Moral Truth and the Law: A New Look at an Old Link

Daniel J. Morrissey
Of lawe there can be no lesse acknowledged, then that her seate is the bosome of God, her voyce the harmony of the world.

Richard Hooker

Rarely does one hear it said that law is a reflection of an objective justice or the ultimate meaning or purpose of life. Usually it is thought to reflect at best the community sense of what is expedient; and more commonly it is thought to express the more or less arbitrary will of the lawmaker.

Harold J. Berman

I. INTRODUCTION: LAW, JUSTICE, AND MORAL SATISFACTION

We have come a long way from Richard Hooker's late medieval outlook to the views that Harold Berman describes as controlling today. We now speak of lawyers as "problem solvers" and say that the purpose of law is to "resolve disputes." There is, however, a widespread dissatisfaction with our legal system, rooted perhaps in a shared sense that the law is no longer connected to its essential purpose—justice.

This disillusionment is hardly a surprise. Can the law command much popular respect if it is considered nothing more than rules of expediency or a justification for arbitrary power? Such an attitude also makes it difficult for ethically sensitive people to practice law. Must lawyers limit their professional goals to the hired gun syndrome—just making a good living by manipulating the rules of law to serve their clients' ends?

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This Article is dedicated to Gregory M. Morrissey and all his hopes and dreams.


Perhaps that is all one can expect in a legal career, but it isn't an attractive way of life for people who seek moral satisfaction in their work. Such limited possibilities will also frustrate beginning lawyers and law students who enter the profession motivated, at least in part, by a "deep and durable demand for justice."

There is, however, a tradition in jurisprudence that links law to a worthier purpose. Hooker, with Renaissance flourish, called it "the harmony of the world." Law, in this view, must be based on moral truths; it must serve proper human ends. Justice Anthony Kennedy expressed that broader outlook recently when, speaking without notes, he delivered these remarks at an ABA dinner: "We must never lose sight of the fact that the law has a moral foundation, and we must never fail to ask ourselves not only what the law is, but what the law should be." But to establish this relationship of law to justice we must answer certain fundamental questions. Is there such a thing as moral truth? If so, what are its principles and how can we know them? And, ultimately, can they underwrite our laws?

This Article begins by noting how those issues are present in comments from a recent Supreme Court case. It then reviews the troubling philosophic and jurisprudential theories that have divorced law from any such foundation in ethics. The Article concludes by discussing three contemporary moral philosophers whose refreshing ideas can lead us back in the opposite direction, toward the restoration of a justice-based theory of law.
II. THE SUPREME COURT'S BRUSH WITH MORAL TRUTH

A. OVERTURNING A WRONGLY-DECIDED CASE

In the recent plurality opinion in Planned Parenthood v. Casey,8 Justices O'Connor, Souter, and Kennedy found it necessary to explain when the Supreme Court would be justified in overruling a precedent.9 Among other decisions contrary to the rule of stare decisis, the Justices cited Brown v. Board of Education.10 There the Court abandoned the separate-but-equal doctrine it had condoned almost sixty years earlier in Plessy v. Ferguson.11 Plessy held that legislatively mandated racial segregation did not violate the equal protection clause of the Fourteenth Amendment.

The Planned Parenthood plurality noted that the Court in Plessy had rejected the argument that “the enforced separation of the two races stamps the colored race with a badge of inferiority.” 12 Justices O'Connor, Souter, and Kennedy then went on to give these reasons for Brown’s reversal of Plessy:

While we think Plessy was wrong the day it was decided . . . we must also recognize that the Plessy Court’s explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine Plessy was on this ground alone not only justified but required.13

Why did the Planned Parenthood plurality comment that the Plessy decision was always wrong if the ostensible reason for its reversal was “the facts apparent to the Court in 1954?” As the Chief Justice noted in his dissent in Planned Parenthood,14 the inequality inherent in legislated segregation was pointed out to the Court in Plessy. In fact, one Justice, John Harlan, based his dissent on it.15

By acknowledging that Plessy was never right, the Planned Parenthood plurality was perhaps recognizing what really happened in Brown. The facts of segregation and their consequences had not changed in sixty years. The Court simply came to understand something that had been true all along, that racial segregation was wrong and contrary to enduring American values.

The comments of the Planned Parenthood plurality reveal how foundational questions about morality underlie legal issues. Since that is the case, the remarks of one contemporary philosopher, Alasdair MacIntyre, describe what should be our ultimate inquiry: “Those of us who see constitutional

9. The precedent in question was Roe v. Wade, 410 U.S. 113 (1973), which guaranteed a woman’s right to abortion.
11. 163 U.S. 537 (1896). In reality, Plessy did not require that equal facilities be provided to those suffering racial segregation. It was three years later in Cumming v. Board of Educ., 175 U.S. 528 (1899), a case upholding a whites-only high school, that the Court first appeared to mandate that the state also provide a similar facility for black children.
13. Id. (emphasis added).
14. Id. at 2865.
15. Plessy, 163 U.S. at 562.
questions as questions of political morality must address the problem of moral knowledge. Is there moral knowledge? Of what does it consist? How is it achieved?" 16

B. ETHICAL ASSERTIONS AND SKEPTICAL REPLIES

At the deepest level, the concept of moral truth arises in each person's search for meaning. It supposes that each of us can find satisfying answers to questions like: "Are some ways of life better than others?" or "What is the point of doing anything?" In addition, if one accepts the basic Aristotelian insight that humans can thrive and flourish only in a community, moral philosophy must be more than a personal matter. Humans must devise some standards for their life together that promote the common good. In other words, laws must be based on moral truth.

But those assertions are open to a hostile response implicit in Berman's epigram that began this Article. How can a notion of justice or the common good ever be more than a meaningless abstraction, a lofty-sounding way to mask personal or group preferences? For instance, the Equal Protection Clause of the Fourteenth Amendment seems to suppose that there is a real, objective norm of equality, but is there? If the skeptic is right, there is no such thing as truth, only individual opinions about what is right and wrong. Or perhaps the most we can say is that a standard like equality is relative to a culture; it can only be defined by the beliefs of particular groups at particular times.

Applying that critique to the plurality's comments in Planned Parenthood, a skeptic might argue that the Brown Court invalidated segregation simply because the Justices in that case found the practice personally distasteful. A cultural relativist would put it a bit differently. She would see the Brown Court as basing its decision on the collective opinion of American society in 1954 that the practice of segregation had to be ended.

We may assume that a majority of the Supreme Court and perhaps of American society as well held a different attitude about race relations in 1896 than they did in 1954 or in 1992. Did the Planned Parenthood plurality therefore have any warrant to criticize Plessy, to say that segregation was just as wrong in 1896 as it was in 1954? Perhaps the Justices were only stating their current dislike for the practice as it existed then. Alternatively, they could have been merely expressing the negative view of racial segregation held by the consensus of American society in 1992.

C. MORAL OBJECTIVITY AS LEGAL GROUNDING

If Justice Kennedy is to be taken at his word, however, one suspects that at least he (and probably Justices O'Connor and Souter as well) was denouncing racial segregation as wrong even at the time of Plessy. What then

made that practice objectionable in 1896 even though most Americans at that time presumably saw no moral or legal problem with it?

One can surmise that the Planned Parenthood Justices would answer that racial segregation always violated the Equal Protection Clause when it is understood in the light of certain principles that the Plessy Court had failed to grasp. As one commentator noted, this method of constitutional interpretation is as old as our Republic: "For the generation that framed the Constitution, the concept of a 'higher law,' protecting 'natural rights' and taking precedence over ordinary positive law as a matter of political obligation, was widely shared and deeply felt."17

Of late, much of the Court’s description of these higher principles has had a ring of cultural relativism to it. The Justices have found certain rights premised on “the basic values that underlie our society,”18 or “rooted in the traditions and conscience of our people . . . .”19 Yet one senses that the Supreme Court is often reaching for an even deeper grounding for its important decisions. The Court has spoken of “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”20 And it has created standards like “the decencies of civilized conduct”21 and “a scheme of ordered liberty”22 to give meaning to our “living Constitution.”23 As Justice Brennan noted in a case involving the rights of foster parents, “the liberty interest . . . has its source, and its contours are

17. Thomas C. Grey, Do We have an Unwritten Constitution?, 27 STAN. L. REV. 703, 715 (1975). An early example of this attitude is the comment of Justice Chase in Calder v. Bull, 3 U.S. (3 Dal.) 386, 388 (1798), that governmental power was constrained not just by the federal and state constitutions but by natural law as well.

See also Stephen Macedo, Morality and the Constitution: Toward a Synthesis for “Earth-bound” Interpreters, 61 U. CIN. L. REV. 29, 32 (1992) (noting that the Constitution speaks in general moral concepts, for example, “equal protection of the laws,” which “call upon interpreters to bring critical moral thinking to bear on the task of construction”).


19. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). Justice Frankfurter was a bit more explicit about the source of his ultimate judicial values in Adamson v. California, 332 U.S. 46 (1947), where he stated that judicial review meant that the Court should scrutinize the whole course of the proceedings to determine "whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . ." Id. at 67 (emphasis added).


21. Rochin v. California, 342 U.S. 165, 173 (1952). As noted Constitutional commentators have put it: "Little more can be said to accurately describe the nature of a fundamental right, because fundamental rights analysis is simply no more than the modern recognition of the natural law concepts first espoused by Justice Chase in Calder v. Bull." JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 367 (3d ed. 1986) (citation omitted).

