

EVALUATING SUPERNATURAL LAW: AN INQUIRY  
INTO THE HEALTH OF NATIONS (THE RESTATEMENT  
OF THE OBVIOUS, PART II)\*

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*“[W]e have now sunk to a depth at which the restatement of the obvious is the first duty of intelligent men.”<sup>1</sup>*

ABSTRACT

This Article provides a working definition of “supernatural law” and describes a pressing problem with it: some say morality is essential to good government and that supernatural law is essential to morality, while others deny one or both of these propositions. As used herein, “supernatural law” refers to any rule or command given to subjects (“believers”) by an incorporeal sovereign and which includes at least one precept, rule, or command that is not necessarily determinable by reason. The term “supernatural law” is intended to be sufficiently general to apply to any such law whether proposed according to Judaism, Christianity, Islam, Mormonism, or any other religion; it also applies to “nonreligious” supernatural rules. Supernatural law is, has been, and probably will remain intertwined with conventional legal

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<sup>1</sup> George Orwell, *Review of Power: A New Social Analysis by Bertrand Russell*, THE ADELPHI, Jan. 1939 (book review), reprinted in GEORGE ORWELL, ESSAYS 107, 107 (2002); accord J. BUDZISZEWSKI, WHAT WE CAN’T NOT KNOW: A GUIDE 15 (2003); see also JAMES V. SCHALL, THE REGENSBURG LECTURE 13 (2007) (“Most people . . . are not learned but they are not idiots; they have common sense. They too seek to know and expect clarity from those of more leisure and genius than they.”). My thanks to Professor Peter Richards for pointing me to the actual source of the well-known Orwell quotation.

systems not only in the United States but globally and transnationally. This Article proposes that the claims of supernatural law be subjected to rational evaluation against specified criteria. Those criteria relate to: (1) the rule of law; (2) the nonimposition principle; and (3) the ability of any system of supernatural law to provide adequate assurances of performance. “Adequate assurances” signify some reason to believe that their undertakings to observe the rule of law and the nonimposition principle will be honestly and faithfully performed if and when the adherents of a supernatural law become politically dominant and powerful enough to make legally binding rules for the rest of the polity. If, in fact, morality is important to the health of nations, and if supernatural law is important to morality, then the state of supernatural law is a leading indicator of the health of any nation. Surprisingly little systematic thought has been given to the general question how to evaluate the claims of any given system of supernatural law (a “supernatural jurisprudence”) against any specified criteria for rational judgment about those claims. This Article does just that. It asserts that if and to the extent any supernatural law positively supports the rule of law and respects the nonimposition principle, it is a great good which can contribute to the health of any nation. It also asserts the converse. Any system of supernatural law that cannot be trusted to be consistent with the rule of law and the nonimposition principle can be toxic to the health of a nation.

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## INTRODUCTION

The argument is in four parts. Part I proposes criteria for a rule of law. Replacing generalities about “democracy” or “liberty” with a specified and determined set of criteria, this Article observes that it becomes possible to grade any system of supernatural law in relation to its conformity with testable propositions. Part II addresses the nonimposition principle. Replacing the narrow view of Western “disestablishment” with a more open concept, it proposes respect for the individual conscience and a commitment to refrain from imposing purely supernatural law upon those who neither accept nor believe the supernatural basis upon which it rests. Part III considers the problem of producing any credible assurances of compliance with supernatural law. Part IV proposes the sequence in which the claims of any system of supernatural law might be evaluated in an orderly and rational process. This Article ends with a Conclusion summarizing the end of supernatural law, its perennial and growing global influence, and its vital importance. It also invites further work. Appendix A contains a succinct listing of the criteria identified during the course of the discussion herein. Appendix B illustrates the formal outline of an application of these criteria.

## PROLOGUE

There are some, including some within the self-styled legal elites and among those wielding actual judicial power, who are no more comfortable with Christianity in American law and governance than with Islam in Turkish law and governance.<sup>2</sup> Given that one polity is a majority Christian nation,<sup>3</sup> and the other is a majority Muslim nation,<sup>4</sup> both governed by constitutional, representative democracies,<sup>5</sup> this is more than odd. It is a curiosity. One might with as much reason exclude British culture from British law, or Chinese culture from Chinese law. It is all the more curious because some say morality is essential to good

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<sup>2</sup> The more general question with which this Article is concerned is the role of supernatural law, anywhere. But the discussion has to start somewhere.

<sup>3</sup> Estimates vary, but one source has it: “Protestant 51.3%, Roman Catholic 23.9%, Mormon 1.7%, other Christian 1.6%, Jewish 1.7%, Buddhist 0.7%, Muslim 0.6%, other or unspecified 2.5%, unaffiliated 12.1%, none 4% (2007 estimate).” CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK, UNITED STATES (2008), <https://www.cia.gov/library/publications/the-world-factbook/print/us.html>.

<sup>4</sup> Estimates vary, but one source has it: “Muslim 99.8% (mostly Sunni), other 0.2% (mostly Christians and Jews).” CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK, TURKEY (2008), <https://www.cia.gov/library/publications/the-world-factbook/print/tu.html>.

<sup>5</sup> See generally U.S. CONST. arts. I–VII, amends. I–XXVII; THE CONSTITUTION OF THE REPUBLIC OF TURKEY, pmbl., pts. 1–7 available at <http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm> (providing an English version, as maintained by the Office of the Prime Minister, Directorate General of Press and Information).

government itself, and that religion is essential to morality. George Washington is but one example, and the United States of America is but one exemplar. George Washington said the following:

Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. . . . And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.<sup>6</sup>

**Proposition 1**—the practical syllogism. Let it be said that a practical syllogism is as follows: if national morality is good for the polity, and if supernatural law is good for national morality, then supernatural law is good for the polity.<sup>7</sup>

Notwithstanding the implied practical syllogism<sup>8</sup> expressed in the quoted passage from George Washington, some have challenged it, or have challenged particular religions, at least as expressed in certain religiously based laws and in certain countries.<sup>9</sup> Indeed, it has happened in the United States, and it has happened elsewhere. Two examples might suffice. The first example of a challenge to the practical syllogism comes from within the United States itself, where problems of supernatural law have figured prominently in constitutional law doctrines that simultaneously recognize a right to the free exercise of religion while prohibiting any congressional establishment of it.

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<sup>6</sup> George Washington, U.S. President, Farewell Address (Sept. 19, 1796), in *THE AMERICAN REPUBLIC: PRIMARY SOURCES* 72, 76 (Bruce Frohnen ed., 2002) [hereinafter *AMERICAN REPUBLIC*].

<sup>7</sup> This Article includes three propositions. This is the first. The second is at *infra* note 29 and accompanying text, and the third is at *infra* note 147 and accompanying text.

<sup>8</sup> The practical syllogism is inspired by, but not identical to, George Washington's formulation. I have softened and transposed it into a hypothetical mode and converted particular terms ("religion" and "religious principle" as well as what might be understood to be a "Christian or Judeo-Christian" religion) into the more general terms ("supernatural law") used herein.

<sup>9</sup> It is certainly the case that the practical syllogism might be valid but not true for the failure of one or more of the premises. It is likewise possible, and perhaps likely, that even if its premises be true, they may be true only for *some* supernatural law and not all systems of supernatural law. This is because there is more than one system of supernatural law, and those systems are not identical. See *infra* notes 40–43, 49, 52. The problem addressed by this Article is precisely the question whether *any* system of supernatural law might be "qualified" in accordance with some rational and testable standard. This Article asserts that some systems might qualify and others might not, according as they do or do not satisfy the standard. This Article does not itself do anything more than propose the standard. It leaves it to the proponents of various systems to make the case that their system meets the standard, and it leaves it to the members of their polity to respond and ultimately to determine for themselves. This Article proposes a rule-based standard, sufficiently specified into testable propositions for use in legal or practical determinations of the question. "Testable" propositions are falsifiable propositions.

Interpreting a clause in the U.S. Constitution<sup>10</sup> in light of a letter written by Thomas Jefferson,<sup>11</sup> and affirming the constitutionality of a law that provided some incidental state financial assistance to parents of children attending religiously affiliated schools, the Supreme Court has said, “In the words of Jefferson, the clause against establishment of religion by law was intended to erect a ‘wall of separation between church and State.’”<sup>12</sup> The Court went on to conclude, “The First Amendment has erected a wall between church and state. That wall must be kept *high and impregnable*. We could not approve the slightest breach.”<sup>13</sup>

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<sup>10</sup> See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”).

<sup>11</sup> While serving as President of the United States, Thomas Jefferson wrote to Nehemiah Dodge and other members of a Committee of the Danbury Baptist Association in the State of Connecticut:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building *a wall of separation* between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

Letter from Thomas Jefferson to the Danbury Baptist Ass’n (Jan. 1, 1802), *in* AMERICAN REPUBLIC, *supra* note 6, at 88 (emphasis added); see also DANIEL L. DREIBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002) (including copies of prior drafts, prior sources and context, and opining as to the probable intent of the letter versus subsequent interpretations of it). Any student of the question would probably be curious to know the extent to which the language in Jefferson’s letter tracked with the language and intent of the contemporaneously widely circulated and widely known common confession of many American citizens. Pertinent portions of Articles 23.1 and 23.3 of the Westminster Confession of Faith (the 1787 U.S. amended version adhered to, or well-known by, a substantial number of Americans at the time of the adoption of the First Amendment) are quoted *infra* at note 137.

<sup>12</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

<sup>13</sup> *Id.* at 18, 98 U.S. 164 (emphasis added). Perhaps only coincidentally, the Court used the opportunity of combining a traditional result (affirming the constitutionality of the challenged state support of transportation costs borne by parents to send their children to religiously affiliated schools) with a decidedly non-traditional and new rubric (the “high and impregnable” wall, to be preserved against even “the slightest breach”). This happenstance permitted the next cases (the ones that actually enforced the newly redesigned wall) to assert they were simply following the rules announced in existing precedent, albeit by way of alternative negative dicta enunciated in *Everson*. See *id.* at 18

The United States is, of course, not the only nation that has dealt with supernatural law within the polity. Separated from the U.S. examples just given by time, distance, particular legal structure, and culture, the European Court of Human Rights recently ruled on the same general problem. The *Refah Partisi* case forced the court to review the place of supernatural law within the Turkish polity under the standard set by international conventions.<sup>14</sup> The European Court of Human Rights, addressing events in Turkey and applying the standards of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"),<sup>15</sup> provides a striking recent example of an objection to supernatural law.

The ruling came as an affirmation of a decision from the Court's Chamber, which upheld a decision of the Turkish Constitutional Court banning a political party (known, in English translation, as "the Welfare Party") and some of its members upon attribution to them of a plan to implement the religiously based legal system of sharia law.<sup>16</sup> The ban decreed by the Turkish Constitutional Court had been challenged by the

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(dissenting opinion noting that, according to the new rule announced by the majority, the case should have come out the opposite way).

<sup>14</sup> *Refah Partisi (the Welfare Party) v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98, 41344/98 (Eur. Ct. H.R. 2003), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=41340/98&sessionId=15411188&skin=hudoc-en>.

<sup>15</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 231, available at <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf> [hereinafter Convention]. The applicants claimed violations of Articles 9 (freedom of thought), 10 (freedom of expression), 11 (freedom of assembly and association), 14 (prohibition of discrimination), 17 (prohibition of abuse of rights), and 18 (limitations on use of restrictions of rights) of the Convention and Articles 1 (protection of property) and 3 (right to free elections) of Protocol No. 1. See *Refah Partisi* ¶ 2 (noting applicants alleged violations of the Convention and of the Protocol). The Court, in unanimously holding that there had been no violation of Article 11, found that it was not necessary to examine separately the complaints under the other articles of either the Convention or the Protocol. *Id.* ¶¶136–39; see also Press Release, Registrar of the European Court of Human Rights, Grand Chamber Judgment in the Case of *Refah Partisi (the Welfare Party) and Others v. Turkey* (Feb. 13, 2003) (defining the relevant articles of the Convention and Protocol), <http://www.echr.coe.int/Eng/Press/2003/feb/RefahPartisiGCjudgmenteng.htm>.

The European Court of Human Rights quoted the relevant portions of Article 11 of the Convention as follows:

Everyone has the right to freedom of peaceful assembly and to freedom of association . . . .

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

*Refah Partisi*, ¶ 49 (quoting Convention, *supra*, art. 11) (omission of text in original).

<sup>16</sup> *Refah Partisi*, ¶¶ 2, 5, 40–41.

Welfare Party and its members on the grounds that the ban violated human rights set forth in Article 11 of the Convention.<sup>17</sup> But the European Court of Human Rights ruled the ban was not a violation, at least where the supernatural law attributed to the political party was sharia law, and the affected nation was Turkey.<sup>18</sup>

The Court explicitly agreed with the Chamber that “sharia [law] is incompatible with the fundamental principles of democracy as set forth in the Convention . . . .”<sup>19</sup> Quoting with approval the language of the Chamber, the Court elaborated on the reasons for incompatibility:

[S]haria, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The [Chamber] notes that, when read together, the offending statements [attributed to the Welfare Party], which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. . . . In the [Chamber’s] view, a political party whose actions seem to be aimed at introducing sharia in a State [which is a] party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.<sup>20</sup>

The Court put its holding both in a general European context and also in the particular context of Turkey. It noted first that it “must not lose sight of the fact that . . . political movements based on religious fundamentalism have been able to seize political power . . . and . . . to set up the model of society which they had in mind.”<sup>21</sup> The Court considered that “each [c]ontracting State may oppose such political movements in the light of its historical experience.”<sup>22</sup> It next noted that in Turkey’s recent historical experience there had already once been “an Islamic theocratic regime under Ottoman law,” which had been “dismantled,” and a republican regime established in its place.<sup>23</sup> Under the republican

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<sup>17</sup> *Id.* ¶ 2.

<sup>18</sup> *See id.* ¶¶ 123–25 (particularizing to Turkey and to sharia); *see also id.* ¶¶ 135–36 (setting forth the holding).

<sup>19</sup> *Id.* ¶ 123.

<sup>20</sup> *Id.* (omission of text in original).

<sup>21</sup> *Id.* ¶ 124.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* ¶ 125.

regime, Turkey “opted for a form of secularism that confined Islam and other religions to the sphere of private religious practice.”<sup>24</sup>

In light of these curious data points, one set from the United States and another set from Europe, this Article advances a restatement of the obvious, limited to what is obvious in any law proposed for actual implementation in a real polity.<sup>25</sup> In so doing, it makes no claim that there is anything obvious about, say, literary criticism, philosophical deconstruction or semiotic reconstruction of meaning, or any other specialized discipline, worthy as any of them might be for the pursuit of knowledge, pleasure, utility, or for any other reason (or for no reason). There may sometimes be advantages of specialization of labor, not only in ordinary trades and businesses but also in the trade or occupation of philosophy or speculation. It has been well said in connection with the wealth of nations:

In the progress of society, philosophy or speculation becomes, like every other employment, the principal or sole trade and occupation of a particular class of citizens. . . . [T]his [specialization] of employment in philosophy, as well as in every other business, improves dexterity, and saves time. Each individual becomes more expert in his own peculiar branch, more work is done upon the whole, and the quantity of science is considerably increased by it.<sup>26</sup>

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<sup>24</sup> *Id.* As a result, the Court was particularly “[m]indful of the importance for [the] survival of the democratic regime of ensuring respect for the principle of secularism in Turkey.” *Id.* The Grand Chamber also noted the observation of Turkey’s own Constitutional Court, which expressed the same concerns in perhaps even stronger language, stating, “Democracy is the antithesis of sharia. [The] principle [of secularism], which is a sign of civic responsibility . . . enabled the Turkish Republic to move on from Ummah [*ümmet* – the Muslim religious community] to the nation.” *Id.* ¶ 40 (alterations in original).

<sup>25</sup> The restatement of the obvious is directed only to law, and then only to law as might be generally intelligible to its subjects. See *infra* Part I.A. for the working definitions. It makes no claim of “obviousness” with respect to anything else. See Thomas C. Folsom, *The Restatement of the Obvious: Or, What’s Right Got To Do with It? Reflections on a Business Ethic for Our Times*, 16 REGENT U. L. REV. 301, 314, 347–49 (2004) [hereinafter *The Restatement of the Obvious*]. While it might be nice for other disciplines to engage in a similar effort, this Article does not go there.

<sup>26</sup> ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1793), reprinted in 39 GREAT BOOKS OF THE WESTERN WORLD 1, 5–6 (Robert Maynard Hutchins et al. eds., 1952). From the context, it is probable Adam Smith was commenting upon that subclass of “science,” which contributes to the invention of new and useful industrial machines and to that subclass of “philosophers or men of speculation, whose trade it is not to do anything, but to observe everything,” which leads to such inventions. *Id.* at 5. It seems not unfair, however, to adapt his general observations about specialization of labor to the sort of moral philosophy practiced by those who make ethical and political judgments about the place of supernatural law in modern nation states. It seems as if such persons are lodged in academic or semi-academic halls in which they engage in their peculiar and highly specialized trade.

But granted the value of specialized disciplines to the *wealth* of nations, the problem of governing a polity by law raises a very practical set of concerns relating to the *health* of nations. In the United States, for example, there are some 300 million persons to be governed.<sup>27</sup> These citizens and residents are not specialists either in academic law or linguistics. They may “not [be] learned but they are not idiots; they have common sense. They too seek to know and expect clarity from those of more leisure and genius than they.”<sup>28</sup>

**Proposition 2**—the health of nations.<sup>29</sup> Let it be postulated that a healthy polity is one with relatively good laws that its subjects, or at least many of them, choose to obey (at least much or most of the time).<sup>30</sup>

The custodians of the law must be able to speak clearly to the law’s subjects on the basis of common sense, or at least with some reason. There is a time and place for a general account, accessible to a general public. Moreover, the world is bigger than the United States alone. If an overwhelming majority of persons throughout the world are “religious” in some sense of the word,<sup>31</sup> it would seem highly unrealistic to attempt to govern them without giving some place to some sort of religious or other supernatural source of a shared moral basis for a legal order. Any legal realist who discards so many data points seems less than realistic.<sup>32</sup> If it be claimed there is no room for supernatural law, then at

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<sup>27</sup> Estimates vary, but one source has it: “303,824,640 (July 2008 estimate).” CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK, UNITED STATES (2008), <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html>.

<sup>28</sup> SCHALL, *supra* note 1.

<sup>29</sup> This Article includes three propositions. This is the second. The first is at *supra* note 7 and accompanying text, and the third is at *infra* note 147 and accompanying text.

<sup>30</sup> If this postulate seems trivial because “everyone” within the polity already knows it, that in itself would be a sign of a healthy polity. But if this postulate should seem to be anything other than trivial, that is in itself a matter not only of some curiosity, but a sign of the opposite of health. The method here is simply that of honestly attempting to think the opposite: can it be said that a polity is healthy if it has relatively bad laws, or a citizenry that is unwilling to obey its laws? Can it be healthy for a polity to pretend that no one in it is competent to determine that one law is “better” than another just because it is more nearly “good” than another? Or can it be healthy to advocate that “good” or “bad” suddenly have no place in polite discussion of the law?

<sup>31</sup> Estimates vary, but one source has it: “Christians 33.32% (of which Roman Catholics 16.99%, Protestants 5.78%, Orthodox 3.53%, Anglicans 1.25%), Muslims 21.01%, Hindus 13.26%, Buddhists 5.84%, Sikhs 0.35%, Jews 0.23%, Baha’is 0.12%, other religions 11.78%, non-religious 11.77%, atheists 2.32% (2007 estimate).” CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK, WORLD (2008), <https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html>.

<sup>32</sup> Even granting that legal “realism” is in some sense a term of art, there still is the troubling, and obvious, observation that many legal realists omit a substantial body of apparently useful data from their conjuring. See Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236, 1254–55 (1931) (declaring only “[t]he temporary divorce of Is and Ought for purposes of study.”). But he

least the ruler or the custodians of the law might consider giving some reasonable account why there should be no room, why there should be a “wall,”<sup>33</sup> or an “effectual barrier,”<sup>34</sup> or other device separating religion or any other supernatural law from the polity,<sup>35</sup> or why any supernatural law should be declared to be “incompatible” with the laws of any polity.<sup>36</sup> These are, of course, disputable propositions, and it is the very point of this Article to open those propositions to exploration and reasoned discussion.<sup>37</sup>

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and the other “realists” never seem to get around to the remarriage of the two, and with the passing of time the methodological divorce proposed by the realists is looking less and less temporary. It seems odd any realist would ignore such a substantial and obvious body of evidence relating to supernatural law that might actually help to predict “*what courts will do*” or that might give some rather obvious clue about what might constitute the “felt necessities” of any society. See *id.* at 1241 (“*what courts will do*”); OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881) (“felt necessities”). See generally Anthony D’Amato, *The Limits of Legal Realism*, 87 *YALE L. J.* 468 (1978) (noting the oddly unrealistic results).

<sup>33</sup> See Thomas Jefferson and “the wall of separation” between “church” and “state” at *supra* note 11.

<sup>34</sup> Writing to the United Baptist Churches in Virginia, George Washington said:

If I could have entertained the slightest apprehension that the Constitution framed in the Convention, where I had the honor to preside, might possibly endanger the religious rights of any ecclesiastical society, certainly I would never have placed my signature to it; and if I could now conceive that the general government might ever be so administered as to render the liberty of conscience insecure, I beg you will be persuaded that no one would be more zealous than myself to establish *effectual barriers* against the horrors of spiritual tyranny, and every species of religious persecution. For you, doubtless, remember that I have often expressed my sentiment, that every man, conducting himself as a good citizen, and being accountable to God alone for his religious opinions, ought to be protected in worshipping the Deity according to the dictates of his own conscience.

Letter from George Washington to the United Baptist Churches in Va. (May 10, 1789), in *AMERICAN REPUBLIC*, *supra* note 6, at 69, 70 (emphasis added). See also DREISBACH, *supra* note 11, at 84–85 (discussing George Washington’s use of the term “effectual barriers”).

<sup>35</sup> James Madison, one of the founding fathers, wrote of a “great [b]arrier which defends the rights of the people,” and Richard Henry Lee wrote of “necessary barriers.” DREISBACH, *supra* note 11, at 85–87. Thomas Jefferson wrote of “certain fences” as well as of his famous “wall.” *Id.* at 87–88. Madison also described a mere “line” of separation. *Id.* at 88–89 (remarking “it may not be easy, in every possible case, to trace the line of separation, between the rights of [r]eligion [and] the [c]ivil authority, with such distinctness, as to avoid collisions [and] doubts on unessential points.”).

