

# THE THREE ANTINOMIES OF MODERN LEGAL POSITIVISM AND THEIR RESOLUTION IN CHRISTIAN LEGAL THOUGHT

*Dr. Charles J. Reid, Jr.*<sup>1</sup>

## I. INTRODUCTION

Christian legal thinkers have shaped and formed Western law from the latter days of the Roman Empire until nearly our own age. Historically, Christianity is of immense importance to the shape and substance of Western law. This great and imposing legal heritage has been the subject of many important historical accounts.<sup>2</sup> Remarkably, the effort to draft a constitution for the new European Union has entailed what can only be called a denial of this deep and powerful historical record.<sup>3</sup> Indeed, what is occurring in Europe is nothing less than a sustained and systematic attempt to erase from official memory the important role played historically by Christianity in the development of Western law.<sup>4</sup>

---

<sup>1</sup> Associate Professor of Law, University of St. Thomas (MN) I would like to acknowledge the thoughtful comments of my colleague and friend Professor Robert J. Delahunty.

<sup>2</sup> To identify some leading works: HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983) (tracing the origin of western law to the papal revolution of the late eleventh and twelfth centuries); HAROLD J. BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* (2003) (considering the importance of the German Lutheran Revolution and the English Calvinist Revolution to the shape of Western law); JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* (1987) (exploring the relationship of Christianity to the formation of Western laws governing marriage and sexuality); JOHN T. NOONAN, JR., *BRIBES* (1984) (reviewing the contribution of the Judeo-Christian tradition to the shaping of the Western anti-bribery ethic); BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW, 1150-1625* (1997) (examining the Christian origins of Western conceptions of natural and human rights); BRIAN TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150-1650* (1982) (considering the Christian foundations of Western constitutionalism); and JOHN WITTE, JR., *LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION* (2002) (examining the importance of the Lutheran reformation to the formation of Western law).

<sup>3</sup> See Peggy Polk, *New Constitution Ignores Europe's Christian History*, THE SEATTLE TIMES, Oct. 29, 2004, at A20; cf. Kenneth L. Woodward, *An Oxymoron: Europe Without Christianity*, N.Y. TIMES, June 14, 2003, at A15 (“[T]he eliding of the Christian foundations of Western culture is morally and intellectually dishonest.”).

<sup>4</sup> The Holy See has begun to warn against the rise of “Christianophobia” in Europe and elsewhere in the world. See Anthony Browne, *We are Committing Cultural Suicide*, THE TIMES (London), Dec. 21, 2004, at 16; Jane Lampman, *Matters of Faith*, THE

In the United States, Christian legal scholars who seek to apply self-consciously Christian norms to the resolution of legal problems are accustomed to thinking that their work is marginalized, but their situation is not nearly so dire as that of European scholars confronted with what can best be described as a kind of militant secularism.<sup>5</sup> Even so, American Christians who take their faith seriously, who see it as relevant to questions of law, should take up the task of explaining exactly how it is relevant, how it can help to resolve pressing legal problems. Harold Berman recently observed that “[w]ith rare exceptions, American legal scholars of Christian faith have not, during the past century, attempted to explain law in terms of that faith.”<sup>6</sup> As Berman also notes, this situation has begun to change for the better in recent decades, as professional associations and legal academics have come to explain how faith and legal thought can, and must, be integrated.<sup>7</sup>

I view my assignment in these proceedings as building on these recent developments. I would like to use this occasion to discuss some ways in which Christian legal thought might assist in resolving some of the great tensions of contemporary legal philosophy—what members of the legal academy call “jurisprudence.”

---

CHRISTIAN SCI. MONITOR, Dec. 20, 2004, at 12; Jonathan Petre, *Vatican Warns of Christianophobia*, THE DAILY TELEGRAPH, Dec. 7, 2004, at 12.

The election in April 2005 of Pope Benedict XVI has been seen by many as motivated in part by a desire to combat the new European relativism. See Anthony J. Figueiredo, *Pope Benedict XVI: The Right Man at the Right Time for the Right Job*, RELIGION NEWS SERVICE, Apr. 25, 2005; Richard Owen, *Pope Sets Stage for Tussle Over Christian and Secular Europe*, THE TIMES (London), Apr. 28, 2005, at 43; and George Weigel, *The Spiritual Malaise that Haunts Europe: Continent Faces a Grim Future If It Turns Its Back on Its Religious Roots*, LOS ANGELES TIMES, May 1, at M5. Weigel writes: “Europe, and especially Western Europe, is suffering from a crisis of civilizational morale.” *Id.* European leaders, Weigel notes, “have convinced themselves that, to be modern and free, Europe must jettison its Judeo-Christian heritage . . .” *Id.* Weigel closes with a somber prediction: “If Europe rejects what Pope Benedict XVI . . . called its ‘unrenounceable Christian roots,’ the results are likely to be grim for those committed to decency, human rights, and democracy.” *Id.*

<sup>5</sup> See Robert Louis Wilken, *The Church as Culture*, FIRST THINGS, Apr. 1, 2004, at 31 (describing his encounter with a woman who unabashedly identified herself as a “heathen”). Wilken wrote:

It is hardly surprising to discover pagans in the heart of Western Europe where Christianity once flourished: a steep decline in the number of Christians has been underway for generations . . . . What surprised me was the absence of embarrassment in her use of the term “heathen.” . . . It would seem that if Christianity is ever to flourish again in the land between the Rhine and the Elbe, a new Boniface will have to appear to fell the sacred oaks of European secularism.

*Id.*

<sup>6</sup> Harold J. Berman, *Foreward* to CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, at xi (Michael W. McConnell et al. eds., 2001).

<sup>7</sup> *Id.* at xii-xiii.

I propose to examine the three great antinomies of modern jurisprudence and how Christian jurisprudence might help to resolve them. Before explaining what these antinomies are, I should offer some explanation into that foreign-sounding word “antinomy.” It is not all that strange a word. Most lawyers know that the Greek word for “law” is *nomos*. We have also often encountered the word “antinomian” in our work. To be antinomian is to be opposed to the law.

The word “antinomy” is derived from the same roots but it does not mean opposition to the law; rather, it signifies laws that are opposed to one another. The *Oxford English Dictionary* defines the word as meaning “a contradiction in a law, or between two equally binding laws.”<sup>8</sup> The word “antinomy” signifies “a contradictory law, statute, or principle; an authoritative contradiction.”<sup>9</sup> It is my contention that contemporary jurisprudence, by which I mean the legal positivism that has come to prevail especially in the Anglo-American academy, embodies within itself serious contradictions—“antinomies”—which can best be resolved by paying studious attention to some of the teachings of modern Christian jurists.

## II. THE ROOTS OF CONTEMPORARY SECULAR JURISPRUDENCE

### A. *Three Antinomies: The Problem Set Out*

Three antinomies have come to shape much modern thinking about the nature and function of law. These might be reduced to a few propositions:

(1) Law consists of commands backed by power, force, and external compulsion. Questions concerning the rightness or justice of those commands are not to be considered when determining whether a particular act of sovereign will should be considered to be law.

(2) Law and morality should and must be viewed as existing as separate and apart from one another. Thus the relative moral content of a given legal provision ought to have nothing to do with the question whether the provision should count as law. This is not to say that moral considerations should be excluded from law-making, only that the moral content of a particular sovereign decree should never be used in determining whether to count a particular sovereign decree as law.

(3) Finally, in determining whether a particular command, rule, or principle should count as law, one is allowed only to consider its formal source. If it emanates from an officially-sanctioned source, such as the legislature or judiciary, and is supported by the Rule of Recognition in a given society or by that society’s Grundnorm, then it counts as law. And

---

<sup>8</sup> OXFORD ENGLISH DICTIONARY 371 (1933).

<sup>9</sup> *Id.*

it counts as law, irrespective, once again, of its content. Whether it is wise or foolish, moral or immoral, it nevertheless remains the duly adopted law of the particular jurisdiction.

These are three antinomies in legal analysis that the average lawyer works with every day and that the average student of jurisprudence takes for granted as part of the foundation of her or his view of the legal world. They are antinomies because they seem to be at war with our instincts as to what should or should not count as law. Indeed, they are at war with other deeply-cherished elements of the legal order. Law should be about justice. Power should be in the service of justice. Law and morality should not occupy separate spheres. Law should not only regulate conduct, but should seem to be inherently good. Thus the acts of civil disobedience that challenged the Jim Crow legal regime in the American South laid bare the immorality inherent in that system and revealed Jim Crow to be nothing but state-sanctioned force devoid of justice. The formal source of law, furthermore, should not be all that counts in determining whether a particular sovereign decree counts as law. Should Stalin's law of counter-revolutionary crimes or Hitler's Nuremberg race laws really qualify as law simply because Stalin and Hitler held monopolies of force within their territories? Instinctively, we recoil against these suggestions.

These antinomies did not always exist in Western law. There was a time when these tensions were unknown to legal thinkers. Western jurists once approached jurisprudence with a single integrated vision of justice, morality, and legal order. That these modern oppositions between justice and force, morality and law, had a beginning goes unrecognized and unappreciated by contemporary scholars. That there might exist means by which these antinomies could be brought together and integrated into a single unified whole also goes largely unacknowledged.

These antinomies can be said to form the foundation-stone of modern legal positivism. The term "positive law," of course, is quite ancient. It goes back at least to the medieval scholastic writers. Thomas Aquinas wrote of the positive law, but he did not view it as existing in opposition to a transcendent natural law, but rather in harmony with it. As one scholar of Thomas wrote, "Laws and rights are necessary to particularize the natural law, to apply it, and to determine the manifold relations between private individuals (positive private law) and the relations between the state and its members (positive public law)."<sup>10</sup> In a writer like Thomas Aquinas, indeed, in most Catholic writers, positive and natural law form a single integrated whole.

---

<sup>10</sup> HANS MEYER, *THE PHILOSOPHY OF ST. THOMAS AQUINAS* 500-01 (Frederic Eckhoff trans., 1944).

I do not propose in this Article to attempt a comprehensive reintegration of modern positivistic jurisprudence within a naturalistic or Christian horizon. That is a large and imposing undertaking best left for another day.

My purpose is much more limited: it is, first, to explore, in a brief and impressionistic fashion, the origin of these three antimonies as a valid means of explaining the nature and function of law. A review of the sources makes it clear that they have their origin in fairly recent history, if one thinks about Western law as a living tradition that has its origin in the twelfth century.<sup>11</sup> Viewed in this context, modern positivism is a recent phenomenon that can really be traced no farther back than the opening years of the nineteenth century.

Second, I propose to look at Christian thought as an alternative to the regnant jurisprudential assumptions, focusing particularly on the writings of some leading Catholic thinkers. In particular, I will focus on the popes of the last century and a quarter. It should become clear that Christian ways of thinking about the law still retain both vitality and relevance.

### *B. The Foundations of Classic Positivism*

#### 1. John Austin

John Austin (1790-1859) is generally considered, together with Jeremy Bentham, to be the founder of modern legal positivism.<sup>12</sup> Austin, however, at least thought and wrote within a framework still conditioned by Christianity, though the same cannot be said for Bentham. In lecture two of his *Province of Jurisprudence Determined*, Austin thus took up consideration of “[t]he Divine laws, or the laws of God.”<sup>13</sup> Divine law, Austin asserted, following classical sources, might be revealed in the Scripture, or it might be “unrevealed.”<sup>14</sup> By “unrevealed” law, Austin meant the natural law that is inscribed on the hearts of persons and made known through various “signs” that Austin termed collectively “the light of nature.”<sup>15</sup> An important modern commentator on Austin has observed that “Divine law is the stated foundation of [Austin’s] ethical

---

<sup>11</sup> The idea that the western legal tradition has a continuous existence stretching back in time to the first flowering of legal culture in the twelfth century is a major theme of BERMAN, *supra* note 2.