For some thoughts on how a court might find objective criteria to define this standard of "fundamental fairness," see Sanford Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and Criticism, 66 YALE L.J. 319, 344-63 (1957).

22. Palko, 302 U.S. at 325.

23. In his dissent in Michael H. v. Gerald D., 491 U.S. 110 (1989), Justice Brennan gave one of his most eloquent explanations of that ideal. He noted that there are "great constitutional concepts (like liberty and property) . . . purposely left to gather meaning from experience." Id. at 138 (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972)). He then cited a number of landmark cases where the Court overturned accepted practices by finding constitutional rights that had not been "traditionally protected by our society," for example, the right of married couples to use contraception (Griswold v. Connecticut-
ordinarily to be sought, not in state law, but in intrinsic human rights as they have been understood in 'this nation's history and tradition.'

One can ask, then, if the Planned Parenthood plurality was using American or human values to condemn segregation. Perhaps, like Justice Brennan, they were basing their judgment on both. Either way, the Justices were claiming to know moral truth and they were applying it to a time outside their own.

D. EPISTEMOLOGICAL ISSUES

Questions about moral judgments and their worth as foundations for legal rules are therefore epistemological: They ultimately depend on our being able to establish theories of how we can know things. How can we say, for instance, that racial segregation was as wrong in 1896 as it was in 1954? Is it possible to assert that value statements like that are intrinsically true? The presuppositions that have held sway for decades in Anglo-American philosophy have unfortunately answered that such claims are indefensible.

This dominant outlook, called non-cognitivism, maintains that all moral statements lack truth status. There is nothing that can make ethical assertions true, it says, in the way that propositions about empirical facts can be verified by reference to material objects. When it comes to validating theories of knowledge then, modern philosophy has given us a fact/value dichotomy. Ethical statements are consequently said to be nothing more than opinions, conveying the subjective preferences of certain individuals and groups. As a result, all prescriptive intellectual discourse, including legal theory, is haunted by skepticism, relativism, and nihilism. Everything is up for grabs.

Mark Tushnet, a leading thinker of the Critical Legal Studies School, sums up this attitude well. He concedes that a world without rights or any real meaning may be "Kafkaesque," but he nevertheless accepts that as an

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26. Id. at 17-23; see also Michael Moore, Moral Reality, 1982 Wis. L. REV. 1061, 1086-88 (1982).

27. As a leading non-cognitivist wrote:

There cannot be such a thing as ethical science, if by ethical science one means the elaboration of a "true" system of morals. For we have seen that, as ethical judgments are mere expressions of feeling, there can be no way of determining the validity of any ethical system, and indeed, no sense in asking whether any such system is true. All that one may legitimately enquire in this connection is, What are the moral habits of a given person or group of people, and what causes them to have precisely those habits and feelings? And this enquiry falls wholly within the scope of the existing social sciences.

ALFRED JULES AYER, LANGUAGE, TRUTH, AND LOGIC 112 (2d ed. 1952).
apt description of contemporary life. Such a state may be distasteful to
some, he says, "[b]ut the point of modernism is precisely that that is just the
way things are these days." 28

Well, things are not as bleak as that, at least according to three current
philosophers who are convincingly bucking the non-cognitivist trend. The
thrust of this Article will be to present their views as groundings for a jus-
tice-based theory of law. Before that, however, this Article offers a brief
digest of the philosophical origins of non-cognitivism. It describes how
those theories have supposedly disconnected legal theory from moral philos-
ophy. The result has been the reigning orthodoxies of our modern legal sys-
tem: positivism and liberal individualism (liberalism).

Contrary to a jurisprudence based on moral truth, both positivism and
liberalism insist on a value-free legal system. Positivism holds that law
should be separated from morality. Liberalism urges that the legal system
must only be a neutral framework in which each person can pursue his or
her own vision of the good.

III. THE MAKING OF MODERN LEGAL THOUGHT

A. THE PHILOSOPHICAL ORIGINS OF NON-COGNITIVISM

Modern philosophy is appropriately said to have begun with a doubt. At
the beginning of the scientific era in the early seventeenth century, French
philosopher Rene Descartes exemplified the inquisitive spirit of his age. He
resolved to question the existence of everything that he could not be certain
was true. 29 This led him to the radical position of doubting all that he per-
ceived except the experience of his own mind thinking. 30 Descartes came to
terms with his disbelief by claiming innate knowledge of the existence of a
good God. That deity, Descartes felt, would surely not deceive him about
the reality of objects that he clearly and distinctly perceived. 31 Later philos-
ophers, however, continued to pursue the subjective and skeptical method
that Descartes originally proposed.

The seventeenth and early eighteenth century British empiricists John
Locke and George Berkeley argued that humans can have no direct knowl-
edge of any material substances, only an awareness of the ideas in their own
minds. 32 They set the stage for the eighteenth century Scottish-born philos-
opher David Hume who pushed epistemology to its most skeptical reaches.
Hume followed the empiricists in disclaiming any direct knowledge of an

29. RENE DESCARTES, DISCOURSE ON THE METHOD 118 (Margaret D. Wilson ed., New
American Library 1969) (1637).
30. Id. at 128.
31. Id. at 131-32. For a lucid explanation of Descartes's revolutionary approach, see
ANTHONY FLEW, PHILOSOPHY: AN INTRODUCTION 61-68 (1980).
32. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Peter H. Nid-
ditch ed., 1975) (1700); GEORGE BERKELEY, THE PRINCIPLES OF HUMAN UNDERSTANDING
(Penguin ed., 1988) (1710); see also FLEW, supra note 31, at 68-79.
objective world. He went even further, however, to doubt that there is any necessity to the conjunction of events that humans commonly explain by the terms cause and effect.

Hume carried this agnosticism into moral matters. He questioned how ethical conclusions can ever be drawn from purely factual observations. A description of what is the case, he argued, can never compel one to behave in a certain way. In other words, moral discourse can never go from an “is” to an “ought.”

Consistent with that outlook, Hume disavowed the role of reason in controlling human affairs. All motivation, he said, comes from the passions, not reason, which can only act instrumentally in helping the passions secure what they desire. As Hume put it in his famous dictum, “Reason is and ought only to be the slave of the passions.”

In other parts of his writings, however, Hume appeared to be anything but a nihilist. At times, he seemed the spokesman for a worldly common sense and advocated adherence to accepted modes of behavior. In addition, while claiming to reject objective moral norms, he somewhat paradoxically recognized the worth of certain universal human sentiments such as sympathy.

Immanuel Kant, who wrote immediately after Hume, was profoundly troubled by his predecessor’s pervasive skepticism. Yet Kant was also distrustful of contemporary rationalist theories that claimed humans are endowed with innate mental faculties that give them a priori knowledge of reality.

As an escape from that conundrum, Kant offered a blended epistemology. He agreed with the empiricists that all knowledge originates in the senses. He went on, however, to assert that the mind has a certain pre-existing classification system that it uses to synthesize the raw data of experience and make it understandable. These mental structures include such concepts as “substance,” “causation,” “space,” and “time.” By using these categories,

33. DAVID HUME, A TREATISE OF HUMAN NATURE 238 (Ernest C. Mossner ed., 1985) (1739); see FLEW, supra note 31, at 79.
34. HUME, supra note 33, at 121-31; see ROGER SCRUTON, FROM DESCARTES TO WITTGENSTEIN 124-26 (1981).
35. HUME, supra note 33, at 507-21.
36. Id. at 521.
37. Id.
38. Id. at 462.
39. Id.
41. HUME, supra note 33, at 550-51.
42. FLEW, supra note 31, at 49 (quoting Kant's famous acknowledgement that Hume had "woken me from my dogmatic slumbers"); see SCRUTON, supra note 34, at 138-39.
43. For a succinct discussion of those rationalist systems put forth by Leibniz and Spinoza, see FLEW, supra note 31, at 106-10. Flew notes that Kant deftly exposed the fallacy of their attempt to deductively prove actual existence from mere existence in thought by contrasting "100 possible thalers [dollars] with 100 real thalers, . . . ruefully reflecting that nothing but the latter would improve his [Kant's] financial position." Id. at 105.
Kant asserted, humans can go beyond merely experiencing random sense impressions. They can have valid scientific knowledge of the world.\textsuperscript{44}

Kant is also renowned for his response to Hume's ethical agnosticism. Although Kant believed that the human mind is not capable of direct, transcendental knowledge,\textsuperscript{45} he did hold that there are objective grounds for certain ethical rules. According to Kant, there is a moral dimension to the human condition that flows from our status as rational agents.\textsuperscript{46} It demands ultimately that we treat each other with fairness. Kant called his grand norm the categorical imperative and stated it several ways, including this well-known prescription: "Act only on that maxim by which you can at the same time will that it should become a universal law."\textsuperscript{47}

\section*{B. The Heritage of Utilitarianism}

Kant thus submitted the ethical consciousness of each individual as a response to Hume's moral skepticism. But a contemporaneous British philosopher, Jeremy Bentham, accepted Hume's passion-driven theory of human behavior and created a socio-political system based on it. Bentham's theory, which he called utilitarianism, postulated that the ultimate goal of a society should be to maximize the pleasure and minimize the pain of its members.\textsuperscript{48} That principle, he said, could resolve every issue of public policy by mandating that government always act to produce the greatest happiness for the greatest number.