<sup>36</sup> See *supra* notes 19–20 and accompanying text (discussing sharia law, adjudicated to be incompatible with democracy in Turkey).

<sup>37</sup> Detailed studies about particular claims of particular schools or varieties of supernatural law are all fine undertakings and well worth doing. But to survey the literature, much less to engage in a constructive critique of each school, would be potentially exhaustive of the reader’s patience, not to mention the publisher’s page limits. It would also produce a different article on a topic different than the one I have selected. All that needs to be said may be said relatively briefly, but only if presented at the level of general truths (and, presented in the absence of any claim to “science” or certain

This Article was invited as a critical response to a contemplated series of articles, the first of which addressed a specifically Mormon jurisprudence.<sup>38</sup> I accepted the commission only on condition that the Article would be (a) not necessarily critical, (b) not directly responsive, and (c) not limited to the question of Mormon jurisprudence.<sup>39</sup> The editors have generously offered the chance to address the wider question of supernatural law in general and to propose a method for evaluating supernatural jurisprudence of any sort. In so explaining the provenance of this Article, I gratefully acknowledge the genesis of this project, and at the same time advise the reader what to expect.

The problem this Article addresses is what to do with supernatural law of any kind in a polity of any sort, but it is no easy thing to write at the desired level of generality. To speak simply, for example, of any “Mormon,”<sup>40</sup> “Muslim,”<sup>41</sup> or “Christian” jurisprudence<sup>42</sup> is to invite

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knowledge, but rather in an account merely of a practical art of governing, at the level of things that are possibly true, highly probable, good and useful). See ARISTOTLE, *THE NICOMACHEAN ETHICS* 7 (H. Rackham trans., new & rev. ed. 1934). Aristotle warned against seeking more certainty than the subject matter allows:

We must therefore be content if, in dealing with subjects and starting from premises thus uncertain, we succeed in presenting a broad outline of the truth: when our subjects and our premises are merely generalities, it is enough if we arrive at generally valid conclusions. . . . [I]t is the mark of an educated mind to expect [no more than] that amount of exactness . . . which the nature of the . . . subject [matter] admits.

*Id.* at 9.

<sup>38</sup> John W. Welch, *Toward a Mormon Jurisprudence*, 21 REGENT U. L. REV. 79 (2008). This is one reason the opening paragraphs of this Article speak of Judaic, Christian, Islamic, and Mormon systems of supernatural law; it was supposed there might be specific Articles from each of those systems, but then the issue tightened to one.

<sup>39</sup> I salute Professor Welch for his pioneering essay about Mormon Jurisprudence, and I look forward to additional developments. The remainder of this Article will be more generally directed towards proposing a template for evaluating supernatural law. The inferences of the template for any particular system of supernatural law might be drawn by the reader, but it is not the intent of this Article explicitly to make such implications.

<sup>40</sup> See Welch, *supra* note 38.

<sup>41</sup> The schools of Islamic law might constitute variations of Muslim jurisprudence. Five major schools of Islamic law have been categorized as: (1) H.anbali; (2) Ma'liki; (3) Sha'fi'i; (4) H.anafi; (5) Ja'fari, and two other movements have been styled as the Kha'riji and the Mu'tazili. Joseph N. Kickasola, *The Schools of Islamic Law* (unpublished paper, revised Sept. 2008) (on file with the Regent University Law Review).

In support of his taxonomy, Professor Kickasola cites several authorities. See, e.g., AHMAD IBN NAQIB AL-MISRI, *RELIANCE OF THE TRAVELLER: A CLASSIC MANUAL OF ISLAMIC SACRED LAW* (Nuh Ha Mim Keller ed. & trans., rev. ed. 1999) (circa 1363); MUHAMMAD ASAD, *THIS LAW OF OURS AND OTHER ESSAYS* (Islamic Book Trust 2001) (1987); ANTONY BLACK, *THE HISTORY OF ISLAMIC POLITICAL THOUGHT: FROM THE PROPHET TO THE PRESENT* (Routledge 2001); LALEH BAKHTIAR, *ENCYCLOPEDIA OF ISLAMIC LAW: A COMPENDIUM OF THE VIEWS OF THE MAJOR SCHOOLS* (1996); CYRIL GLASSÉ, *THE NEW ENCYCLOPEDIA OF ISLAM* (Nicholas Drake & Elizabeth Davis eds., rev. ed. 2001); MOHAMMAD HASHIM

difficulty because of the staggering array of particular views held by the adherents of each. There is a similar problem with nondenominational and “nonreligious” versions of supernatural law.<sup>43</sup> It is evident the authorities take opposing and sometimes contradictory positions, but that makes it all the more important to look for some common measure with which to make reasonable sense out of the apparent cacophony of voices. It is not without full awareness of the persistence of false starts in philosophy that it has recently been said:

Here I am reminded of something Socrates said to Phaedo. In their earlier conversations, many false philosophical opinions had been raised, and so Socrates says: “It would be easily understandable if someone became so annoyed at all these false notions that for the rest of his life he despised and mocked all talk about being—but in this way he would be deprived of the truth of existence and would suffer a great loss.”<sup>44</sup>

The problem is what to do with supernatural law in general and what to do with it in any polity—not just in the United States or in Turkey, but anywhere. This is a problem that not only does not require specialized treatment, but is one for which a specialized treatment may be counterproductive. What is needed is nothing more than a restatement of the obvious, limited to what is obvious about law, and addressed to those who must put up with it as well as those who make and interpret it. In this context, it is well to use common sense.

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KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE (3d rev. & enlarged ed. 2003); 1 THE OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD (John L. Esposito ed., 1995).

<sup>42</sup> The schools of Christian law and variations on Christian jurisprudence might be rather numerous. *See, e.g.*, AUGUSTINE, THE CITY OF GOD (Demetrius B. Zema & Gerald G. Walsh, trans., 1950) (presenting views relating to Christianity that include some observations on law); THOMAS AQUINAS, THE SUMMA THEOLOGICA (Fathers of the English Dominican Province trans.), reprinted in 19 & 20 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 26, at 3; CATECHISM OF THE CATHOLIC CHURCH (1994) (presenting views relating to Christianity that include some observations on law); ABRAHAM KUYPER, LECTURES ON CALVINISM (photo. reprint 1994) (1931) (presenting views relating to Christianity that include some observations on law); H. RICHARD NIEBUHR, CHRIST AND CULTURE (HarperCollins 2001) (1951) (counting some categories); VERN S. POYTHRESS, THE SHADOW OF CHRIST IN THE LAW OF MOSES (1991) (refuting the handful of modern day Christian theocrats); MICHAEL P. SCHUTT, REDEEMING LAW: CHRISTIAN CALLING AND THE LEGAL PROFESSION (2007) (assessing what it might mean to be a Christian and a lawyer in the United States); *The Westminster Larger Catechism, in* THE CONFESSION OF FAITH TOGETHER WITH THE LARGER CATECHISM AND THE SHORTER CATECHISM (PCA 1990) (presenting views relating to Christianity that include some observations on law).

<sup>43</sup> *See infra* note 49 (counting some of the various schools of nonreligious, or antireligious supernatural law).

<sup>44</sup> SCHALL *supra* note 1, app. at 146 (quoting Pope Benedict XVI from the Regensburg Lecture given on September 12, 2006).

## I. THE RESTATEMENT OF THE OBVIOUS AND THE RULE OF LAW

The restatement of the obvious in respect of the law is proposed as an exercise. Let it be said that law can be whatever anyone wants it to be. The only question left to discuss is “what, then, would anyone want?” It might be obvious that a better law is preferable to a worse one. Unless juridical agents (including lawyers, law teachers, judges, legislators, and subjects who come into contact with law) choose to say they do not have any idea what makes one law better than another, they owe some explanation of what, exactly, they suppose. A restatement of the obvious in respect of the most fundamental principles underlying the law is something an organization like the American Law Institute might have prepared.<sup>45</sup> Since they have not, someone else might do so. Of course, to proclaim anything really to be obvious would be to make an audaciously banal claim, but one which at the same time might actually be controversial and also lead somewhere useful. There is nothing entirely new about such an approach. As to such audacious banality, G.K. Chesterton has said “[i]t is only the last and wildest kind of courage that can stand on a tower before ten thousand people and tell them that twice two is four.”<sup>46</sup> And as to the controversy surrounding such a claim, C.S. Lewis has observed:

Thus in a geometrical proof each step is seen by intuition, and to fail to see it is to be not a bad geometrician but an idiot. . . .

. . . [There can be progress and correction in the reception of facts, and in the art or skill of arranging the facts, but] the intuitional element[ ] cannot be corrected if it is wrong, nor supplied if it is lacking. . . . [W]hen the inability is real, argument is at an end. You cannot produce rational intuition by argument, because argument

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<sup>45</sup> The American Law Institute describes itself this way:

There is no other association in the United States like The American Law Institute. It was founded in 1923 following a study by a group of prominent American judges, lawyers, and teachers, who sought to address the uncertain and complex nature of early [twentieth-century] American law. According to the “Committee on the Establishment of a Permanent Organization for the Improvement of the Law,” part of the law’s uncertainty stemmed from the lack of agreement on fundamental principles of the common-law system, while the law’s complexity was attributed to the numerous variations within different jurisdictions.

The Committee recommended that a perpetual society be formed to improve the law and the administration of justice in a scholarly and scientific manner. Thus was established our unique organization dedicated to legal research and reform.

The American Law Institute, Overview: The Creation of the Institute, <http://www.ali.org/index.cfm?fuseaction=about.creationinstitute> (last visited Nov. 2, 2008).

<sup>46</sup> G.K. CHESTERTON, *HERETICS*, reprinted in 1 G.K. CHESTERTON COLLECTED WORKS 39, 75 (David Dooley ed., 1986). It takes a certain daring to present simple truths in an era that prizes nuance.

depends upon rational intuition. Proof rests upon the unprovable which has to be just “seen.”<sup>47</sup>

A restatement of the obvious is a nonproprietary, nonsectarian, and nonantiquarian set of foundational principles upon which a rule of law, grounded in morality and history and balanced by pragmatic concerns, can be established among free and equal subjects. A restatement at this level of generality is both possible and highly desirable. This Article presents a further tentative draft of such a restatement.<sup>48</sup>

#### A. Law, the Rule of Law, and Supernatural Law

For purposes of discussion, let the following terms be used in the following ways:

**1. Law.** “Law” is a rule or command imposed upon its subjects by a sovereign. By “sovereign,” is meant an authorized governor. For the sort of law (human law) that is imposed upon citizens and residents, this implies a “state” having a visible executive actually enforcing rules and commands upon its subjects, who are not free to nonacquiesce by withholding belief. For the sort of law (moral law) that is self-commanded, this implies a “person” who is self-binding. For the sort of law (supernatural law) imposed upon believers, this implies an incorporeal sovereign whose commands and rules can be discerned by believers. “Law” in each of these senses is a primary fact.

**2. The Rule of Law.** A “rule of law” is a set of laws its subjects can obey voluntarily and rationally, in conscience and in the absence of external force because doing so is (or seems to be) good for the person affected (such action being referred to as “autonomy”). Characteristic of a rule of law is the condition that a subject might autonomously, and rationally, will both to think and to act in conformity with the law.

**3. Supernatural Law.** “Supernatural law” is any rule or command given to subjects (believers) of an incorporeal or disembodied

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<sup>47</sup> C.S. Lewis, *Why I am Not a Pacifist*, in C.S. LEWIS, *THE WEIGHT OF GLORY AND OTHER ADDRESSES* 33, 34–35 (Walter Hooper ed., rev. & expanded ed. 1980). The danger and the controversy must be apparent. At the claimed level of confidence, argument ends and a sort of name-calling begins. Compare Richard Dawkins, *Ignorance Is No Crime* (May 15, 2006), <http://richarddawkins.net/article,114,Ignorance-is-No-Crime,Richard-Dawkins>, where he explains his 1989 book review that has been criticized as uncivil— in which he characterized “somebody who claims not to believe in evolution” as “ignorant, stupid or insane (or wicked, but I’d rather not consider that)” —by saying he’d left out the category of the non-ignorant, non-stupid, non-insane victim of indoctrination or coercion. *Id.* He is not operating at the level of first principles, but rather at the point of remoter inferences, yet the tone of the rhetoric is suggestive, as he says “undisguised clarity is easily mistaken for arrogance.” *Id.* But that is no objection in principle, only a warning to be careful in proceeding to claim any more than a handful of rational intuitions, and to be careful in drawing inferences further and further removed from them.

<sup>48</sup> See *infra* app. A. For an earlier tentative draft, see *The Restatement of the Obvious*, *supra* note 25, at 347–49.

sovereign<sup>49</sup> and which also includes at least one precept, rule, or command not necessarily determinable by reason.<sup>50</sup> Although perhaps offered or given to all people, it directly and initially binds only those who have accepted or received it by submission to it or belief in it. The term “supernatural law” is intended to be sufficiently general to apply to any such law whether proposed according to Judaism, Christianity, Islam, Mormonism,<sup>51</sup> or any other religion, and also to “nonreligious” and secular traditions.<sup>52</sup> Supernatural law is distinct both from “morality” and from “epistemology” each of which rest at least in part upon some authority or upon an indemonstrable principle<sup>53</sup> not completely verifiable by natural means, but which do not claim an incorporeal sovereign.

**4. God-Revealed Supernatural Law.** A more specific type of supernatural law may be termed “God-Revealed Supernatural Law” because it deals with a very particular kind of rule or command imposed by an incorporeal sovereign and which is not necessarily knowable by natural means. This is because the sovereign in this class of supernatural law is an asserted immaterial God, and the means of knowledge is a claimed written revelation *from* this God *to* someone to whom God has chosen to speak or otherwise to communicate. For ease

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<sup>49</sup> The God of Abraham, Isaac, and Jacob within the Jewish revelation; the God and father of Jesus Christ within the Christian revelation; and the Allah of Abraham and Ishmael within the Qur’anic revelation, is characterized as incorporeal. The reification and subsequent promotion into a real or allegorical leadership, governing, or sovereign role of “history” or the “proletariat” or “the people” or “chance” or “survival” or of “society” or of the “idea” or of the “earth” within the various Marxist, Historicist, Darwinian, Materialist, Hegelian, Realist, Progressive, or Environmental traditions may likewise be characterized as incorporeal (or if used to signify some composite, abstract, or allegorical “thing” might be characterized as “disembodied” from the real thing itself) and constitutive of supernatural law when coupled with rules not necessarily determinable by reason.

<sup>50</sup> Precepts not necessarily determinable by reason include those against mixing fabrics in clothing, or dividing a week into seven days, and then taking one of them off. Other such precepts include those requiring everyone to work to the best of their ability, and then to give to everyone else in accordance with their needs. *See infra* note [134] (sourcing both religious and antireligious supernatural law roots of the precept).

<sup>51</sup> These are some of the major traditions that share common books. It is not meant to be an exclusive listing, but is illustrative only.

<sup>52</sup> “Supernatural law” certainly includes “religious” traditions other than those illustrative traditions listed here. In addition, it includes all other traditions, whether they are “religious” or not, that answer to the description. Among the candidates for inclusion are some forms of Marxism, Historicism, Darwinianism, Materialism, and other systems. It makes no difference whether the incorporeal sovereign is “the proletariat,” the idea of history, progress, the working out of variations of the consequences of a competition to survive and produce offspring, material bodies in motion, or the people. The list of nonreligious varieties of supernatural law can actually encompass a very broad range of laws and legal systems.

<sup>53</sup> “Indemonstrable principles” such as those against contradiction, of cause and effect, of the basic reliability of sense perceptions, and of the rational preference for good over evil, life over death, and something over nothing, are discussed *infra* at notes 61–71. Other indemonstrable principles might include those that assert “matter is all there is.”

of expression, the shorter term “supernatural law” will be used throughout this Article, and the reader will note from the context when the term is being used in its more specialized sense to refer to “God-Revealed Supernatural Law.” This God-Revealed law does not necessarily imply a visible “church” though in some cases the body of believers may be referred to as such.<sup>54</sup> What this term does necessarily imply is a number of believers who, as such, are adherents to the rules or commands imposed regardless of whether they organize themselves into something called a visible church.

**5. Other Constraints (“Influencers”).** Human conduct is also constrained or influenced by extra-legal influences including markets, norms, associations (family, friends, firms, schools, entertainment and news media, neighborhoods and voluntary organizations, organized religions, and class or group identity), and by the architecture of external reality, some of which is fixed, but some of which may be changed or influenced by, or reciprocally influences, the law or its interpretation.<sup>55</sup>

As so used, the term “supernatural law” associates or relates the claims of a visible and corporeal “state” with the claims of an invisible and incorporeal sovereign. It does this by the univocal use of the term “law” in the context of both “human law” and “supernatural law.”<sup>56</sup> One term (“human law”) asserts the real effect of the evident force of observable law as manifest in a visible “state.” The other term (“supernatural law”) proposes the real effect of an unseen world which may or may not be manifest in any visible “church,” but which does claim a visible law, given by an invisible sovereign. The connection of the two terms is made in a way not limited to the United States or to the Western nations. While this usage is not inconsistent with common Western notions of “faith” and “reason,” “nature” and “grace,” and “church” and “state,” it also invites a general understanding and is

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<sup>54</sup> This is almost certainly the limited sense in which most discussions of “religion,” “church,” and “state” probably use the terms when referring to “religion” and the “church.” Because this limited sense of the expression is also the one that most starkly raises the problem which this Article addresses, it is the sense in which most of the Article’s discussion occurs.

<sup>55</sup> These influencers are commonly understood. Professor Lessig has given an elegant recent reformulation of them. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 87–88, app. at 235–39 (1999) (describing, in addition to “law,” the influence of markets, norms, and architecture).

<sup>56</sup> As used herein, “law” univocally relates sovereign and subject by way of command or precept imposed by the one upon the other. Subcategories depend upon the characteristics of sovereign and subject: human law implies a sovereign state and subject citizens or residents; moral law implies a person who self-binds according to a standard; and supernatural law implies an incorporeal sovereign and a believing subject. For ease of expression, this essay sometimes uses adjectives or parentheticals to distinguish (human) law from supernatural law or moral law, but sometimes simply uses the word “law.” The context, and the underlying univocal usage, should make the meaning clear in cases where the adjectives are omitted. “Moral law” is discussed, *infra* at Section I.B.

intended to be open to participation from any perspective. It thereby illuminates the controversy, which is precisely the intersection of two sovereign regimes, one “seen” and one “unseen,” but both of which are sources of manifest commands and rules.

It would seem unobjectionable to contend that any believer in an unseen world of law who also resides in a visible polity is a subject of dual citizenship because of dual sovereignty. Moreover, it would seem safe to say that any unbeliever must have a reciprocal causal connection with any believer within the polity. This is simply to say the unbeliever both affects the believers, and is in turn affected by them to the extent they participate in the same polity. So also the believer has some effect on the nonbeliever. As a result, and to the extent of their mutual interactions in respect of their respectively desired policies within the polity, the believer and the unbeliever must necessarily be mutually supportive, nonsupportive, or indifferent to each other (there being no other choices). On matters that make a difference, the question is whether the relationship is supportive and friendly, or is nonsupportive and hostile. The potential for conflict is enhanced, *ex hypothesi*, because it is in the nature of supernatural law to be indemonstrable at least in part. Where the law of the polity is opposed or contrary to supernatural law, not only must one yield to the other, but there is little apparent room for useful discussion. Of course, if it is possible to divorce, separate, or exclude one or the other entirely from influencing policy choices within a polity, then what the excluded one desires might be utterly irrelevant to what happens.<sup>57</sup>

The problem is illustrated by the opposite conclusions drawn about the consequences of dual sovereignty. Some have celebrated the phenomena to the extent of prescribing supernatural law as a tonic for the polity, and others have warned against it to the extent of proscribing supernatural law altogether as toxic. If there is some middle position between the “all” or “nothing at all” approaches to supernatural law, it

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<sup>57</sup> This creates the real potential for a “gap” between human law and supernatural law (and also a gap involving any moral law to the extent a moral law is congruent or not congruent with any particular human law or any given supernatural law). It might well be supposed that a fairly standard historical pattern, transnationally and across cultures, involved the commonplace congruence within a given polity of human, moral and supernatural law among one another, and the further congruence of extra-legal influencers with all three; and it may well be that the attempted separation of the three laws (and the other influencers) is a relatively novel and fairly recent policy choice. In any event, it must be a rather obvious observation that the mere fact of a gap creates an issue. Some persons might celebrate, just as others might decry it (and the parties might cross paths: it may be there are some supernaturalists in favor of maintaining the gap of separation, and some others in favor of closing it, and some who take intermediate positions). What to do about the gaps involving moral law and extra-legal influencers is a problem that this essay identifies in the context of supernatural law, but it is a bigger problem than that, and must await more complete resolution in a subsequent Article.

has not been well-articulated by the courts that have dealt with the question. To speak (outside the current legal categories) of “just a bit” of shari’a, or of the “church,” or any other supernatural law, would seem to raise the questions: “how much” and “is it really ‘supernatural’ at all, or is it just a policy choice that does not need or depend upon supernatural authority?” To test the moral claims of any supernatural law, it is necessary to postulate a moral purpose to the law of any polity. If the law of any polity is directed to a moral end, then any supernatural law may be tested according to that end.

*B. Mediating Terms: Common Morality and Indemonstrable Principles*

A mediating term between “law” and “supernatural law” is a common sense moral philosophy supporting a normative jurisprudence. If a normative jurisprudence may be posited, and if it may serve as a measure, then the claims of any supernatural jurisprudence may be assessed against that measure.<sup>58</sup> It is rather obvious that the practical syllogism (if morality is good for the polity, and if supernatural law is good for morality, then supernatural law is good for the polity)<sup>59</sup> is dependent upon a commitment to “morality” prior to any commitment to supernatural law. What might be said about “law and morality” is worth discussing. Without it, law makes no moral sense and any conversation about supernatural law as friend or foe to the moral foundations of the polity is rendered pointless at the outset.