<sup>12</sup> See, e.g., ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 3 (1998) (“Classical legal positivism was developed in England by Austin and Bentham . . . .”)

<sup>13</sup> JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 38 (Wilfrid E. Rumble ed., 1995).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 39.

system.”<sup>16</sup> Thus, in many respects, if one read only Austin’s treatment of the divine and natural law, one would find oneself moving in terrain that would have been recognizable to a medieval schoolman.<sup>17</sup>

It is not, however, his religious thinking, but his thinking about the secular law that set Austin apart from his predecessors and his contemporaries. To Austin belongs the honor of having been the first to argue, from a self-consciously juridic standpoint, in favor of the antinomies set forth above. Austin, above all, wished to create a “scientific” jurisprudence, modeled on the sort of empirical work being done by early economic writers like David Ricardo and James Mill.<sup>18</sup> He sought to identify those characteristics that made law distinct from other branches of scientific inquiry.<sup>19</sup> He relied, furthermore, on David Hume’s sharp distinction between “is” and “ought” to maintain that the question, “what is law?” should be kept separate from the question “what ought the law to be?”<sup>20</sup> Jurisprudence, Austin claimed, was a descriptive, not a prescriptive science, and concerned itself exclusively with the law as it is.<sup>21</sup>

Understood scientifically, Austin stressed, jurisprudence was about the study of commands issued by sovereigns.<sup>22</sup> Law was variously described by Austin as an expression of the will or desire of those with sovereign authority. Austin’s choice of language was significant. To scholastic writers, reason played an important part in determining the validity of law—law was valid only to the extent that it conformed with principles of right reason.<sup>23</sup> To Austin, on the other hand, what counted was will, divorced from consideration of reason.<sup>24</sup> Such a bifurcation made sense in Austin’s analysis. To introduce considerations of reason

---

<sup>16</sup> Wilfrid E. Rumble, *Divine Law, Utilitarian Ethics, and Positivist Jurisprudence: A Study of the Legal Philosophy of John Austin*, 24 AM. J. OF JURIS. 139, 148 (1979).

<sup>17</sup> Prominent among the Christian thinkers Austin names as an influence is William Paley (1743-1805), who is described as “hav[ing] anticipated Bentham” and whose philosophy “is the best statement of the utilitarianism of the eighteenth century.” William Paley, *The Internet Encyclopedia of Philosophy*, <http://utm.edu/research/iep/p/paley.htm> (last visited Sept. 9, 2005).

<sup>18</sup> W. L. MORISON, JOHN AUSTIN 1 (1982).

<sup>19</sup> *Id.*

<sup>20</sup> Richard F. Devlin, *Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education*, 27 QUEEN’S L.J. 161, 174 (2001).

<sup>21</sup> See AUSTIN, *supra* note 13, at 59-60 (distinguishing between is and ought in analysis of law and morality).

<sup>22</sup> *Id.* at 21 (“Every law or rule (taken with the largest signification which can be given to the term *properly*) is a *command*. Or, rather, laws or rules, properly so called, are a *species* of commands.”).

<sup>23</sup> Thomas Aquinas thus defined law as “an ordinance of reason for the common good.” JOHN FINNIS, AQUINAS 255 (1998).

<sup>24</sup> Thus Austin defined a command variously as an expression of a “wish” and a “desire.” AUSTIN, *supra* note 13, at 21. Austin never considered whether these commands should be measured by some external standard of justice or rightness.

would, on Austin's account, necessarily obscure the sharp lines separating the "is" and the "ought" that should characterize scientifically-grounded jurisprudential inquiry. To ask whether a particular act of sovereign will was reasonable permitted the questioner to read into that law his or her particular values ("oughts"), thereby challenging the sovereign's monopoly over the making of law and also disrupting the central distinction that lay at the heart of the Austinian project.

The sovereign, thus, made its will known through the issuance of commands.<sup>25</sup> Commands, in Austin's mind, were the proper subject-matter of jurisprudence and might qualify as law only if backed by the possibility of real coercive force being employed in the face of disobedience. Commands, Austin asserted, represented one side of a correlative relation, the other side being the real threat of enforcement.<sup>26</sup> Austin labeled this threat a "sanction" and described it as an "evil," which the superior was free to impose on those who defied the superior's will.<sup>27</sup> "Duty," finally, was the obligation to obey the sovereign's will.<sup>28</sup> Stripped of its moral sense, Austin insisted that duty was nothing more or less than "the chance of incurring the evil [of punishment], or . . . the liability or obnoxiousness to the evil."<sup>29</sup> Duty, in short, was the fearful obedience of the law.

"Superiority," which was the source of law so understood, might be understood as the equivalent of the concept of "sovereignty." But this was superiority or sovereignty understood only in terms of the power to issue commands and to inflict evil if its will were disregarded. As Austin put it, "the term *superiority* signifies *might*: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes."<sup>30</sup> Notably absent from this definition was any notion of justice. St. Augustine had declared famously that a state lacking in justice was no different from a gang of highway robbers.<sup>31</sup> This sort of comparison was not possible in Austin's model, in light of his preoccupation with commands, sovereign will, and the use of coercive force as the determinates of what counted as law.

After making the commands of a superior power the focus of his jurisprudential analysis and after premising his theory of law not on

---

<sup>25</sup> *Id.* ("Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*.").

<sup>26</sup> *Id.* at 24.

<sup>27</sup> *Id.* at 24-25.

<sup>28</sup> *Id.* at 25.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 30.

<sup>31</sup> HERBERT A. DEANE, *THE POLITICAL AND SOCIAL IDEAS OF ST. AUGUSTINE* 126-27 (1963).

considerations of justice but on an appreciation of the importance of force in the enforcement of the law, it was an easy and logical step for Austin to separate law and morality. Indeed, it was improper, Austin asserted, to speak in general terms of the “laws of morality.”<sup>32</sup> Austin conceded that some moral rules had their foundation in the law of God and so might thus be considered a type of law.<sup>33</sup> This was not so, however, with a set of principles Austin termed “positive morality.”<sup>34</sup> “The positive moral rules, which are laws improperly so called, are *laws set or imposed by general opinion . . .*”<sup>35</sup> General agreement or acceptance by a given community of a set of moral aspirations, on this analysis, could result in nothing greater than a kind of customary morality. Imposed by no superior,<sup>36</sup> lacking the threat of governmental force and the obligatoriness of duty,<sup>37</sup> moral principles stood outside the legal order.<sup>38</sup>

This did not mean that Austin thought morality unimportant. It has been noted that “Austin regarded his discussion of ethical theories as essential for achieving the principal purpose of his book.”<sup>39</sup> He entertained the ambition of writing a companion work that would relate jurisprudence to ethical theory, although he never succeeded in producing such a volume.<sup>40</sup> What would prove significant for later generations, however, was the separation that Austin proposed must prevail between law and moral principles.

Austin was similarly moved to distinguish between the source of law and its content. A particular norm’s content had nothing to do with whether it qualified as a law. A law’s validity depended solely on its enactment by the duly-authorized law-giver. Only commands backed by force counted as law.<sup>41</sup> And these commands, in turn, had to issue from a discernible superior or sovereign, whether that superior stood in the relation of the government to its subjects or citizens; a slave-holder to his

---

<sup>32</sup> AUSTIN, *supra* note 13, at 20.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 123.

<sup>36</sup> *Id.* at 124-25.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 125.

It follows from the foregoing reasons, that a so called law set by general opinion is not a law in the proper signification of the term. It also follows from the same reasons, that it is not armed with a sanction, and does not impose a duty, in the proper acceptation of the expressions. For a sanction properly so called is an evil annexed to a command. And duty properly so called is an obnoxiousness to evils of the kind.

*Id.*

<sup>39</sup> Wilfrid E. Rumble, *Nineteenth-century Perceptions of John Austin*, 3 No. 2 UTILITAS 199, 204 (1991).

<sup>40</sup> *Id.*

<sup>41</sup> AUSTIN, *supra* note 13, and accompanying text.



slaves; or a father to his children.<sup>42</sup> The rightness or wrongness of the commands was never considered; similarly excluded from analysis was the justice or injustice of particular legal structures, such as slavery. What mattered was the form and source of the law—it had to originate in the command of a superior power capable of backing its commands with the real threat of punishment should the commands not be complied with.

Austin's earliest readers recognized the holistic quality of his work; recognizing, as later readers did not, that Austin strove to produce a work that was simultaneously concerned with legal order and with moral principle.<sup>43</sup> This should not be surprising in light of the emphasis that Austin himself had placed on divine law. A later generation of commentators, however, did not take this aspect of Austin's thought seriously.<sup>44</sup> In the 1870s, Henry Sumner Maine famously observed that Austin's theory of legal positivism was "consistent with *any* ethical theory."<sup>45</sup> Henceforward the "usable" John Austin—the Austin who would be quoted and relied upon by later generations of jurists—would be entirely secular in outlook. It thus came to pass that Maine's interpretation of Austin's applicability came to prevail in the twentieth century, as legal scholarship itself grew into a rigidly secular enterprise.<sup>46</sup>

## 2. Jeremy Bentham (1748-1832)

If John Austin still operated in a thought-world that could look to the law of God as a valid source of law, this was not the case with

---

<sup>42</sup> *Id.* at 30.

<sup>43</sup> It has been observed that to turn from the first generation of Austin's readers "to modern scholarship is indeed to encounter a very different Austin . . ." Rumble, *supra* note 39, at 201.

<sup>44</sup> In his 1906 summary of Austin prepared for use in the schools, W. Jethro Brown omitted Austin's lectures on divine law. See John V. Orth, *Casting the Priests Out of the Temple: John Austin and the Relation Between Law and Religion*, in *THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION (A TRIBUTE TO HAROLD J. BERMAN)* 229, 236-37 (John Witte, Jr. & Frank S. Alexander eds., 1988). Orth has written that Austin's lectures about "God and divine law—[thus] remained to all intents and purposes interred even after the posthumous editions of his work achieved success." *Id.* at 236.

<sup>45</sup> Rumble, *Divine Law*, *supra* note 16, at 141 (quoting HENRY SUMNER MAINE, *LECTURES ON THE EARLY HISTORY OF INSTITUTIONS* 368 (7th ed. 1966)).

<sup>46</sup> It has thus been written:

The modern legal mind with its reluctance to relate any analysis of the law to topics such as theology, finds it difficult to conceive of Austin as a man whose primary concern was not with the minute analysis of legal terms, but rather with their relationship to other elements in a universe dominated by a particular vision of God and the state.

Rumble, *supra* note 39, at 202 (quoting RAYMOND COCKS, *FOUNDATIONS OF THE MODERN BAR* 49 (1983)).

Jeremy Bentham,<sup>47</sup> who took a far more dubious view of religion. Indeed, concerning Bentham's view of religion, it has been recorded: "Between 1809 and 1823 Jeremy Bentham carried out an exhaustive examination of religion with the declared aim of extirpating religious beliefs, even the idea of religion itself, from the minds of men."<sup>48</sup> Bentham was not a theologian. His thoughts on religious belief were impassioned and hostile, but not especially profound.<sup>49</sup> He viewed the physical world of the here and now as the only reality.<sup>50</sup> He was, in other words, an unremitting materialist who was willing to trust only those things capable of being apprehended by sensory perception. Intangibles that could not be quantified, measured, felt, or seen were excluded as unworthy of serious consideration. They did not constitute a part of external, observable reality, so far as Bentham was concerned.