Bentham's hedonistic calculus was radically egalitarian. It sought only to quantify human preferences and admitted no qualitative differences in those desires.\textsuperscript{49} It is not hard to see how the non-cognitivists with their skeptical and subjective approach to morality are the offspring of Hume and Bentham.

The leading thinker of utilitarianism's next generation, John Stuart Mill, sought to refine Bentham's theory by proposing a regime of higher and lower pleasures, some by definition more worthy than others.\textsuperscript{50} For Mill, the judgments of those who had experienced diverse pleasures would be dispositive of their qualitative rank. Mill also tempered utilitarianism's index of general happiness with a Kantian respect for personal autonomy. Humans, he said, ought to be afforded the greatest amount of freedom to satisfy their individual desires. When this leads to conflict, Mill proposed the somewhat superfi-

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\item \textsuperscript{44} HUMPHREY PALMER, KANT'S CRITIQUE OF PURE REASON, AN INTRODUCTORY TEXT (1983) (1781); see also SCRUTON, supra note 34, at 137-48.
\item \textsuperscript{45} PALMER, supra note 44; see IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON (Lewis W. Beck ed., 1949) (1788).
\item \textsuperscript{46} IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 13-15 (Robert P. Wolff ed., 1969) (1785). Kant's poetic closing remarks to his CRITIQUE OF PRACTICAL REASON are also relevant here: "Two things fill the mind with ever new and increasing admiration and awe, the oftener and more steadily they are reflected on: the starry heavens above me and the moral law within me." KANT, supra note 42, at 258.
\item \textsuperscript{47} KANT, supra note 46, at 44.
\item \textsuperscript{48} JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 3 (Hafner Press ed., 1948) (1780).
\item \textsuperscript{49} Id. at 29-32.
\item \textsuperscript{50} JOHN S. MILL, UTILITARIANISM, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 8-9 (H.B. Action ed., 1972) (1863).
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cial notion of harm to others as the only legitimate check on human action.\textsuperscript{51}

Despite Mill’s hierarchy of pleasures and his libertarian bow to individual freedom, the classic utilitarian formula for justice continued to be simple. In making social policy, the lawgiver need only aggregate the desires of all members of society. If certain values held by a minority of citizens are odious to the larger part of the political community, they can logically be disregarded as inimical to the general welfare.\textsuperscript{52}

C. THE RIGHTS REACTION

In response to this strong majoritarian strain in utilitarianism, liberal individualism has emerged as an influential countervailing foundation for legal rules. This jurisprudence of “rights” sees each person as having certain paramount claims that take precedence over any action advocated on behalf of the common good.\textsuperscript{53} Because of the dignity of each person as a rational moral agent, the law must have a Kantian preference, liberal individualists say, for respecting individual desires.\textsuperscript{54}

Legal principles are therefore to be crafted with an eye to resolving individual conflicts, not to promoting any notion of the common good. For the liberal individualist, law serves as a “neutral framework.” It exists to create a state of affairs where each person can pursue his or her own chosen ends with as much freedom as can be permitted to secure that liberty for all others.\textsuperscript{55}

Egalitarian liberals would distribute the riches of society as evenly as possible to afford each individual the greatest chance for self-fulfillment.\textsuperscript{56} Others in this general school, however, would resist such policies of coerced sharing on the theory that they negate each person’s ability to maintain the wealth that he earns.\textsuperscript{57} Both of these strains of contemporary liberalism, however, hold that the law ought to promote individual autonomy over any notion of the general welfare.

D. POSITIVISM CENTERSTAGE

Legal positivism shares this value-neutral spirit of liberal individualism and grew hand-in-hand with it as a jurisprudential corollary.\textsuperscript{58} Positivism

\textsuperscript{51} Id. at 143.
\textsuperscript{52} SCRUTON, supra note 34, at 229.
\textsuperscript{53} MICHAEL J. SANDEL, LIBERALISM AND ITS CRITICS 2-3 (1984).
\textsuperscript{54} As a leading contemporary proponent of this outlook puts it: “Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.” JOHN RAWLS, A THEORY OF JUSTICE 3-4 (1971).
\textsuperscript{55} SANDEL, supra note 53, at 4.
\textsuperscript{56} See RAWLS, supra note 54.
\textsuperscript{57} See, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).
\textsuperscript{58} But see DWORKIN, supra note 54 (arguing that legal positivism is ultimately incompatible with the moral notion of human rights upon which liberalism is based).
defines law starkly as a command of the sovereign;\textsuperscript{59} the morality of a particular legal rule in no way affects its juridical status.

In the modern era, the seventeenth-century political philosopher Thomas Hobbes gave one of the earliest justifications for this attitude. Hobbes saw humans as interminably selfish and quarrelsome.\textsuperscript{60} Therefore, only a sovereign with absolute power can secure civil peace.\textsuperscript{61} Everyone must surrender to its authority, no matter how arbitrary. To allow humans to resist the sovereign's commands as unjust, would only, Hobbes feared, give them a pretext to dissolve society into anarchy.\textsuperscript{62}

Bentham was also a precursor of positivism. He denigrated any notion of justice that went contrary to his theory of social welfare. Since legislation was Bentham's means to achieve his happy state of utility, he recognized no limits whatsoever on parliamentary sovereignty.\textsuperscript{63}

It was, however, Bentham's nineteenth-century disciple John Austin who created positivism as an analytical school.\textsuperscript{64} Austin accepted Bentham's theories of social welfare. But he rigidly separated those ethical notions from the study of law, which, he argued, should be carried out without regard to its moral content.\textsuperscript{65} Austin advocated that jurisprudence be treated as a science whose only concern would be to understand the common features that characterize mature legal systems.\textsuperscript{66}

Austin may have given us the study of law as a separate subject from morality, but it was the distinguished Supreme Court Justice Oliver Wendell Holmes who drove that difference into the practical consciousness of American jurisprudence. Holmes, an avowed skeptic,\textsuperscript{67} looked pragmatically at the law as mere "prophecies of what the courts will do in fact."\textsuperscript{68}

Holmes's positivism was blunt and full-blown. He wrote candidly: "When

\textsuperscript{59} EDGAR BODENHEIMER, JURISPRUDENCE 97 (1974).
\textsuperscript{60} THOMAS HOBBES, LEVIATHAN 81-82 (Michael Oakeshott ed., 1946) (1651). Among Hobbes's memorable comments on that point are:
So that in the nature of man, we find three principal causes of quarrel. First, competition; secondly, diffidence; thirdly, glory .... Hereby it is manifest, that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man, against every man.
Id.
\textsuperscript{61} Id. at 112.
\textsuperscript{62} Id. at 211.
\textsuperscript{63} BODENHEIMER, supra note 59, at 86-87.
\textsuperscript{64} Id. at 96. See generally W.L. MORISON, JOHN AUSTIN (1982).
\textsuperscript{65} JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 126 (H.L.A. Hart ed., 1954) (1832). A contemporary commentator has pointedly restated the essential thrust of Austin's jurisprudence:
He [Austin] ... does refer ... to the natural law of the moderns, and says it ought to be thrown out of jurisprudence, along with the classical notions, because of its dependence on nonsense about moral sense.
MORISON, supra note 64, at 77.
\textsuperscript{66} BODENHEIMER, supra note 59, at 96-97.
\textsuperscript{67} Id. at 123. For a sharp critique of Holmes's ethical agnosticism and its effect on American legal theory in the early twentieth century, see Francis E. Lucey, S.J., Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society, 30 GEO. L.J. 493 (1942).
\textsuperscript{68} OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 173 (1920).
it comes to the development of a corpus juris, the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way." 69 Holmes allowed that moral principles had shaped the development of the law, but he regarded them as only reflecting the value preferences of the leading elements coincident in society. In his opinion, it would be a distinct advance if "every word of moral significance could be banished from the law altogether." 70

E. INPUT FROM THE LEGAL REALISTS

Yet Holmes also stated his distrust of the formal underpinnings of laws, urging that legal rules be constantly re-evaluated in the light of contemporary concerns. 71 He was advocating, in essence, that law serve human needs and that it be based on flexible, human-centered principles. If Holmes was at heart a moralist, he did not acknowledge it. But his call to examine the practical effects of particular laws did inspire a group of scholars in the early decades of this century who came to be known as the "Legal Realists." 72

The Realists studied both the process of adjudication and its impact on society. That led them to distrust the controlling force of legal rules. Courts, the Realists found, purported to apply precedent to cases before them, but their legal reasoning often resulted in a skewed syllogism. Most legal opinions really had more to do with a judge's hunch than the application of a legal rule to a particular state of facts. 73 The Realists therefore sought to expose and examine the unarticulated premises and felt necessities that actually shaped legal decisions. 74 The Legal Realists, like Holmes, would probably resist being described as moralists, but many of them were political activists with agenda for dealing with the complexities of a changing economic order. All of their talk of policy and new legal models was in reality nothing more than the application of humanistic values to the industrial conditions that were transforming twentieth-century America. 75

69. BODENHEIMER, supra note 59, at 123 (quoting Letter to John Wu, in HOLMES' BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 187 (H.C. Shriver ed., 1936)).
70. HOLMES, supra note 68, at 179.
71. Id. at 186-87.
72. See generally MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 169-246 (1992). The author notes, "Legal Realism was neither a coherent intellectual movement nor a consistent or systematic jurisprudence. It expressed more an intellectual mood than a clear body of tenets, more a set of sometimes contradictory tendencies than a rigorous set of methodologies or propositions about legal theory." Id. at 169.
74. For the foremost example of this application of psychology to law, see JEROME FRANK, LAW AND THE MODERN MIND (1930). It has been called "the most popular and widely read piece of Realist literature." HORWITZ, supra note 72, at 175-76.
Legal Realism thus came to temper liberal-positivism and that strange amalgam has dominated the workings of the American legal system in the post-war era. One also hears on occasion a new version of utilitarianism, that legal rules should be designed to promote economic efficiency by maximizing the value preferences of individuals. If there is a morality to the law today, it is this overriding ethic of individualism, moderated only by vague invocations of public policy.