The need to propose a moral philosophy of common sense accessible to all citizens and not just academic specialists, and then to evaluate the claims of supernatural law and its contribution to the health of modern nations, should be apparent. It has already been proposed that a “rule of law” is a set of laws that its subjects can obey voluntarily and rationally, in conscience and in the absence of external force because doing so is good for the person affected (such action being referred to as

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<sup>58</sup> It is beyond the scope of this Article to do anything other than take this point as a hypothetical. Of course, one might assume it to be so as a sort of presuppositionalism or foundationalism, or one might recognize that it is in fact so, as a sort of empirically observed moral “sense,” or one might fashion some other explanation. It suffices for present purposes to observe simply that *if* there were a normative jurisprudence, *then* it could serve as a measure, and a model of a set of rational intuitions and inferences that can serve as the basis for a reasoned discussion. But if the posited moral philosophy should fail to persuade, then the next argument is a contingent-transcendental one: if anyone desires a rule of law (rather than rule by compulsive force alone) then what conditions must obtain? The basis of a common sense direct moral argument is set forth in this Section I.B. The basis of a transcendental argument investigating the conditions for a rule of law is set forth in Section I.C. Both arguments are interwoven in the discussion of the nonimposition principle and reasonable assurances of performance in Sections II and III.

<sup>59</sup> *See supra* note 8 (“the practical syllogism”).

“autonomy”).<sup>60</sup> Characteristic of a rule of law is the possibility that a person might autonomously will to think and to act in conformity with the law.

Embedded in the idea of a rule of law is the concept of a free subject who makes moral choices. The best term for such a subject is a “human being” (or “person”) and there is no way to avoid the manifest evidence that persons routinely make choices on the basis of indemonstrable principles. Any restatement of the obvious would be incomplete if it failed to propose a set of definitions or testable propositions having to do with common morality. For purposes of this Article, let it be postulated:

**1. Human Beings.** A “human being” (or “person”) is anyone who is either (1) capable of conceptual thought, syntactical speech, and apparent freedom of moral choice, or (2) biologically and naturally descended from persons having that capability, including by DNA signature, regardless of whether those capabilities are being exercised or even exist in such a descendent.

**2. Indemonstrable Principles.** “Indemonstrable principles” are those principles that are both manifest and claimed to be true even though they cannot be proved by reference to their conformity with external objects of perception. Some of these are analytically or tautologically expressed, as in the case of a material composite whole and its parts.<sup>61</sup> But others are predicated to be true on their own, and these include principles both of thinking and of acting. The significance of asserting these to be true is that they are not advanced as postulates, but as axioms.<sup>62</sup> The significance of admitting they are indemonstrable is that no one can demonstrate or prove them to a person who claims to deny them, yet they are true regardless.<sup>63</sup>

**3. Indemonstrable Principles of Thinking.** Indemonstrable principles of thinking about things include: the rule against contradiction;<sup>64</sup> the rule of causation;<sup>65</sup> the essential reliability of

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<sup>60</sup> See *supra* Part I.A.2.

<sup>61</sup> *E.g.*, EUCLID, *ELEMENTS*, reprinted in 1 GREEK MATHEMATICS: FROM THALES TO EUCLID 436, 445 (G.P. Goold, ed., Ivor Thomas trans., 1939).

<sup>62</sup> See *id.* (distinguishing axioms, definitions, and common notions from postulates); and see T.L. HEATH, *THE THIRTEEN BOOKS OF EUCLID'S ELEMENTS*, cited in *id.* at 436, 437, 443.

<sup>63</sup> LEWIS, *supra* note 47, at 34–35 (giving the example of the student who “cannot get” geometry and who, if really unable to “see” the principles, cannot be convinced of them any more than a color-blind student might be convinced to “see” the colors red or green).

<sup>64</sup> A thing cannot both “be” and “not be” at the same time and in the same mode. *E.g.*, ARISTOTLE, *Metaphysics*, Bk. IV, ch. 3, in *THE WORKS OF ARISTOTLE* (W.D. Ross trans., 1908), reprinted in 8 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 26, at 499, 524 (“[T]he most certain [principle] of all . . . [is] that the same attribute cannot at the same time belong and not belong to the same subject and in the same respect . . . [f]or it is impossible for any one to believe the same thing to be and not to be . . .”).

<sup>65</sup> Compare the statement “every effect must have a cause,” with the statement “everything must have a cause.” See R.C. SPROUL, *DEFENDING YOUR FAITH: AN INTRODUCTION TO APOLOGETICS* 51–53 (2003) (also combining the four indemonstrable

sense impressions;<sup>66</sup> and the use of language to signify meaning and of numbers to signify relationships.<sup>67</sup> These have been called the first principles of the speculative reason, probably because they are necessary to establish any subsequent thought or speech about things.<sup>68</sup> Because the fundamental predicate of such thinking is that a thing is thought either “to be” or “not to be,” all of these indemonstrable principles have to do with—and lead to subsequent statements about—what “is,” which is the copula in any such statement. These statements, in the affirmative mode, take the form “A is B.”

**4. Indemonstrable Principles of Acting.** Indemonstrable principles of acting and of thinking about choices between actions include: the rule that good is better than its absence or opposite and so, as an independent proposition, “ought” to be preferred;<sup>69</sup> and the cognates or corollaries—something is better than nothing, life is better than

principles of thinking, as set forth herein). The first statement properly states the law of causality and is analytically true. The second statement neither states the law nor is true. *Id.* See also IMMANUEL KANT, *The Critique of Pure Reason* (J.M.D. Meiklejohn trans., 1901), reprinted in 42 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 26, at 1, 17 (analyzing the concept that “[e]verything that happens has a cause”).

<sup>66</sup> It is impossible to prove sense impressions are real, but where thoughts or words are evaluated by their conformity to “reality” (and where their truth resides in such conformity), an objective reality, knowable either by its sensible effects or by its sensible accidents, is taken to be true, even if imperfectly knowable. See SPROUL, *supra* note 65, at 58–60; and see PLATO, THEAETETUS 157e-158d, reprinted in 7 GREAT BOOKS OF THE WESTERN WORLD, *supra* note [26] at 1, 520-21 (raising the problem: “How can you determine whether at this moment we are sleeping, and all our thoughts are a dream; or whether we are awake, and talking to one another in the waking state?... You see, then, that a doubt about the reality of sense is easily raised...[a]nd may not the same be said of madness and other disorders?”)

<sup>67</sup> It is not entirely clear why the external world seems intrinsically ordered so that it might be described at least analogically by words or numbers. But though the fundamental truth of these relations is clear, there is no demonstrable proof why these should be so, and no proof even that such relations “are” or must be so. *Cf.* SPROUL, *supra* note 65, at 61, 66–68 (discussing univocal, equivocal, and analogical uses of the word “good”—“good work,” “good grief, Charlie Brown,” “good guy,” and “good dog”); see also ARISTOTLE, *Physics*, Bk. VII, ch. 4, in THE WORKS OF ARISTOTLE (R.P. Hardie & R.K. Gaye, trans., 1930), reprinted in 8 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 26, at 259, 331 (discussing the word “sharp”—a sharp pen, a sharp wine, and a sharp note).

<sup>68</sup> See THOMAS AQUINAS, THE SUMMA THEOLOGICA, Ia IIae, Q.94, art. 2, ans. (Fathers of the English Dominican Province trans.), reprinted in 20 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 26, at 1, 220–22 (considering the precepts of natural law). “Therefore the first indemonstrable principle [of speculative reason] is that the same thing cannot be affirmed and denied at the same time, which is based on the notion of being and not-being; and on this principle all others are based . . .” *Id.* at 222.

<sup>69</sup> “[T]he first principle in the practical reason is one founded on the notion of the good, namely, that the good is what all desire. Hence this is the first precept of law, that good is to be pursued and done, and evil is to be avoided.” *Id.* Perhaps an equally fundamental starting point is the proposition that “something is better than nothing” so that “good” is something that is better than its absence (nothing) as well as better than its opposite (evil).

death, love is better than hate—and so “ought” to be preferred; and a person “ought not” cause harm to another person.<sup>70</sup> The fundamental predicate of acting is the conviction that one action is better than another (and so “ought” to be sought or done). The copula “ought” has to do with free choices by a person to will one thing over another beginning with some deontological or categorical moral principle. These statements concern what “ought” to be chosen by free persons who are free to choose. Sometimes they have been called the first principles of the practical reason, probably because they are necessary to establish any subsequent practical action about things to be done (or not done). These statements, in the affirmative mode, take the form “A ought to do or seek B.”<sup>71</sup>

**5. Rational Choice.** The reason any human being might voluntarily and rationally obey a rule of law is that doing so seems “good” to the person subject to the law. A thing is rationally “good” for a person if it is an object of reasonable desire, even on the basis of indemonstrable principles. Such an object is likely to make any person better off than its absence, and better off than the presence of its opposite. A reasonable desire is one subject to discussion governed by practical reason (or “right reason”) and also subject to the dictates of conscience as well as to the conclusions of “pure” intellect.

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<sup>70</sup> These are no more demonstrable than the first principles of the speculative reason, and no less solid. One could, of course, discard both and replace them with arbitrary will or power only, but that would be irrational. The point is that both speculative reason and practical reason depend on indemonstrable truths.

<sup>71</sup> It should be clear that these statements might be put in the form of a practical syllogism that begins with an indemonstrable but axiomatic “ought” statement (for example, life ought to be preferred to death) and ends with a conclusion having the same copula (A ought to do B, where “B” answers to a minor premise added to an axiomatic major premise). There is no illicit conversion of any “is” statement to any “ought” statement. The familiar bromide attributed to David Hume is inapplicable. Compare DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING, Sec. XII, Pt. III, *reprinted in* 35 GREAT BOOKS OF THE WESTERN WORLD, *supra* note [26], 445, 508-09 (1999) (suggesting that many unexamined “ought” statements are illicit conversions), *with* MORTIMER J. ADLER, THE TIME OF OUR LIVES: THE ETHICS OF COMMON SENSE 130–34 (1970) (demonstrating how to fashion “ought” statements without any illicit operation, and maintaining that valid “ought” statements follow as inferences from syllogisms based upon a self-evident, categorical “ought” statement as the initial premise). See also ADLER, *supra*, at 281 nn.18–19. Adler’s position goes further than the limited claim advanced for the sake of the argument herein: an indemonstrable yet true statement already in the form of “ought” (Adler contends not only for the truth of, but also for the demonstrable proof of the fundamental “ought” proposition; for the sake of the argument presented herein, I need not go so far—a common moral truth, even if unprovable, suffices). Of course, the practical syllogism is subject to limitations that carry through to its conclusion that if the opening premise is qualified (for example, other things being equal), then the conclusion will be likewise contingent. These “ought” statements are not only not illicitly converted from “is” statements, but have, if anything, a higher degree of confidence. One test of the validity of a generalized “ought” statement is the impossibility of honestly thinking the opposite—it cannot be honestly thought that (other things being equal) any person “ought” to seek what is bad for that person, or that (assuming something good is available) any person “ought” nonetheless to desire nothing at all in preference to something.

**6. Individual, Common, and Legal Goods.** Among those things individuals might desire are:

- (a) wealth, including material goods and an abundance of them;
- (b) pleasures, including leisure activity, amusements, play, the enjoyment of things that feel good in the consumption or use of them or afford disinterested pleasure in the contemplation of them, relaxation, good health, and the absence of pains or disappointments;
- (c) power or reputation, including fame, glory, celebrity, and honor, and the absence of insult or discredit, unfair deprivations, and slights;
- (d) freedom from any restraint at all, including not only freedom of thought and freedom of the will, but freedom to think and will anything at all, and to act upon such impulses to the maximum extent possible;
- (e) various eclectic goods, including liberty or equality, sharing, caring, consensus-building, and all-around “niceness,” efficiency, and the avoidance of waste;
- (f) relational goods, including friendship, love, family relations (husband and wife, parent and child, and extended family connections), social relations, voluntary associations, and other affiliations;
- (g) virtue or character, including the virtues of courage, temperance, justice, wisdom, and the absence of dangerous addictions, laziness, untrustworthiness, meanness, or cruelty; and
- (h) happiness considered, technically, as a whole life well lived in accordance with complete virtue and accompanied by at least a minimum sufficiency of external goods.<sup>72</sup> In addition to health, wealth, pleasure and reputation, the “good” of a good government is one of the greatest external aids to happiness.<sup>73</sup> The common good and the political good consist in those goods that can be shared by all members of a polity and also may be supported by the polity because they are nonrivalrous, nonexclusive, and because they suffer from the public goods analysis of collective action, externalities, and free-riding. If “happiness” is defined, technically, as comprising individual and internal virtue plus a minimum sufficiency of external goods, then the

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<sup>72</sup> In this sense, most of the goods in subparagraphs (a) through (e) would be considered “external” goods because they are more or less outside the unilateral power of the individual, or require favorable circumstances to acquire. Those in paragraphs (f) and (g) may be considered “internal” because they are more nearly within the power of an individual to attain and less subject to outside disruption.

<sup>73</sup> The list could be extended almost indefinitely. It might include, for example, some commitment to the public acting out of a person’s self-declared sexual identity; some sort of positive commitment to absolutely nothing whatsoever; some commitment to rude, ugly, mean, or death-friendly pursuits; and any number of other cafeteria-style “goods,” all of which might deserve to be named in a restatement of the obvious. But some of those might contradict a rule of law and many of the other omitted items could probably be subsumed under one of the categories already listed, which suffice for purposes of discussing the conditions favoring a rule of law (while nothing might be interesting to the nihilist, it seems inherently implausible to build a rule of law around nothing at all).

pursuit of happiness as a goal of the polity (taken either as an active or passive goal: actively to facilitate,<sup>74</sup> or passively just not to interfere with, its citizens' pursuit of it) becomes not only reasonable but realistic.<sup>75</sup> It is possible for a polity to cooperate with a pursuit of happiness so defined without privileging or sacrificing any of its subjects. On the contrary, if "happiness" is defined on any other basis, it seems impossible for a polity to achieve, and futile for a polity to try to deliver or compel, never-ending and always increasing wealth, pleasure, power, fame, or any other object of desire for itself or its subjects.

The legal good has to do with whether and, if so, the extent to which any particular legal system is placed at the disposal of (or is directed towards) the common good and thereby contributes to it.<sup>76</sup>

**7. Absolute and Relative Goods.** It may be posited, absolutely, that good is better than evil; life better than death. But at the same time, it is obvious and evidently true that any particular instance is often relative to time, place, and circumstances. A soldier, policeman, fireman, and others might deliberately give their life to save another's. But the general proposition, "life is better than death" is unaffected by this particular. It is an obvious fact that the good has an absolute and unchanging aspect and also has a contingent aspect that is relative and uncertain. Reasonable persons do not differ as to the first, but can and do differ as to the second.

**8. Moral Law.** Law in general is a rule or command imposed upon its subjects by a sovereign. Where (1) the sovereign and the subject coincide within a self-binding person who has accepted a moral imperative by choosing to act in accordance with it, and (2) the consequent rules or commands are claimed to be based upon practical reason, indemonstrable principle or other moral authority, the resulting claims constitute a "moral law" binding upon that person.

A key to the practical syllogism, as it relates to morality, to the polity, and to supernatural law is the proposition that virtue (in the sense described in 6(g) of the above list) is an internal good somewhat, but not completely, impervious to externals. Virtue is, in fact, both a nonrivalrous and nonexcludable good, and one of the very few goods that is. But, though it is largely impervious to externals, it is not completely

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<sup>74</sup> Active support of the goal might include nothing more than indirect aid or encouragement by supporting various extra-legal influencers on conduct that support congruent systems of supernatural (or moral) law. For a listing of "extra-legal influencers" (including markets, norms, associations, and architecture) *see supra* text at note [55].

<sup>75</sup> This argument has probably been made many times and by many persons because it seems so obvious. *See, e.g.,* MORTIMER J. ADLER, *ARISTOTLE FOR EVERYBODY: DIFFICULT THOUGHT MADE EASY* 92–94 (1978) [hereinafter *ARISTOTLE FOR EVERYBODY*].

<sup>76</sup> As a subspecialty, it might also be asked whether a particular law contributes to the common good by being (a) retributive, (b) corrective, (c) distributive, (d) commutative, (e) deterrent, or the like.

so. It is a sort of public good, subject to the collective action problem and to public goods analysis much like any other public good.

From this it follows governments really can contribute (actively or passively) to the pursuit of happiness, for the common good, but only in the technical sense of “happiness” indicated in 6(h) herein. Because each of wealth, pleasure, and power are rivalrous, excludable, finite and limited, no government can maximize any of those without taking sides in favor of one person, faction, class, or group against another. It follows none of these can be maximized for the “common” good of all, but only for the particular good of one faction, group, or class. On this unfortunate understanding, there can be no “rule of law” for the outsider, for the members of the “other” faction, group, or class. But a government can rationally encourage the common good, which consists in the pursuit of happiness, understood as a technical term of art. This is because virtue, the internal good that chiefly constitutes happiness, is free to all, and the external goods contributing to happiness are limited to those essential for virtue to thrive. It does not take much for that to occur. A modest sufficiency of external goods, as opposed to the infinite multiplication of them, is all any good government needs to provide, given its citizens are themselves virtuous.

Among those who hold that the polity has an active, positive role<sup>77</sup> (or even a passive but nonneutral role) to play in its citizens’ pursuit of happiness, it is this that must have been the rational meaning of the “pursuit of happiness.”<sup>78</sup> This must be the rational meaning of the proposition that the polity must have a moral and virtuous citizenry. This is the basis for the moral law component of the practical syllogism previously asserted as a hypothetical. It is also the basis for a rule of law, for it is what enables a polity to fashion the kind of law a person would be prepared voluntarily to obey. The next subsection explores additional conditions for a rule of law.

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<sup>77</sup> An “active” role does not imply anything more than indirect support of the polity’s goal by its choices to support various congruent extra-legal influencers. *See supra* text at note [55] (describing extra-legal influencers on conduct). Because the modern state taxes, subsidizes, allocates airwaves, cables and communication outlets, mandates compulsory education and has something to say about its schools’ selection of books, viewpoints and curriculum, and because it grants various concessions and privileges, a modern state is very able to “influence the influencers.” In doing so, the polity may be understood to be actively encouraging the pursuit of virtue or happiness, and supporting a congruent moral law or a supernatural law (or not) by the direct and indirect choices it makes in respect of these extra-legal influencers. This observation has nothing to say about so-called positive legal rights v. negative rights analysis, but is limited to the rather obvious fact that the polity might take an active or a passive stance in its relation to extra-legal influencers, and that this stance is independent of any commitment to negative legal rights, and does not require any embrace of positive legal right theory or practice.

<sup>78</sup> ARISTOTLE FOR EVERYBODY, *supra* note 75, at 92–96 (commenting on the assertion of a right to the “pursuit of happiness” in the U.S. Declaration of Independence).

### *C. The Restatement of the Obvious and the Rule of Law*

If a rule of law is desirable and possible, it is desirable because it is fitting for persons. Only persons have any claim to be ruled for their own good. Outside of the obvious principles so far set forth in Sections A and B of this Article, there is no basis for anything else to claim a rule of law. Neither cows nor any other subhuman animals have any such claim because none of them make apparently free moral choices based upon conceptual thought and evidenced by syntactical speech. If, as asserted in Section B above, the mediating term between “law” and “supernatural law” is a common sense moral philosophy supporting a normative jurisprudence, then it is to normative jurisprudence we should turn. Assuming a rule of law might be desired, what are the conditions most likely to support or attain it? Rather than speaking vaguely of “democracy”<sup>79</sup> or of “liberty,”<sup>80</sup> this Article proposes a specified set of testable propositions. The rubric is “rule of law” and not “democracy” or any other term. The following five topics draw the outlines of a rule of law. For the convenience of the reader, all of these are summarized in the attached Appendix A.

#### 1. Topic One: Principles of Moral Realism

It makes no sense to speak of comparatives relative to supernatural law, or to speak normatively without a first look at things obvious to most people. The reference is to the great multitude subject to the law, if not to the elite lawgivers themselves. There are four things to be said at the outset. First, there is an objective reality. Second, at least some things about objective reality are knowable or subject to a reasonable opinion at the level of working probabilities and plausible concepts. Third, these things knowable about objective reality include not only

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<sup>79</sup> See David Bukay, Review Essay, *Can There Be an Islamic Democracy?*, MIDDLE E. Q., Spring 2007, at 71, <http://www.meforum.org/article/1680> (citing Professor John L. Esposito and others for the proposition that “democracy” is variously defined and culturally determined). Granted, “rule of law” is likewise variously defined, but this Article proffers its own specified definition. Whether it is culturally determined must be answered by the adherents of any given system of supernatural law who might object to it on that basis. Regardless of the minute controversies, if “democracy” ultimately means something like “whatever any majority wills into law,” it does not begin to answer the question whether any person subject to such laws has any obligation in conscience to obey them if given an opportunity to disobey.

<sup>80</sup> See MORTIMER J. ADLER, *THE IDEA OF FREEDOM: A DIALECTICAL EXAMINATION OF THE CONCEPTIONS OF FREEDOM* 29–34, 198 (1958) (explaining that “freedom” or “liberty” is variously defined). If “liberty” has many meanings, and if, to some persons, it ultimately means something like “whatever any person wills and has the capacity to do,” it does not seem particularly useful on the question without some additional elaboration. It seems more productive to elaborate upon the conditions for a “rule of law” than upon the various notions of “liberty” because it more completely answers the question posed herein.

matters of fact and probable opinion about things, but also matters of conduct, and doing one thing in preference to another thing (morality). Fourth, the (human) law sometimes fails to demand all of what might be demanded by the moral laws which its subjects also embrace, and the resulting gap is a matter of some dispute. Some say the gap is good and ought to be maintained, while others suppose the gap is a fault and ought to be closed. The same gap is also a matter of continuing dispute when it comes to the claims of supernatural law within any polity. These four propositions are claimed to be obvious because it is evident from observation that a great multitude of people do, in fact, act upon them.

These principles afford a basis for the postulated rule of law. *If* there is any law a subject might be inclined voluntarily to obey because doing so seems good to the person, it is likely to be some law that appears to be good for that person. Should a law be announced on any basis opposite or contrary to one of the first three foundational premises just stated, namely, if it should be maintained that “nothing is true, and so what if it is,” it would seem rather obvious the lawgiver is undermining any claim to voluntary obedience. In what amounts to another way of saying the same thing, if the law were posited by lawmakers who deny there is an external reality, or deny they can know anything about it, or concede only that they might know something about matters of fact, but nothing at all about matters of morality, they undercut the moral authority of their own law.