Bentham's deep animosity toward religion and its supposedly baneful influence on the law is apparent in his treatment of William Blackstone's understanding of the law of nature and the divine law.<sup>51</sup> Bentham described Blackstone's effort to connect the law of nature with divine will as a "smooth string of unmeaning periods."<sup>52</sup> The "mixing [of] theology . . . with jurisprudence" was improper, in Bentham's mind.<sup>53</sup> Bentham sought to establish "how absolutely unserviceable and indeed disserviceable the idea of God is for the purpose of solving any political problem . . . ."<sup>54</sup> Instead of following the "Law of Revelation," Bentham argued that civil politics would be much better served by adhering to "[t]he principle of utility."<sup>55</sup>

Bentham defined utility entirely in materialistic terms. Pain and pleasure, as experienced by the physical senses, were the sole guides to right and wrong.<sup>56</sup> "The *principle of utility*," Bentham asserted,

---

<sup>47</sup> WILFRID E. RUMBLE, *THE THOUGHT OF JOHN AUSTIN: JURISPRUDENCE, COLONIAL REFORM, AND THE BRITISH CONSTITUTION* 65 (1985).

<sup>48</sup> J.E. Crimmins, *Bentham on Religion: Atheism and the Secular Society*, in 2 *JEREMY BENTHAM: CRITICAL ASSESSMENTS* 113 (Bhikhu Parekh ed., 1993).

<sup>49</sup> Bentham's works, it has been said, "cannot . . . provide anything other than a superficial treatment of the subject of religion." *Id.*

<sup>50</sup> *Id.* at 114. "Bentham could not countenance any common ground between the spiritual world of religion and the perceptible world of physical experience; they are, he believed, mutually exclusive worlds. Indeed, in taking his stand on the apparently solid ground of the latter, he confidently declared the nonexistence of the former." *Id.*

<sup>51</sup> See *JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES* 35-44, 45-52 (Charles Warren Everett ed., 1928) (referring to natural law and divine law respectively).

<sup>52</sup> *Id.* at 42.

<sup>53</sup> *Id.* at 46.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 51.

<sup>56</sup> He stated,

Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the

“recognizes this subjection [of the mind to the senses]” and makes use of it as a foundation for law and political order.<sup>57</sup> Bentham ridiculed legal orders and systems that looked to alternative principles for guidance: “Systems which attempt to question it [the principle of utility], deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light.”<sup>58</sup> Indeed, although Bentham would have eschewed any association with the natural law, he praised the principle of utility in terms that would have been familiar to natural lawyers: “By the natural constitution of the human frame, on most occasions of their lives men in general embrace this principle,[] without thinking of it.”<sup>59</sup>

Having rejected the possibility of divine or natural law and having grounded his call for a new jurisprudence on materialist and utilitarian premises, Bentham’s definition of law closely mirrored the positivist account that Austin had set forth. Like Austin, Bentham exalted as the chief consideration of jurisprudence the will of the sovereign as expressed through clearly perceived forms and symbols:

A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the *sovereign* in a state, concerning the conduct to be observed in a certain *case* by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question.<sup>60</sup>

One can identify a substantial similarity between this definition of law and John Austin’s understanding. Law, in each understanding, was the imposition of sovereign will. There was no room for the use of reason as a means of challenging the sovereign’s “volition.”<sup>61</sup> Compliance with the law is the reaction that the sovereign properly expects on the part of those subject to the law. The sovereign’s will, furthermore, is given effect precisely because it is backed by a sanction—the “means of bringing to pass” the expected obedience.

---

standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne.

JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1 (1948).

<sup>57</sup> *Id.* at 1-2 (footnote omitted).

<sup>58</sup> *Id.* at 2.

<sup>59</sup> *Id.* at 4.

<sup>60</sup> JEREMY BENTHAM, OF LAWS IN GENERAL 1 (H.L.A. Hart ed., 1970).

<sup>61</sup> The word “volition,” with its root in the Latin verb “volo,” “I will it, or wish it so,” conveys Bentham’s point that it is the act of willing, not reasoning, that is implicated in the law-making process. On the verb “volo,” consult the OXFORD LATIN DICTIONARY 2098-99 (1982).

One must note what is not present in this definition: there is no mention of any purposes served by the law. Justice, thus, does not figure into his definition. Law is separated from conventional moral considerations. Like Austin, Bentham rigorously separated the “is” from the “ought.” Although Bentham devoutly wished law to serve utilitarian principles, law, as a definitional matter, was nothing more or less than sovereign will effectively conveyed to a subject population and backed by force.

This is not to say that Bentham was entirely lacking in a theory of justice, although he subsumed it under his principle of utility. Ideally, a law should have in view “the greatest good of the community”;<sup>62</sup> although, Bentham simultaneously conceded that “[i]n many instances it may happen, and that properly enough, that the end which [the legislator] has in view is no other than his own particular benefit or satisfaction.”<sup>63</sup> There was, in Bentham’s judgment, no necessary connection between law and utility, even though, in the abstract, such a connection was desirable.

The validity of law, furthermore, could be judged only in relation to its formal source. Thus Bentham asserted that law considered “with respect to its source” must be the expression of “the will of the sovereign in a state.”<sup>64</sup> Bentham acknowledged that the analysis of where sovereignty lay in a particular state might be quite complex: magistrates, assemblies, and monarchs might all exercise sovereign will in particular political contexts. What made a particular decree law, however, was its issuance by the duly-constituted sovereign of the state.

Here, as in other contexts, Bentham condemned considerations of a transcendent natural law.<sup>65</sup> As with Austin, so also with Bentham: the validity of law was linked with sovereign will and the force that gave that will its effect; justice, understood as the implementation of the utility principle, was desirable but not necessary to a law’s validity; law, finally, was separated from traditional notions of morality, which were connected with a discredited notion of natural law.

On the whole, Bentham’s work was more sophisticated than Austin’s. As H.L.A. Hart remarked, had Bentham published his treatise on law during his lifetime, “it, rather than John Austin’s later and obviously derivative work, would have dominated English

---

<sup>62</sup> BENTHAM, *supra* note 60, at 31. Bentham added: “The common end of all laws as prescribed by the principle of utility is the promotion of the public good.” *Id.* at 32.

<sup>63</sup> *Id.* at 31.

<sup>64</sup> *Id.* at 18.

<sup>65</sup> Thus in one place Bentham attacked Blackstone for permitting his readers to “wander[] in a labyrinth of rights and wrongs, and duties, and obligations and laws of nature, and other fictitious entities.” *Id.* at 3.

jurisprudence.”<sup>66</sup> Bentham’s discussions of command, of sanctions, and of the other elements of analytical jurisprudence were generally more refined and sometimes significantly more advanced than Austin’s account. But with respect to the three antinomies that are the subject of this Article, his work bore a substantial similarity to Austin’s. Like Austin, Bentham understood law in terms of state-sanctioned force or compulsion; he similarly severed law “as it is” from considerations of justice. Bentham also rigorously separated law from morality; indeed, he rejected conventional morality, proposing that it be replaced by the utility principle. Finally, Bentham determined the validity of law only in terms of the formal source of law, not its content.

### 3. H.L.A. Hart (1907-1992)

Herbert Lionel Adolphus Hart, typically known by the abbreviation H.L.A. Hart, was born into a Jewish home in England in 1907.<sup>67</sup> He trained as a scholar of classics and ancient philosophy and showed every promise of becoming a great philosopher even though, in 1932, he opted instead for the life of a chancery lawyer.<sup>68</sup> World War II, however, both interrupted and inalterably changed the course of Hart’s life. He went to work for the British intelligence service and, at the completion of the war, chose to pursue a career as an academic philosopher rather than return to his old chancery practice.<sup>69</sup> In 1952, he was invited to assume the chair of jurisprudence at the University of Oxford despite a paucity of published writings to that point in time.<sup>70</sup> In the course of an academic career that would span over thirty years, Hart produced a corpus of work that would have the effect of revising and refining the legal positivism of Austin and Bentham, and of recasting the field of contemporary jurisprudence.

Hart began his great work of jurisprudence, *The Concept of Law*, with a discussion of Austin’s command theory of law.<sup>71</sup> Sensitive to the criticism that on Austin’s theory one could not distinguish between

---

<sup>66</sup> H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 108 (1982). Bentham’s major treatise on law, *Of Laws in General*, “was substantially completed in 1782 but was never published by Bentham and remained unknown until it was discovered by Professor Charles Warren Everett among the Bentham [manuscripts] at University College London in 1939.” See H.L.A. Hart, *Introduction to JEREMY BENTHAM, OF LAWS IN GENERAL*, at xxxi (1970) (footnote omitted).

<sup>67</sup> NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* 11 (2004). “Both of Herbert Hart’s parents came from families which had moved to England from central Europe during the course of the late eighteenth and nineteenth centuries.” *Id.* at 12. Lacey notes that because of this background, Hart was never entirely comfortable as a member of the English establishment. *Id.* at 39.

<sup>68</sup> NEIL MACCORMICK, *H.L.A. HART* 2 (1981).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 2-3.

<sup>71</sup> H.L.A. HART, *THE CONCEPT OF LAW* 18-25 (2d ed. 1994).

legitimate and illegitimate uses of force, Hart considered the case of a robber who demands that a bank clerk hand over the cash in the till.<sup>72</sup>

Such an order should not be considered a “command” in a legal sense of the word because it lacked the sense of authority and rightfulness that most people associate with the word and concept of “command.”<sup>73</sup> Relying on ordinary language theory, which he borrowed from the work of Ludwig Wittgenstein,<sup>74</sup> Hart asserted that the law was distinguishable from the robber’s demands because of the acceptance the law received on the part of those governed by it.<sup>75</sup> It was generally agreed that what the bank robber did was wrong, while the state acts rightfully in commanding certain acts be done and others forbidden.<sup>76</sup> It is this general consensus among the ordinary users of language that the word “command” signifies a sense of rightfulness that separates the robber’s order from the law of the state. Most citizens, after all, would concede that a particular government behaves rightfully in issuing and enforcing the law. The commands of the law are thus legitimate in a way the demands of a robber cannot be, because the former are accepted as legitimate while the latter are universally condemned.<sup>77</sup>

Hart was thus willing to acknowledge, not that law for its validity must embody and reflect some fundamental principles of justice, but that, for its effectiveness, it must be believed and accepted as just by those subject to it. There was a place in jurisprudential analysis, Hart declared, for the “normative terminology of ‘ought’, ‘must’, and ‘should’,

---

<sup>72</sup> *Id.* at 19.

<sup>73</sup> *Id.* at 20 (“To command is characteristically to exercise authority over men, not power to inflict harm, and though it may be combined with threats of harm a command is primarily an appeal not to fear but to respect for authority.”).

<sup>74</sup> See MACCORMICK, *supra* note 68, at 15 (“A chief task for philosophy is . . . that of working towards an interpretive understanding of normal human discourse in its normal social settings.”).

<sup>75</sup> *Id.* at 34-35.

<sup>76</sup> HART, *supra* note 71, at 57. Hart calls this the “internal aspect of rules.” There is no contradiction in saying that people accept certain rules but experience no such feelings of compulsion. What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism . . . demands for conformity, and in acknowledgements that such criticism and demands are justified . . . .

*Id.*

<sup>77</sup> Hart’s line of argument smuggles morality into the equation through the backdoor, so to speak. States do not proclaim their law as something indifferent to questions of justice or fairness. Indeed, states assert that their laws are intended to achieve justice or to resolve disputes in a fair and equitable manner. It is in this way that states acquire the legitimacy that allows the populace to grant them the legitimacy needed for survival. This fact establishes a conceptual linkage between the public’s belief in the justice of a given legal regime and the legal regime’s understanding of its law.