Along those lines, some commentators have issued rather hesitant invitations for new forms of legitimacy that might give legal theory a "logic of appropriateness." Perhaps there is a groping there toward what two illustrious legal scholars have called a "politics of virtue." Yet there has been no real effort to place the law on a more convincing normative footing.

IV. THE DOMINANT CRITICS

A. PUBLIC APOSTASY

In the last ten or fifteen years, we have seen a willingness among certain prominent academic lawyers to break from the reigning orthodoxy of positivism and liberalism. They have openly acknowledged the foundational agnosticism of that system and forthrightly embraced the legal equivalent of nihilism or ethical relativism. Making a virtue of necessity they say: "If modern philosophy has given us life without any intrinsic meaning, then let the law respond by understanding itself solely as a creative exercise in human self-definition." 

76. See, e.g., Richard A. Posner, Economic Analysis of Law (3d. ed. 1986). The author does concede that "[t]he term efficiency, when used as in this book to denote that allocation of resources in which value is maximized, has limitations as an ethical criterion of social decisionmaking—although perhaps not serious ones, as such examples are very rare." Id. at 12; see also Robin P. Malloy, Law and Economics (1990).


79. See, e.g., Sanford Levinson, Constitutional Faith 171 (1988) (stating "[w]hat gives twentieth-century modernism its particular identity is its brutal washing, in what Holmes called 'cynical acid,' of many of the fondest tenets of preceding eras, including a confidence about the ability to grasp 'truth' "). But see John Stick, Can Nihilism be Pragmatic?, 100 Harv. L. Rev. 332 (1986) (noting that "[n]ihilism is too strong a skeptical theory to be held consistently at all times. Every author who uses nihilist criticisms against others at times makes definite statements about law and so falls out of nihilism"). Accord Daniel C.K. Chow, Trashing Nihilism, 65 Tul. L. Rev. 221 (1990), who comments:

Carried to their furthest limits, the nihilists' sceptical arguments deny the possibility of any type of moral or legal knowledge as well as the possibility of any type of objective knowledge at all...[t]he nihilists must ultimately retreat from the extreme limits of their position and admit unjustified beliefs. By asserting unjustified beliefs, the nihilist also re-admits all that he tried to vanquish: the possibility of reason and knowledge as legitimate guides to human conduct.

Id. at 293.


81. Most writers of the Critical Legal Studies school are more or less committed to that project. See Tushnet, supra note 28 and accompanying text; see also The Politics of Law, A
B. PHILOSOPHICAL AND LITERARY SUPPORT

There are obvious soundings of Nietzsche\(^8\) and the post-war existentialists\(^8\) in those jurists. Their thought, however, most readily reflects the influence of one reading of Ludwig Wittgenstein,\(^8\) a major philosopher in the first half of this century. In his attack on traditional philosophy, especially platonic epistemology, Wittgenstein appeared to follow the skeptical path of Descartes and Hume by refusing to recognize external reality as the basis for any certain knowledge. He found truth only in particular "language games" or "forms of life."\(^8\)

Some have thus used Wittgenstein's thought as a basis for cultural relativism. One of his contemporary disciples, Richard Rorty, has presented a thoughtful justification for this epistemology. For Rorty, it is a mistake to assume that our thoughts, as expressed in language, correspond to nature. All human knowledge is instead mediated exclusively through culturally conditioned paradigms, that is, through some humanly constructed framework.\(^8\)

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8. See ROBERTO M. UNGER, KNOWLEDGE AND POLITICS V (1975) (dedicating his work to producing "a kind of thought and society that does not yet and may never exist").

81. JEAN-PAUL SARTRE, EXISTENTIALISM & HUMANISM (Philip Mairet trans., 1977) (1948). Sartre puts the case for total human freedom most starkly: Everything is indeed permitted if God does not exist, and man is in consequence forlorn, for he cannot find anything to depend upon either within or outside himself. He discovers forthwith, that he is without excuse. For if indeed existence precedes essence, one will never be able to explain one's action by reference to a given and specific human nature; in other words, there is no determinism—man is free, man is freedom.

Id. at 33-34.

82. Ludwig Wittgenstein's philosophy is complex and susceptible to various interpretations. Of his two major works, TRACTATUS LOGICO-PHILOSOPHICUS (1922) and PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 1953), the latter appears to repudiate much of what is written in the former.

In the Tractatus, Wittgenstein declared that the purpose of all philosophy was to criticize language so that thoughts could be clarified. But in Philosophical Investigations he stated that he was no longer interested in analyzing propositions, but asserted that the only legitimate interest of philosophy should be to describe the actual use of language. BODENHEIMER, supra note 59, at 108.

For a lucid discussion of Wittgenstein's basic ideas, see LOVIBOND, supra note 25; see also infra, notes 135, 145 and accompanying text.

85. This appears to be the understanding of Williams, supra note 80, at 453-54 (describing the epistemological predicate for the Critical Legal Studies movement).

86. See RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979).
In its vulgar form, the ethical consequences of this approach are startling. All values are relative to the language or thought patterns that create them. Change a culture and you can change truth. The literary parallel to this relativistic spirit in philosophy is known as Deconstructionism. It denies that a text has any meaning beyond what its readers bring to it.\textsuperscript{87} Writings therefore hold no inherent message, only possibilities of interpretation.

Deconstructionism can be taken hand-in-hand with its philosophical counterpart to support a pervasive skepticism toward legal theory. For instance, the terms of a document like the United States Constitution are seen by the Deconstructionists as totally open-ended and susceptible to whatever meaning certain individuals may give them.\textsuperscript{88} Legal rules are ultimately indeterminate and can therefore be manipulated to support any result.\textsuperscript{89}

C. CRITICAL LEGAL STUDIES

The most vibrant legal scholarship inspired by these schools of modern philosophy and literary criticism has been the Critical Legal Studies movement (CLS or Crits).\textsuperscript{90} In the late 1970s and the 80s, the Crits took up the agenda of Holmes and the Legal Realists, making it their work to expose the latent political interests underlying supposedly value-neutral rules of law.\textsuperscript{91} The ambitious agenda of CLS writers is thus to evaluate the existing order from an adversarial perspective. They have worked to lay bare all human arrangements as merely arbitrary social constructs having no pre-ordained justification.\textsuperscript{92} The ultimate rationale for all law is purely political.\textsuperscript{93} Legal

\textsuperscript{87} A basic work in this area is STANLEY FISH, \textit{Is There a Text In This Class?} (1980). For a general application of this principle of interpretivism to law, see Gary Peller, \textit{The Metaphysics of American Law}, 73 CAL. L. REV. 1152 (1985). This creation of meaning, however, can be a communal rather than a purely individualistic experience. See Stephen M. Feldman, \textit{The New Metaphysics: The Interpretive Turn in Jurisprudence}, 76 IOWA L. REV. 661 (1991).

\textsuperscript{88} See, e.g., Anthony D’Amato, \textit{Aspects of Deconstruction: The “Easy Case” of the Under-Aged President}, 84 NW. U. L. REV. 250 (1989) (explaining how the constitutional mandate that the president be at least 35 years old could be reinterpreted to allow someone younger to assume that office). See generally LEVINSON, supra note 79.


\textsuperscript{90} See also supra notes 28, 81 and accompanying text.

\textsuperscript{91} A seminal work in this area is Duncan Kennedy, \textit{The Structure of Blackstone’s Commentaries}, 28 BUFF. L. REV. 205 (1979).

\textsuperscript{92} As Jonathan Turley, \textit{The Hitchhiker’s Guide to CLS, Unger, and Deep Thought}, 81 NW. U. L. REV. 593, 605 (1987), puts it:

\textit{A central CLS theme is that law is inherently nonneutral because language and the interpretive process are themselves value-laden. The Crits argue that an individual’s political, social, and economic surroundings create a “context” that limits and shapes the individual’s “institutional or imaginative assumptions.” CLS is committed to demystification, and thereby transcendence, of texts through an understanding of both the author’s and interpreter’s contextuality.}

\textit{Id. (quoting UNGER, \textit{Passion}, supra note 81, at 7-8).}

\textsuperscript{93} See generally \textit{The Politics of Law}, supra note 81.
rules, say the Crits, are based on nothing but ideologies of self-interest. As one prominent CLS member has stated:

CLS is thus the form that modernism takes in legal thought. Like modernism in philosophy and sociology, it displaces settled understandings, insisting that whatever we have is something we create and recreate daily . . . . So, in part, the CLS program is justified in the way all modernist programs are: The program consists of shattering congealed forms of life by showing that they have no particular integrity.94

D. DECONSTRUCTING AND RECONSTRUCTING LIBERALISM

One congealed form of life that the Crits have attacked rather mercilessly is liberalism.95 That outlook, as we have said, presumes that each person should be free to pursue his or her own version of the good. But, as the Crits point out, liberalism relies on legally-enforceable rights to make good that postulate.