The lawmakers who are in denial of objective moral reality might assert some efficiency, safety, protection, or advancement of particular interests; they might assert a “policy” or some way to avoid waste—but they will not have asserted that the subject “ought” to obey when the subject can get away with not doing so.<sup>81</sup> The argument is not that such nonmoral bases are completely ineffective to counsel voluntary obedience, but only that they are not as effective as they might be if a positive moral basis were also explicitly asserted and defended. This is not so hard to do if the general population already accepts the underlying and basic intuitions upon which a moral basis is asserted. The argument is, assuming a rule of law is possible, that a plausible claim the lawgiver actually knows something about reality, including moral reality, affords a better set of conditions for attaining a rule of law than does the opposite claim.

So also with the fourth premise. If the lawgiver strives to close any perceived gap between the demands of (human) law and any more

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<sup>81</sup> If it is affirmed that honesty, for example, is “a good policy” then the speaker is confessing that the moment a better policy appears, the speaker will forsake honesty (unless the speaker also believes there is something to commend honesty beyond mere policy).

stringent demands of a moral law or a supernatural law, the attempt might create burdens which its subjects cannot or will not bear. The resulting conditions might be as unfavorable to a rule of law as those that stem from a lawgiver's refusal or denial of any moral reality.

## 2. Topic Two: Sources of Any Existing Law

The creative or interpretative sources of any existing law can be nothing more than fiat, reason, and history. This claim is obvious because it is exhaustive. There is simply nothing else that generates or interprets law. To be sure, things other than law influence conduct and even command obedience. One elegant recent formulation is by Professor Lessig, who recognizes a regulatory matrix including not only law, but also norms, markets, and code (or "architecture").<sup>82</sup> Another is by Professor Berman, who recognizes the tripartite nature of law, and the desirability of a moral basis for it.<sup>83</sup> There are other formulations of the broader mix of things forcing conduct outside of or in addition to law, but when it comes to law in its univocal sense it still seems quite obvious that law itself can only come from one of three broadly understood fonts—fiat, reason, and history.

Fiat law most obviously means the law that is what it is by virtue of having been made. It is positive law because it is "posited" by some person or group of persons who had the power both to posit and enforce it, as a sovereign in a state, or as any sovereign over any other subject. Fiat itself implies nothing other than power imposed by a state or any other sovereign. It might be a power exercised with restraint, in a reasonable way, and for the good of the people being governed. Or it might not. It could just as easily be a power exercised without restraint, as an arbitrary act of will, pleasure, or whim, and for no good at all. It might exist, or some special authority might exist, only during some "emergency." It could be anything between either extreme. It is, however, the most obvious and most undeniable source of law imaginable. Fiat law simply is, and because it is, it is evident to anyone. Fiat law has been not only evident from time immemorial, but has been exhaustively discussed, enough to have produced several variations or "schools."<sup>84</sup>

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<sup>82</sup> LESSIG, *supra* note [55]; *supra*, text at note [55].

<sup>83</sup> HAROLD J. BERMAN, LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION, at xii (2003); Harold J. Berman, *Law and Logos*, 44 DEPAUL L. REV. 143, 149–53 (1994).

<sup>84</sup> These include the one formulated by Hans Kelsen. See HANS KELSEN, PURE THEORY OF LAW 33–37 (Max Knight trans., Lawbook Exchange, Ltd. 2005) (1967); see also OTTO A. BIRD, THE IDEA OF JUSTICE 43–46 (1967) (counting Hans Kelsen among many other positive law proponents).

Reasonable law most obviously refers not only to a source that is generative of law, but also a heuristic that drives the interpretation of any law. As a source of law, reason is a method of creating law not only as a gap-filler but as a deliberate extension or development of existing law and as a creator of new law. As a heuristic, reason is a method of interpreting any given law. When speaking of “reason” for these purposes, what is signified is any coherent application of reason and observation, using methods of induction or deduction. It is not necessary to call it a “science” of the law. It is at least as good to call it an “art” in the sense of “rhetoric” dealing with matters of probabilities reasonably sufficient for rational decisionmaking in contingent and practical affairs in the face of irreducible risk, uncertainty, and imperfect knowledge. Reasonable law has been apparent from ancient times, and continues to be exhaustively discussed. Some of the schools using reason and observation either to generate or to interpret law include the various sorts of “natural” law, the various schools of “utilitarian” or “realistic” law, and the various kinds of “law and [whatever]” provided the “[whatever]” is based on reason and observation.<sup>85</sup> Of these many variations of natural law, the “law and economics” school has been quite influential in the recent course of law in the United States and elsewhere.

Historical law most obviously connotes the source and anchor of law that emphasizes a historical foundation, in the sense, for example, of the historical schools of Anglo-American and German law, either for the origin or the interpretation of existing law. Moreover, as used in any restatement of the obvious in law, it also includes the related social, cultural, and normative elements having the practical effect of influencing, generating, interpreting, and channeling any fiat law or reasonable law otherwise enacted or imposed in any particular community at any particular time. Historical law is the obvious explanation why it is not always possible to “export” “democracy” (that is to say, to enact laws or to create constitutions thought to be conducive to democracy in nations or states in which there is no historical or cultural basis for such things), or for that matter, to “impose” any other “new” law. Such “improvements” might be thwarted by inhospitable historical

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<sup>85</sup> See BIRD, *supra* note 84, at 118–22 (listing some proponents of, and discussing a “natural right” theory). There is, of course, nothing entirely natural about the “natural law” except only that it may be known or profitably discussed on the basis of natural reason alone (and without any appeal to “supernatural law”). See AQUINAS, *supra* note 68, at 222. My category of “reasonable (or natural) law” combines the so-called natural law schools with all the other schools that rely upon reason and observation, and so I also include the various approaches that have been labeled utilitarian or “realistic,” of which there are many. See BIRD, *supra* note 84, at 79–82 (listing some proponents of a “social good” or utilitarian theory).

law, even if the proposed improvements are supported by the power of positive law or are alleged in reason to lead to economic prosperity, and even if they are contended to be reasonably preferable to existing norms in any given society.

These three sources—fiat, reason, and history—are claimed to be obvious because each of the three is evident. They are plainly manifest in observable legal systems and would appear free from doubt. They are claimed to be exhaustive because, so long as “law” is used in a univocal sense, there seem to be no other sources of law.<sup>86</sup>

A candid recognition of these sources of law affords yet another basis for the postulated rule of law. *If* there is a law any subject might be inclined voluntarily to obey, it is likely to be some law that appears to be good for that person. If the three sources of law are congruent, then it is more likely the law will appear to be good. That is, if any given adjudication, or any act of new lawmaking is seen to be consistent with existing positive law, is also evidently and reasonably related to something good, and is at the same time in accordance with long-established customs and norms of the subjects, it would seem a more likely candidate for voluntary adherence by its subjects. So, for example, if a written constitution actually and explicitly provided some basis for an asserted right, and if that asserted right were reasonably ordered to some good, and were grounded in historical norms, then the concurrence of all three sources of the law would be expected more nearly to lead to voluntary consent than if only two, or only one (or none) of the three sources were apparent. This is to say, law that is nothing more than brute force (that is, if there are nine votes, then five of nine rule simply because they can),<sup>87</sup> and cannot command any plausible or convincing support from reason or from history, is not likely to be obeyed absent brute force or the presence of a docile and trusting citizenry.

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<sup>86</sup> To refer, say, to the workings of a market as a “law” is to speak allegorically. It is part of the power of Professor Lessig’s formulation that he claims markets are *not* laws, but that together with law, norms, and code, they influence human conduct. See LESSIG, *supra* note 82, at 86–91. Likewise, in context, it appears he is using “norms” to refer not to the historical school of law in which norms and customs become law or are a font of law, but to an extra-legal influencer of human conduct. See *id.*

<sup>87</sup> See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971).

[A certain kind of man] claims for the Supreme Court an institutionalized role as perpetrator of limited coups d’etat.

... What can he say, for instance, of a Court that does not share his politics or his morality? I can think of nothing except the assertion that he will ignore the Court whenever he can get away with it and overthrow it if he can.

*Id.*; see also *id.* at 10, 20–21 (identifying some problems along these lines).

### 3. Topic Three: Making or Changing Law

It is evident laws can be made over time because many new laws have, in fact, been made. It is equally evident law can change over time because many laws have, in fact, changed over time. It is obvious that if law is created or changed, then at least sometimes it might be that the law was created or has changed for a reason (rather than simply made up on a whim of arbitrary fiat, or simply changed in mindless and purposeless response to some blind historical, accidental, or chance evolution).<sup>88</sup> This is particularly obvious when it is observed that a great many people actually—actively, openly, notoriously, purposefully, and deliberately—try to change the law, and many make a concerted effort to explain, justify, convince, or rationalize their goals. It is obvious there are only a finite number of reasons that might be given by anyone, to anyone else, in support of a change in law or the creation of any new law. The nonexhaustive list of deliberate and purposeful reasons for change must include at least the following four:<sup>89</sup>

- *Is it reasonable?* If any existing law no longer makes any reasonable sense, or is not as sensible as it once was, then perhaps it may be time to improve or replace it by something more reasonable.
- *Is it any good?* If the law is good for nothing or no one,<sup>90</sup> or for very few or only for a particular sect, faction, class, or other subgroup, then it may be time to redirect the law either to the common good, or at least to some good of some kind, or for someone, which is claimed to be better than the current status.
- *Is it articulate, intelligible, and clear?* Granting that law in its generality may be expected to be not entirely certain until applied in particular instances,<sup>91</sup> there is a problem if any particular law is so

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<sup>88</sup> Cf. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008) (explaining that the applicability of the Eighth Amendment's excessive cruelty standard must change with "evolving standards" of human decency). There are other judicial opinions that contemplate an "evolving" law, perhaps in the technical sense of the word. Surely there must be at least a few instances in which a new law was actually developed on purpose and for a purpose. It might be readily admitted that the Uniform Commercial Code, and especially Article 4A on electronic funds transfers, for example, shows at least some signs of intelligent design. UNIF. COMMERCIAL CODE art. 4A (2007).

<sup>89</sup> These are posed in the form of questions, in the rhetorical mode of one who is questioning any existing law with an eye towards changing it, or who might be proposing a new law that better answers the need the question implies. They conform to Topic Three of the attached Appendix A. See *infra* app. A. They are by no means original. See AQUINAS, *supra* note 68, Ia IIae, Q. 90, art. 4, ans., at 207–08.

<sup>90</sup> To be sure, a law that truly is good for nothing is a law that might be deemed good to a nihilist. But aside from the nihilist, a law that is good for nothing would not seem to have any obvious appeal to anyone.

<sup>91</sup> ARISTOTLE, *THE NICOMACHEAN ETHICS* bk. 5, pt. x, at 317 (G.P. Goold ed., H. Rackham trans., revised 1934) (it is "equitable" to correct any law where it is defective,

general or obscure and subtle<sup>92</sup> as to be unintelligible, or lacks clarity sufficient to predict whether conduct conforms or does not conform. If not even the most informed legal advisors can confidently predict outcomes, then it would be better to clarify the law, if such clarification is possible and if the benefit is worth the cost.

- *Is it authorized?* Almost everyone, even the most ardent champion of fiat law, makes a distinction between the authorized law of a polity that compels its subject and the unauthorized force of the pirate, outlaw gang, or highwayman that compels its victims at the point of a knife or gun.<sup>93</sup> The notion seems to be almost universally held that laws are “authorized” and other compulsive orders are not. A citizen is obligated to follow the law of the state, but not the demands of an outlaw. If it should be the case that one or more laws have been created or interpreted beyond the authority vested in any agent within a polity, such laws should be undone, removed, or changed back to their original and authorized form.

It is rather obvious these four all tend to relate to one another. Thus, if reason is part of the law, it is reasonable to suppose any fiat or historical law that leaves a gap may be filled, without any usurpation of authority, by a reasonable gap-filler provision.<sup>94</sup> Likewise, if a law is

owing to its universality); see generally, *id.* at bk. 10, pt. 20, at 641 (discussing the problems in framing laws).

<sup>92</sup> At least some fields of law—copyrights and patents, in particular—“approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle [sic] and refined, and, sometimes, almost evanescent.” *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901). One might well worry about any strategy committing the wealth of nations to a “law” of such subtlety few can explain it coherently and no one can predict its outcomes confidently.

<sup>93</sup> Compare AUGUSTINE, *THE CITY OF GOD* (Marcus Dods trans., T & T Clark, Edinburgh 1871), reprinted in 18 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 26, at 129, 190 (“[Without justice], what are kingdoms but great robberies?”—others translate the same passage more freely as “Without justice, what are kingdoms but great robber bands?” AUGUSTINE, *POLITICAL WRITINGS*, Michael W. Tkacz and Douglas Kries, trans., at 30), with Kelsen, *supra* note 84, at 313 (“If the state is comprehended as a legal order, then every state is a state governed by law (*Rechtsstaat*) . . . . In fact, however, the term is used to designate a special type of state or government . . . . A *Rechtsstaat* in this specific sense is a relatively centralized legal order . . . bound by general legal norms . . . and certain civil liberties of the citizens, especially freedom of religion and freedom of speech . . .”). By raising this possibility, Kelsen suggests that a basic norm, while perhaps initially established as a matter of will and affording the basis for pure positive laws established as a matter of will, is something that preserves the distinction between lawful and lawless force.

<sup>94</sup> It should go without saying that a law based upon reason may be completed by reason—as the maxim says: “[where the reason leads the rule follows,] where the reason ceases the rule ceases.” See SIR EDWARD COKE, *The First Part of Institutes of the Lawes of England*, in 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 577, 687 (Steve Sheppard ed., 2003) (“*Cessante ratione legis cessat ipsa lex.*”). It might be reasonable to fill the gap with a term the parties (or the lawgiver) would have agreed upon in hypothetical negotiation; or with a different term the more dominant party might have

understood to be dedicated either to the common good or to any particular good, then a gap in any sort of law may be filled, without usurpation of authority, by a gap-filler calculated to accomplish the good intended by the existing law. Moreover, if there are judges who have historically been given the authority to develop a sort of organic or common law, then their authority permits them within the discipline of the polity to develop that law, presumably in accordance with the historical and reasonable bases of the law.

There are other reasons for changing law than these four. Among the other factors that might make any law arguably good, better, or best are questions whether existing law is predictable, consistent, systematic, humane, compulsory, and validated.<sup>95</sup> These characteristics are related to one another and to the four factors already mentioned. The more it is reasonably related to some articulated good, the more predictable it might become. Any law might be even more predictable to the extent it is also consistent (both internally coherent and also consistent over time) and systematically ordered in its patterns and structures to permit a kind of deductive process to predict juridical outcomes—a degree of “formalism” that is not an entirely bad thing. Finally, if a law is not properly ordered to human beings or imposes burdens that are or seem to be inhumane, it cannot be obeyed;<sup>96</sup> if a law is honored more in the breach than in the observance, then obedience becomes not compulsory but optional, and enforcement begins to look arbitrary and unjust;<sup>97</sup> and if a law consistently fails of its intended purpose, result, or object and is negatively validated, it becomes an obvious candidate for change.<sup>98</sup>

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insisted upon; or with a forcing term the more dominant party might have rejected but that might, in subsequent instances, create an incentive for someone in the position of a dominant party to explicitly include in the agreement. The point is simply that “reason” itself can provide an argument for an authorized interpretation if, but only if, the law itself is deemed to be reasonable. Provisions such as these are sometimes appended to comprehensive civil codes to provide for their application. *See generally* 3 THE CIVIL CODE OF THE STATE OF NEW YORK: NEW YORK FIELD CODES 1850–1865 (as reported by the commissioners of the code, but not enacted by the State of New York), at 638 (Lawbook Exchange, Ltd. 1998) (1865) (reporting proposed § 1996, “An interpretation which gives effect is preferred to one which makes void.”); *id.* at 639 (reporting proposed § 1997, “Interpretation must be reasonable.”)

<sup>95</sup> See *infra* app. A, ch.2, Topic 3, §§ 301–11.

<sup>96</sup> It would be utopian, fit for imaginary or nonhuman beings possessed of imaginary or nonhuman powers and abilities, but not fit for actual human beings.

<sup>97</sup> Selective enforcement of laws that the polity will not generally submit to, but that have not been repealed, creates disrespect for the law, coupled with opportunities for corruption of law enforcement agents. Some laws are worth that risk, but all that is claimed here is that such laws are worth reexamining from time to time.

<sup>98</sup> Something that is not working is a good candidate for reexamination and overhaul.

These other factors seem equally as obvious as the first four. Certainly, if any law is systematic, then it is easier to develop and to fill gaps with authority and with intelligibility. If a law is also validated, it is easier to demonstrate that it is good for something rather than nothing, and it becomes more possible to count the cost of attaining the identified good. All of these factors in the nonexclusive listing given here are claimed to be obvious. These factors are claimed to be obvious because it seems unreasonable to think the opposite. It seems evident (even when qualified by the phrase “other things being equal” or the phrase “insofar as reasonably possible”) that a law which is more nearly reasonable, good for something, articulate, authorized, predictable, compulsory, humane, consistent, systematic, and validated is better than its opposite.

It would seem no one could seriously advocate laws that are unreasonable, immoral, amoral, good for nothing, incoherent, unauthorized, unpredictable, voluntary, inhuman, inconsistent, random, or never validated. This obvious understanding creates a rather unremarkable taxonomy containing categories against which to evaluate an assertion that any given law “ought” to be changed, or any new law “ought” to be enacted. If a “change” is proposed, it is obviously and easily questioned whether and exactly why the change is asserted to be better rather than worse. As a condition to the postulated rule of law, it would seem safe to say new or modified laws are more likely to command the voluntary obedience of their subjects to the extent the new or modified laws constitute a change for the better.

4. Topic Four: Law and Justice (the concept of justice as a rule or measure against which any law may be evaluated)

Justice is not a synonym for “law” nor is it the same thing as benevolence, love, charity, or generalized goodness. If it were, it would be redundant. Justice typically signifies something to which someone is entitled while at the same time signifying a standard against which the law is measured. Other terms, including benevolence, love, or charity, typically signify something to which a person is not entitled. It seems a substantial, confusing, and obfuscating category mistake to use “justice” to refer to anything to which a person is not entitled. It is substantial and harmful because this is a consequential category mistake. As a matter of common sense, many persons think it is appropriate to demand justice and to expect their polity to deliver justice for all. But if “justice” is so confused as to cover things to which no one has any right, then the resulting polity would seem an exercise in tyranny, all the worse because the objects sought by the compulsory force of the polity might seem intrinsically “good” (things such as mercy, love, and other

gifts certainly are good, but only when voluntarily rendered and not when coerced by force).<sup>99</sup>

As used in this Article, “justice” is a term signifying an objective standard against which a law might be measured. It includes three sets of terms, introduced in overview in the following chart:

<b>Column A</b> <i>(misguided moralism)</i>	<b>Column B</b> <i>(4-dimensional justice)</i>	<b>Column C</b> <i>(incomplete analytics)</i>
An interest or construct	The right	Something other than lawful
. . . of the stronger	The fair	Neutral process or rules
. . . a false consciousness	The lawful	An empirical factor
A nomophobic impulse	The good	Opportunity or results
Instrumental and adjectival “justice”		

Considered as the set of four terms tabulated in Column *B* above, justice consists in the right, the fair, the lawful, and the good. As so considered, “justice” consists in a combination of each of the four dimensions. It is asserted that each is irreducible to any identity with any of the other four, and that justice itself consists in a combination of all four elements. Moreover, it is conceded that each of the four is partially predicated on a moral and partially on a conventional or analytic basis—each of the four is partially categorical (deontological) and at the same time partially conventional (contingent).

The “right” is a correlative of duty, and it is also a matter of giving to each what is due.<sup>100</sup> It constitutes paying the debts, or performing the

<sup>99</sup> One of the important claims advanced in this Article is precisely that the dual sovereignty concept is the only one that might deliver the nonjustice goods of love and charity that might enrich a polity. The supernatural law is recognized as binding only by those who voluntarily submit to it. If a supernatural sovereign commands a law of love which extends to believers and to nonbelievers, such an obligation binds only the believers, to the advantage of the believer (that is, the believer who benefits from an act of love performed by another believer) and also to the advantage of the nonbeliever (assuming, of course, that a nonbeliever might remain free to decline unwanted gifts). Such a supernatural law would contribute to the health of a nation in tangible ways. It preserves the limits of the visible state by allowing the state to confine its laws to the realm of justice, and yet encourages the voluntary provision of the nonjustice goods that so many persons want and need. It may be only the believers of supernatural law who recognize an obligation to love their neighbor, but there is no state sanction for failure to love, and the believer is free to abandon the supernatural law without any visible penalty at any time the burden might seem too great or whenever the believer finds some ground to withdraw belief.

<sup>100</sup> See, e.g., PLATO, THE REPUBLIC, bk. 1, [p. 331] in THE DIALOGUES OF PLATO (Benjamin Jowett trans., 1914), reprinted in 7 GREAT BOOKS OF THE WESTERN WORLD,

obligations of duty. Were there no duties, there would be no rights. This is in some sense analytically or tautologically true.<sup>101</sup> To go further, if there were no constant duties, this tautology would be grounded simply in convention or will: whatever duty is determined upon, as a matter of will or arbitrary decision, that is the duty which must be obeyed and whence a set of correlative but equally conventional “rights” would be derived.<sup>102</sup> But because it seems, instead, rather obvious that there is among the population of the polity a number of persons who believe there is a human duty to live, to live well, and to make the choices conducive to a whole life well lived in accordance with virtue,<sup>103</sup> then there exists a claim to the existence of an obvious common duty which sets the standard for measuring what is right. In a restatement of the obvious, there is no need to take sides—either there is nothing but a conventional duty, so “justice” measures only the extent to which any law actually promotes the “right” as conventionally understood; or else there is an inherent human duty, so “justice” also measures the extent to which any law promotes the inherent and inalienable rights of humankind. Either way, it is obvious that the “right” is something justice can (and does) hold up as a standard against which to measure any law.<sup>104</sup>

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*supra* note 26, at 295, 297 (defining justice as telling the truth and repaying debts); *id.* at 298 (defining justice as rendering to each his due); *id.* bk. 4, [p. 443] at 349, 354 (minding one’s own business).

<sup>101</sup> *E.g.*, WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 38 (Walter Wheeler Cook ed., 1919).