'right' and 'wrong.'<sup>78</sup> The prevalence of this sort of normative language signaled, for Hart, a "general standard to be followed by the group as a whole."<sup>79</sup>

Despite his acknowledgement that for law to be effective it must at least be perceived to be just and reflect widely-shared conceptions of right and wrong, Hart nevertheless retained the old positivist conception of law. Law was the product of sovereign will, mediated through such conceptions as the Rule of Recognition by which existing laws are shaped into a system and the "rules of change" by which the system of law can be altered in response to changing conditions.<sup>80</sup> Even though he found the question uninteresting, Hart ultimately conceded that "[e]ven in a complex large society, like that of a modern state, there are occasions when an official, face to face with an individual, orders him to do something."<sup>81</sup> In this way, Hart found the old Austinian emphasis on sovereign will, expressed through the use or threat of coercive force, to be an unavoidable feature of the law.

In exploring the relationship of justice and law, Hart conceded wide latitude to cultural relativism. Hart proposed that fairness, the idea that like cases should be decided alike, that laws should be of general applicability, that there should be no discrimination among persons, are what most people think of when they turn their attention to the specialized meaning of justice.<sup>82</sup> In modern Western societies, these principles have been properly understood as condemning racial and religious discrimination,<sup>83</sup> but Hart also acknowledged that "it is certainly possible to conceive of a morality which . . . openly rejected the principle that prima facie human beings were to be treated alike."<sup>84</sup> Thus, while Hart introduced the notion of fairness into his jurisprudence, it was a sense of procedural fairness not bound to any particular notion of substantive justice.<sup>85</sup> Substantive norms of right and wrong, in contrast, were for the particular culture to determine. In short, even though Hart certainly made greater room than Austin and Bentham for a notion of justice as part of his conception of law, this was a conception of procedural justice that might vary widely in its

---

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 56.

<sup>80</sup> *Id.* at 94-95.

<sup>81</sup> *Id.* at 20.

<sup>82</sup> *Id.* at 158-59.

<sup>83</sup> *Id.* at 161-62.

<sup>84</sup> *Id.* at 162.

<sup>85</sup> Hart wrote: "It is therefore clear that the criteria of relevant resemblances and differences may often vary with the fundamental moral outlook of a given person or society. Where this is so, assessments of the justice or injustice of the law may be met with counter-assertions inspired by a different morality." *Id.* at 163.

substantive provisions from one political community or culture to another.

Hart also argued on behalf of the separation of law from morals. In this respect, he viewed his work as being continuous with the great positivists of the nineteenth century, “Bentham and Austin, [who] constantly insisted on the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be.”<sup>86</sup> Writing in the shadow of World War II, Hart sought to defend the separation of law and morality from critics, including even those, like the German positivist-turned-natural-lawyer Gustav Radbruch, who had concluded that the Nazis were able to come to power for a time in part because of the acquiescence of a German legal academy whose capacity for outrage had been tamed by too much exposure to legal positivism.<sup>87</sup> He criticized Radbruch specifically for attempting to make the category of law bear more than was possible.<sup>88</sup> Hart feared that merging law and morality would confuse and weaken both categories of thought. Even though an immoral law was still law, Hart concluded, it should not on that account be obeyed.<sup>89</sup> Hart thus recognized the importance of civil disobedience, but unlike those possessed of naturalist inclinations who pledged allegiance to a higher law, he believed that civil disobedience always entailed violations of the law.

Hart specifically took issue with natural law in its various forms and in its various attempts to fuse morality and law. Classically, natural law reflected a theistic view of nature and of the human person that is, “in many ways, antithetic to the general conception of nature which constitutes the framework of modern secular thought.”<sup>90</sup> The word “law,” when used within this old and debunked framework, carried a fatal ambiguity: it might be “descriptive,” in that it purported to set out “the course or regularities of nature;”<sup>91</sup> but it might also be prescriptive, in the “demands” that it made that “men shall behave in certain ways.”<sup>92</sup> It

---

<sup>86</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594 (1958).

<sup>87</sup> *Id.* at 617.

<sup>88</sup> *Id.* at 618.

For everything that [Radbruch] says is really dependent upon an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: “Ought this rule of law to be obeyed?” Surely the truly liberal answer to any sinister use of the slogan “law is law” or of the distinction between law and morals is, “Very well, but that does not conclude the question. Law is not morality; do not let it supplant morality.”

*Id.*

<sup>89</sup> *Id.* at 620.

<sup>90</sup> HART, *supra* note 71, at 186.

<sup>91</sup> *Id.* at 187.

<sup>92</sup> *Id.*



is this confusion of thought, which was a legacy of an older theistic view of the universe, that Austin and Bentham, with their rigorous distinction between law and morals, proposed to clarify.<sup>93</sup> An earlier generation of scholars, influenced variously by Aristotle or by the medieval schoolmen, proposed a natural law grounded on a teleology that understood “the end or good for man . . . as a specific way of life about which, in fact, men may profoundly disagree.”<sup>94</sup>

Hart, however, rejected the Aristotelian/scholastic synthesis in favor of the Austinian/Benthamite approach; although, he was willing to entertain minimal natural law grounded on the impulse of most persons to seek their own survival.<sup>95</sup> He was also willing to concede that certain legal systems, in essence, enshrined moral analysis into their fundamental law, as the American legal system had through the invention of substantive due process.<sup>96</sup> Ultimately, however, his jurisprudence relied on a thin conception of the human person that denied the possibility of human transcendence. His frame of reference, in contrast, was wholly modern, secular, and materialistic.<sup>97</sup>

Despite these concessions and qualifications, Hart defended the separation of law and morality as not only a proper intellectual stance, but as a socially beneficial one:

Hart affirms that natural lawyers’ moralization of the concept of law tends either towards a form of extreme conservatism (whatever is law must be moral, therefore all law is morally binding) or towards revolutionary anarchism (since whatever is law must be moral, governments must be disobeyed or even overthrown if what they propound as ‘law’ is not morally justified). The proper attitude to law is, as against that, one which acknowledges that the existence of law depends on complex social facts, and which therefore holds all laws as always open to moral criticism since there is no *conceptual* ground for supposing that the law which *is* and the law which *ought to be* coincide.

Indeed, as Hart frankly acknowledges at the end of his book the ultimate basis for adhering to the positivist thesis of the conceptual differentiation of law and morals is itself a moral reason. The point is to make sure that it is always open to the theorist and the ordinary person to retain a critical moral stance in face of the law which is.<sup>98</sup>

---

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 192.

<sup>95</sup> *Id.* at 192-93. “[O]ur concern is with social arrangements for continued existence, not with those of a suicide club.” *Id.*, at 192.

<sup>96</sup> H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 970-71 (1977).

<sup>97</sup> See, e.g., LACEY, *supra* note 67, at 194 (noting that religion did not play a role in Hart’s jurisprudence).

<sup>98</sup> MACCORMICK, *supra* note 68, at 24-25 (citation omitted).

In a logical corollary to the emphasis he placed on the need to apprehend the “law as it is,” Hart concluded that the validity of legal norms could only be determined by reference to their source. The ultimate “criterion of legal validity or source of law,” in Hart’s jurisprudence, was the rule of recognition, which gave definition and shape to the law-making authority of a given regime.<sup>99</sup> Different systems might have different rules of recognition—the doctrine of legislative supremacy as practiced in Great Britain, for instance, or the constraints of written constitutions in the American federal system.<sup>100</sup> It is always possible to question the soundness and efficacy of the rule of recognition, Hart conceded.<sup>101</sup> But, Hart emphasized, the rule of recognition remained the only source of valid law within a given jurisdiction.<sup>102</sup> One might object on moral or utilitarian grounds to a law made in accord with a state’s rule of recognition, but such objections could not affect the validity of the law.

### III. CHRISTIAN LEGAL THOUGHT AND THE RESOLUTION OF THE THREE GREAT ANTIMONIES

Christian legal thought, as an intellectual category, is a broad subject with many dimensions. One might quite properly speak of the Bible and its contributions to the shape of Western law. The Bible, of course, was a fundamental reference point for lawyers, whether they be the common lawyers of the Anglo-American tradition or the canonists whose influence was felt for many centuries across the entirety of western Europe. And the Bible continues to exert great influence today in ways large and small even where lawyers may not notice the influence. To give just one small example: Good Samaritan laws are meant to give legal protection to people following the example Jesus set for His followers with His parable of the Good Samaritan who looked

---

<sup>99</sup> HART, *supra* note 71, at 106.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 107 (“We can ask whether it is a satisfactory form of legal system which has such a rule at its root. Does it produce more good than evil? Are there prudential reasons for supporting it? Is there a moral obligation to do so?”).

<sup>102</sup>

No such question can arise as to the validity of the very rule of recognition which provides the criteria [of validity for other rules in the system]; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way. To express this simple fact by saying darkly that its validity is “assumed but cannot be demonstrated”, is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of the correctness of all measurement in metres, is itself correct.

*Id.* at 109.

after an injured wayfarer he encountered on the highway.<sup>103</sup> It is regrettably fair to say that the modern secular courts that use the terminology and concept of the Good Samaritan probably only rarely think of the New Testament.<sup>104</sup> In the remainder of this article, I will not pursue the sorts of direct biblical influence that we see in the development and adoption of the Good Samaritan laws, even though such a project would be important and interesting in its own right. Rather, I will be concerned with another facet of Christian legal philosophy, namely, the light that modern papal teaching might shed on the three antinomies that I have identified and discussed. Over the course of the last century and a quarter, the papacy has developed a clear and consistent message about the demands of justice and morality in the modern world. The implications of this body of teaching for jurisprudence will be considered.

#### A. Catholic Theories of the State and Justice

There are, of course, many responses to the three great antinomies outlined above. I shall make particular use of Catholic social thought as a means of developing one line of response. One might start by concentrating on Catholic theories of the relationship of the state to justice. The writers of the high middle ages, scholastics like Peter Lombard and Thomas Aquinas, came to view the state not only in terms of the defense that it might offer against those who would threaten its existence, but as a means of promoting the welfare of its citizens. Medieval writers were conscious of living in a Christian world—the *mundus Christianus*.<sup>105</sup> In such a context it was easy to think of a Christian state, functionally different from the Church but sharing the same broad commitment to justice and virtue. It was similarly easy for medieval thinkers to conceive of themselves as having a dual citizenship—belonging to the Church and to the state.<sup>106</sup> In this context, Christian writers proposed:

---

<sup>103</sup> “The term ‘Good Samaritan’ derives from a New Testament parable in which a Samaritan was the only passer-by to aid a man who had been left half dead by a group of thieves. *Luke* 10:30-37 (King James).” *Velazquez v. Jiminez*, 798 A.2d 51, 55 (N.J. 2002).

<sup>104</sup> A Lexis search using the search terms “Jesus” and “Good Samaritan” was able to locate only four cases, in addition to *Velazquez*, 798 A.2d at 55, that drew the connection between modern Good Samaritan statutes and the parable Jesus told. See *Maynard v. Ferno-Washington, Inc.*, 22 F. Supp. 2d 1171 (E.D. Wash. 1998); *Gibson v. Lee County Sch. Bd.*, 1 F. Supp. 2d 1426 (M.D. Fla. 1998); *Crockett v. Sorenson*, 568 F. Supp. 1422 (W.D. Va. 1983); and *State v. Hillman*, 832 P.2d 1369 (Wash. Ct. App. 1992). In contrast, a Lexis search using only the search term “Good Samaritan,” stripped of religious reference points, revealed over 3,000 results.

<sup>105</sup> HEINRICH ROMMEN, *THE STATE IN CATHOLIC THOUGHT: A TREATISE IN POLITICAL PHILOSOPHY* 532 (1945).