When rights conflict, someone's notion of the good must prevail while the liberty of others is necessarily restricted. The cynical conclusion is that all the “rights-talk” by Mill and his latter-day followers merely serves to mask the triumph of one class over another.96 But if rights and other human conventions are all infinitely malleable and ultimately quite arbitrary, what are we left with? Roberto Unger, who has been hailed as the “Christ-figure”97 of the Crits, says we can be animated by a “superliberal” “vocation of social transformation” to create new legal institutions that will better nourish the potential for human fulfillment.98

94. Tushnet, supra note 28, at 517.
95. For an exhaustive discussion of the Crits' critique of liberalism, see Hutchinson & Monahan, supra note 81, at 1482-90. The authors however add this qualification:
But CLS does not seem committed to abandoning wholly the basic philosophical value that is the source of the idea of a human right—the notion that individuals are themselves independent sources of value. On the contrary, CLS acknowledges that the “affirmation of free human subjectivity against the constraints of group life” is one of the “liberating accomplishments of our culture.”
Id. at 1488 (quoting Duncan Kennedy, Critical Labor Theory: A Comment, 4 INDUS. REL. L.J. 503, 506 (1981)).
96. This essential insight of Critical Legal Studies is restated cogently by Gjerdingen, supra note 77, at 413 (quoting UNGER, KNOWLEDGE AND POLITICS, supra note 81, at 83-88).
97. See supra note 81. That mockingly messianic metaphor is from Schwartz, supra note 81, at 416.
98. See Turley, supra note 92, at 608. Unger rejects what he calls the doctrine of objective value inherent in Aristotelianism because it “tends to 'discover' the alleged universality in the concrete and idiosyncratic institutions of its own particular social world.” Hutchinson & Monahan, supra note 81, at 1496 (quoting UNGER, KNOWLEDGE AND POLITICS, supra note 81, at 661).
Unger also claims that a theory of objective goods “degenerates into either meaningless abstraction or unwarranted parochialism.” UNGER, KNOWLEDGE AND POLITICS, supra note 81, at 239. Yet Unger’s vision of the good is the realization that human nature will be revealed in the “presence of shared values and genuine community.” Hutchinson & Monahan, supra note 81, at 1496.
Those views are ultimately quite close to the theories developed in this Article, particularly to the idea that the acquisition of moral truth involves both a “making and a finding.” See infra notes 192-99 and accompanying text. In other words, when it comes to objective value, there is a “middle ground between meaningless abstraction and unwarranted parochialism.” See John Finnis, The Critical Legal Studies Movement, 30 AM. J. JURIS. 21, 41 (1985).
Some like Bruce Ackerman and Frank Michelman have called in a more circumscribed fashion for projects that would reconstruct liberalism. Ackerman would revive the work of the Legal Realists. He speaks vaguely of "constructing a new language of power that does justice to the aspirations of justice."\textsuperscript{99} Michelman would promote civic republican virtues through a dialogic community.\textsuperscript{100} Others have expressed similarly attractive views that laws can be created or given meaning by a community.\textsuperscript{101} Those commentators, however, premise their interpretive theories on a form of cultural relativism,\textsuperscript{102} ultimately professing that there is no way to evaluate a belief or practice other than by testing it against the way of life in which it is embedded. But the \textit{Plessy} Court followed prevailing racist attitudes in condoning segregation and recent history has given us cultures that were even more unspeakably evil. Were those belief systems legitimate foundations for the legal rules of their societies? If so, then the law may rightfully be an instrument of horrifying oppression.\textsuperscript{103}

Perhaps dialogue among all members of society will be an effective protection against the potential for tyranny inherent in culturally-based legal systems.\textsuperscript{104} But what if those discussions lead to no agreement on the common good? Does that leave liberal individualism,\textsuperscript{105} with its fundamental contradictions inevitably favoring one class over another,\textsuperscript{106} as the only acceptable underpinning for law?

\textsuperscript{100} Frank Michelman, \textit{Law's Republic}, 97 \textit{YALE L.J.} 1493, 1510 (1988). \textit{But see} Kelman, \textit{supra} note 81, at 14 who derides this notion of "interpretive community" by pointedly paraphrasing the remarks of Paul Brest, \textit{Interpretation and Interest}, 34 \textit{STAN. L. REV.} 765 (1982):

\begin{quote}
According to Paul Brest . . . even if such a unified community did exist, which it doesn't, and even if everyone in it didn't carry within him contradictory maxims and ideals that are available to resolve every controversy, the "community" would consist of a bunch of stuffy old privileged white males, whose opinions would scarcely be worth tossing onto a trash heap.
\end{quote}

Kelman, \textit{supra} note 81, at 14.

\textsuperscript{101} \textit{See}, e.g., \textit{PERRY, supra} note 80; Feldman, \textit{supra} note 87.
\textsuperscript{102} \textit{PERRY, supra} note 80, at 38-54; Feldman, \textit{supra} note 87, at 701-14.
\textsuperscript{103} Rorty himself has recognized the terrifying implications of cultural relativism in these poetic remarks:

\begin{quote}
Suppose that Socrates was wrong, that we have \textit{not} once seen the Truth, and so will not, intuitively, recognize it when we see it again. This means that when the secret police come, when the torturers violate the innocent, there is nothing to be said to them of the form. "There is something within you which you are betraying. Though you embody the practices of a totalitarian society which will endure forever, there is something beyond those practices which condemns you."
\end{quote}

\textbf{RICHARD RORTY, \textit{CONSEQUENCES OF PRAGMATISM} xlii (1982).}

In the same depressing vein are Sartre's comments, quoted by Rorty, that someday the fascists may triumph, and that when such a time comes, "fascism will be the truth of man." \textit{Id.}

\textsuperscript{104} \textit{See supra} notes 100-02 and accompanying text.
\textsuperscript{105} \textit{See supra} notes 53-57 and accompanying text.
\textsuperscript{106} \textit{See supra} notes 95-96 and accompanying text.
V. TOWARD A NEW NATURAL LAW

A. HUMAN GOODNESS AS THE STANDARD

As an alternative to either pure liberalism or cultural relativism, this Article offers a different juridical foundation. It is one that might well arise from a genuine dialogue among all members of a community working to find common ground for legal rules. This Archimedean point107 is human goodness.

This theory has been best developed by several contemporary moralists who draw on those foremost philosophers of the pre-modern world, Aristotle and St. Thomas Aquinas.108 These new thinkers, however, read Aristotle and St. Thomas Aquinas in the light of Kant and a more complex understanding of Wittgenstein. These contemporary moral philosophers part company with the non-cognitivists because they offer objective, non-relative ethical theory that has truth value. Their propositions are secured by a realistic epistemology that presents knowable moral concepts with concrete, descriptive contents. In the natural law tradition, their work offers the possibility of grounding the law on the rational premises of justice.

B. JOHN FINNIS: NATURAL LAW AND NATURAL RIGHTS

John Finnis can be credited with re-introducing natural law to the mainstream of legal thought with his ground-breaking 1980 book Natural Law and Natural Rights.109 Until that time, natural law theory was principally the province of Roman Catholic philosophers from the neoscholastic tradition.110 The linchpin of their theory was Aquinas' First Principle of Practical Reason: "Good is to be done and promoted and evil is to be avoided."111

The neoscholastics took that principle as a moral norm presupposing a speculative understanding of "human nature,"112 a construct having its origins in the Stoic philosophers of the Hellenistic period.113 Human nature properly understood, according to the neoscholastics, leads us to the correct

107. The term is borrowed from Hutchinson & Monahan, who remark:
   The (CLS critique of rights) is enlightening to the extent that it highlights the value-laden character of rights arguments and the ways in which rights reinforce illegitimate hierarchies. But the unanswered foundational question of human existence still lingers: what are the social conditions that best foster the development of individual powers and potentials? The tension between the individual and the community does not dissolve because of this recognition that there is no "Archimedian point from which to make a choice between competing values."

Hutchinson & Monahan, supra note 81, at 1490 (emphasis added). This Article is an attempt to answer that foundational question by identifying human goodness as just that Archimedian point.

108. See Russell Hittlinger, A CRITIQUE OF THE NEW NATURAL LAW 2 (1987) (calling this the "recoverist project").


110. See Robert P. George, Recent Criticism of Natural Law Theory, 55 U. CHI. L. REV. 1371, 1379 (1988); see also Mensch & Freeman, supra note 78, at 966-85.

111. SAINT THOMAS AQUINAS, BASIC WRITINGS OF ST. THOMAS AQUINAS, VOL. TWO 774 (Anthony C. Pegis ed., 1945); SUMMA THEOLOGICA (1265-72) 1-2, question 94 art. 2.

112. George, supra note 110, at 1379.

113. See Marcus Tullius Cicero, De Re Publica 211 (Loeb ed., 1928); see also Lloyd L. Weinreb, NATURAL LAW AND JUSTICE 35-42 (1987).
MORAL TRUTH AND THE LAW

end, which St. Thomas referred to as “Good.” Doing good therefore means conforming to the notion of well-being demanded by human nature. In other words, once one identifies the content of human nature, moral principles become apparent.

Two important insights from modern thought, however, bedeviled the neoscholastic interpretation of Aquinas's dictum. Its whole point was to infer moral rules from factual statements about human nature, but Hume had shown the apparent futility of drawing an “ought” from an “is.” Even more troubling, the neoscholastic theory seemed to presuppose a direct knowledge of human nature as a platonic ideal, unmediated by the influence of our Kantian minds.