<sup>102</sup> *See* W.S. GILBERT & ARTHUR SULLIVAN, THE PIRATES OF PENZANCE, OR THE SLAVE OF DUTY (Bryceson Treharne ed., 1879). If accidentally indentured to serve as apprentice to a pirate (should have been a “pilot” but for a mistake), then the subject has a duty to be a full-bore pirate; when released from the pirate profession upon the twenty-first birthday, the subject has a duty to hunt down and capture his former comrades; when confronted by the accident of a birthday that falls on the leap year-only day of February 29, and that most ingenious paradox creating a situation of an apprentice who is twenty-one years old but has had only a handful of birthdays, then the subject has the duty to give up the task of hunting the pirates and to take up the duty of betraying the pirate hunters to the pirates. *Id.* And so it goes in staggering incoherence. As with any *reductio*, one obvious solution is to give up the premise (here, the embedded premise that duty is wholly conventional). If there were not an inherent human duty to live well by making moral choices, there would be no inherent or inalienable right to choice, to freedom, or to life, liberty, property, and the pursuit of happiness. *See infra* Part I.D.3.

<sup>103</sup> These duties generate corresponding rights to life, liberty and the pursuit of happiness. Mere survival has long been taken to be so strong a drive in all persons that it is treated “as if” survival itself were a duty.

<sup>104</sup> Either “right” connotes a duty coterminous with “the law” and is a conventional measure, or it connotes a duty higher than the law and is a categorical, absolute measure. In either event, it affords something to measure.

The “fair” consists in a twofold relationship: treating equals equally in respect of a relevant criterion, and at the same time treating unequals unequally in respect of the given criterion (treating those who do not meet the criteria differently from those who do). It is as unfair to advance unequals as it is to deny equality to those who are equals in respect of the criteria at issue. For human rights based on equal personhood, the only relevant criterion is humanity (personhood). There are, of course, other ways in which to use the term “fair,” but each of them seems to go beyond any obvious application of fairness in the context of a legal relationship.<sup>105</sup> It is not, for example, at all evident why it should be imagined that “fairness” requires an uneven application of a standard. There might be good reason to waive, excuse, or bend a standard criterion, or to discard a given standard altogether, but “fairness” is not the reason for doing so. If, for example, a given standard is irrelevant to something it is supposed to measure, the objection is not lack of “fairness” but lack of reason. So also, if a given standard fails to recognize some basic human right, fails to comply with law, or fails to deliver a human good, the objection is not lack of “fairness,” but rather lack of right, the presence of illegality, or a failure to do what is good.

The “lawful” consists in conformity to the law. It is so simple a relationship of justice to law as sometimes to be overlooked, but even common speech indicates it is hard to call anyone a “just” person if that person is habitually a scoff-law. It is also a more subtle but telling critique of certain laws and certain interpretations of them. If any interpretation of the law is, in fact, not in accordance with the law (after all allowances are made for ordinary “play in the joints,” ordinary gap-filling, or reasonable interpretation or application of the law in a new set of circumstances), it is unjust. This is perhaps a special reproach to judges, but it is also a reproach applicable to executives and prosecutors in respect of criminal or public law, and to private actors and their lawyers in respect of private law.

The “good” consists in a moral relationship,<sup>106</sup> and this aspect of justice consists in comparing any law to some good of some sort. The good with which justice is concerned must be either the particular good of the law (is it appropriately distributive, restorative, retributive, and the like),<sup>107</sup> or the greater good of the polity and/or its citizens. Does it promote the good of the community, or the good of at least some if not all of its citizens; if there is a common good, does the law support and

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<sup>105</sup> So “fair” in the context of beauty, or of a quality level, or of an even-mindedness (it is this last denotation that actually approaches very closely to that used in this Article) does not connote a connection to any specific legal relationship.

<sup>106</sup> See *supra* Section I.B (setting forth various “goods” and moral relationships based on choices among or between competing goods).

<sup>107</sup> See *supra* note [76] (listing some of the specifically legal goods).

encourage it or does the law do the opposite? In either the public or private sphere, the term might be used to signify a contingent or hypothetical good; or it might be used to signify a categorical or deontological good. So, if it were a set policy to create a copyright for the purpose of enriching the public by providing some incentive to authors, then it would be, according to this hypothetical good, fitting to judge existing copyright law as better or worse to the extent it more nearly does or does not achieve this contingent end. Likewise, if it were intrinsically good for all human beings to be free and equal citizens, entitled to life, liberty, and the pursuit of happiness, then it would, according to these categorical goods, be fitting to judge existing public and private law to be better or worse to the extent it interferes with these deontological ends, and some might suppose the polity ought actually to encourage them or at least secure them against trespass.

It would seem obvious that “justice” resides in some combination of all four of the foregoing, each of which is irreducible to the others, but each of which influences and guides the others.<sup>108</sup> If, for example, “fairness” in any law is said to reside in equal treatment according to a criterion, then something beyond fairness must be used to evaluate the appropriateness of the criterion itself. A particular criterion might be challenged on the basis that it is unlawful, is not right, or, finally, is not good but evil. It seems both evident and obvious that these considerations work together, but are neither synonyms nor antonyms. Together they constitute the four dimensions of justice, taken as an integral whole.<sup>109</sup>

Considered as a second set of related terms as tabulated in Column A, there are yet other things that have been said about justice as a measure of the law, and those lead to different and contradictory consequences. Any restatement of the obvious must at least account for these other uses. They include the use of “justice” as a *merely* conventional interest,<sup>110</sup> as the interest of the stronger,<sup>111</sup> as a false

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<sup>108</sup> This is a proposition made by implication in a number of authorities, and made quite explicitly by at least one. See MORTIMER J. ADLER, *SIX GREAT IDEAS* 186–205, 228–43 (1st Touchstone ed. 1997) (discussing the concept of “justice” in chapters dealing with the domain of “justice,” the authority of law, and the conception of “justice” joined with liberty and equality).

<sup>109</sup> *Id.*

<sup>110</sup> This usage places an emphasis on the conventional aspect of justice. Of course, the “right” also raises an element of the conventional, as does “fairness” in respect of any arbitrary choice of criterion, as does the “lawful” in respect of purely conventional law, and as does the “good” in respect of hypothetical goals. The difference is that this usage, as it refers to law as merely “an interest,” tends to be purely and exclusively conventional and tends towards a misapprehension or dogmatic denial of the mixed nature of the contrary positions (there is a notion of the deontological and categorical in the questions of the right, the fair, the lawful, and the good, at the same time and coexisting with the notion of the

consciousness<sup>112</sup> or mental illness (which should, perhaps, be lifted in favor of some more nearly true consciousness, or cure of the psychosis),

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hypothetical and conventional in each of these relations—each of these is a mixed proposition). This usage tends to be used to “debunk” the notion that law is ever anything but a conventional interest, and hence is never anything other than an ultimately arbitrary or totally conditioned interest. This usage might well lead to the view that justice demands that persons “ought” to get over the primitive idea that one set of legal rules is “better” than any other, since each set of laws is simply a way of expressing some community’s privileged or favored “interests.”

<sup>111</sup> PLATO, *supra* note 100 [note 100], [p. 338-339a] at 301 (expressing the view of Thrasymachus). This usage seems to do more than express the merely trivial notion that laws are passed and enforced by those who are authorized to do so, which implies that they are empowered to do so, which suggests that they are able to do so, and therefore they must be stronger than those who choose to disobey the law. It seems to go so far as to say that there are different and irreducibly conflicting interests among the members of a polity. According to this view, a first interest *X* (the few, or the “rich,” or the “talented”) will rule over a contrary interest *Y* (the many, the “poor,” or the “untalented”) only if *X* imposes its special “interest” against *Y*. This sort of zero sum game theory leads to an odd view of justice. If the observation is more than a simple statement of a fact, it tends to lead to the odd notion that because the law favors *X* over *Y* (as the interest of the stronger over the weaker) then perhaps justice “ought” to prefer *Y* over *X* (perhaps on an “underdog” principle, some sort of odd, indemonstrable categorical imperative that the weaker “ought” to overcome the stronger, or for no reason whatever). Perhaps the “many” are considered to be weak, and the “few” are strong, and so perhaps this is some sort of inarticulate attempt to say that “democracy,” taken as the rule of the many, is what “ought” to be law, though this apparently contradicts the notion that the law is always the interest of the stronger, and might be more forthrightly and candidly premised on a frank acknowledgment that democracy is “good” or that self-government is a “right” or that all persons who are adult citizens have a right in “fairness” against the criterion of citizenship to an equal vote.

<sup>112</sup> The term is often associated with Marxists, though its usage by Karl Marx and Fredreich Engels is not robust. See Doğan Göçmen, *False Consciousness*, in 1 ENCYCLOPEDIA OF SOCIAL PROBLEMS 350, 350–51 (Vincent N. Parrillo ed., 2008). This usage seems to go yet further in the direction marked by the prior terms. If the law is always and only the interest of the stronger, why is it that the “weaker,” or at least some of them, comply with apparent docility against their own self-interest? The answer, according to this view of the question, is that there must be some pathology. If an interest of, say, the proletariat, is one that the proletariat (or the worker, or the subservient domestic partner) fails to notice or to act upon, it must be that the proletariat is deceived, deluded, sick, or doped with some sort of opiate (such as “religion”) and must be in need of a cure to be administered by some political doctor. The cure, of course, must be against the “patient’s” express desire to be left alone and must be administered against the “patient’s” protestation that he or she is “just fine as I am, thank you.” This would seem to lead to the notion that “justice” ought to act contrary to law, for the simple reason that existing law is not merely the interest of the stronger, but a pathogen that is a positive harm to its subjects, who must be treated as the law’s victims. This orientation differs markedly from similar results reached under a different way of thinking. Black African chattel slavery, for example, was in fact opposed on the basis that it was not right (it offended against categorical duties), that it was not fair (skin pigmentation is not a reasonable criterion for dividing slave from free), that it was not lawful (if a legal determination hinged upon a finding of “personhood” and if there is no way legitimately to hinge personhood on skin pigmentation, the “laws” are in fact not lawful at all), or that it was not any good (it is an evil thing to treat human beings as if they were nonhuman animals). It was not necessary to overcome slavery on the basis that the slaveholder was stronger and that any slave who

or as an evil imposition checking the desires or the will of its subjects. I have previously coined the term “nomophobia” to refer to this unqualified fear of law.<sup>113</sup> The unchecked progression of related concepts under this head leads to nomophobia and embraces an ungrounded instrumentalism—“justice” becomes either some sort of misguided moralism or a simple hammer with which to strike any opponent.

Considered as yet a third set of terms, and as tabulated in Column C, there is a yet further set of things that have been said about justice. “Justice” is sometimes used as if it were merely a neutral process, a matter of merely conventional jurisdiction or “rules of the game.” It is sometimes used as if it were an empirical derivation from an inductive study of the science of the law. Occasionally “justice” is used as if it were simply an empirical fudge factor or catch-all term to explain the result in a case that is not understandable on any other basis. This set of usages embraces any number of unrelated and contradictory notions (indeed, the peculiar result is that “justice” is sometimes used to describe just about anything other than what is lawful).

As so used in these counterfeits,<sup>114</sup> “justice” becomes a meaningless term and the unchecked progress of such concepts leads both to an unjust regime and to a kind of instrumentalism. “Justice” becomes a nonsense word, a nomophobic shibboleth of misguided moralism from the perspective of Column A, or a term used in some sort of incomplete analytics dedicated to an inhuman “science” of the law that leaves a moral gap in the heart of the law as it pursues “pure” justice from the perspective of Column C. At best, there is an instrumentalism from

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seemed even partially resigned to his or her lot was mentally diseased by false consciousness. The one view saves justice while reforming the law, while the other view sacrifices both justice and law while supporting some sort of elite vanguard who is self-appointed to act on behalf of and to “raise the consciousness” of those who are (per the hypothesis of the vanguard) wholly blind and totally unable to see even where their own self-interest lies. Its apparent logic also incidentally but necessarily denies the equality of humankind and instead posits different species of humanoids permanently divided according to class as expressed in historical stages.

<sup>113</sup> *The Restatement of the Obvious*, *supra* note 25, at 335.

<sup>114</sup> A careful reader will notice that the approach of this Article is suggesting a somewhat new formulation of justice as a virtue, as an habitual attitude towards the rule of law, and having both a defect (here characterized as “incomplete analytics” because it fails to include the common moral core of a rule of law) and an excess (here characterized as “misguided moralism” because it fails to include the rational basis of moral impulses). This suggestion also leads to an inference concerning the necessity of combining a certain kind of “faith” (in the existence of a common moral truth) with a certain kind of “reason” (by which moral impulses, including those attributed to “religion,” might be rationally tested). But that must await for another article; this one is limited to a mere survey of the existence of various terms used to describe “justice” and to their arrangement into a table as illustrated herein.

these perspectives.<sup>115</sup> So also it is possible to attach adjectives to create category mistakes: “social” justice, or “economic” justice would seem, at best, useless terms. If justice is good for society, then all justice would constitute a social good; but this seems an odd reason to call it “social” justice rather than simply calling it “justice.”<sup>116</sup> If some sort of law had to do with good economics and were otherwise just, perhaps one might say such a law tended to produce some kind of good economic result and is also a just law, but to call such a thing “economic” justice is to add nothing beyond an epithet.

It certainly seems obvious that a law which is also itself lawful, right, fair, and good, and which is accepted as such by its subjects is a law more likely to be voluntarily obeyed than if it were not so understood. At the same time, a law understood to be some sort of conventional or arbitrary rule imposed by some alien yet powerful faction, to support the interest of that faction and not the interest of the subject, is less likely to be voluntarily obeyed. And likewise a law seen, at best, as some sort of neutral rule of some game that the subject never much wanted to play in the first place might produce some instrumental obedience but is not likely to produce anything deeper or more reliable.

#### 5. Topic Five: The Use of Language in the Law

This topic remains for further development, but an easy and obvious observation follows from a simple multiple choice question: if you call a tail a leg, how many legs does a cow have? Please explain your answer.

- (a) one, and only one
- (b) four
- (c) five
- (d) all of the above, depending
- (e) none of the above, because there is no way whatsoever to answer this question, which is either a category mistake or otherwise so flawed by embedded but erroneous assumptions as to make it nonsensical even to ask.

It is rather obvious the first answer might be correct, if we take language as a convention and if we take the call of the question as indicating a change of convention: assuming a “tail” is both like a leg (it is an elongated extension of matter) but also unlike (it is not a weight-bearing member), then the question itself implies that what “we” once called a tail, we will now call a leg. Therefore what “we” used to call legs no longer qualify because they are unlike the thing we now call a leg. The previously single tail now becomes the single leg simply as a

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<sup>115</sup> There is an instrumentalism, of sorts, in the Column *B* “justice” as well, but it is as the instrument of doing justice itself.

<sup>116</sup> All justice is social justice. Most counterfeits are not just at all, except when they accidentally hit upon the right result.

function of its different nature, characteristics, and qualities compared to the weight-bearing thing formerly known as a leg.

The second answer might also be correct, if we take the question as not establishing any power on the part of the implied speaker to determine meaning. You might call yourself the King of Prussia, the Queen of Persia, or an artichoke, but you have no power to compel meaning beyond your own speech or your own manuscript. The speaker cannot arbitrarily force a changed meaning on the reality signified by the words used, even granting the words might have some aspect of convention about them. Thus, if there were four legs prior to the call of the question, there remain four legs after. Assuming a tail is a verbal token referring to a substantive thing which is different from the substantive thing (a leg) referred to by a different word, then “calling” a tail a leg cannot make it so. There are still four and only four legs, and calling a tail a leg does not change any real attribute of the thing; calling a tail a leg does not make it one.<sup>117</sup>

The third answer is also good, if we take the question as establishing a simple addition to the prior category of “legs.” It is as if “we” were to say that “leg” now refers to any elongated extension of matter. In that case there are (at least) five such things on the cow. Therefore, with ease and confidence one might answer there are now five legs on the cow.

The fourth answer is also good, by reference to the three already given. Of course, were this an actual examination, we could refine this answer by calling out any combination of two of the prior answers, thereby allowing the test-taker to reject some one of the prior three as being untenable.

The fifth answer is not impossible, simply by reference to the four answers already given. If the question can be answered, essentially, in any way imaginable, then there must be no one answer that is necessarily determinative. And so it goes. It is not the purpose of this Article to answer the question posed, but simply to illustrate how ordinary men and women (and also self-described subtle and learned persons) must use language to communicate, using words even though analogous and imprecise at best and positively equivocal or misleading at worst. Yet despite these obvious difficulties, it is evident that human beings communicate, more or less effectively, by way of language.

No one can talk about law for very long without noticing both the usefulness of language and the irreducible difficulties. Law presents at

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<sup>117</sup> This is the answer commonly attributed to Abraham Lincoln. See, e.g., Lawrence A. Cunningham, Compilation, *The Essays of Warren Buffett: Lessons for Corporate America*, 19 CARDOZO L. REV. 1, 198 (1997); Calvin H. Johnson, *Accounting in Favor of Investors*, 19 CARDOZO L. REV. 637, 648 (1997).

least a double difficulty: the things signified are probably uncertain at least at the edge, and the words used to signify those blurry things are themselves not univocal or otherwise perfect markers. There comes a point at which any ordinary observer can discern words are being distorted beyond any reasonable semblance of truth. If, and when, such distortion occurs in the language of the law, it might be expected its subjects will be less likely to voluntarily obey. Indeed, upon such distortions, it begins to seem as if the law has been stretched to the point it is no longer lawful. But where the law is understood to be interpreted at least plausibly in accordance with the words by which it was first given, then it seems rather obvious its subjects might more nearly consent to the interpretation so given.

If it happens, not only that language is difficult in the best of circumstances, but that some juridical actors are thought to be partisans and are often understood to be using words as weapons and intentionally equivocating with them, it is not to be wondered that trust in the rule of law might suffer erosion. If “justice” is lost as a reliable and intelligible concept embodying the lawful, the fair, the right, and the good, confidence in the rule of law is bound to suffer. If the rational reasons for changing the law are neither explained nor examined, it is likely the rule of law will be jeopardized. Over time, the law will remain only somewhat good, reasonable, intelligible, or authorized, and it will come to be measured by some merely instrumental standard of “justice.” Moreover, when law itself is generated sometimes by fiat including arbitrary will, occasionally by reason, and almost always by history and cultural norms and by some odd mixture of the three, and when it is concerned with moral actions by reference to an objective moral reality, it must be obvious that disputes will arise. Almost everyone knows this, or could know it upon reflection. Many people probably have known this, from time immemorial and across cultures and across many barriers of time, place, and circumstances. But perhaps it is especially in our own age, with the accidents of globalization, communications, and insistence upon self-government for a purpose, and upon self-will for any purpose or no purpose that these obvious conflicts require an explicit restatement. It appears the rule of law itself is under attack in a way that is, if nothing entirely new, at least a pressing problem of the current age.

It is for the sake of addressing this issue that more needs to be said in respect of the obvious connections between law and morality, hence the inquiry now turns back to the problem first identified and to the practical syllogism first proposed.

#### *D. Law and Morality*

Morality is a basis of justice and law. The obvious premise is that good “ought” to be done and its opposite (“evil”) “ought” to be avoided.

Reverting to the practical syllogism with which we began,<sup>118</sup> unless there is some ground to assert at least a provisional “national morality” or any other kind of morality or moral law,<sup>119</sup> there is no basis for a truth claim to the syllogism. Based upon an understanding that there are indemonstrable moral principles with which the law must be concerned if it is to be at all realistic, certain moral bases for the familiar divisions of private and public law must follow. At the outset it should be noted the argument proceeds according to a form. The form is to assert: (a) the existence of a moral principle, *plus* (b) some other ground to support the conversion of a moral principle into a legal rule or legal precept. Thus, the method of law and morality proposed herein is to affirm a moral principle as a necessary condition, but at the same time to affirm that moral principle by itself is not a sufficient basis to claim a useful “law and morality” approach to the examination of any particular human law. The law and morality approach proposed herein is claimed to be a useful way to understand, explain, and predict the development of law. It is not claimed to be the sole source of, or the only justification for any law.

#### 1. The Moral Basis of Private Law

In deriving the law and morality basis of private law, we begin with the moral intuitions:

(a) Contract is based on the moral intuition that promises ought to be kept.<sup>120</sup>

(b) Property is based on the moral intuition that the person who makes, improves, or transforms something ought to have it.<sup>121</sup>

(c) Tort is based on the moral intuition that one person ought to use their own person, things, or agents, so as not to harm another person’s.

(d) Agency is based on the moral intuition that one person might act on behalf of another and, in so doing, should have the power to incur obligations for which the other might be responsible or secure rights which the other might enforce. In

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<sup>118</sup> See *supra* note 8 (if morality is good for the polity, and if supernatural law is good for morality; then supernatural law is good for the polity).

<sup>119</sup> See *supra* note 9. It is beyond the scope of this Article to do more than make the assumption.

<sup>120</sup> That is to say, deliberate promises in accordance with their terms including all conditions and other qualifications.

<sup>121</sup> That is to say, it is based on the precept that people owns their own bodies, the labor of their bodies, and the fruits of their labor, subject to limitations based on sufficiency for others and against waste and spoilage. See JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION*, Chap. V., pts. 26-30, pp. 15-17 (J.W. Gough ed., 1948) (speaking of property); *id.* pts. 31-45, at 17-24 (speaking of real property).

doing so, the one incurs a set of obligations to the other,<sup>122</sup> as well as to third parties.

(e) Partnership is based on the moral intuition of mutual agency because each partner has a share of ownership and control.

(f) Limited liability entities are based on the moral intuition of nonagency because there is separation of ownership from control.

(g) Family law is based on the moral intuition that children ought to be protected, nurtured, and supported by their parents, and parents ought to be accountable to one another.

(h) Fraud (and private law remedies against fraud) is based on the moral intuition that one person ought not lie to another.<sup>123</sup>

In each case, the moral basis is a constituent of a “law and morality” analysis of any law. In such an analysis it is apparent the moral basis is only a partial explanation. In addition to a moral intuition, there is almost always some other factor<sup>124</sup> that explains, predicts, or determines whether a law will be enacted to support the moral intuition, and it is to those other factors we now turn.

(a) (*bis*). In the case of contracts, the additional factor includes the observation that certain promises tend to produce or enhance aggregate wealth, to induce detrimental reliance by other persons, to cause the promisor to expend wealth in anticipation of a promised counter-performance, or to be of the sort the parties themselves desire to have enforced. When these additional factors are weighed, and when they are balanced with countervailing factors (some promises tend to be personal, tend to be of the sort the parties either do not want to be enforced at law or could not tolerate if they were, or would tend to foster a degree of interference by the polity in private

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<sup>122</sup> And vice versa.