<sup>106</sup> *Id.*

[A] new concept of the state . . . based upon the theory of natural law independent of ecclesiastical ways of thinking. . . . The state is conceived as a natural intrinsically good form of political, self-sufficient life. It is a perfect society with a proper specific end, the secular common good, and in its proper field it is independent of the spiritual power.<sup>107</sup>

The circumstances that allowed for such a conceptualization—an essential unity of belief and action on the part of believers and the state—was shattered over the course of the early modern and modern periods. And while the shattering of the medieval order was tragic in many respects for Christendom, it has also allowed the Church to see the injustices that had been perpetrated in its name—in inquisitions, pogroms, and the repression of dissenting forms of Christianity.<sup>108</sup>

The pontificate of Leo XIII (1878-1903) stands as a landmark in the recent history of the Church. His pontificate can, with justification, be called the first modern pontificate.<sup>109</sup> It witnessed the first sustained attempt to apply the medieval synthesis to the problems of the modern world—a world characterized by rapid industrialization; massive population shifts caused by immigration and the increasing urbanization of the West; and new concentrations of wealth and power that were able to exploit urban populations as inexpensive and expendable pools of labor.<sup>110</sup> In the face of these developments, Pope Leo reminded his readers in his encyclical *Diuturnum*, issued in 1881, that:

[I]t is of the highest importance that those who rule states should understand that political power was not created for the advantage of any private individual; and that the administration of the State must be carried on to the profit of those who have been committed to their care, not to the profit of those to whom it has been committed.<sup>111</sup>

<sup>107</sup> *Id.* at 536.

<sup>108</sup> See POPE JOHN PAUL II, *TERTIO MILLENIO ADVENIENTE* para. 35 (1994). In reflecting on the excesses of the high middle ages, the Holy Father has written:

Many factors frequently converged to create assumptions which justified intolerance and fostered an emotional climate from which only great spirits, truly free and filled with God, were in some way able to break free. Yet the consideration of mitigating factors does not exonerate the Church from the obligation to express profound regret for the weaknesses of so many of her sons and daughters who sullied her face, preventing her from fully mirroring the image of her crucified Lord . . .

*Id.* Cf. INT'L THEOLOGICAL COMM'N, *MEMORY AND RECONCILIATION: THE CHURCH AND THE FAULTS OF THE PAST* para. 5.3 (1999) (criticizing the Church's medieval reliance on the use of "all arms of force . . . in the repression and correction of errors").

<sup>109</sup> See the important summary of Leo XIII's character and accomplishments in OWEN CHADWICK, *A HISTORY OF THE POPES 1830-1914*, at 278-331 (1998).

<sup>110</sup> A comprehensive and classic study of these phenomena in the context of nineteenth-century England is E.P. THOMSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (1963).

<sup>111</sup> POPE LEO XIII, *DIUTURNUM* para. 16 (Paulist Press trans. 1942) (1881). Leo expressed concern about the "unbridled license" that might follow should states and

Ten years later, in his encyclical *Rerum Novarum*, Pope Leo added substantive detail to his teaching on the responsibility of the modern state to see to the demands of justice.<sup>112</sup> In this encyclical, Leo confronted head-on the crisis of late-nineteenth-century industrialization—the emergence of large pools of capital controlled by magnates with little in the way of social conscience, on the one hand, and large masses of urban poor, whose services could easily be exploited, on the other.<sup>113</sup> It was an era of laissez-faire economics, characterized by long hours, low pay, and child labor.<sup>114</sup> It was also an age of revolutionary ferment, as Marxists and socialists of various stripes pressed for revolution, agitated against the institution of private property, and promised the working classes a future utopia without distinction of class or caste.<sup>115</sup>

Responding to this economic, political, and spiritual crisis, Leo admonished that alleviation of this sort of suffering required that church and state recognize their proper roles and spheres of authority.<sup>116</sup> The Church, for instance, must not be “so preoccupied with the spiritual concerns of her children as to neglect their temporal and earthly interests.”<sup>117</sup> The Church was obliged to intervene directly where it could so as to relieve the suffering of the poor.<sup>118</sup> In taking action, in seeing to the material requirements of those in need, the Church did nothing more than follow the example of the earliest Christian community as depicted

---

societies deny the centrality of God in the governance of the polity. *Id.* at para. 23. He feared in particular “Communism, Socialism, Nihilism, hideous deformities of the civil society of men . . .” *Id.*

<sup>112</sup> On the background to this encyclical, see JOE HOLLAND, *MODERN CATHOLIC SOCIAL TEACHING* 107-96 (2003).

<sup>113</sup> The encyclical has often been called “the Magna Charta of Social Catholicism.” *Id.* at 176. The Latin term *De Rerum Novarum* is translated literally as “of new things.” The “new things” referred to by the encyclical were the changed conditions brought about by the Industrial Revolution. *Id.*

<sup>114</sup> Child labor in industrial occupations in France, one of the countries with which Leo was most concerned, was common in industrial occupations in the latter half of the nineteenth century and was met by a series of legislative acts in the 1870s. A law of 1874 limited the number of hours children between sixteen and twenty-one years of age might work. See COLIN HEYWOOD, *CHILDHOOD IN NINETEENTH-CENTURY FRANCE: WORK, HEALTH, AND EDUCATION AMONG THE ‘CLASSES POPULAIRES’* 264 (1988). The 1874 law was superseded by more comprehensive legislation in 1892. *Id.* at 318. Leo’s encyclical, clearly, was both shaped by and responsive to the climate of opinion in Europe in the late nineteenth century. The United States, of course, had its own problems with child labor at this time. See generally, HUGH D. HINDMAN, *CHILD LABOR: AN AMERICAN HISTORY* (2002).

<sup>115</sup> ARTHUR ROSENBERG, *A HISTORY OF BOLSHEVISM: FROM MARX TO THE FIRST FIVE YEARS’ PLAN 1-18* (1965).

<sup>116</sup> Altogether, Pope Leo XIII issued ten encyclicals that collectively reflected his “grand design” for the family, for politics, and for just economic relations. See HOLLAND, *supra* note 112, at 146-147.

<sup>117</sup> POPE LEO XIII, *RERUM NOVARUM* para. 28 (1891).

<sup>118</sup> *Id.* at para. 29.

in the *Acts of the Apostles*.<sup>119</sup> The Church, furthermore, as the principal expositor of Christian morality, should elucidate the principles by which responsible officials might take further action to relieve the crisis.<sup>120</sup>

But the state also had responsibilities. Indeed, the crisis has been brought about in part because of failures on the part of the state: “[T]he ancient workingmen’s guilds were abolished in the last century, and no other protective organization took their place. Public institutions and the laws set aside the ancient religion.”<sup>121</sup> The state now had the responsibility to restore the imbalance and to return to the basic principles of the common good. And Leo had more than mere slogans in mind when he considered the content of the common good. Indeed, he set forth a deep and rich notion of substantive justice to which he expected the state to conform:

The foremost duty . . . of the rulers of the State should be to make sure that the laws and institutions, the general character and administration of the commonwealth, shall be such as of themselves to realize public well-being and private prosperity. . . . Now a State chiefly prospers and thrives through moral rule, well-regulated family life, respect for religion and justice, the moderation and fair imposing of public taxes, the progress of the arts and of trade, the abundant yield of the land—through everything, in fact, which makes the citizens better and happier. Hereby, then, it lies in the power of a ruler to benefit every class in the State, and amongst the rest to promote to the utmost the interests of the poor; and this in virtue of his office, and without being open to suspicion of undue interference—since it is the province of the commonwealth to serve the common good. And the more that is done for the benefit of the working classes by the general laws of the country, the less need will there be to seek for special means to relieve them.<sup>122</sup>

In that paragraph, one sees the connections that twentieth-century Catholic thinkers would come to draw between law and justice. Yes, the strict positivist might rejoin: it is possible to separate law and justice. But in reply the believer might note that the separation of law and justice will ultimately result in failure: the state will fail in its responsibilities to its citizens, and the public might turn to revolutionary utopianism out of desperation. Law and justice are not only connected at the level of abstract principle, but, Leo made clear, at the level of concrete proposals. The State that treats its populace fairly, that builds up public institutions, that promotes an equitable legal order will command the respect of its people and thrive in the long run. A state that fails in these responsibilities is, on the other hand, ripe for ruin. In

---

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at paras. 19-21, 23-25.

<sup>121</sup> *Id.* at para. 3.

<sup>122</sup> *Id.* at para. 32.

the revolutionary context of 1891, Leo's promise that respect for the common good had practical benefits for state and civil society carried real resonance with his audience.

Catholic thinkers would come to understand *Rerum Novarum* as the starting point of a set of ideas that would be grouped together under the rubric of the "social teaching of the Church." Popes came to mark various anniversaries of *Rerum Novarum* by issuing their own encyclicals, expanding upon and deepening Leo's original insights, exploring the integral connections between law, the state, and justice in the modern world.

Thus, Pope Pius XI, addressing a world gripped by economic depression on the fortieth anniversary of *Rerum Novarum*, reaffirmed that "the very structure and administration of the State" must promote well-being and the common good.<sup>123</sup> Pius applauded the emergence of a complex body of employment law that sought "the protection of life, health, strength, family, homes, workshops, wages, and labor hazards . . ."<sup>124</sup>

Writing in 1961, seventy years after *Rerum Novarum*, in the face of the competition between capitalist and communist economic orders, Pope John XXIII elucidated a complicated set of requirements that individual states and the international order were to satisfy in order to ensure the promotion of the common good.<sup>125</sup> John XXIII, like his predecessors,

---

<sup>123</sup> POPE PIUS XI, *QUADRAGESIMO ANNO* para. 25 (1931) (quoting POPE LEO VIII, *supra* note 117 at para. 19). The title of the encyclical, "*Quadragesimo Anno*"—"On the Fortieth Year"—was meant to call to mind Leo's earlier encyclical.

<sup>124</sup> *Id.* at para. 28.

<sup>125</sup> Pope John wrote:

Any adjustment between wages and profits must take into account the demand of the common good of the particular country and of the whole human family.

What are these demands? On the national level they include: employment of the greatest possible number of workers; care lest privileged classes arise, even among the workers; maintenance of equilibrium between wages and prices; the need to make goods and services accessible to the greatest number; elimination, or at least the restriction, of inequalities in the various branches of the economy—that is, between agriculture, industry and services; creation of a proper balance between economic expansion and the development of social services, especially through the activity of public authorities; the best possible adjustment of the means of production to the progress of science and technology; seeing to it that the benefits which make possible a more human way of life will be available not merely to the present generation but to the coming generations as well.

The demands of the common good on the international level include: the avoidance of all forms of unfair competition between the economies of different countries; the fostering of mutual collaboration and good will; and effective co-operation in the development of economically less advanced communities.

POPE JOHN XXIII, *MATER ET MAGISTRA* paras. 78-80 (1961).

envisioned a social order governed by law and backed by a powerful conception of justice. To John, Pius, and Leo, the kind of separation of justice from law contemplated by positivist jurists was fraught with practical and theoretical danger.

