in The International Congress in Natural Moral Law (12 Feb. 2007).