<sup>123</sup> That is, the prohibition is based upon the intuition that a lie is wrong, coupled with the more remote definition or determination that a lie consists in a false statement made knowingly and for the purpose of inducing reliance causing harm to another. It is interesting, by the way, to concede there might be room to discuss the precise contours of the more remote determination notwithstanding agreement upon the foundational intuition. Persons who agree that “lying” is wrong still have much to figure out, and there is great room for diverse views. In any given polity, its own fiat laws, reasonable observations, and historical experiences will color its own determinations, and a “law and morality” approach will factor these elements. *See supra* Part I.C.2.

<sup>124</sup> The rubric is “almost” always some other factor. There may be cases, such as murder, where the moral intuition functions alone, but even in such cases there may be other factors that explain, predict or determine the specific contours of the prohibition, as by establishing degrees of culpability, or excuse.

matters which the subjects deem to be invasive) it is possible to consider the moral dimension as an obvious force on the direction of the law.<sup>125</sup>

(b) (*bis*). Property rights under law, as dependent upon other factors added to the moral intuition, might have to do with observations concerning the costs of externalities compared to the costs of internalization. Such other factors as these, added to the preexisting moral intuition, might shape an explanation of particular laws of property within a given polity.<sup>126</sup>

Omitting the other headings, which may be filled in later, in a subsequent article, we proceed to (h).

(h) (*bis*). So it is also with fraud. There are plenty of lies for which the law provides no remedy. But when the moral intuition is coupled with additional factors—lies in respect of the purchase and sale of derivative property interests (like securities)<sup>127</sup> tend to be economically costly, wasteful, and likely to spoil the efficient use and allocation of resources, and tend to be the sort of lies the parties themselves want to prevent<sup>128</sup>—then the moral analysis is an aid in determining whether, for example, one polity might wish to address the

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<sup>125</sup> “Promissory estoppel” tends to enforce promises not otherwise enforceable for want of consideration, and for a host of other defects, if reliance was “reasonably” expected and “injustice” can be avoided only by enforcement. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). The notion that it is ever reasonable to rely on a promise not otherwise enforceable, or that “justice” would ever require anything the law does not otherwise demand, might be more readily understood upon the moral basis that everyone has an intuition that promises ought to be kept, and that justice ought to consider not only what is lawful but also what is good; and that the current doctrine of “promissory estoppel” is but a way station towards a more comprehensive “law and morality” explanation of contract law. Cf. Thomas C. Folsom, *Reconsidering the Reliance Rules: The Restatement of Contracts and Promissory Estoppel in North Dakota*, 66 N.D. L. REV. 317, 329–33 (1990) (recounting the various kinds of reliance recognized by the Restatement). It should be noted that the law & morality approach does not predict nor expect uniformity in remote consequences. There are obviously at least two comprehensive systems of contract law (civil law and common law), and probably more, that can be developed from the same moral intuition.

<sup>126</sup> See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 347 (1967).

<sup>127</sup> I am using “derivative” in its broad sense to refer to any asset whose value is derived from the value of something else. So stock in a joint stock company derives its value from the “present discounted value of all future dividends to be paid by the corporation.” STEPHEN M. BAINBRIDGE, *MERGERS AND ACQUISITIONS* 194 (2003). In turn, this value depends on the value of the firm’s net assets, free cash flow, capital structure, and other attributes. See *id.* at 197–202.

<sup>128</sup> See ROBERT CHARLES CLARK, *CORPORATE LAW* 150–54 (1986) for a reflection on various reasons for “our common belief” that fraud is wrong—it makes the markets imperfect, increases transaction costs, and encourages free-riding, thereby undermining the social utility of established patterns of truthfulness.

moral issue by requiring disclosure, and another polity might wish to address the moral issue by substantive regulation about the quality of derivatives offered or sold, and yet another polity might take some other approach. Similarly, lies under oath, in a court proceeding, or in an official investigation, or which constitute “ordinary” fraud might attract special attention.

In respect of a rule of law, it should be obvious that the subjects of any private law which has an explicit moral intuition as an integral part will be more likely to embrace and voluntarily observe it. Conversely, the less there is any moral intuition, or the more the moral intuition is denied or obscured, or the less the subjects believe in the moral intuition, the less likely it is the law will be observed voluntarily (and, not coincidentally, the attempt to provide any coherent explanation for the law itself will be less plausible). The cycle of observance or nonobservance might be thought to create a feedback loop.

For example, as it becomes more common for contract law to be taught as if it were some sort of amoral or even immoral set of conventional rules, the more completely will some students actually come to believe that contract “law” consists in nothing more than determining whether any promise is “enforceable” at law and then calculating the relative costs of performance or nonperformance. It should be obvious, to the extent these students teach those lessons to clients and communicate them to other members of the polity, that there will be less voluntary performance of promises, even those imagined to be enforceable as contracts.

This leads not only to an “efficient breach” mentality in contract law, but to precisely the same manner of calculation in all areas of the law.<sup>129</sup> It should not be in the least surprising that some of the “best and brightest” in a polity might make a cost/benefit analysis and then violate any law whatsoever when they determine the risk-weighted cost of compliance is less than the benefit of noncompliance<sup>130</sup>—a generalized “choice theory” of law is precisely what their polity has taught them to embrace.

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<sup>129</sup> See *Kemezy v. Peters*, 79 F.3d 33, 34–35 (7th Cir. 1996) (suggesting, in an opinion authored by Chief Judge Posner, that punitive damages are necessary in some cases to make sure that the costs of theft and sexual assault are high enough to rebalance the potential expropriator’s “choice theory” calculations of costs/benefits).

<sup>130</sup> See generally HOWELL E. JACKSON ET AL., *ANALYTICAL METHODS FOR LAWYERS* 1–32 (2003) (reporting on methods of calculating and weighing the costs and benefits of the available options in strategic counseling concerning matters such as environmental cleanup investigations in land purchases, and tax deduction advice).

## 2. The Moral Basis of Public Law

Criminal law is based on the moral intuition that certain acts by which a person causes or suffers harm ought to be prevented, punished, or somehow recompensed.

Administrative and constitutional laws are based on the moral intuition that certain limits ought to be set within the polity, assuming the polity exists to serve its subjects and assuming there are various pressures pushing the polity into a different orientation towards its subjects.

Tax law is based on the moral notion that joint action implies joint payment for the instrumentalities of action.<sup>131</sup>

Democracy itself is based on a moral intuition best explained by example. If a democracy permits Timothy (as an elected representative) to impose a tax on Peter to pay Paul and Lydia; if Peter, Paul, and Lydia are voting; and if Paul and Lydia each get one vote as against Peter's one vote, it might be important to a rule of law for both Paul and Lydia to understand they ought not take from someone else just because they can.

So if some other form of government permits a sovereign to take from its subjects, it might be important to a rule of law for the sovereign to understand there are circumstances in which it ought not to do so.

## 3. The Moral Basis of Human Rights Law

The subjects of a rule of law must be human beings ("persons"). Persons are those objects previously defined as having the capacity of conceptual thought, syntactical speech, and apparent freedom of choice (and those who are natural born descendents, or DNA matches, of those who have such capacities).<sup>132</sup> No other thing has any such claim to a law that is reasonable, directed to the good of the subject, and promulgated in advance by some person authorized to do so. Humankind, however, has a dignity which is distinctively different from other things that are ruled. It is not fitting to rule a person as a cow, dog, sheep, or wolf would be ruled. These things go together. If there are no human beings, there is no rule of law, or at least none that makes any sense. If there is no categorical human good and no human duty to make the choices leading to a good life, then there are no corresponding categorical human rights. To be sure, in the absence of personhood, categorical duties, and corresponding human rights, there may be hypothetical rights and there may be sovereigns who deign from time to time to extend privileges or concessionary prerogatives, but these are not offered on the basis that

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<sup>131</sup> Within a democratic representative polity, the equal status of persons as citizens implies at least two further tax-related moral determinations: "no taxation without representation" and also the converse "no representation with taxation" (no free-riders).

<sup>132</sup> See discussion and definition of "human being," *supra* Part I.B.

they are inherent rights, but on the basis that they are a revocable gift from the sovereign. From the perspective of the subject, if all law were merely the interest of the stronger, it is inexplicable why, exactly, any subject would reasonably consider himself obligated in conscience to obey an alien rule, absent force and absent the reasonable calculation that it would be inexpedient to challenge the ruling force. But if the subject ever had an opportunity to break the alien's law, it would seem hard to imagine why the subject would refrain from lawbreaking activity.

Just as the moral basis of contract law is the precept that it is good to keep deliberate promises in accordance with their terms, and as the moral basis of property law is the precept that people own their own bodies, the labor of their bodies, and the fruits of their labor, the moral basis of human rights is likewise specific.

- The moral basis of individual duties, rights, and liberties is the precept that a person has a duty to live and to make moral choices and therefore has a derived or correlative right, not only to life, but to liberty of conscience and a concomitant right to take actions in accordance with conscience that are consistent with just laws and which do no harm to any person.
- The moral basis of privacy extends liberty of conscience to matters that are, in fact, private (nonpublic).
- The moral basis of ordered liberty is the yet further extension of freedom of conscience to freedom of speech and action.

In each case, an actual and articulable moral basis is a necessary but not a sufficient cause for any particular morally based law. So contract law is not created simply by the moral principle of promise keeping, but by additional factors: there are some promises leading to the economic well being of the polity, there are members of the polity who demand legal enforcement of some promises, and efficient public rules allocating the costs of promise-keeping are a social good. So also with certain privacy rights, especially those relating to freedom of conscience—something that might be called “supernatural freedom”—the progression would be from the moral intuition more directly to implementation. There is, obviously, plenty of room to sort out what the rules might be, in particular.

A rule of law is necessarily dependent upon indemonstrable principles, as is most anything else of any particular worth. Perhaps the most important of these, at least for evaluating any particular supernatural law, is the human right to freedom of conscience. This leads to a discussion of the nonimposition principle, an aspect of the rule of law so important as to deserve its own separate heading.

## II. THE NONIMPOSITION PRINCIPLE AND FREEDOM OF CONSCIENCE

The argument asserted so far is that if a rule of law is desired, it is possible to specify conditions rather obviously contributing to it. In testing whether any system of supernatural law contributes to a rule of law, the first question is whether it is consistent with the rule of law. Part I has outlined a specified set of statements describing a rule of law. The second question is whether any given system of supernatural law is consistent with the nonimposition principle. This Part will map the contours of that principle.

The nonimposition principle, as a condition to any rule of law, follows from the definition of a supernatural law. If supernatural law is the law of an incorporeal sovereign received and accepted by believers and including at least one rule or precept not necessarily determinable by reason, it follows that it is neither received by, nor accepted by nonbelievers. The nonimposition principle asserts the freedom of the conscience, and supports a “supernatural freedom” relative to matters of pure supernatural law, for believers and nonbelievers alike. Those components of a system of supernatural law that are consistent with already known common moral principles do not constitute “pure” supernatural law principles. As moral principles they may be independently based, as are all other moral or epistemological statements, on certain indemonstrable principles. But the acknowledgement of those moral intuitions does not necessarily depend upon any acknowledgement of any particular incorporeal being or sovereign.<sup>133</sup> Such common or shared portions of supernatural law (which may be shared in common by a system of supernatural law and by a system of moral law) comport with moral principles already and independently known within the polity and, hence, do not constitute any imposition of pure supernatural law upon nonbelievers within the polity.

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<sup>133</sup> The relationship is of complements, with (ideally) consistent outcomes. Those who focus on the indemonstrable principles of morality, who admit them to be unprovable while still advancing a truth claim, who decline to accept the burden of proof as to the indemonstrable truths of common sense, and shift the epistemological burden of proof to those who deny common sense, may refer to themselves as neo-realists, modern moral realists or practitioners of normative jurisprudence. Those who focus upon the commands of an incorporeal sovereign, whether by a direct study of God-revealed supernatural law or by indirect study of the historical effects and traces of such a law upon particular cultures and nations might refer to themselves as theistic moral realists. The thesis advanced herein is that the two approaches (which might be paired somewhat clumsily as complementary faith and reason, or as evidence cooperatively discerned from the congruence, or non-congruence, of “nature’s God” as seen in any given God-Revealed supernatural law and “nature” itself as seen by looking at the common moral law) can be tested to determine whether and to what extent they are supportive, counter to, or indifferent to each other.

The issue arises over what must be called precepts of “pure” supernatural law. So, if some version of supernatural law teaches that good is better than evil, life is better than death, and something better than nothing, or if any version of supernatural law teaches that promises ought to be kept, property ought not to be stolen, fraud ought not to be committed, and affirms, confirms, and supports similar moral principles already known to all persons within the polity, it is no objection to supernatural law that such categorical moral truths are already part of the “law and morality” analysis of the law.

This is to say the basic moral principles are not the exclusive province of any supernatural law, are not sectarian, and are nonproprietary. If some form of supernatural law embraces and confirms them, this is no more startling than if supernatural law were to embrace the law against contradiction (one might hope, and rather expect it does). If the law against contradiction is affirmed—not only by its obvious presence in human understanding, but also by its presence in some supernatural affirmation—this should be a basis for confidence in the supernatural law, not a ground for suspicion of it.<sup>134</sup> What is true of speculative reason is also true of practical reason. The fact that supernatural law might confirm a common moral truth is a basis for confidence in the supernatural law, as when an incorporeal sovereign concurs with the moral truths that a person ought not to murder, to lie, or to steal.<sup>135</sup>

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<sup>134</sup> So if Theresa aids the poor and encourages others to do likewise because it is good to do so, how can it be an objection if she also does so because she acknowledges that God desires or commands that she do so? Likewise, in respect of errors doubly attributed, it would seem the supernatural provenance of the error is not the most relevant distinguishing factor, at least where there is a dual source claimed by the proponent, or manifest in the circumstances. If Karl were a Marxist, say, by virtue of some indemonstrable moral claim (perhaps false) that private property is theft, or by some supernatural command of an incorporeal sovereign such as “history” or the “proletariat,” and Karla were a Marxist, say, by virtue of some indemonstrable moral claim combined with a supernatural law that she ought to love her neighbor, or by a reading (or misreading) of *Acts* 2 or 4 of the Bible, how can Karl’s version of an indemonstrable truth or supernatural law be presumed more eligible for implementation within the polity than Karla’s? Compare KARL MARX, *CRITIQUE OF THE GOTHA PROGRAMME* 20 (Electronic Book Co. 2001) (1875), <http://www.elecbook.com/> (“From each according to his ability, to each according to his needs!”), with *Acts* 2:42–47 (NIV) (“Selling their possessions and goods, they gave to anyone as he had need.”), and *id.* at 4:32–35 (“[T]hey shared everything they had.”); but cf. *id.* at 5:4 (“Didn’t [your property] belong to you before it was sold? And after it was sold, wasn’t the money at your disposal?”) (reminding that the giving and sharing, though encouraged, was voluntary and not coerced).

<sup>135</sup> See THOMAS AQUINAS, *ON THE TRUTH OF THE CATHOLIC FAITH: SUMMA CONTRA GENTILES* bk. 1, at 66–68 (Anton C. Pegis trans., 1955). Aquinas asserted the proposition that one of the reasons for the existence of a supernatural law is precisely to confirm the congruence of nature with nature’s God. *Id.* Supernatural law may also have been given as an aid to choose among plausible moral alternatives. See *id.* at 68; and see AQUINAS, *supra*

But when the supernatural law posits a purely supernatural rule or precept, a potential conflict arises. By definition, such a purely supernatural rule or precept cannot be sensible to a nonbeliever. Accordingly, it would seem to them as nonsense, and it is likely they would not want it, and would not obey it except by force. Pure supernatural law must not be imposed upon any nonbeliever if there is to be a rule of law. The term “nonimposition principle” is used herein to convey that requirement. It should be noted that the rule of law rubric proposed herein can also test, and the nonimposition principle can also very well apply to, systems of moral law as well as to systems of supernatural law. As such, the methodology proposed herein can perform a double test of the practical syllogism. It can test the syllogism in the case of any set of moral laws, as well as in the case of any set of supernatural laws, in which either is asserted to be good for any polity. This Article is directed at the place of supernatural law within a polity, but later applications might extend the analysis more explicitly to address the place of moral law within a polity that is committed to a rule of law.

The nonimposition principle might be expressed in various ways:

**1. Separation.** If what is separated from the law of the polity is pure supernatural law, then “separation” might be a fair way to express the concept. But the thing separated ought to be only pure supernatural law; there is no basis in reason also to separate moral law, and it would obviously be wrong to do so. The reason it would be obviously wrong to separate moral law is that a common moral law foundation is essential to a rule of law in a way that pure supernatural law is not. Though common morality depends upon an indemonstrable principle, it is still something knowable to all members of the polity in a way that pure supernatural law might not be.<sup>136</sup> If the statements of the U.S. Supreme Court in respect of its First Amendment constitutional jurisprudence were understood to signify nothing more than a separation of pure supernatural law within a moral polity, they might be largely unobjectionable. In this regard, it should be understood the target audience of this Article is not limited to Americans. It might well be that American law has drifted off course, but that makes no difference to a global audience, which might actually profit by seeing there is no necessary requirement that any axiom separating pure supernatural law from the (human) laws of the polity must also exclude common morality

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note [68], Ia Ilae, Q. 109, at pp. 338-39 (observing that much if not all knowledge depends on something indemonstrable).

<sup>136</sup> Morality (and thinking itself) depends upon indemonstrable principles. Supernatural law depends upon an incorporeal sovereign. They differ in their sources.

from the law. The rest of the world might learn from an American mistake, even if America does not.

**2. A Disestablished Supernatural Law within a Moral Polity.**

If what is to be disestablished is pure supernatural law, without excluding moral law, then the “wall” formulation might not be the best way to articulate the principle. It seems the disestablishment formula has been captured, more than once.

One formula is that which was well known at the American founding. Article 23.3 of the Westminster Confession of Faith reads:

Civil authorities may not take on themselves the ministering of God’s word and the sacraments, the administration of spiritual power, or any interference with matters of faith. . . . [N]o law of any civil government should interfere with, abridge, or hinder the proper exercise of church government among the voluntary members of Christian denominations, acting in accordance with their own professed beliefs. It is the duty of civil authorities to protect the person and good name of all people so that no one is abused, injured, or insulted on account of their religious faith or lack of it.<sup>137</sup>

But none of this was thought to exclude common morality (nor even so much of supernatural law as confirms it) from the polity. Article 23.1 declared that God had ordained civil authorities to “encourage those who are good and to punish wrongdoers.”<sup>138</sup> This “supportive” disestablishment certainly seems as promising a formula as the “wall of separation” language as construed by the U.S. Supreme Court to express the historical and cultural norms of the founding generation.

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<sup>137</sup> THE WESTMINSTER CONFESSION OF FAITH 38, app. 1 (Douglas Kelly et al. eds., 2d ed. 1981) (including historical collation of changes made to the original 1647 document in the United States). The quoted language is a “modern [language] version” of Article 23.3, *Id.* app. 1, at 57. The original 1647 Article 23 clearly privileged the Christian version of supernatural law. If it seems that the newer language is not entirely clear on disestablishment of supernatural law coupled with encouragement of moral law, the amended Article 23.3 might be compared against the original version of 1647. The original version included language affirming that the civil magistrate, although without power to administer the Word or the Sacraments, “yet . . . hath authority, and it is his duty to take order . . . that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed.” *Id.* app. 1, at 60–61. The deletion of the quoted language, with the retention of language in Article 23.1 recognizing the power of the civil magistrate “to defend and encourage those who are good and to punish wrongdoers,” supports the conclusion that the result is a disestablished supernatural law within a supportive moral polity. *Id.* at 38. Portions of Article 23 as originally written in 1647 were rejected (“not received”) in the United States by the 1729 “Adopting Act” of the first Presbyterian Synod of Philadelphia in North America; Article 23.3 was amended, substantially as quoted here, in 1787 in preparation for the organization of the General Assembly of the Presbyterian Church, U.S.A., and were adopted as the doctrinal part of the constitution of that church. *See* THE CONFESSION OF FAITH OF THE PRESBYTERIAN CHURCH IN AMERICA xvii (2d ed. 1986).

<sup>138</sup> *Id.*

**3. Supernatural Law, Evaluated for Compatibility with Fundamental Principles.** If what is to be measured is “compatibility,” then the formula of the European Court of Human Rights is a starting point. In defense of the formula, the court had the opportunity to consider the fundamental laws of Turkey, which included a significant, explicit preference for “secular” law as opposed to some version of supernatural law.<sup>139</sup> It was, in fact, an aversion to a Muslim style of supernatural law which animated the Turkish constitution and, hence, some other, better, and more useful term might be substituted for “democracy” (such as “rule of law” and “nonimposition” coupled with “adequate assurances”) having to do, *mutatis mutandi*, with the fundamental fiat law, reasonable law, and historical legal regime of Turkey or whatever other polity is affected.

**4. Supernatural Freedom.** Speaking specifically of one form of supernatural law, Professor George Weigel asserts there is “no Christian agenda for the politics of the world,” although there are “a number of causes for which [the] Christian[ ] [is] bound to contend.”<sup>140</sup> He says further:

The most important of these [causes] is religious freedom.

. . . Coerced faith is no faith. As the *Letter to Diognetus* puts it, the God of Christians “saves by persuasion, not compulsion, for compulsion is no attribute of God.” The Church’s defense of religious freedom is thus not a matter of institutional self-interest. Religious freedom is an acknowledgment, in the juridical order of society, of a basic truth about the human person that is essential for the right ordering of society: a state that claims competence in that interior sanctuary of personhood and conscience where the human person meets God is a state that has refused to adopt the self-limiting ordinance essential to right governance (not to mention democracy). *Religious freedom is the first of human rights* because it is the juridical acknowledgment (in constitutional and/or statutory law) that within every human person is an inviolable haven, a free space, where state power may not tread—and that acknowledgment is the beginning of limited government. In defending religious freedom, therefore, the Church defends both the truth about the human person and the conditions for the possibility of civil society.<sup>141</sup>

<sup>139</sup> See *supra* notes 21–24 and accompanying text.

<sup>140</sup> GEORGE WEIGEL, *AGAINST THE GRAIN: CHRISTIANITY AND DEMOCRACY, WAR AND PEACE* 80 (2008). I owe this source, and the selected quotations, to Professor Hewitt.