The twentieth-century popes did not only call for the creation of substantively just legal institutions, but were also quick to condemn wars and regimes that denied fundamental principles of justice. Pope Benedict XV, elected pope in the fall of 1914,<sup>126</sup> a few weeks after the outbreak of World War I, dedicated his pontificate to the cause of a peace that respected Christian conceptions of justice and right order.<sup>127</sup> Writing in November, 1914, Pope Benedict condemned the disappearance of Christian virtue among the combatants of Europe. The loss of the Christian love that transcended borders and boundaries and allowed for the recognition of the humanity of the other permitted the fratricide that was the Great War.<sup>128</sup> Writing three weeks after the Armistice that closed the War's hostilities, on December 1, 1918, Pope Benedict expressed his hope for "true peace founded on the Christian principles of justice."<sup>129</sup> In an encyclical issued in May, 1920, Benedict warned that peace among nations required both respect for justice and for principles of Christian charity. He urged the "pardon of offences and the fraternal reconciliation of . . . peoples."<sup>130</sup>

By the early 1930s, the one-sided "victor's peace" that ended World War I had broken down. Fascism rose to dominate the government in Italy, while Adolph Hitler and his Nazi Party seized full power in Berlin in 1933. In response to these grave threats to world order, Pope Pius XI issued a series of encyclicals. In *Nova Impendet*, published in November, 1931, Pius feared the "insensate competition in armaments" then emerging in Europe.<sup>131</sup> Six months later, in his encyclical *Caritate Christi Compulsi*, Pius returned to the theme of social justice: economic injustice, hatred of religion, the rise of totalitarianism all threatened to destroy "the Divine Laws, which are the standard of all civic life and

---

<sup>126</sup> On the election of Pope Benedict XV, see FRANCIS A. BURKLE-YOUNG, *PASSING THE KEYS: MODERN CARDINALS, CONCLAVES, AND THE ELECTION OF THE NEXT POPE* 11-16 (1999).

<sup>127</sup> Pope Benedict proposed a peace plan in 1917 that was ultimately rejected by the great powers fighting World War I. *Id.* at 16. Under Pope Benedict's direction, Catholic organizations sought to provide assistance to victims of the conflict and also saw to the just treatment of prisoners of war on all sides. See JOHN F. POLLARD, *THE UNKNOWN POPE: BENEDICT XV (1914-1922) AND THE PURSUIT OF PEACE* 112-16 (1999).

<sup>128</sup> BENEDICT XV, *AD BEATISSIMI APOSTOLORUM* para. 3 (1914).

<sup>129</sup> BENEDICT XV, *QUOD IAM DIU* para. 2 (1918).

<sup>130</sup> BENEDICT XV, *PACEM, DEI MUNUS PULCHERRIMUM* para. 15 (1920).

<sup>131</sup> POPE PIUS XI, *NOVA IMPENDET* para. 8 (1931). Pius feared that in the context of the Great Depression this was a misdirected squandering of public resources "diverting large sums of money from the public welfare . . ." *Id.*



culture.”<sup>132</sup> And in March, 1937, with war in Europe imminent, Pius XI wrote to the bishops of Germany:

Whoever exalts race, or the people, or the State, or a particular form of State, or the depositories of power, or any other fundamental value of the human community—however necessary and honorable be their function in worldly things—whoever raises these notions above their standard value and divinizes them to an idolatrous level, distorts and perverts an order of the world planned and created by God . . .<sup>133</sup>

The state, the “depositories of power” on this analysis, could not be separated from the human community or the cause of justice without grave social consequences. And Pius XI needed to look no farther than events north of the Alps as an example of how such a separation might play out.

The Second Vatican Council’s teaching on the responsibility of the state to see to justice and the common good is a natural development and outgrowth of this formidable body of papal teaching. The political community exists, the Council taught:

[F]or the common good; this is its full justification and meaning and the source of its specific and basic right to exist. The common good embraces the sum total of all those conditions of social life which enable individuals, families, and organizations to achieve complete and efficacious fulfillment.<sup>134</sup>

Do these documents teach that law and justice must, as a matter of logical necessity, be connected? Not in so many words. They do teach, however, in clear tones that echo with the history of the twentieth century, that the practical separation of law from justice can lead to devastating social consequences. Perhaps as a matter of neat syllogistic reasoning, one might succeed in separating justice from law and in compelling obedience through force; as a matter of human reality, however, the implementation of such a program will result in the ruination of human communities. And this, in turn, raises the question whether a jurisprudence that views such a separation as analytically desirable truly reflects the human condition or assists in its development.

### *B. The Fusion of Law and Morality in Natural Law*

Natural law is a wide and capacious concept. As with the relationship of law and justice, so also with the natural law, it is best to be brief and impressionistic. Natural law has been associated with

---

<sup>132</sup> POPE PIUS XI, *CARITATE CHRISTI COMPULSI* para. 4 (1932).

<sup>133</sup> POPE PIUS XI, *MIT BRENNENDER SORGE* para. 8 (1937).

<sup>134</sup> SECOND VATICAN COUNCIL, *GAUDIUM ET SPES* para. 74 (1965). All quotations from Second Vatican Council documents used here and elsewhere in this Article are from the standard English translation found in VATICAN COUNCIL II: THE CONCILIAL AND POST-CONCILIAL DOCUMENTS (Austin Flannery, O.P., ed. and trans., 1975).

Christianity, especially western Catholicism, but the idea that the natural order embodied and reflected norms for the right living of human life is at least as old as the Greek *polis*. “Plato took the widest possible view of law. He held that it was a product of reason and he identified it with Nature itself.”<sup>135</sup> Aristotle grounded his vision of natural law on a powerful teleology—the world and all within it was essentially purposive.<sup>136</sup> All things aimed at the achievement of their naturally-endowed purposes.<sup>137</sup> Human life was no different—the purpose of the human person was the achievement of life lived well and virtuously in the context of the Greek city-state.<sup>138</sup> Natural law, which Aristotle analogized to such natural forces as fire, was an objective guide to the accomplishment of this good life, which Aristotle taught might “be revealed by a process of reason and observation.”<sup>139</sup>

Christian writers divinized the Greco-Roman conception of the natural law. This divinization occurred as early as the New Testament, when St. Paul wrote of non-Christians who do not have the Gospel to follow but yet follow a law “inscribed on their hearts.”<sup>140</sup> By the high middle ages, a specifically Christian content came to be introduced into the natural law.<sup>141</sup> The twelfth-century canonist Gratian, who was responsible for the creation of the systematic discipline of canon law, equated the natural law to the Golden Rule expressed by Jesus in the New Testament: Gratian’s opening dicta in his *Decretum* declares: “Humankind is governed by two, namely, natural law and custom; the law of nature is that which is contained in the law and Gospel, by which one is commanded to do unto others that which one wishes done to oneself, and is prohibited from inflicting on others that which one does not wish done to oneself.”<sup>142</sup>

Not only at the level of general principle, but even at the level of specific content, natural law came to be associated with specifically Christian teachings and commands. One might consult the thirteenth-century canonist Hostiensis (c. 1200-1271). His distinction between positive law and natural law was one that might resonate with jurists today: In the realm of positive law, Hostiensis noted, it is often true that “will stands for reason,” by which he meant that earthly rulers grounded their law on exertions of raw power, not on the reason

---

<sup>135</sup> HUNTINGTON CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* 29 (1949).

<sup>136</sup> WAYNE MORRISON, *JURISPRUDENCE: FROM THE GREEKS TO POST-MODERNISM* 41-42 (1997).

<sup>137</sup> *Id.* at 42.

<sup>138</sup> *Id.* at 44-45.

<sup>139</sup> *Id.* at 49.

<sup>140</sup> *Romans* 2:14-15.

<sup>141</sup> MICHAEL BERTRAM CROWE, *THE CHANGING PROFILE OF THE NATURAL LAW* 72-110 (1977).

<sup>142</sup> GRATIAN, *DECRETUM* D.a.c, d. 1.

that belonged to natural law.<sup>143</sup> Natural law, however, operated on different premises. Hostiensis distinguished between two types of natural law—"the first was that common to man and beast alike, the second that which was unique to rational creatures."<sup>144</sup> This second category, the rational natural law, was specific to human persons who could grasp its essential demands through their use of reason. Hostiensis used this latter category to argue for specifically Christian moral insights, such as the natural-law requirement that marriage be lifelong and monogamous.<sup>145</sup>

In this way, natural law came to be closely associated with Christian revelation. Legal positivists, such as Bentham and Hart, as noted above, relied on the distinction between is and ought to reject theistic conceptions of natural law.<sup>146</sup> Equating morality with Judeo-Christian principles, H.L.A. Hart argued that it was much healthier, for both the cause of law and the cause of morality, to keep the two categories of thought separate and distinct.<sup>147</sup>

But is the "is/ought" distinction really as efficacious as the positivists believe? Can the "is" and the "ought" be kept in separate compartments, where each can be analyzed free of the contamination, so to speak, of the other? Lon Fuller answered these questions famously when he argued that in all human artifice, even of a purely mechanical nature, the "is" and the "ought" are necessarily fused.<sup>148</sup> Consider, for instance, a steam engine:

[A]ssume that we have before us an assemblage of wheels, gears, and pistons, and that the question is whether this assemblage *is* a steam engine. This question cannot be answered without regard to another question: whether the assemblage can make steam and make moving parts move by steam pressure, a notion of what ought to be. The assemblage will count as a steam engine if the assemblage (the "is") at least minimally serves the creator's purpose of making steam (the "ought").<sup>149</sup>

<sup>143</sup> HOSTIENSIS, *LECTURA* X.4.17.13, v. *testamento*. On the history of the phrase *pro ratione voluntas* ("will standing for reason"), see KENNETH PENNINGTON, POPE AND BISHOPS: THE PAPAL MONARCHY IN THE TWELFTH AND THIRTEENTH CENTURIES 17-20, 34-38 (1984).

<sup>144</sup> CHARLES J. REID, JR., POWER OVER THE BODY, EQUALITY IN THE FAMILY: RIGHTS AND DOMESTIC RELATIONS IN MEDIEVAL CANON LAW 77 (2004).

<sup>145</sup> *Id.*

<sup>146</sup> See *supra* notes 47-89 and accompanying text.

<sup>147</sup> See *supra* notes 86-102 and accompanying text.

<sup>148</sup> Fuller distinguished between things occurring naturally and things brought into being through human invention. "Pebbles along a stream and pieces of soil are mere things. They are not human inventions informed by anyone's conceptions about what ought to be." ROBERT S. SUMMERS, LON L. FULLER 24-25 (1984).

<sup>149</sup> *Id.* at 25. An objection might be raised: Is a malfunctioning steam engine still a steam engine? The analogy seems clear: a bad law might nevertheless be a valid law. An answer might take the following form: a malfunctioning steam engine can still be

“Is” and “ought,” Fuller asserted, formed an “integral reality,” whether the work of artifice under consideration was a feat of engineering, such as a steam engine, or a statute, or a judicial opinion.<sup>150</sup> On this analysis, a central tenet of positivism—the separation of law as it is from the value it reflects—breaks apart. All law is essentially purposive in the sense that it aims to promote certain goals or types of conduct as normative, or good; and to prohibit other types of conduct as dysfunctional, or bad.

This point becomes even clearer when it is realized that all law necessarily teaches certain values. In a searching analysis of the antebellum Virginia slave statutes, John Noonan identified any number of values that that law protected and conserved. These were not, of course, the sorts of values that any legal system should aspire to: the inhumanity of the African-Americans held in involuntary servitude was one aspect, of course, but so also were other values, such as the sanctity of private property as opposed to basic respect for persons.<sup>151</sup> Such an analysis of the “oughts” served by a particular legal framework need not be confined to statutory schemes that are odious in nature. A careful analysis can lay bare the essential values of nearly every area of law one can think of. The criminal law clearly serves to conserve such values as

---

considered a steam engine, *up to a point*, in the same way that a bad law can still be considered a law, up to a point. But at a certain point, a line is crossed where the artifact in question—be it steam engine or statute—simply ceases to be recognizable as a steam engine or law.

