

## Theism, Realism, and Rawls

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### I. INTRODUCTION

Understanding the proper interplay between faith and law is challenging, if not vexing. Errors are committed on two extremes—on the one hand, mandating principles of faith by law, while on the other hand, excluding principles of faith from the public square. As I argued in a recent article,<sup>1</sup> *theistic legal realism* properly encapsulates the core principles that should govern the interplay between faith and law. Expanding on my previous work, this Article critiques two important modern legal theories, legal realism and John Rawls's concept of public reason, from the perspective of a theistic legal realist. Part II summarizes theistic legal realism. Part III briefly describes how American law devolved from theism to relativism. Part IV explains that although legal realism properly disavowed the hyperdeductivism in early American law, legal realism erred by not providing a proper normative basis for just law. Part V similarly explains how Rawls's concept of public reason was a mixed attempt to balance law and faith. Rawls understood that law should be based on principles accessible by all and should not impose precepts unique to one faith. Rawls's concept of public reason nevertheless excludes proper

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<sup>1</sup> See generally Michael V. Hernandez, *Theistic Legal Realism and Normative Principles of Law*, 2 LIBERTY U. L. REV. 703 (2008).

religiously based principles from the public square and is rooted in relativism that undermines effective base legal norms.

## II. THEISTIC LEGAL REALISM

Theistic legal realism is related to theistic moral realism. Moral realism is a philosophical belief in objective moral values common to humanity.<sup>2</sup> There are foundational principles of right and wrong for, and knowable by, all rational creatures.<sup>3</sup> Theistic moral realism recognizes the Creator as the source of common objective values and includes the belief that the pattern of the Creator's purpose is revealed in creation and written on the heart of mankind. It is based on two presuppositions. First, and foundationally, God is good, and He desires to bless humanity and all of His creation.<sup>4</sup> Second, God has designed us to live in harmony with inherently good, objective moral values embedded in our nature.<sup>5</sup> We prosper when we act in accordance with these values and experience troubles when we violate them.<sup>6</sup>

We access God's inherently good objective values by the exercise of right reason, including following our God-given conscience. This process involves the proper exercise of the natural reason God gave man—not just thinking, but *discerning* correctly. Natural reason is part of our created nature that bears the image of God. We are not born with a cognitive knowledge of objective values but rather with the innate ability to discern those values. As God designed it, the exercise of *right* reason leads to the *discernment* of objective truth; truth is not the mere fruit of human reason.<sup>7</sup>

Common objective moral principles (*general revelation*), rather than principles attainable only by faith or a particular religious belief (*special revelation*), provide the foundation for theistic moral realism.<sup>8</sup> Regarding the substance of the basic objective principles of moral truth, “the first precept of law [is] that good is to be done and pursued, and evil is to be avoided.”<sup>9</sup> Specific basic principles of moral

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<sup>2</sup> RUSS SHAFER-LANDAU, MORAL REALISM: A DEFENSE 2 (2003).

<sup>3</sup> *Id.* at 17.

<sup>4</sup> Hernandez, *supra* note 1, at 704.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 704–05.

<sup>9</sup> THOMAS AQUINAS, SUMMA THEOLOGIAE, I-II, ques. 94, art. 2, at 1009 (Fathers of the English Dominican Province trans., Christian Classics 1981) (n.d.).

truth, which can be found across cultures and time, “include honesty in relationships, family loyalty, personal dignity, concern for others, temperance, justice, and the respect for, and preservation of, life.”<sup>10</sup> An important clarification is in order here. The fact that these core principles are timeless and universal—that they can be found across cultures and time—does not mean that they are numerous or widely and consistently applied. The point is not that all cultures across time have many principles in common, but rather that core precepts of theistic moral realism are reflected in *consensus that exists across cultures and time*.

The related concept of *theistic legal realism* provides the proper basis for discerning legal norms. “Theistic” reflects the Creator who is the ultimate source of binding norms; “legal” suggests the focus on civil or human law; “realism” indicates reality, fidelity to human nature, and an accurate assessment of things as they are.<sup>11</sup> By combining these concepts, *theistic legal realism* reflects the true nature of legal norms.<sup>12</sup> It includes two core principles.

First, civil rulers must base law solely on principles of general revelation, not principles unique to any faith.<sup>13</sup> The church and state have separate jurisdictions under which the state may not rule the conscience. Principles of special revelation, which can only be accepted by faith, are not the proper basis for the substance of civil law.<sup>14</sup> Basing law solely on principles accessible to all—principles of general revelation—ensures a fair and just legal system.<sup>15</sup> Only principles of general revelation can fairly govern everyone, including people of any or no faith.

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<sup>10</sup> Hernandez, *supra* note 1, at 705 (citing Charles E. Rice, *Natural Law in the Twenty-First Century*, in COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW 310 (Edward D. McLean ed., 2000) (quoting Harvey N. Chinn, *Protestant Cheers Pope’s Message*, SACRAMENTO BEE, Jan. 15, 1994, at 10 (praising Pope John Paul II’s encyclical *Veritatis Splendor*)). As I explain in *Theistic Legal Realism*, C.S. Lewis’s THE ABOLITION OF MAN (1947) provides an excellent summary of the base norms of general revelation that can be found across cultures and time. Lewis identifies the following principles or laws, which, although not comprehensive, summarize timeless, universal, objective truths: the Law of General Beneficence, the Law of Special Beneficence, Duties to Parents, Elders and Ancestors, Duties to Children and Posterity, Law of Justice, Law of Good Faith and Veracity, the Law of Mercy, and the Law of Magnanimity. These laws reflect core principles of theistic moral realism. Hernandez, *supra* note 1, at 705–06.