<sup>141</sup> *Id.* at 80–81 (quoting *The Epistle to Diognetus*, in *THE APOSTOLIC FATHERS: GREEK TEXTS AND ENGLISH TRANSLATIONS OF THEIR WRITINGS* 545 (J.B. Lightfoot et al. eds. & trans., 2d ed. Baker Book House Co. 1992) (1891)) (emphasis added). Perhaps the nonimposition principle is itself a supernatural rule, but it is one so commonly held by so many cultures influenced by a common supernatural law that it seems obvious to them. It is beyond the scope of this Article to go further.

Perhaps this idea is what the U.S. Supreme Court so awkwardly attempted to convey when it suggested there is a “right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>142</sup> If this is all the Court was trying to say, then its statement is not only not insane, but also actually makes sense. Indeed, converting the terms to those used in this Article, we may agree that the right to supernatural freedom is the first of human rights. Converting “religious freedom” (as used in the quoted passage) to “supernatural freedom” more clearly signifies that the meaningful right is not to define “reality” but is the right to accept (or to decline to accept) the commands of a supernatural, incorporeal sovereign.

#### **5. Apostasy and Peaceful Persuasion Without Penalty.**

Crucial to the concept of dual sovereignty, in which believers coexist with nonbelievers is an exit strategy for disaffected believers. The premise of the polity is that its law equally commands all subjects. The premise of the supernatural law is that its law is received as binding only by those believers who have voluntarily submitted to it. Essential to the premise of supernatural law, if it is to coexist within a nonsupernatural polity which respects freedom of conscience, is the ability of the believer to disassociate from supernatural law coupled with the freedom of believers peacefully to persuade others within the polity.

### III. REASONABLE ASSURANCES OF COMPLIANCE

Any system of supernatural law might be measured against a specified standard in respect of two questions: does it support a rule of law? Does it embrace the nonimposition principle? A third standard poses a third question: what assurances can the believers in supernatural law possibly give to their nonbelieving fellow members of the polity that, once the supernatural party gains the upper hand and is able to make law, it will abide by its professed allegiance to rule of law and to nonimposition? A merely verbal commitment to “democracy” cannot be sufficient to remove the risk of “one man, one vote, one time.”

Some of the measures of assurance would be these:

**1. Intrinsic Hermeneutics.** Evaluation of the claims of any given system of supernatural law, especially that which is claimed to be God-revealed supernatural law embodied in a written document is not itself a supernatural undertaking.<sup>143</sup> If a given supernatural law also has a long-

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<sup>142</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

<sup>143</sup> This essay is written from the perspective of an “outsider” (an unbeliever) relative to the claimed supernatural law system. It would seem the outsider’s evaluation of any believer’s interpretation would have to be non-supernatural (or else we’d be talking about another believer, who wouldn’t be an outsider at all). It would seem not unreasonable for the outsider to evaluate the interpretive claims made by the believers, and to do so as an undertaking that is not itself supernatural.

standing, trustworthy, and reasonable history of interpreting itself according to the thinking and writing of its own believers in a way consistent with the rule of law and with the nonimposition principle, these would comprise one sort of assurance. If a given supernatural law has, historically, been inconsistent with the rule of law or the nonimposition principle, but there is some intrinsic basis to propose a change to previously held interpretations by way of something approaching a renaissance or reformation to long-held interpretations, and if the change permits an inference that it is both reasonable in itself and consistent with the God-revealed text, and also moves the supernatural law system towards the rule of law and the nonimposition principle this, too, would count for something.

**2. Toleration Versus Religious Liberty.** A supernatural law merely tolerating other religions, other moral bases, and different supernatural law systems is less trustworthy than one which embraces religious liberty as a human right. The difference is between a concession which might be withdrawn and which is seen as a privilege, and a right which is God-given and irrevocable by God or by any other sovereign precisely because it owes its origin to an unchangeable God.

**3. Voluntary Renunciation.** A supernatural law whose adherents once had political power and who either refrained from violating the rule of law and the nonimposition principle, or who learned to respect both (and perhaps even contributed to the creation and articulation of those principles), or who voluntarily renounced their power might thereby afford a trustworthy reason to believe their present profession. The difference is between a voluntary renunciation (coupled with present professions of renunciation) and an involuntary disestablishment (perhaps coupled with vocal nostalgia for the ancient regime). The one would seem, obviously, more trustworthy than the other.

**4. An Answer to the Continuity Problem.** A continuity problem is that any claimed God-Revealed law comes at a fixed point in time, and times change; what to do about drawing normative conclusions or systems of casuistry from any narrative, possibly colored by some nonnormative accidental historical circumstances? An answer many Christians agree upon is the division of supernatural law into moral, juridical, and ceremonial parts.<sup>144</sup> They agree that the juridical and ceremonial are terminated, expired, abrogated, and of no effect (except insofar as their inherent equity may suggest).<sup>145</sup> They also agree that the

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<sup>144</sup> AQUINAS, *supra* note 68, Ia IIae, Q. 99, arts. 2 (moral precepts), 3 (ceremonial precepts), & 4 (judicial precepts), at 246–48; The Westminster Confession of Faith, ch. XIX, paras. II–IV (1647), [http://www.presbyterian.ca/webfm\\_send/1307](http://www.presbyterian.ca/webfm_send/1307).

<sup>145</sup> AQUINAS, *supra* note 68, Ia II ae, Q 103, art. 3, at 300–01 (ceremonial law has ceased); *id.* Q 104, art. 3, at 305–06 (judicial law is annulled); The Westminster Confession of Faith, *supra* note 144, at ch. XIX, para. III (ceremonial laws are abrogated); *id.* at para.

moral law is perennial and still in effect.<sup>146</sup> To the extent any of the juridical or ceremonial ordinances conflict with any rule of law, the problem no longer exists. As an intrinsic answer to the concern over historic “theocracies” or peculiar dietary laws, criminal penalties, or historical warfare against nonbelieving nations, this counts for something because it relegates these to the past, abrogating any current effect. It certainly counts for more than an alternate answer from an adherent of a supernatural law system that refuses to address the issue or that seems manifestly disingenuous in light of the entirety of the God-revealed text claimed by the adherent.

**5. Positive Affirmations of Human Dignity Confirmed by Conspicuous Actions.** A supernatural law whose adherents have given evidence of a commitment to human rights (not to “Christian” rights, or “Muslim” rights, but to human rights) by conspicuous and costly actions is one that implicitly gives some measure of assurance. If a supernatural law system acted against its own economic or power interests within its polity by, for example, dedication to freeing slaves at economic cost to the polity and even so far as sacrificing in war to end slavery, this is an implicit assurance it supports a rule of law. If it extends the franchise, or insists on freedom of thought and expression even when such extensions welcome new voters, and when such freedoms produce changed political alignment and speech that seems toxic to the polity and to the supernatural law’s adherents, these provide assurances of a genuine commitment to the rule of law rather than mere instrumental posing or pretensions. If it protects innocent human life consistently with common morality and because it is the correct thing to do in support of human rights, even though wildly criticized for doing so, or if it engages in other costly undertakings in support of clear and clearly important principles of common morality contrary to its own immediate interests, but for the good of the polity and for the integrity of the supernatural law itself, and if it consistently renounces opportunities to intervene on behalf of unclear, remote or inconsequential issues, the supernatural system should be credited as trustworthy on the question of rule of law and nonimposition. It is the difference between words, which might be feigned, and actions which tend to be somewhat more confidence-inspiring to those who are trying to test the sincerity of the speaker or actor.

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IV (judicial laws are expired and not obliging now except as “the general equity thereof may require.”).

<sup>146</sup> AQUINAS, *supra* note 68, Q 100, art. 1, at 251–52 (the moral law lasts forever because it depends upon natural knowledge of first principles); The Westminster Confession of Faith, *supra* note 144, at ch. XIX, para. V (the moral law binds forever).

## IV. EVALUATING SUPERNATURAL LAW

This Article has set forth a template for evaluating supernatural law. There are three steps: 1) does any supernatural law support the rule of law; 2) does it embrace the nonimposition principle; and 3) does it provide any reasonable assurance its adherents will keep their commitments when in a position of political power to do otherwise? A supernatural law that does so contributes to the health of a nation. It is also one that might be expected to add a truth component to the practical syllogism connecting supernatural law to a form of “national morality” and to the well-being of the polity.

**Proposition 3**—qualified supernatural law.<sup>147</sup> Let it be said that any supernatural law is “qualified” if it supports the rule of law, embraces the nonimposition principle, and provides credible assurances of performance in accordance with those professions.

Parts I, II, and III specified a set of standards for rational discussion of supernatural law to the end of determining whether any one or more such systems might be “qualified,” and now we briefly propose a process for doing so. The process defers, in the first instance, to experts within each supernatural law system to interpret the system, and to outside experts to evaluate the interpretations. It leaves it to them to advance the claim that any given system is qualified or not. This Article proposes that interpretations should come from those who know what their own tradition teaches and what their tradition is, and that evaluations of those interpretations may come from those competent to judge. To be credible, the claims of any supernatural jurisprudence should be checked against the list summarized in Appendix A, which contains in brief compass the criteria discussed herein.

The second step, after proponents or evaluators of a supernatural legal system have made their claim, is that replies, critiques, or further questions may then subsequently be made by anyone. It would be expected that from such discourse according to specified criteria leading to falsifiable or verifiable propositions any given polity could finally make an assessment as to the claims of any given supernatural law, and transnational organizations may do the same.

The third step is the assessment, as made by the polities or transnational organizations affected. It is not the aim of this Article to go so far as to make the assessments, but only to set forth the template by which initial claims of compliance can be made, critiqued, and assessed. It proposes a process by which proponents of any system of supernatural law might carry something like an initial burden of producing credible

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<sup>147</sup> This Article includes three propositions. This is the third. The first is at *supra* note 7 and accompanying text, and the second is at *supra* note 29 and accompanying text.

evidence tending to persuade unbelievers why an unbeliever might rationally submit to political governance by persons professing their adherence to supernatural law. Next, unbelievers may test that evidence. And, finally, any polity might make assessments on the evidence. Each of these steps may be the subject of rational argument, discussion, and determination based on the specified rule of law, nonimposition, and assurance of performance principles set forth herein.

What, it might be asked, are the practical consequences of qualifying any one or more supernatural legal systems within any given polity (or determining any one or more is not qualified)? There might be a range of possibilities:

**1. No Consequences.** There might be no consequences whatsoever. Some polities may be so committed to free exercise and free association that even if there were a nonqualified supernatural law system and if it were taking steps to gain political power, the polity might do nothing at all about it.<sup>148</sup>

**2. Interpreting or Enforcing a “Wall” of Separation.** There might be a polity which has some history of concern about “church/state” “entanglement” or “establishment” and about the presence or absence of “walls” of separation. A polity such as this might determine there is nothing to fear, and no need to erect any “wall” between the “state” and any “church” whose adherents are part of a qualified supernatural legal system.<sup>149</sup> It might choose to maintain its wall to separate only unqualified supernatural legal systems.<sup>150</sup> It might determine to put a door or gate in the wall, opening it for qualified supernatural law and closing it for unqualified supernatural law. Or it may continue to treat all supernatural systems the same and to wall off all of them simply because they are supernatural and regardless whether they might help or hurt the polity.<sup>151</sup>

**3. Excluding Inconsistent Political Parties.** There might be a polity which fears all supernatural law, or which is prepared to ban or to

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<sup>148</sup> Some might suppose this to be a bad idea, at least in a generally healthy and well-balanced polity that encourages and supports qualified supernatural law. It would seem to ignore a fundamental threat to the well being or continued existence of the polity.

<sup>149</sup> Some might suppose this to be a good idea. It would encourage a moral or God-fearing disposition in a disestablished polity. It has been claimed this was the genius of the original experience in the United States. Perhaps instead of a “wall” that is high and impenetrable it might have been better to propose a semi-permeable membrane. It should be recalled that what would be encouraged would be common morality, and not pure supernatural law. Moreover, the encouragement might amount to nothing more than “influencing the influencers” in support of common morality. *See supra* note [77].

<sup>150</sup> This might make sense. Of course, all that is being proposed is the erection of a wall of separation against unqualified supernatural law.

<sup>151</sup> Some might suppose this to be a directionless course, or to constitute a decision not to decide a question that perhaps ought not to be abdicated.

forbid certain political parties if certain “religious” or “nonreligious” supernatural tenets are attributed to such parties and if those are “inconsistent” with some fundamental rule. This is exactly what has happened in Turkey, as affirmed by the European Court of Human Rights. One might reasonably wonder where such a practice might lead. A polity such as this might determine to channel its practice by distinguishing between those political parties to whom might be attributed the policies of a qualified supernatural law, and those of an unqualified supernatural law. A polity that has determined to ban some religious parties might be much better off were it to measure any religious party against a specified standard rather than some potentially shifting and perhaps subjective view. The same could be applied to supernatural law proposed by nonreligious or antireligious parties. This Article proposes a specified standard suitable for forensic use, if a polity determines to pursue this course.

#### EPILOGUE

This Article began with a prologue addressing issues in the United States, Turkey, and the International Court of Human Rights. It is a legitimate question whether the world might look to the United States of America as a model, or to Turkey, or to Europe, or elsewhere for a generalizable method of dealing with the claims of supernatural law within a constitutional order dedicated to the rule of law. Likewise there is a question whether controversies involving Christian or Muslim supernatural law exhaust the domain. There is not sufficient space in this Article to do more than raise the perplexities created by current approaches, and to propose a specified set of criteria for better understanding the issue in the future.

The model of Turkey is not entirely clear. It would seem that if the Refah Partisi case were rightly decided,<sup>152</sup> its aftermath cannot be easily reconciled. It is reported that the Welfare Party reconstituted itself in Turkey as the “Justice and Development Party” (or “AKP”).<sup>153</sup> When, as governing party, the Islamic-rooted AKP and seventy-one of its members, including the prime minister and the president, were brought before the Turkish Constitutional Court in the summer of 2008 (as the Welfare Party had been some years earlier), only six of the eleven judges favored banning the party and its members.<sup>154</sup> It was contended that the AKP had a secret agenda slowly to bring religion into politics, which

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<sup>152</sup> See *supra* notes 14–24 and accompanying text.

<sup>153</sup> Farnaz Fassihi & Andrew Higgins, *Turkey Averts Crisis as Court Rejects Attack on Ruling Party*, WALL ST. J., July 31, 2008, at A1.

<sup>154</sup> *Id.* (noting it would have taken the vote of seven of the eleven judges to ban the AKP).

allegations were denied by the AKP.<sup>155</sup> As Prime Minister Recep Tayyip Erdogan (a member of the AKP who had previously been a member of Refah Partisi or other banned parties) put it, the AKP was “never the focal point of antisecular activity” and “will continue from now on to defend the republic’s basic values.”<sup>156</sup> That may be true, and a wonderful thing if so, but it is a rather thin reed upon which to lean. The AKP aftermath to Refah Partisi suggests that all a previously banned party in a relatively recently dismantled “Islamic theocratic regime under Ottoman law” need do is change its name, revise its platform, and get “lawyered up” to provide the right formulaic answers in support of “basic values.” If the Refah Partisi case is not just an aberration or a fluke, and if its concerns are serious and are to be resolved under a rule of law, it would be better to articulate some specific criteria—a rule of law and a nonimposition principle—against which to evaluate the claims of any supernatural party, and then to seek some reasonable assurances of performance.

The model of the United States is itself not entirely clear.<sup>157</sup> It would seem that if George Washington were correct in asserting (as translated into the terminology of this Article) that morality is good for the polity and supernatural law is good for morality,<sup>158</sup> and if the Westminster Confession were correct in advancing the foundational concept of a disestablished supernatural law within a moral nation,<sup>159</sup> then the American aftermath cannot be easily reconciled. In the American

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<sup>155</sup> *Id.* at A12.

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

<sup>157</sup> The United States is a model of a nation that has dramatically changed its principles of accommodation with supernatural law over time. It appears, prior to its operation in March 1789 under the Constitution, to have contemplated establishment of supernatural law at the level of the several states. Then, from shortly after the adoption of the Constitution and for about 150 years thereafter, it seems to have contemplated a disestablished but favored supernatural law—the view of disestablishment referred to as “supportive” herein. Then, as a third shift, from about 1947 through the present, it has flipped to a disestablished and at least nominally disfavored or unprivileged supernatural law. *See supra* note 13. This creates, not an easy “America-the-model” vantage point, but instead an opportunity to understand that America yields three choices. This is especially valuable when considering whether to “export” an American model. Because there is one pre-constitutional model and two post-constitutional models, it might actually be refreshing for the world outside the United States to reflect there is, or at least ought to be, no casual certainty that the American constitutional model “is” the antiestablishment model of the last sixty years. America might be stuck with it, but there is no need to insist to any part of the rest of world that either “modernity” or “democracy” necessarily requires an antisupernatural bias selectively employed against the religiously based supernatural law accepted by the majority. Instead, it might be quite possible and highly desirable to embrace a disestablished but favored supernatural law order—at least it seems the United States did so, and with pretty good results for a considerable period of its history.

<sup>158</sup> *See supra* note 6 and accompanying text.

<sup>159</sup> *See supra* note 137 and accompanying text.

context, a “wall” that is high and impregnable or impenetrable would seem to require a more sensible explanation than doctrinaire antiestablishmentarianism has thus far provided. It might have been sensible to erect a wall to exclude “pure” supernatural law, while admitting common moral law. It might have been sensible to erect a wall with a doorway through which “qualified” supernatural laws, both “religious” and “nonreligious” might pass. But it would seem perplexing to assert that the American model somehow recommends that modern democracies should be free of any support to common principles of morality that are shared with any given supernatural law, rather than simply requiring a nonimposition principle in support of a rule of law.

The models of Christianity in Europe and Mormonism in the state of Utah within the United States are equally perplexing. The nations of Europe present a multi-variable model of a series of interactions among supernatural law, morality, and various polities. It is a model of many things, one of which is a kind of radical antiestablishmentarianism.<sup>160</sup> It may or may not be a model for anywhere else in the world, and it may or may not have been an altogether satisfactory response even in Europe.<sup>161</sup> It would, however, be interesting to see further work clustered around the criteria suggested herein. Utah is an interesting model of a kind of supernatural law within a federal nation. In the nineteenth century, Mormon Utah was widely understood to have been a theocratic territory

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<sup>160</sup> Having had experience on both the giving and receiving sides of imperialism and colonialism, religious (and nonreligious and antireligious) wars of offense and defense, clericalism and anticlericalism, missionary zeal and anti-missionary reaction, religious and antireligious fundamentalism and violence, perhaps some of the European nations have a special sensitivity to, or suspicion of the claims of supernatural law that make the aggregate European experience more a special case than a bellweather example. In some historical experiences, as perhaps in some of the nations of Europe, a radical antiestablishmentarianism might seem routine, but in other contexts it might seem extreme, peculiarly bigoted and self-defeating.

<sup>161</sup> The European Court of Human Rights was keen to notice that political movements “based on religious fundamentalism” have from time to time, presumably in Europe, been able to seize power and to “set up the model society which they had in mind.” *Supra* note 21 and accompanying text. If the court had been more focused on supernatural law as including nonreligious and antireligious versions, it might profitably have noted that many other political movements based upon supernatural fundamentalism, such as the several varieties of National socialism and various strains of Marxist-Leninist socialism, have also been able to seize power and set up their own model societies. If a supernatural law is given by an incorporeal sovereign (such as “the people” or the “general will” or the “movement of history” or like source) and is accepted by those who believe in its fundamental principles, rules, and commands, then the nations of Europe continue to have much to say about the experience of trying to discern “good” from “bad” supernatural law, perhaps succeeding by their misadventures in providing a lesson to others (none of whom are immune from similar disasters). The criteria proposed herein are intended to provide a better method for evaluating the claims of any supernatural law.

within the United States,<sup>162</sup> having strongly held views of family law (polygamy) diverging from the common moral rules of the national federation. As a condition to entering the United States as a new state, Utah renounced its incompatible rules, and the Mormon strain of supernatural law may well have provided some assurances of performance, by way of an intrinsic interpretation, reinterpretation, or fresh revelation which satisfied its fellow citizens. It may or may not be a model for anywhere else in the world, but it is an interesting example of a voluntary renunciation that seems to have been effective despite somewhat skeptical, if not hostile, historical circumstances.

This Article seeks to generalize a conflict involving supernatural law and to reframe the issues away from “church/state” and other localized formulations. The problem addressed by this Article is not the conflict between or among different versions of supernatural law, but is instead the problematic relationship between *all* versions of supernatural law on the one side and all who either welcome or forbid the robust participation of supernatural law’s adherents in the polity on the other side. It is for this reason I have proposed to come to terms with the issue by translating “church,” “religion,” “religious principles,” and “sharia law” on the one hand, and the “state” on the other hand into common terminology. In the reframed problem, it is “supernatural law” itself that is at the center of the issue, and it is at issue precisely in its relation to any polity. The modest goal was to identify a problem and propose a method of evaluating it in a manner open to nonspecialists. This method is what I and others have called the restatement of the obvious. There are many reasons for this terminology, but let it suffice for now to say that some have made of philosophy a sort of closed system in which only specialists work, but that is a bad idea when it comes to governing human beings under a rule of law.

There is much remaining to be done. A more exhaustive treatment of the rule of law principles outlined in this Article and summarized in

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<sup>162</sup> See generally ARTHUR CONAN DOYLE, *STUDY IN SCARLET*, reprinted in 1 *THE COMPLETE SHERLOCK HOLMES* 3, 77 (Doubleday, Doran & Co. 1930) (1892), for an expression of some not entirely pleasant views of Utah: “[i]n the central portion of the great North American Continent there lies an arid and repulsive desert . . . [having] the common characteristics of barrenness, inhospitality, and misery” and for a generally unflattering, if not prejudiced, view of Utah’s Mormon settlers. See also ZANE GREY, *RIDERS OF THE PURPLE SAGE* (1912), reprinted in *ZANE GREY: FIVE COMPLETE NOVELS* 1, 79, 149 (1980) (evidencing unflattering, if not prejudiced, views of the Mormon settlers, but rather admiring the landscape). Crediting the foregoing works of fiction as perhaps capturing some of the sentiments of the times, despite mutual hard feelings and suspicions between themselves and those with whom they shared a nation, Mormons have prospered in the United States and might have something to teach about the adaptability of supernatural law and its contributions to a polity founded on a rule of law. A Mormon jurisprudence further developed against the criteria proposed herein could be very fruitful, and the work of Professor Welch should be a welcome beginning. See *supra* note 38.

the Appendices might be undertaken as an effort more fully to state the principles of a “*Normative Jurisprudence and the Restatement of the Obvious*.” One or more comparisons could be made, in the nature of “*Normative Jurisprudence and a Qualifying Interpretation of [Jewish] / [Christian] / [Muslim] / [Mormon] / [Marxist] / [nonreligiously or antireligiously based supernatural] Jurisprudence*.” Finally, a set of proposed laws, asserted to be consistent with the “law and morality” principles summarized in this Article might be promulgated.