Thus consider the following: Suppose an old boiler is converted into a decorative planter and was intended to serve as the centerpiece of a thematically-designed restaurant. While the boiler/planter might once have been a steam engine, it would cease to serve any of the functions typically associated with being a steam engine. It has become something else—a decoration, a centerpiece at a restaurant, not a steam engine. It has come to serve other purposes. The same is true of other human artifacts, such as laws: thus a law might achieve such unimaginably wicked results, that one ceases to call it a law and begins to call it by other names—instruments of terror perhaps, or the fiats of a dictator.

The comparison might be extended: So also, at a certain point, a steam engine might simply have fallen into such an extreme state of disrepair or desuetude, that we might conclude that it could not possibly function as a steam engine. The same again, is true of other human artifacts, such as laws: a law might have fallen into such neglect or desuetude that we are compelled to conclude that it cannot function as a law. No one, for instance, believes that Hammurabi’s Code remains valid law. It might stand as a wonderful monument to the legal history of the world, but we are not governed by its provisions.

<sup>150</sup>

For example, not just anything that falls from the collective lips of legislators, however solemnly pronounced and however procedurally correct, can qualify as statutory law. To begin with, it must have a substantive purpose or purposes. A putative statute not informed by some such authoritative conception of what ought to be, would not be a rule of law.

*Id.*

<sup>151</sup> JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 35-43 (2002).

respect for the life and limb of others. The law of torts teaches care in conduct affecting others' interests. Even the great social welfare statutes teach many important lessons about public responsibility toward those least able to see to their own needs.<sup>152</sup> It is not surprising, therefore, that Thomas Aquinas taught that "[t]he proper effect of law is to lead its subjects to their proper virtue: and since virtue is *that which makes its subject good*, it follows that the proper effect of law is to make those to whom it is given, good, either simply or in some particular respect."<sup>153</sup>

### C. Personhood and the Law

John Noonan has called attention to a remarkable oversight in modern analytical jurisprudence: the relative neglect of persons when speaking about the nature and function of law. Noonan makes his point by imagining "a Conference on the Study and Improvement of Railroads."<sup>154</sup> One expert after another testifies to different aspects of the proper way to run a railroad: one should focus on the process, one expert intones; another speaks about the master plan by which the railroad is run; yet another speaks about the lay-out of the track.<sup>155</sup> And on it goes until an on-looker asks about the failure of any of the experts to talk about the importance of passengers to the system.<sup>156</sup>

Arguments on behalf of the separation of the validity of law as distinguished from its content have the feel about them of Judge Noonan's imagined Conference on the Improvement of Railroads. Must the only determinant of law's validity be the law-making organs of the state? Must the Nuremberg race laws of pre-World War II Nazi Germany count as law because of their source in the law-making power of the Nazi state? Is the state the final arbiter of right and wrong? Is the state the sole source of human rights? Should not law conform in some respect to the basic attributes of human nature? If the law really is about doing justice, if it inevitably embodies and teaches certain values while rejecting others, then perhaps we cannot neatly separate the source of law's validity from the soundness of its content.

Again, one might point to the Church's social teaching as a means of exploring this issue. There is the steady development of a body of principles that challenges states to satisfy the basic requirements of natural law under penalty of losing their very legitimacy. The Church has taken these steps over the course of the last century by integrating

---

<sup>152</sup> MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 101-08 (1991).

<sup>153</sup> CHARLES RICE, 50 QUESTIONS ON THE NATURAL LAW 80 (1995) (quoting THOMAS AQUINAS, *SUMMA THEOLOGICA* I, II, Q. 92, art. 1).

<sup>154</sup> NOONAN, *supra* note 151, at 9.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 10.

respect for persons within its teaching on natural law. This process is detectible as early as encyclicals like Leo XIII's *Rerum Novarum*. In justifying the natural right of property, Leo looked to the basic attributes of human personhood: the human person is confronted with certain economic needs and must be allowed to hold property "in stable and permanent possession."<sup>157</sup> Through reason, the human person may make sound and good use of the things he owns.<sup>158</sup> The person's right to possess, use, and enjoy the goods of the earth, Leo continued, preceded the state itself and was grounded in the nature of the person as a creature of God.<sup>159</sup>

Pius XI continued this line of reasoning in *Quadragesimo Anno*. "[T]win rocks of shipwreck must be carefully avoided," Pius wrote, by which he meant an extreme individualism that tended to "deny[] or minimiz[e] the social and public character of the right to property," on the one hand, and the complete denial of the right of private property, on the other.<sup>160</sup> While it belonged to the state to regulate this fundamental natural right, Pius stressed that "[t]he natural right . . . both of owning goods privately and of passing them on by inheritance ought always to remain intact and inviolate, since this indeed is a right that the State cannot take away."<sup>161</sup> Pius further proposed, as a principle of governance, a set of ideas that would come to be labeled "subsidiarity."<sup>162</sup> As he had with private property, Pius grounded subsidiarity on human nature itself: "[I]t is gravely wrong," he wrote, "to take from individuals what they can accomplish by their own initiative and industry and give it to the community."<sup>163</sup> Allowing room for a wide variety of political organizations, Pius stressed that all political orders must recognize and accommodate the basic freedom of the human person to associate with others.<sup>164</sup>

In this way, Leo and Pius articulated basic natural law principles conformable to the character of the human person and against which the ultimate validity of the human law might be judged. Pius XI allowed wide latitude for the prudential judgments of governmental leaders in satisfying these basic principles, but their total denial resulted in nothing less than invalid acts on the part of state leaders. Subsequent

---

<sup>157</sup> POPE LEO XIII, *supra* note 117, at para. 6.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at para. 7 ("Man precedes the State, and possesses, prior to the formation of any State, the right of providing for the substance of his body").

<sup>160</sup> POPE PIUS XI, *supra* note 123, at para. 46.

<sup>161</sup> *Id.* at para. 49.

<sup>162</sup> *Id.* at paras. 79-80.

<sup>163</sup> *Id.* at para. 79. Pius completed the thought: "[S]o also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do." *Id.*

<sup>164</sup> *Id.* at para. 87.

church teaching developed these insights into a set of natural-law principles that were responsive to the essential character of the human person and that judged the actions of states accordingly.

In a period of about twenty years, from the late 1930s to the late 1950s, one sees a series of encyclicals that did not shy away from condemning entire states for their denial of the fundamental attributes of personhood. Pius XI was unsparing in his condemnations of Nazism.<sup>165</sup> Natural law, Pius wrote, was the ultimate standard by which the positive law of contemporary regimes must be judged, and Hitler's regime fell grievously short of the mark:

Such is the rush of present-day life that it severs from the divine foundation of Revelation, not only morality, but also the theoretical and practical rights. We are especially referring to what is called the natural law, written by the Creator's hand on the tablet of the heart (*Rom. 2:14*) and which reason, not blinded by sin or passion, can easily read. It is in the light of the commands of this natural law, that all positive law, whoever be the lawgiver, can be gauged in its moral content, and hence, in the authority it wields over conscience. Human laws in flagrant contradiction with the natural law are vitiated with a taint which no force, no power can mend.<sup>166</sup>

Because of its grounding in nationalism, racism, and religious hatred, Pius XI concluded that the Nazi government of Germany fell far short of the mark in its denial of basic human rights and of human nature itself.

Pius XII, whose conduct in World War II has come in for fundamentally unjust criticism,<sup>167</sup> was steadfast in his condemnations of communism as falling short of minimal standards of justice.<sup>168</sup> Writing in 1950, Pius XII condemned attacks on the Church in communist lands, seeing in them an assault on the foundations of the natural law and the believer's quest for God.<sup>169</sup> In 1956, the Soviet Union brutally repressed Hungary's attempt to break free of the Soviet axis. Defending the "rightful freedom" of the Hungarian people to be free of such domination, he condemned the Soviet regime and its rulers as liable to divine justice

---

<sup>165</sup> See generally POPE PIUS XI, *supra* note 133. Cf. ROBIN ANDERSON, BETWEEN TWO WARS: THE STORY OF POPE PIUS XI (ACHILLE RATTI) 1922-1939, at 84-88 (1977) (providing historical background to this encyclical).

<sup>166</sup> POPE PIUS XI, *supra* note 133, at para. 30.

<sup>167</sup> Ralph McInerny has written a scathing critique of the campaign against Pius XII. See generally RALPH MCINERNY, THE DEFAMATION OF PIUS XII (2001).

<sup>168</sup> On Pius's conduct in the Cold War, see generally PETER C. KENT, THE LONELY COLD WAR OF POPE PIUS XII: THE ROMAN CATHOLIC CHURCH AND THE DIVISION OF EUROPE 1943-1950 (2002).

<sup>169</sup> POPE PIUS XII, *ANNI SACRI* para. 5 (1950) ("We must above all deplore with overwhelming sadness that in not a few nations the rights of God, Church and human nature itself are outraged and trampled upon.").

in this world as well as the next.<sup>170</sup> Addressing circumstances in China in the late 1950s, Pius criticized “atheistic materialism” as contrary to principles of human nature and religious belief.<sup>171</sup>

The Second Vatican Council did not represent a break with this tradition but, rather, an important synthesis of it. *Gaudium et spes* and other conciliar documents present to the world a profound defense of natural law in the context of the fundamental nature and needs of the human person. This conciliar decree began with a powerful endorsement of a theology of creation that viewed the human person as sacred: “For Sacred Scripture teaches that man was created ‘to the image of God,’ as able to know and love his creator, and as set by him over all earthly creatures . . . .”<sup>172</sup> Called to use our reason within the world God made and granted, endowed with the capacity to ponder the transcendent, the human person is directed by conscience toward observance of the natural law.<sup>173</sup>

Our God-given reason, our status as uniquely-blessed and endowed creatures, and the dignity that attached to having been made in God’s own image conferred certain natural rights on the human person. Foremost among them, the Council taught, was the solemn right and obligation to seek the truth.<sup>174</sup> Religious freedom, “based on the very dignity of the human person as known through the revealed word of God and by reason itself,” was a right and obligation which no human power should abridge.<sup>175</sup> From this principle, certain corollaries followed: at a bare minimum, the state must refrain from coercion on matters of conscience.<sup>176</sup> Affirmatively, the state should act to ensure “those

---

<sup>170</sup> POPE PIUS XII, *DATIS NUPERRIME* paras. 2-3 (1956). Pius wrote, prophetically: The words which “the Lord said to Cain . . . the voice of thy brother’s blood crieth to me from the earth.” (*Gen.* 4: 10), are relevant today. For so the blood of the Hungarian people cries out to God. And even though God often punishes private individuals for their sins only after death, nonetheless, as history teaches, He occasionally punishes in this mortal life rulers of people and their nations when they have dealt unjustly with others. For He is a just judge.

*Id.* at para. 5.

<sup>171</sup> POPE PIUS XII, *AD APOSTOLORUM PRINCIPIS* paras. 11 and 19 (1958) (condemning “atheistic materialism” which denies both God and “religious principles” and condemning Chinese violations of “the principal rights of the human person”).

<sup>172</sup> SECOND VATICAN COUNCIL, *supra* note 134, at para. 12.

<sup>173</sup> *Id.* at para. 16.

Deep within his conscience man discovers a law which he has not laid upon himself but which he must obey. Its voice, ever calling him to love and to do what is good and to avoid evil, tells him inwardly at the right moment: do this, shun that. For man has in his heart a law inscribed by God. His dignity lies in observing this law, and by it he will be judged.

<sup>174</sup> SECOND VATICAN COUNCIL, *DIGNITATIS HUMANAE* para. 1 (1965).

<sup>175</sup> *Id.* at para. 2.