Finnis’s ingenious response was to turn from the outward construct of a “human nature” to the inner experiences of each person’s human inclinations. In doing this, he built on the groundbreaking work of philosophers like Germain Grisez and Victor Preller, who had taken another look at Aquinas in the mid-1960s and found a thinker who was more Kantian than the neoscholastics had supposed.

Preller discovered that Aquinas's epistemology was not purely passive; it entailed more than just the mind's "taking a look' at the world." Aquinas’s version of the human intellect was really much more like Kant's. Speaking of the human faculty that makes knowledge possible, Aquinas’s agent intellect, Preller said: "It is because of the natural power of the 'agent intellect' to create intelligible forms that we are able to understand that which we experience."

Grisez had similarly given a broader reading to Aquinas’s First Principle of Practical Reason. He discovered that it was not a moral imperative, as the neoscholastics held, but merely a primitive description of human motivation. According to Grisez, Aquinas was using the term “Good” without specific moral content to mean simply whatever we pursue, whatever we understand to be worthwhile.

The dictum “Good is to be done and evil is to be avoided,” thus understood, means merely that human actions must have a point. The practical intellect simply grasps certain ends as self-evident goals for human well-being. In Aquinas’s words, those goods are per se nota, that is to say, understanding them is underived from any other knowledge. Finnis restated that epistemological insight in this way: “[B]y a simple act of non-inferential

\begin{enumerate}
\item 114. See supra note 37 and accompanying text.
\item 115. See supra note 44 and accompanying text.
\item 116. FINNIS, supra note 109, at 34.
\item 118. VICTOR PRELLER, DIVINE SCIENCE AND THE SCIENCE OF GOD (1967).
\item 119. Id. at 53
\item 120. Id. at 55.
\item 121. Grisez, supra note 117, at 190-201; see also George, supra note 110, at 1379.
\item 122. Grisez, supra note 117, at 184.
\item 123. AQUINAS, supra note 111; see Charles P. Nemeth, A Commentary on the Natural Law. Moral Knowledge and Moral Application, 34 CATH. LAW. 227, 239 (1992).
\end{enumerate}
understanding one grasps that the object of the inclination which one experiences is an instance of a general form of good, for oneself (and others like one).”

Finnis then went on to delineate the basic forms of good which are ultimately all aspects of human fulfillment. Following Grisez's interpretation of Aquinas, he did not present them as moral norms, but described them as “evaluative substratum of moral judgments.”

Finnis's basic goods are the universal human values of life, knowledge, play, aesthetic experience, sociability, and religion (religion understood in the broadest sense as some purpose beyond one's own life). “Practical reasonableness,” the methodology to order one's life in pursuit of the basic goods, is itself a basic good as well. According to Finnis, it involves bringing “an intelligent and reasonable order into one's own actions and habits and practical attitudes” in pursuit of those goals.

Again, Finnis's basic goods are not in themselves ethical principles, but intrinsic aspects of human well-being and fulfillment. As such, however, they are the fundamental reasons for human actions and they thus underwrite morality as the ultimate justifications for all our choices.

A non-cognitivist would question Finnis's claim that it is possible for the practical intellect to grasp the basic goods in the data of human experience. Aren't they, like all moral notions, just intuitions? The skeptic will thus doubt the universality of those claims and see all of Finnis's talk of “self-evidence” as mere rhetoric masking personal or group preferences. For instance, a non-cognitivist might challenge Finnis's assertion that sustenance is a basic good. Without food, of course, one will die—but how can Finnis prove that life is better than death? Finnis would answer that he cannot. That proposition is non-demonstrable. Life is just a self-evident good. Anyone with some sense about what it means to be human, Finnis would say, just knows that we all have a primal inclination to live which is self-validating.

It is obvious, however, that reference to the basic goods will not resolve all ethical or legal problems. An example involving Finnis and Grisez themselves quickly demonstrates that point. Although the two philosophers have of late become collaborators, they differ on the morality of capital punishment. Grisez sees it as contrary to the basic good of life, but Finnis de-

124. FINNIS, supra note 109, at 34.
125. Id. at 59.
126. Id. at 85-90.
127. Id. at 100-03.
128. Id. at 88.
129. HITTINGER, supra note 108 (asserting that Finnis's attempt to describe basic human goods without grounding them on a speculative philosophy of nature ends up as a type of intuitionism that is an easy target for skeptics).
130. Perhaps this is what St. Thomas means when he says, “Some propositions are only self-evident to the wise.” AQUINAS, supra note 111, at 774.
Yet acceptance of certain basic goods does serve the important function of providing a starting point for moral and legal discussion. In his comprehensive work, Natural Law and Justice, Lloyd Weinreb comments on Finnis's work to make that point:

Finnis suggests ways of thinking about purposeful human activity that helps [sic] us to recognize how much agreement there is about human ends and how properly to achieve them. This is a shelter from the winds of moral relativism and an antidote to excessive skepticism. Hard cases of moral uncertainty and conflict understandably attract our attention, but they are so troubling partly because more often the moral course is unproblematic.

C. MARTHA NUSSBAUM AND NON-RELATIVE VIRTUES

The second contemporary philosopher bucking the non-cognitivist trend is Martha Nussbaum. Nussbaum is a self-consciously devoted disciple of Aquinas's mentor, that most worldly of all philosophers, Aristotle. She reads Wittgenstein, like Aristotle, as rebelling against Plato's idealization of philosophy. This hostility to other-worldliness no doubt accounts for her stated aversion to certain types of Christianity. Yet lately she has been writing of St. Thomas with approval, and her theory of non-relative virtues may just be the best contemporary restatement we have of Aquinas's natural law. This Article first describes how Nussbaum offers Aristotle's realistic epistemology for contemporary reconsideration. It then summarizes her ethical theory and explains how it follows from her theory of knowledge.

For Plato the real natures of things do not exist in the secular sphere, but in an ideal realm. Understanding truth, in his well-known metaphor, means getting out of the cave that is our earthly existence and going up to the transcendent sunlight where we can grasp those eternal structures.

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133. JOHN FINNIS, FUNDAMENTALS OF ETHICS 130 (1983).
134. WEINREB, supra note 113, at 115.
136. See infra note 163 and accompanying text. But see MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE (1990) and Martha C. Nussbaum, A Reply to Stanley Hauerwas, 57 SOUNDINGS 765 (1989), where she writes sympathetically of those forms of Christianity that present a human vision of God.
139. For a good discussion of this Platonic theory of "forms" and Aristotle's criticism of it, see G.E.L. OWEN, LOGIC, SCIENCE, AND DIALECTIC: COLLECTED PAPERS IN GREEK PHILOSOPHERS 155-79 (Martha Nussbaum ed., 1986). I am indebted to Professor Nussbaum for directing me to that essay.
Aristotle’s theory of being is more earthbound. It focuses, as Nussbaum tells us, on *phainomena*, a classical Greek word that has been translated as “observed facts,” but is better rendered as “appearances.” For Aristotle it is only in the ever-changing particular things of this world, as they appear to us, that we can know any real form or structure.

Nussbaum’s Aristotelian epistemology is thus anthropocentric. It is not rooted in a platonic, “God’s-eye” view of things as they exist in themselves, but in life as we perceive it. Yet it is also realistic because it fully accepts human understanding as truth in a way that is not relativistic. Nussbaum describes this theory of knowledge as “insisting that truth is one for all thinking, language-using beings.” Or, as Aristotle wrote with his customary directness: “That which seems so to everyone, that we say is.”

A more subjective, skeptical attitude seems self-defeating and just not very helpful to the business of being human. Descartes and Hume, at least as they have been popularly understood, have taken us on a three-hundred year detour from reality. Nussbaum thinks that Wittgenstein, at least in his later years, shared that view. She quotes this passage with approval from his *Remarks on the Foundations of Mathematics*: “What we are supplying are really remarks on the natural history of man: not curiosities however, but rather observations on facts which no-one has doubted, and which have only gone unremarked because they are always before our eyes.”

Nussbaum premises her Aristotelian approach to morality on this realistic epistemology. She wants to rescue ethics from Kantian abstractions and make it sensitive to the actual circumstances of life, rooted in concrete human experiences. Her moral theory, thus, has a specific content. To use an old-fashion term, it prescribes virtue.

Aristotle proposed a single, objective view of human good. But, aren’t rules for human conduct just based on the traditions or practices of particular groups? In our modern age, when the social sciences have demonstrated the great diversity of cultural responses to the human condition, is it possible to defend a system that posits universal ethical principles?

Nussbaum answers that there are indeed transcultural norms. Aristotle gave us a morality that even today, she says, combines value content and universality. He did this by focusing on certain experiences that are common to all. Nussbaum describes these as “spheres of life within which all

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142. *Id.*
143. *Id.* at 257.
144. *Id.* at 248 (quoting Aristotle, *Nicomachean Ethics* 1172a36). By this, however, Aristotle does not mean that universally-held beliefs are beyond criticism. In the same passage Nussbaum points to Aristotle’s remark: “Very rarely is truth a matter of majority vote.” *Id.* (quoting Aristotle, *Metaphysics* 1009b2).
147. *Id.* at 33.
148. *Id.* at 34.
human beings regularly and more or less necessarily have dealings.\textsuperscript{149} Some prominent examples include (1) the fear of damage and loss, (2) the bodily appetites, (3) the attitude a person has to others, and (4) the need for humans to distribute limited resources.\textsuperscript{150}

For Aristotle, all humans have these and certain other experiences in common. Virtue is the disposition to choose and respond correctly in those circumstances. As Nussbaum points out, according to Aristotle there is a particular course of action in each of those spheres that is proper in any culture:\textsuperscript{151} (1) As to fear, it is courage; (2) in the satisfaction of our bodily appetites, the corresponding virtue is moderation; (3) in our attitude to others, it is an inoffensive, easy grace and friendliness; and (4) as to the distribution of limited resources, the proper response is justice.\textsuperscript{152} Other responses are, of course, possible, but they are wrong and vicious because they do not promote a condition where humans can thrive and flourish.