Just as there is an American Law Institute engaged in promulgating “restatements” of the law, so there might be created a National Law Institute to promulgate “rediscoveries” or “reformations” of the law by drawing out the underlying common moral bases omitted from the existing restatements. And, as there is within the United States a National Conference of Commissioners on Uniform State Laws (“NCCUSL”) which drafts proposed uniform laws, so also there might be organized a Joint Associated Council of Commissioners on Uniform State Enactments (“JACCUSE”) to draft proposed uniform laws to include common moral components recognizable to those who are supposed to be subject to the law.

Finally, it is no accident this Article eschews some conventional terms that have become overused and carry inordinate baggage. While perhaps instinct with what has been called “natural law,” I have avoided the term because it is the opposite of helpful. There is nothing more “natural” about natural law than any other law except the claim that it is naturally knowable; in fact natural law is all about denying certain natural impulses and desires in favor of other and better goods that natural reason can discern, but the very label “natural law” obscures what is natural about it.<sup>163</sup> So also, others may later add many other fine formulations. The current problem, in short, is not any “lack of problem” (and will not be resolved by adding yet further technical complications)

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<sup>163</sup> This Article is not an exposition of the “classic” natural law theory, but a full or even partial explanation of how and why it diverges would require another article and would be contrary to the purpose of this one. *See supra* note [135] (suggesting one of the bases for reworking the “classic” theory). One consequence of avoiding the classic natural law theory is that it avoids the unhelpful search (in this context) for prior authorities who have advanced the same, similar, or opposite positions on “natural” goods as those advanced here. As a commentator on Pope Benedict’s Regensburg Lecture has written, “Philosophy was the search for truth, not for who said it.” SCHALL, *supra* note 1, at 77; *The Restatement of the Obvious*, *supra* note 25, at pt. IV (noting the dilemma of sourcing things claimed to be obvious). The selective sources cited herein have deliberately included many drawn from a Hellenistic philosophic tradition (numbering Plato, Aristotle, Augustine and Aquinas among them). This is because of the non-proprietary claim they make to the universal application of rational principles to all persons, everywhere, regardless of the accidents of culture and nationality, and without presupposing there are any “second class” persons anywhere. This Article invites a response, not limited by cultural conditioning. *See* Pope Benedict, Regensburg Lecture, in SCHALL, App. ¶¶ 13-31, 54-63 (*semble*)

but rather a lack of clarity and lack of any rational method to address conflicts among moral and supernatural systems of law within any polity that desires a rule of law. It is past time for a nontechnical solution of the sort proposed herein.<sup>164</sup>

#### CONCLUSION

Lack of problems is not the problem.<sup>165</sup> As used herein, supernatural law describes any rule or command given to subjects (“believers”) of an incorporeal sovereign which includes at least one precept, rule, or command not determinable by reason. Supernatural law is, has been, and probably will remain intertwined with conventional legal systems not only in the United States but globally and transnationally. Among many other things, supernatural law underpinnings frequently support a “higher law” perspective which animates any living law and which generates meaning when it comes time to interpret any given law—it is certainly and evidently a large part of what creates “the spirit of the law” to aid in glossing the letter. In addition, its adherents sometimes forcefully advance supernatural law as a suitable rule for inclusion in the political life and law of human governments because they claim it enhances morality.

Supernatural law might be good or bad to the extent it either supports or opposes (1) the rule of law, and (2) the principle of

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<sup>164</sup> The approach has been to argue both directly for a restatement of the obvious, and also transcendently for a set of conditions by which a rule of law might be obtained. It is nontechnical because it does not rely upon mastery of the literature or the technical terms of art of professional, academic philosophy (or of “legal” philosophy). It is addressed to all persons throughout the world who are bound by law, in language and forms of discussion that should be understandable to anyone interested in living under a rule of law, in preference to living under a rule of brute force. It is couched in language sufficient to explain the situation. One might hope that professionally trained persons who are so inclined would advance the argument by rephrasing it in the language of the academy.

<sup>165</sup> Ludwig Wittgenstein’s “last word” on his teacher, Bertrand Russell was: “[s]ome philosophers (or whatever you like to call them) suffer from what may be called ‘loss of problems.’ Then everything seems quite simple to them, no deep problems seem to exist anymore, the world becomes broad and flat and loses all depth, and what they write becomes immeasurably shallow and trivial. Russell . . . [suffers] from this.” Posting of John Podhoretz to The Corner, <http://corner.nationalreview.com/post/?q=NDM1OGRiNDc4YmRjZDY4M2U3YzZjMGQ5MzczM2JkYzg=> (July 13, 2006, 17:27). Given the immeasurably “deep” (technically nuanced but solipsistic and futile) discourse on law and morality in the current era, it cannot be imagined that loss of problem is today’s problem. The restatement of the obvious proposed herein is a nontechnical method of resolving legal conflict in an increasingly transnational world that is anything but simple, and yet without adding any artificially manufactured *faux* complexity. I believe the proposed approach outlined herein is neither simple nor likely to lead to simple solutions, but is simply nontechnical and therefore open to anyone for their consideration regardless of class, culture, bias, sect, or other nonessential divisions in a global community interested in a rule of law

nonimposition upon the freedom of conscience of unbelievers. Any given system of supernatural law might be qualified (or not) by responding to a series of testable questions. Does it acknowledge the equal human dignity of all persons? Does it appreciate that the only generative or interpretative sources of law must be fiat, reason and observation, or history? Does it affirm that any law might be better the more it is reasonable, good for something, authorized and clearly set forth, and to the extent it is also reasonably consistent, systematic, humane, and validated? Does it seek after justice as comprising the lawful, the fair, the right, and the good? Does it seriously work to understand the language in which its law is expressed? To the extent it does so, it supports a rule of law. In addition to supporting the rule of law, any given system of supernatural law may be tested against a second measure. Does it by its own terms embrace a nonimposition principle—whether by affirmation of freedom of conscience, by separation, by disestablishment in any of the senses of that term, or otherwise? To the extent it does, it further qualifies as an aid to the health of any polity.

Moreover, any particular brand or version of supernatural law might be greeted with a greater or lesser degree of proper suspicion on the part of unbelievers. This suspicion will exist to the extent that it does or does not provide reasonable assurances that its promises, if any, to support both the rule of law and the nonimposition principle will be honestly and faithfully performed if and when the supernaturalists become politically dominant and powerful enough to make rules for the rest of the polity. Does any given system of supernatural law have a demonstrated internal heuristic of restraint? Does it have any historical experience, or any other basis for predicting how it (or its adherents) will likely behave in respect of the rule of law and nonimposition if and when entrusted with lawmaking and law enforcing power within a polity? To the extent any system of supernatural law provides reasonable assurances it yet further, and finally, qualifies itself as an aid to the good health of the polity.

This Article asserted three propositions, intermixed with the main thesis. First, it posited a practical syllogism (if morality is good for the polity, and if supernatural law is good for morality, then supernatural law is good for the polity). Second, it provided a standard for the health of a nation (a healthy polity is one with relatively good laws which its subjects, or many of them, choose to obey much or most of the time). Third, it identified a “qualified” supernatural law (any supernatural law is qualified if it supports the rule of law, embraces the nonimposition principle, and provides credible assurances of performance in accordance with those professions).

If in fact morality is important to the health of nations, and if supernatural law is important to morality, then the state of

supernatural law is a leading indicator of the health of any nation. Surprisingly, little systematic thought has been given to the general question how to evaluate the claims of any given system of supernatural law (a “supernatural jurisprudence”) against any completely specified criteria for rational judgment about those claims. This Article has proposed a specified method for such an evaluation.

If there is any one or more vibrant supernatural laws that supports the rule of law, embraces the nonimposition principle, and can be trusted not to violate the rights of unbelievers, such a thing would be a great good and would greatly contribute to the health of any nation. Conversely, the opposite system of supernatural law, if there be such a thing (and there may well be), would be a toxic threat and would undermine, weaken, or destroy the health of any nation.

APPENDIX A: LAW AND MORALITY BASED ON MODERN MORAL REALISM AND  
NORMATIVE JURISPRUDENCE\*

*This is a restatement concerning law*

**THE RESTATEMENT OF THE OBVIOUS****CHAPTER ONE: DEFINITIONS**

*Section 1. Law.* Law is a rule or command imposed upon its subjects by a sovereign. Different subcategories of law depend upon the nature of the sovereign:

- (1) Where the sovereign is claimed to be incorporeal or disembodied, and the rules or commands are accepted by a believer, the subcategory is “supernatural law;”
- (2) Where the sovereign and the subject coincide within a self-binding person, and the rules or commands are claimed to be based upon practical reason, indemonstrable principle, or other moral authority, the subcategory is “moral law;” and
- (3) Where the sovereign is a visible person, executive, or other agent of a state actually enforcing rules or commands upon its subjects the subcategory is “human law.”

For ease of discussion, human law is frequently referred to as “law” but the context can govern when “law” is being used in a more specialized sense to refer to one of the other subcategories.

*Section 2. Rule of Law.* A rule of law is a set of laws its subjects can obey voluntarily and rationally, in conscience and in the absence of external force, because doing so is (or seems to be) good for the person affected (such action being referred to as “autonomy”).

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\* © Thomas C. Folsom 2004, 2005, 2006, 2008. Portions of this restatement were first published in 16 REGENT U.L. REV. 301, 347–49 (2004) and, with modifications, in 21 REGENT U.L. REV. 105 (2008). Permission is granted to reprint and distribute “The Restatement of the Obvious” in its entirety, with attribution and with this footnote. Permission is also granted to excerpt various topic and section heads for purposes of scholarship, commentary, or reporting, provided that as to any topic, all section heads within that topic are included. Such reproductions should indicate that this is a restatement of the obvious in respect of [human] law, and not as to any other subject. *Disclaimer:* there is no claim to any original thought herein, except in selection, order and arrangement, and the absence of footnotes is intended for brevity (and speed) only. An annotated and more fully expressed version is something I would like to write but have not the time to do yet. This is a tentative draft, and these are things I would like to expand.

*Section 3. Human Beings.* A human being (or “person”) is anyone who is either (1) capable of conceptual thought, syntactical speech, and apparent freedom of rational moral choice, or (2) biologically and naturally descended from persons having that capability, including by DNA signature, regardless whether those capabilities are being exercised or even exist in such a descendent.

*Section 4. Rational Moral Choice.* The reason any human being might voluntarily and rationally obey a rule of law in the absence of external force is that doing so seems rationally “good” to the person subject to law. A thing is rationally “good” for a person if it is an object of reasonable desire, including on the basis of indemonstrable principles. Such an object is one likely to make any person better off than its absence, and better off than the presence of its opposite. A reasonable desire is one subject to discussion governed by practical reason (or “right reason”) and also subject to the dictates of conscience as well as to the conclusions of “pure” intellect.

*Section 5. Goods.* Among the things individual persons might desire because they are rationally good (or seem to be) are:

- (1) Wealth, including material goods and an abundance of them;
- (2) Pleasures, including leisure; activity; amusements; play; the enjoyment of things that feel good in the consumption or use of them, or afford disinterested pleasure in the contemplation of them; relaxation; good health; and the absence of pains or disappointments;
- (3) Power or reputation, including fame, glory, celebrity, honor, and the absence of insult or discredit, unfair deprivations, and slights;
- (4) Freedom from any restraint at all, including not only freedom of thought and freedom of the will, but freedom to think and to will anything at all and to act upon such impulses to the maximum extent possible;
- (5) Various eclectic goods, including liberty or equality, sharing, caring, consensus building and all-around “niceness,” efficiency, and the avoidance of waste;
- (6) Relational goods, including friendship, love, family relations (husband and wife, parent and child, and extended family connections), social relations, and other associations;
- (7) Virtue or character, including the virtues of courage, temperance, justice, wisdom and the absence of dangerous addictions, laziness, untrustworthiness, meanness, or cruelty; and

- (8) Happiness, considered technically as a whole life well-lived in accordance with complete virtue and accompanied by at least a minimum sufficiency of external goods.

*Section 6. Common Goods and Political Goods.* Common goods consist in those that can be shared by all members of a polity because they are rationally good, nonrivalrous and nonexclusive. Rational political goods consist in those common goods, the pursuit of which can be supported by the polity, and especially those that suffer from public goods and free-riding externalities. If “happiness” is defined, technically, as comprising individual or internal virtue plus at least a minimum sufficiency of external goods, then the pursuit of happiness as a goal of the polity becomes not only reasonable but realistic. It is possible for a polity to cooperate with the pursuit of happiness so defined without privileging or sacrificing any of its subjects; however, it seems impossible for a polity to achieve, and futile for a polity to try to achieve never-ending and always increasing, wealth, pleasure, power, absolute freedom, or other eclectic goods for its subjects.

*Section 7. Indemonstrable Principles.* Indemonstrable principles are those that are both manifest and claimed to be true even though they cannot be proved by reference to their conformity with external objects. Some of these are analytically true, others are claimed to be true independently.

- (1) Among the indemonstrable principles of thinking are the rule against contradiction, the rule that every effect must have a cause, the essential reliability of sense impressions, and the ability of language to signify meaning and numbers to signify relationships.
- (2) Among the indemonstrable principles of acting and of choosing between actions are the propositions that good is better than its absence or opposite, something is better than nothing, life is better than death, love is better than hate (and the independent moral propositions: good ought to be preferred over evil, something ought to be preferred over nothing, life over death, love over hate), and that no person ought deliberately to harm another person.

*Section 8. Supernatural Law.* Supernatural law is a rule or command imposed upon its subjects (and received and accepted by them as “believers”) by an incorporeal or disembodied (reified) sovereign and which also includes at least one precept, rule, or command not necessarily determinable by reason.

*Section 9. Legal Foundations of the Polity.* Any polity might make its legal foundations more intelligible, and possibly more secure, if it were to announce (somehow) that its laws are enacted in light of some one or more of the rules, definitions and sub-definitions set forth in §§ 1–8, or else that it explicitly denies, ignores, or modifies one or more of them.

## CHAPTER TWO: RULE OF LAW

### Topic One: Basic Principles

*Section 101. Ontology.* There is an objective reality.

*Section 102. Epistemology.* Human beings can know something about objective reality.

*Section 103. Morality.* The things knowable about objective reality include not only matters of fact and probable opinion about things, but also conduct. There are some things that human beings know every person ought to do, including on the basis of indemonstrable principles (these are the basic claims of morality).

*Section 104. Legality.* There are some things that the law requires every subject to do (these are the claims of human law).

*Section 105. The Gap.* There is reason to be concerned about the presence of, and also about the absence of a gap between what some persons believe ought to be done (the claims of moral law and of supernatural law) and what the law requires or prohibits (the claims of human law).

(1) There is a moral claim that *is* the same as everything that ought to be done because it includes all of morality, and there is a claim made upon its believers by supernatural law because it includes the law of a supernatural sovereign.

(2) There is a legal claim that is *not* the same as all that ought to be done because it includes only that which the human law requires; this often differs from the claims made by moral law or by supernatural law, even if the difference consists in the human law's demanding less than what moral or supernatural laws demand of their believers.

- (3) There is a legitimate question what to do about the presence or absence of the gap between the claims of human law and those of moral law and supernatural law.

### **Topic Two: Sources, and Integration of Law**

*Section 201. Fiat or Positive Law.* Command, authority, rule, fiat, and will to power: the compulsive force of the state.

*Section 202. Reasonable Law.* Logos, reason and observation: the natural law and other empirical sources including law and economics, statistical methods; moral law and human conscience.

*Section 203. Historical Law.* The spirit of the law: history and realistic imagination; the possibility of normative history; designs or constraints on the future.

*Section 204. Extra-legal Constraints (Influencers).* Human conduct is also constrained or influenced by extra-legal influences including markets, norms, associations (family, friends, firms, schools, entertainment and news media, neighborhoods, voluntary organizations, organized religions, and class or group identity), and the architecture of external reality, some of which is fixed, but some of which may be changed or influenced by, or which reciprocally influences, the law or its interpretation

*Section 205.* Any [human] law is integrated to the extent it is:

- (1) positive (based upon a command or fiat); and/or
- (2) reasonable (based upon reason and observation); and/or
- (3) historical (based upon historical norms); and/or
- (4) consistent with relevant extra-legal influencers.

*Section 206. Integrated Moral Realism in the Law.* Law is further integrated when [A] what ought to be done (the claims of morality), is compared with [B] what the law requires to be done (the claims of the law), and, subject to the provisions of this restatement, a conclusion [C] is reached or a proposal is formulated for retaining, modifying, or making law. See especially, sections 105, 205, 901(2) and topics three and four.

### **Topic Three: Making or Changing the Law**

*Section 301.* Is it compulsory?

*Section 302.* Is it reasonable?

- Section 303.* Is it good?  
*Section 304.* Is it articulate?  
*Section 305.* Is it authorized?  
*Section 306.* Is it reasonably predictable?  
*Section 307.* Is it reasonably humane?  
*Section 308.* Is it reasonably consistent over time as well as internally?  
*Section 309.* Is it reasonably systematic?  
*Section 310.* Is it purposeful, and is it fairly validated?  
*Section 311.* Is it fairly directed to the appropriate level, sphere or jurisdiction?

#### **Topic Four: Law and Justice**

##### **First set—justice as a virtue in respect of the rule of law**

- Section 401.* Justice as the right: paying debts; and justice as punishment.  
*Section 402.* Justice as the fair: treating equals equally and unequals unequally.  
*Section 403.* Justice as the lawful: following the law.  
*Section 404.* Justice as the good: respecting inherent duties and rights.  
*Section 405.* Justice as the normative: allowing for the possibility of normative history and culture.

##### **Second set—misguided moralism\***

- Section 406.* Justice as a construct.  
*Section 407.* Justice as the interest of the stronger.  
*Section 408.* Justice as a correction of a false consciousness.  
*Section 409.* “Justice” as *nomophobia*.

##### **Third set—incomplete analytics\***

- Section 410.* Justice as a catch-all misnomer for things other than lawful.  
*Section 411.* Justice as mere process or as a merely conventional jurisdictional matter.  
*Section 412.* Justice as the empirical.  
*Section 413.* Justice as social or economic opportunity or results

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\* Perhaps including one or more of the foregoing, but also including one or more of the following.

**Justice and modern moral realism**

*Section 414.* Justice must be a combination of some one or more of the foregoing (sections 401–413) depending upon time and place.

**Topic Five: Law and language: the language of moral realism**

*Hypothetical:* Consider the case, Johnny and the Cow: if we call a tail a leg, how many legs does a cow have? (a) five; (b) one (and only one); (c) four; (d) all of the above; (e) none of the above; (f) whatever you want it to be.

*Section 500A.* Language is not wholly conventional and subjective.

*Section 500B.* Language is able to signify something objective.

**CHAPTER TWO: NONIMPOSITION**

*Section 900.* Evaluating Supernatural Law and Moral Law.

- (1): The Rule of Law Principle.
- (2): The Nonimposition Principle.
- (3): Adequate Assurances of Performance.
- (4): Qualified Supernatural and Moral Law.

*Section 901.* Evaluating Human Law; rule of law, nonimposition, and the further limitations of architecture.

*Section 902.* Consequences (separation and disestablishment)

**CHAPTER THREE: LAW AND MORALITY**

*Section 1000.* The moral basis of family law.

*Section 1100.* The moral basis of property law.

*Section 1200.* The moral basis of contract law.

*Section 1300.* The moral basis of tort law.

*Section 1400.* The moral basis of criminal law.

*Section 1500.* The moral basis of agency law.

*Section 1600.* The moral basis of business associations and limited liability law.

*Section 1700.* The moral basis of individual rights and liberties.

*Section 1800.* The moral basis of abstention (or limits on the power to compel): rights, jurisdictions and spheres.

*Section 1900.* The moral basis of the police power and of the taxing power.

APPENDIX B: A FRAMEWORK ILLUSTRATING HOW A PARTICULAR  
SUPERNATURAL LAW MIGHT BE QUALIFIED

[as to each item in Appendix A, an adherent of a supernatural law jurisprudence would respond with an analysis according to the standards of §§1-9, 101-05, 201-06, 301-11, 401-15, 501-10, and the other sections, and then might add a specific conclusion in each topic as indicated below] [various other supernatural systems might be inserted, and each might advance its own claims, according to the evidence of its own authorities, indicating which of the propositions they would affirm, and which they would deny—the examples below would, of course, be qualified by identifying which specific schools of Christian jurisprudence affirm (or deny) the propositions and which schools or versions of nonchristian supernatural law also affirm (or deny) the propositions]

*Section 106.* Christians affirm these things (Sections 1–9 and 101–105) because God has revealed them not only by the special illumination of the Holy Spirit and the special revelation of the Bible, but also by general revelation in creation and conscience.

[Nonchristians might also know and affirm these same things, because these things are manifest in nature—these are not special, secret, or private matters, nor are they mysteries of Christian-specific supernatural law.]

*Section 207.* Christians know these things (Sections 201–206) because they know that God is triune, and God acts by will (positive law *fiat*, and God the Father), by reason (*logos*, and God the Son), and by historical memory and imagination (*spirit*, and God the Holy Spirit), all three in one.

[Nonchristians might also know these things because these things are manifest in existing human law.]

*Section 312.* Christians are stewards of the (human) law because God is a lawgiver, whose laws reflect his nature, which is good and which seeks what is best for humankind, and because God has called Christians to good works prepared in advance for them to do. Good human laws constitute a benefit to humankind.

[Nonchristians might also be stewards of the law, because it might seem good to them to do so.]

*Section 416.* Christians are concerned about the definition of justice, understood primarily in accordance with §§ 401-05, because God has commanded Christians to act justly and, therefore, they need to know what “justice” is and how it should be conceived and implemented.

[Nonchristians might be concerned about the definition of justice because they in fact use the concept of “justice” (or at least the word) to contend for changes in, preferred applications of, or predictions about actual law.]

*Section 511.* Christians believe language can communicate because God reveals himself, not only in creation and conscience but also by language in the Bible.

[Non-Christians might agree that language can communicate because it is evident that language does in fact communicate, at least if honestly and carefully used.]