<sup>176</sup> *Id.* at para. 3.



conditions of social life which enable men to achieve a fuller measure of perfection with greater ease.”<sup>177</sup> As a general principle, the Council affirmed that “[t]he protection and promotion of the inviolable rights of man is an essential duty of every civil authority.”<sup>178</sup>

*Gaudium et Spes* stressed the importance of human freedom as evidence of the human person’s creation in God’s image and likeness: “The people of our time prize freedom very highly and strive eagerly for it. In this they are right. . . . [T]hat which is truly free[] is an exceptional sign of the image of God in man.”<sup>179</sup> Freedom, the Council stressed, was not radically individualistic; indeed, it could only be exercised in community with others since the human person was, by nature, social.<sup>180</sup> Social groups, which included both free associations of individuals as well as large-scale political communities and even nations and governments, were called to conserve the common good, which included “the sublime dignity of the human person, who stands above all things and whose rights and duties are universal and inviolable.”<sup>181</sup>

Having established these first principles, the Council also spoke to the content of the common good that individuals, associations, and states were all alike expected to safeguard. Crimes against the person were condemned—“murder, genocide, abortion, euthanasia, and willful suicide.”<sup>182</sup> Fundamental equality among persons should be respected.<sup>183</sup> The State, furthermore, was affirmatively charged with the task of promoting “the formation of a human person who is cultured, peace-

It is through his conscience that man sees and recognizes the demands of the divine law. He is bound to follow this conscience faithfully in all his activity so that he may come to God, who is his last end. Therefore he must not be forced to act contrary to his conscience.

*Id.*

<sup>177</sup> *Id.* at para. 6. *Dignitatis Humanae* continued:

It consists especially in safeguarding the rights and duties of the human person. For this reason the protection of the right to religious freedom is the common responsibility of individual citizens, social groups, civil authorities, the Church, and other religious communities.

*Id.*

<sup>178</sup> *Id.*

<sup>179</sup> SECOND VATICAN COUNCIL, *supra* note 134, at para 17.

<sup>180</sup> *Id.* at para. 24 (“In his fatherly care for all of us, God desired that all men should form one family and deal with each other in a spirit of brotherhood”).

<sup>181</sup> *Id.* at para. 26.

<sup>182</sup> *Id.* at para. 27. The Council continued:

[A]ll offenses against human dignity, such as subhuman living conditions, arbitrary imprisonment, deportation, slavery, prostitution, the selling of women and children, degrading working conditions where men are treated as mere tools for profit rather than as free and responsible persons.

*Id.* The Council also condemned “mutilation, physical and mental torture, [and] undue psychological pressures.” *Id.*

<sup>183</sup> *Id.* at para. 32.

loving, and well disposed towards his fellow-men . . . .”<sup>184</sup> But this did not mean that the state was entitled to swallow the person. Echoing Pius XI's teaching on subsidiarity,<sup>185</sup> the Council stressed: “Citizens, . . . either individually or in association, should take care not to vest too much power in the hands of public authority nor to make untimely and exaggerated demands for favors and subsidies, lessening in this way the responsible role of individuals, families, and social groups.”<sup>186</sup>

Pope John Paul II's teaching on the human person is rich and complex but fits comfortably within the path of trajectory that has been thus far reviewed. In *Sollicitudo Rei Socialis*, the Pope emphasized the universality of the teaching that all persons are created in God's likeness.<sup>187</sup> In *Veritatis Splendor*, the Holy Father stressed not only the nature of the human person as created in the image and likeness of God, but also the essential unity that prevails in the individual person between the physical body and the immortal soul.<sup>188</sup> The dignity of every person is grounded on this principle of creation.<sup>189</sup> Essential rights and duties,<sup>190</sup> indeed, the entirety of the moral law,<sup>191</sup> flow from this reality. And in *Centesimus Annus*, John Paul condemned the totalitarian state, “which sets itself above all values, [and] cannot tolerate the affirmation of an objective criterion of good and evil beyond the will of those in power.”<sup>192</sup> He juxtaposed to totalitarianism the principles of “authentic democracy,” grounded on the rule of law and “a correct conception of the human person.”<sup>193</sup>

It should be evident from this line of development how difficult it is to ground the validity of law on its formal source, that is, on the exercise of state authority alone, without regard to the content of the law or its impact on persons. Law should be concerned with the promotion of the common good. It should use as its touchstone the nature of the human person as worthy of fundamental dignity and respect and as possessed of

---

<sup>184</sup> *Id.* at para. 74.

<sup>185</sup> *See supra* 162-64 and accompanying text.

<sup>186</sup> SECOND VATICAN COUNCIL, *supra* note 134, at para. 72.

<sup>187</sup> POPE JOHN PAUL II, *SOLLICITUDO REI SOCIALIS* para. 47.5 (1987) (The human person is “the indestructible image of God the Creator, which is *identical* in each one of us.”)

<sup>188</sup> POPE JOHN PAUL II, *VERITATIS SPLENDOR* para. 48.3 (1993).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at para. 50.1. “At this point the true meaning of the natural law can be understood: it refers to man's proper and primordial nature, the ‘nature of the human person,’ which is the person *himself in the unity of soul and body.*” *Id.* (quoting SECOND VATICAN COUNCIL, *supra* note 134, at para. 51).

<sup>191</sup> *Id.* (“The natural moral law expresses and lays down the purposes, rights, and duties which are based upon the bodily and spiritual nature of the human person.” (quoting CONGREGATION FOR THE DOCTRINE OF THE FAITH, *DONUM VITAE, Introduction* 3)).

<sup>192</sup> POPE JOHN PAUL II, *CENTESIMUS ANNUS* para. 45.1.

<sup>193</sup> *Id.* at para. 46.1.

certain fundamental rights. The history of the twentieth century has been the story of the systematic denial of these human realities and their ultimate vindication through nothing less than titanic struggle. The Church's teaching offers to law-makers a powerful substantive vision of right and justice that provides an alternative to the great antinomies of positivist jurisprudence.

A focus on personhood as the ultimate source of law's validity also makes clear that what is at stake in the struggle between rigorous forms of positivist jurisprudence and natural law is nothing less than conflicting anthropologies. Over the last two centuries, positivist jurisprudence has relied on the shifting anthropologies of a variety of secular sciences. Social Darwinism and its diminishment of the sanctity of the person dominated late nineteenth-century philosophy<sup>194</sup> and continued to exert a large influence on the jurisprudence of the first half of the twentieth century.<sup>195</sup> Other competing anthropologies have, of course, also played a large role in the shaping of modern jurisprudence and law. One thinks, for instance of Rousseau's conception of the noble savage, corrupted by the restraints of civilization—an image that would

---

<sup>194</sup> Social Darwinism has its origin with Charles Darwin himself, who in the concluding chapter of his *Descent of Man* stressed the importance of sex selection in the "improvement" of various species. "Man scans with scrupulous care the character and pedigree of his horses, cattle and dogs before he matches them." CHARLES DARWIN, *THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX* 612 (rev. ed. 1874). Individuals should exercise the same degree of care:

Both sexes ought to refrain from marriage if they are in any marked degree inferior in body or mind; . . . . The advancement of the welfare of mankind is a most intricate problem: all ought to refrain from marriage who cannot avoid abject poverty for their children; for poverty is not only a great evil, but tends to its own increase by leading to recklessness in marriage.

*Id.*

<sup>195</sup> One area of American life and law in which social Darwinism had profound influence was in the area of eugenics—which was nothing less than the use of selective breeding to improve the race. It was this idea that stood behind the Supreme Court's infamous decision in *Buck v. Bell*, 274 U.S. 200 (1927). Upholding a statute that put into effect Darwin's teaching on sex selection by requiring the sterilization of certain mentally "unfit" persons, Oliver Wendell Holmes wrote, on behalf of eight members of the United States Supreme Court:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccinations is broad enough to cover cutting the Fallopian tubes. [Citation omitted]. Three generations of imbeciles are enough.

*Id.* at 207.

profoundly influence Karl Marx and generations of revolutionaries. More recently, philosophical liberals like John Rawls<sup>196</sup> and exponents of law and economics have explained human behavior in terms of rational self-interest devoid of any consideration for man's social dimension.<sup>197</sup>

The Christian anthropology that undergirds the natural-law postulates examined in this Article differs significantly from the competing anthropologies of secular legal scholarship. The dignity of the human person, *qua* person, is exalted in Catholic natural-law writing. Secular anthropologies tend, on the other hand, to exalt one or another *aspect* of the human person as *the* primary identifying characteristic of what it means to be human—whether that be membership in a neo-Darwinian species; or the naturally free and good individual of Rousseau and Marx; or the unremittingly rationally self-interested actor of liberal and economic-libertarian thought. It may be that our anthropology must be taken on faith. But in light of the extreme inhumanity that has resulted from the social experiments of the twentieth century that chose to discard Christian anthropology, we may be well-served indeed to choose the Christian model.

---

<sup>196</sup> The basic postulate of Rawlsian liberalism, the “veil of ignorance,” makes critical assumptions about the rationally self-interested nature of the human person. See JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1971).

<sup>197</sup> Thus, it has been argued that penalty clauses should be permitted in commercial contracts on the basis of the rational self-interest of the parties:

When the promisee demands a ‘penalty clause’, the promisor will agree only if the price is increased sufficiently to cover any increase in the cost of performance. . . . [S]ince it seems plausible that commercial contractors act largely in their ‘rational’ self-interest, it is likely that both parties initially saw a benefit even in a clause which a court later terms a penalty.

Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L. J. 633, 687-88 (2001) (quoting Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683, 720 (1986)).

In its pure form, law and economics depends on persons behaving rationally at all times, especially where their economic interests are concerned. It is believed by the follower of law and economics that this rationality is revealed through the choices that the economic actor makes. Arthur Leff considers the circularity involved in this mode of reasoning:

[S]ince people are rationally self-interested, what they *do* shows what they value, and their willingness to pay for what they value is proof of their rational self-interest. Nothing merely empirical could get in the way of such a structure because it is definitional. That is why the assumptions can predict how people behave: in *these* terms there is no other way they can behave.

John E. Noyes, *Book Review: An Introduction to Law and Economics*, 59 N.Y.U. L. REV. 410, 423 n.93 (1984) (book review) (quoting Arthur A. Leff, Comment, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 457 (1974)).

## IV. CONCLUSION

Writing in the summer of 1986, the Protestant legal theorist Frank Alexander proposed that “contemporary American legal thought—nonpositivist as well as positivist—would benefit greatly from theology.”<sup>198</sup> This Article, which began with a review of the tensions and defects of the modern positivist project, has ended with just such a theological exploration of the created nature of the human person and the implications of this theological reality for jurisprudence. Ultimately, when the analysis is pressed back, it becomes evident that jurisprudential debates are really, at bottom, debates about human nature and the relationship of human nature to the law-making enterprise.

Is it possible to sever justice from law and to analyze law in terms of structures of command and monopolies of force devoid from any larger purpose? Is it possible to analyze law as something separate and apart from its moral contents or the values it seeks to conserve? Is it possible to speak of the validity of law in terms of its formal source in state authority, as opposed to its origins in human nature and the requirements of human life? It is hoped that this Article has revealed some of the difficulties inherent in the positivist project.

An alternative to this project is available in the social teaching of the Catholic Church. This social teaching did not develop in isolation, but rather in response to the great upheavals of the twentieth century. In contrast to the great antinomies of positivism, Catholic social thought emphasizes the integral connections between justice and law; the inseparability of law from morals and values; and the need to ground the validity of law not in a formal analysis of state authority but in human nature itself.

---

<sup>198</sup> Frank S. Alexander, *Beyond Positivism: A Theological Perspective*, 20 GA. L. REV. 1089, 1090 (1986).