But how can Aristotle be sure that those actions are the universally proper ones and not just the precepts of a particular culture? Could they not merely be the norms of behavior that ancient Athenian society prescribed for its aristocrats? Nussbaum ultimately answers no, but she sees Aristotle as recognizing more validity in that objection than has previously been supposed. She points out that defining virtuous conduct was an on-going process for Aristotle by noting his comment that in general, all humans seek "not the way of their ancestors, but the good."\textsuperscript{153}

In line with Aristotle's epistemology, Nussbaum additionally argues that ethics does not exist in an idealized state, outside the fabric of human experience.\textsuperscript{154} Rather the wise and virtuous person has learned what it is to live well from both tradition and from a lifetime of particular choices.\textsuperscript{155} This context-driven morality may explain the attraction of a feminist writer like Linda Hirshman to Aristotle's theory.\textsuperscript{156}

And in shaping a theory of virtue, due regard must be given to the responses of others to our shared experiences. It is our common humanity, Nussbaum says, that makes morality a joint endeavor, inviting rational discussion among individuals and cultures.\textsuperscript{157} As Aristotle wrote: "One may observe in one's travels to distant countries the feelings of recognition and affiliation that link every human being to every other human being."\textsuperscript{158}

Nussbaum answers three objections to her theory of non-relative virtues.

\textsuperscript{149} Id. at 35.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 40 (quoting ARISTOTLE, POLITICS 1268a39ff). Aristotle, however, had his own moral blind spots, for instance, he vigorously defended slavery. ARISTOTLE, ARISTOTLE'S POLITICS 58 (1254a15-30) (Modern Library ed. 1943).
\textsuperscript{154} Nussbaum, supra note 138, at 36.
\textsuperscript{155} Id.
\textsuperscript{157} Nussbaum, supra note 138, at 33.
\textsuperscript{158} Id. at 32 (quoting ARISTOTLE, NICOMACHEAN ETHICS 1155a21-22).
One comes immediately to mind. Maybe rational persons or cultures will disagree on the appropriate response to a common human experience. Nussbaum conceives this, refusing to set someone up as an ultimate arbiter to apodictically give us the only correct mode of behavior. Nussbaum would agree with Jeffrey Stout that in some cases there may be more than one right answer. But at least by applying humanistic criteria to issues of proper conduct, Nussbaum says, we may be able to eliminate some bad answers. She cannot resist illustrating that point with this slap at Augustinian Christianity: "For example, if we should succeed in ruling out conceptions of the proper attitude to one's own human worth that are based on a notion of original sin, this would be moral work of enormous significance, even if we got no further than that in specifying the positive account."

The second objection that Nussbaum recognizes cuts deeper into Aristotle's scheme. His common grounding experiences are intended to invite universal moral judgments, but perhaps they themselves are just cultural constructs? That opposing theory existed even in classical antiquity when some of the Stoics doubted that there are standard human responses to privacy. The Stoics went so far as to claim that babies do not directly experience hunger or cold, but are conditioned to those sensations by parental responses to their cries. Of course, modern social science has taught us much more about the way culture creates certain desires and expectations.

But Nussbaum holds fast to the notion that there are universal aspects to the human condition. And it is politicians who can, perhaps, make the best case for such a notion. Politicians are, after all, the people who must actually appeal to shared values in a transcultural framework.

One thinks of Jesse Jackson's eloquent call to "common ground," or perhaps even more poetically, John Kennedy's American University speech in which he reached across the gulf of the cold war. Inviting the Soviet Union to begin disarmament talks, Kennedy made this moving case for the universal human need for peace: "[I]n the final analysis . . . we all inhabit the [same] small planet. We all breathe the same air. We all cherish our children's future. And we are all mortal."
The third objection to Nussbaum’s thesis is even more profound: Why even talk about virtue? Is virtue not ultimately a response to the inadequacies of the human condition? Perhaps the Marxists are correct. Would we not be better off if virtue were unnecessary? For example, if there were no needy people, there would be no reason for the bourgeois virtue of generosity.

Nussbaum cites Aristotle for the correct rebuttal to that utopian aspiration. If we were gods, beings without limits, we would not have to talk about virtue. But such is not the case.

Well, can’t we transform ourselves into such a state by changing the conditions that underlie our lives? Roberto Unger holds out that possibility. Certainly we can ameliorate some of the frustrating inadequacies of our current situation by fashioning laws that are more just and a culture that is more humane.

Ultimately, however, Nussbaum invokes Aristotle’s perspective that such radical transformations of human life will bring with them their own dire consequences. For better or worse we are limited beings, and a certain tragedy seems to be our lot. Saint Thomas adds the gloss, “At least in this life.” So no matter how we couch our discussions about politics, law or social policy, we will always be talking about morality and virtue.

D. JEFFREY STOUT AND ETHICS AFTER BABEL

Philosopher and social critic Jeffrey Stout dwells more deeply on the diversity of moral beliefs and practices than Finnis or even Nussbaum. He readily admits that there may be foundational disagreements in ethics among various groups, and he is suspicious about theories that would resolve such disputes by imposing a false unity.

In that regard he seems particularly weary of appeals to a transcultural moral law. He accepts Wittgenstein’s insight that all human knowledge is bound up in the language and traditions that various peoples have created to deal with the world. In his major work, Ethics After Babel, Stout repeat-
edly rejects the notion that we can "look directly, without help from variable
tradition-bound presuppositions, at the Moral Law and then back again at
our beliefs, surveying the relations for instances or failures of
correspondence." 179

Yet, like Nussbaum and Finnis, Stout questions the non-cognitivists' as-
sertion that we must abandon talk of moral truth. 180 Why, he asks, must the
understanding that our epistemic condition is embedded in diverse cultures
necessarily lead us to nihilism or even a type of ethical relativism that denies
the existence of objective truth? 181 For Stout, philosophy may not be able to
explain the nature of truth or even give exact criteria for it, but that does not
have to make us moral skeptics.

Then how can we establish the truth of certain propositions? Stout an-
swers that "all we have to go on in testing our moral beliefs is our own
culture's best view of what moral truth or justified moral belief consists
in." 182 That, he says, helps explain a certain type of ethical relativism,
which holds that people in specific cultures can be justified in believing that a
particular practice is moral when, objectively, it is not. 183 To support his
point, Stout gives the example of slavery, an institution that he is willing to
condemn as morally wrong at all times and in all places. 184 The pervasive
belief-system of a particular age may render individual slaveholders blame-
less, says Stout, but it does not make their actions proper. 185

In all our culturally-constructed knowledge then, Stout firmly holds out
the possibility of searching for moral truth that is real and objective. 186
Even though he calls this approach a "modest pragmatism," 187 he is willing
to join the school of natural law which he says is just a fancy name for all
moral truth known or unknown. 188 Stout even says, in so many words, that
certain ethical statements are self-evident:

Some propositions acquire a kind of epistemic authority that needs no
support from recitation of justifying reasons or demonstrations of truth
... . In fact, as Wittgenstein pointed out, there are many propositions
that we are justified in believing but wouldn't know how to justify. 189

We may be trapped, as Nietzsche says, in our own language, but it is
hardly a prison house. And our moral judgments are more than mere intu-
itions. There is, in Stout's words, a "logical space of moral language, relying
on standards of appraisal and patterns of authority." 190 This moral lan-
guage has been established by the opinions of those we deem to be competent

179. Id. at 22-23.
180. Id. at 21-32.
181. Id. at 21.
182. Id. at 23.
183. Id. at 21-32.
184. Id. at 21-22.
185. Id. at 22.
186. Id. at 250.
187. Id. at 249-50.
188. Id. at 22.
189. Id. at 35.
190. Id. at 39.
moral judges and by the actions of those we recognize as virtuous persons.\textsuperscript{191} There we can take our stand and make moral judgments with objectivity.

For Stout, moral truth is thus both “found” and “made.” He holds that there are objectively true propositions that we can discover.\textsuperscript{192} Those truths, however, are brought into being by creative human efforts, by our attempts through language and culture to shape the world into an environment that has meaning for us.

Stout describes this process of finding and making moral truth with a French word, \textit{bricolage}, which he loosely translates as a collecting of odds and ends that can be refashioned to meet a future need.\textsuperscript{193} For Stout, this bespeaks: “every moralist’s need to engage in selective retrieval and eclectic configuration of traditional linguistic elements in hope of solving problems at hand.”\textsuperscript{194} He singles out Aquinas as a quintessential practitioner of that art, cobbled together fragments of various philosophies (“Platonic, Stoic, Pauline, Jewish, Islamic, Augustinian and Aristotelian”) in a way that created a new moral language, a new and improved natural law theory.\textsuperscript{195}

Stout asserts that this melding process occurs when two different cultures enter into dialogue.\textsuperscript{196} He even adds a note of universality by observing that it is possible to “make sense of all extant moral languages as members of a single family connected by intelligible relations of family resemblance.”\textsuperscript{197} Stout even squares this all-embracing notion of a single true morality with the very real ethical differences that he concedes have arisen in various cultures.\textsuperscript{198} An adequate moral system, he says, could be “the set of all true fully interpreted moral sentences in all possible moral languages.”\textsuperscript{199}

But what of conflicts in moral systems? Perhaps two ways of life, says Stout, could be judged as “equally true or adequate.”\textsuperscript{200} It does not follow, however, that anything goes. Stout sums up his quite elastic but ultimately non-relative, morality with this poetic admonition:

\begin{quote}
Tolerate genuinely good ways of life . . . , but don’t tolerate just any system of rules that manages to catch on within some group as a mechanism for managing internal or interpersonal conflict while satisfying its own, perhaps evil, moral ideal. Let a thousand flowers bloom, but keep killing weeds.\textsuperscript{201}
\end{quote}

But what are the consequences of Stout’s modest pragmatism when applied to social theory and, ultimately, to law? Stout does hold to a concept of the “good,” but it is decidedly non-utopian. As he starkly puts it: “We can all dream of what life would be like in a world united in a perfect rational

\begin{footnotes}
\item 191. \textit{Id.} at 39-40.
\item 192. \textit{Id.} at 77.
\item 193. \textit{Id.} at 294.
\item 194. \textit{Id.} at 293.
\item 195. \textit{Id.} at 76.
\item 196. \textit{Id.}
\item 197. \textit{Id.} at 70.
\item 198. \textit{Id.} at 91-105.
\item 199. \textit{Id.} at 97.
\item 200. \textit{Id.} at 98.
\item 201. \textit{Id.}
\end{footnotes}
consensus on the good, but this dream represents no accessible alternative to what we have now."\textsuperscript{202} For Stout, rather, we must look to what is "achievable under our social-historical circumstances by acceptable means."\textsuperscript{203}

We may have a common notion of the good, says Stout, but it is a rather thin one.\textsuperscript{204} The exigencies of contemporary society, with all its moral diversity, lead us to accept liberal virtues like "tolerance" as essential if we are all going to live together in some type of civil peace. So let our concept of the good be one that is "self-consciously provisional and contextually sensitive," he says.\textsuperscript{205}

Stout questions if this is really very far from Aristotle's ideal of a community seeking the good.\textsuperscript{206} Perhaps Aristotle only required that members of his polis share enough agreement to make a discussion of justice possible.\textsuperscript{207} Citing his notion of bricolage, Stout suggests that we refashion Aristotle's ideal of the common good for our time just as Aquinas "baptized the same pagan vocabularies for use in Christian ethics."\textsuperscript{208} Stout would thus not oppose the notion of moral truth to the ideals of liberalism, but would encourage social critics and lawgivers to find the right principles in the numerous particular cases that arise daily. After all, is this not exactly what Aristotle insists be done—that we find truth in the appearances of things with the guidance of practical reasonableness?

Stout distinguishes his theory from a "vulgar pragmatism," where all of our choices are only grounded \textit{a la} Bentham on some instrumental reasoning like cost-benefit analysis.\textsuperscript{209} He would make that just one language, one of a number of acceptable approaches. Stout's modest pragmatism is thus anti-reductionist; it is willing to make use of all kinds of arguments. Although his pragmatism shrinks from claiming privileged insights into the nature of reality, it will not hesitate to use any justified beliefs drawn from observation. Stout is, therefore, always willing to entertain new moral languages that eventually lead to new truths—"truths that pay their way by serving as rules for action."\textsuperscript{210}

E. ANOTHER LOOK AT THE SUPREME COURT AND MORAL TRUTH

This Article began by asking whether there are such things as moral truths and, if so, whether they can validly serve as premises for legal rulings. Specifically, the Article sought to defend the implicit assertion of the \textit{Planned Parenthood} plurality that racial segregation was just as objectively wrong in the late 19th Century as it was in 1954 or is now.\textsuperscript{211}

\textsuperscript{202} \textit{Id.} at 224.
\textsuperscript{203} \textit{Id.} at 226.
\textsuperscript{204} \textit{Id.} at 225.
\textsuperscript{205} \textit{Id.} at 238.
\textsuperscript{206} \textit{Id.} at 239.
\textsuperscript{207} \textit{Id.}
\textsuperscript{208} \textit{Id.} at 241.
\textsuperscript{209} \textit{Id.} at 264.
\textsuperscript{210} \textit{Id.} at 262.
\textsuperscript{211} See supra notes 8-16 and accompanying text.
Brown v. Board of Education, the 1954 decision where the Court outlawed legislated segregation in education, has not been without controversy. Some have expressed misgivings about the sociological studies used by the Court to support its opinion. Others have doubted Brown's effectiveness in desegregating schools. Recently, Critical Race Theory has questioned whether integration is even necessary or desirable for African-Americans.

Those issues are beyond the scope of this Article. Whatever the actual consequences of Brown, its moral statement is clear. Legislated segregation is wrong because it brands a group of people as inferior and therefore denies them the equal dignity to which all humans are entitled. Anyone who disputed that today would not be taken seriously.

But can that proposition be defended as an objective truth supporting Planned Parenthood's dictum that legislated segregation was always wrong? In late 19th century America the Supreme Court, supported presumably by a majority of society, may well have believed that certain groups of citizens were inferior to others. Whatever its view on human equality, the Court in Plessy recognized no degrading effects in the practice of segregation.

Notwithstanding such suggestions of ethical relativity, Finnis, Nussbaum, and Stout all make convincing cases that we are capable of the type of moral knowledge that the Planned Parenthood plurality saw as informing Brown. The core arguments of those philosophers can be marshalled to support the unchanging principles underlying that landmark decision.

For Finnis, as we have said, there are certain basic goods that are self-
evident aspects of human well-being. Those goods form the grounding and justification for our evaluative judgments. Segregation that is legislatively imposed upon a racial minority obviously stigmatizes the minority and denies them the ability to thrive and prosper.\textsuperscript{216} It strips them of certain intangible goods like respect and fair treatment, which are necessary to social fulfillment. In addition, legislated segregation will almost certainly deprive the minority members of a fair share of economic and educational opportunities. Without those concrete resources, members of minority groups are indisputably hindered in obtaining the basic goods of sustenance and knowledge. As such, legislated segregation is wrong and immoral.

Like Finnis, Nussbaum presents a realistic theory of knowledge that she roots in the common understanding of all “thinking, language-using people.” For her, such an anthropocentric observation of the human condition reveals transcultural, universal experiences. Moral judgment is the ability to act worthily, to seek the good, in each of those shared spheres of life.

The universality of our condition thus gives rise to an understanding that other humans are entitled to be treated fairly and equally. We therefore come to know that in our dealings with others, the most essentially appropriate response is justice—giving each person what he or she is due. Any laws that lack that cardinal attribute are vicious and must be condemned.

In much the same way as Nussbaum, Stout describes the acquisition of moral knowledge as both a finding and a making. Humans interact with their world, discovering truths that are justified by legitimate standards of authority. In that process certain ethical statements even gain such epistemic authority that they become self-evidently true and need no defense. The immorality of legislated segregation easily qualifies as such a proposition today.

But that was not always so. One should not be quick to excuse the Justices in \textit{Plessy}, but perhaps some of them were acting in good faith, misled by the racist culture of late nineteenth century America. Nevertheless, that does not make their decision moral. As the \textit{Planned Parenthood} plurality said, \textit{Plessy} was wrong the day it was decided.\textsuperscript{217}

Stout does, however, hold out the possibility that through linguistic and cultural changes humans who previously could not recognize certain moral truths can come to understand them. Since this process involves to some extent the creation of new truths, our claims to moral knowledge must always be “self-consciously provisional and contextually sensitive,” he says. Yet grounded in our human framework, they can still be real and objective.

Legal reasoning consists in just such a process of making and finding truth. It justifies conclusions by both appeals to accepted principles and new arguments that better fit specific circumstances. With such expanded moral

\textsuperscript{216} Justice O'Connor in her concurring opinion in \textit{Fordice}, 112 S. Ct. at 2743, decided just three days before \textit{Planned Parenthood}, made reference to the “lost educational and career opportunities and stigmatic harms caused by discriminatory educational systems.”

\textsuperscript{217} A similar judgment should be made on Aristotle’s blatantly immoral defense of slavery. \textit{See supra} note 153.
knowledge today's Supreme Court, Stout would say, can state that racial segregation was just as objectively wrong in the late 19th century as it was in 1954 or is now.

VI. CONCLUSION

Legal rulings can thus be grounded on objective principles, and the practice of law can be more than "a game of easy analogies." It can be a search for moral truth and an application of it to human affairs.

This outlook should be particularly attractive to lawyers and others who serve the law for it promises them a palpable sense of purpose in their work—the finding and making of justice. Even more significantly, this perspective can win renewed respect for our legal system from a disillusioned society. Aristotle, the ancient advocate of moral truth, should fittingly have the final word on that important goal: "But justice is the bond of people in states, for the administration of justice, which is the determination of what is just, is the principle of order in political society."  

218. ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 8 (1986). Unger's famous phrase is contained in these remarks, which can be taken as a recognition that law must be grounded in moral truth:

Every branch of doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals. . . . Without such a guiding vision, legal reasoning seems condemned to a game of easy analogies. It will always be possible to find, retrospectively, more or less convincing ways to make a set of distinctions, or failures to distinguish, look credible.

Id. (emphasis added)

Comments