<sup>11</sup> Hernandez, *supra* note 1, at 706.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 706–08.

<sup>15</sup> *Id.* at 708.

Second, civil rulers must vigorously protect and preserve religious liberty and expression.<sup>16</sup> The law must not impose unique principles of faith, Christian or otherwise, which would intrude on individual conscience and overstep the government's limited, God-given authority.<sup>17</sup> Preserving religious liberty also serves the common good.<sup>18</sup> Believers should not advocate preserving religious liberty solely to vindicate their faith. Preserving religious liberty protects the conscience rights of all, including people of no faith.<sup>19</sup>

A critical distinction must be drawn between the proper activities of a governmental ruler and those of a private citizen or theorist. The civil ruler who is formulating law may use faith-based sources, including Scripture, but only to apply principles of general revelation. Believers

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<sup>16</sup> *Id.* at 706, 708.

<sup>17</sup> Hernandez, *supra* note 1, at 708.

<sup>18</sup> *Id.* at 709; *see also* Pope Benedict XVI, Address at the General Assembly of the United Nations (Apr. 18, 2008) (transcript available at <http://www.catholic.net/index.php?option=dedestaca&id=305>).

Discernment . . . shows that entrusting exclusively to individual States, with their laws and institutions, the final responsibility to meet the aspirations of persons, communities and entire peoples, can sometimes have consequences that exclude the possibility of a social order respectful of the dignity and rights of the person. On the other hand, a vision of life firmly anchored in the religious dimension can help to achieve this, since recognition of the transcendent value of every man and woman favours conversion of heart, which then leads to a commitment to resist violence, terrorism and war, and to promote justice and peace. This also provides the proper context for the inter-religious dialogue that . . . should be recognized as the means by which the various components of society can articulate their point of view and build consensus around the truth concerning particular values or goals. It pertains to the nature of religions, freely practised, that they can autonomously conduct a dialogue of thought and life. If at this level, too, the religious sphere is kept separate from political action, then great benefits ensue for individuals and communities. . . .

Human rights, of course, must include the right to religious freedom, understood as the expression of a dimension that is at once individual and communitarian—a vision that brings out the unity of the person while clearly distinguishing between the dimension of the citizen and that of the believer.

*Id.*

<sup>19</sup> Hernandez, *supra* note 1, at 709; *see also* Pope Benedict XVI, *supra* note 18 (“Refusal to recognize the contribution to society that is rooted in the religious dimension and in the quest for the Absolute—by its nature, expressing communion between persons—would effectively privilege an individualistic approach, and would fragment the unity of the person.”). For Christians, preservation of religious liberty also allows the Gospel to be proclaimed fully and freely. *See* Hernandez, *supra* note 1, at 709.

may access all revelation when speaking or acting as private citizens, rather than as civil rulers, including when espousing legal or governmental theory or, most importantly, when ministering to others.<sup>20</sup> By not imposing unique principles of faith in law, believers can still fruitfully analyze issues of law and government while respecting the jurisdictional boundaries of church and state.<sup>21</sup>

### III. FROM THEISM TO RELATIVISM

American law was rooted in the core principles of theistic legal realism. The common law, the Declaration of Independence, and the Constitution reflected theistic belief. The Founders were influenced by natural law thinking, principally the theories of John Locke, who grounded his *Second Treatise of Civil Government* firmly in theism:

[A]ll men are naturally in . . . a state of perfect freedom . . . within the bounds of the law of nature, without asking leave, or depending on the will of any other man.

[C]reatures of the same species and rank promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection, unless the lord and master of them all, should by any manifest declaration of his will set one above another, and confer on him by an evident and clear appointment an undoubted right to dominion and sovereignty.

. . . .

[T]he law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions, must, as well as their own and other men's actions, be conformable to the law of nature, i.e. to the will of God, of which that is a declaration, and the fundamental law of nature being the preservation of mankind, no human sanction can be good, or valid against it.<sup>22</sup>

Lockean natural law theory influenced state constitutions and, most notably, the Declaration of Independence, which was overtly theistic:

When, in the course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of

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<sup>20</sup> See Hernandez, *supra* note 1, at 716.

<sup>21</sup> *Id.*

<sup>22</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT: THE SECOND TREATISE OF GOVERNMENT* 116, 184 (Mark Goldie ed., Everyman 1993) (1689).

Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.<sup>23</sup>

Although not explicitly theistic, the U.S. Constitution reflected the core principles of theistic legal realism by ensuring religious liberty for all while prohibiting the establishment of religion<sup>24</sup> and the imposition of religious tests for public office.<sup>25</sup> The absence of overt theism in the Constitution did not reflect the intent to create a secular government. The Founders established a limited federal government in a Republic of preexisting state governments, not a comprehensive national governmental system.<sup>26</sup> At the time the Constitution was drafted, state law and governmental systems were well established and explicitly theistic—some state laws even transgressed the proper boundaries of church and state by imposing Christian belief.<sup>27</sup> The common law—which, as Blackstone's *Commentaries* made clear, was rooted in theism<sup>28</sup>—served as the foundation for the states' laws. Thus, except for the laws that imposed uniquely Christian principles, American law in the Founding era reflected the core values of theistic legal realism.

The slow fade of American law from theism to relativism in the nineteenth century was rooted in earlier disagreements over the proper source and substance of law. Under classical natural law

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<sup>23</sup> THE DECLARATION OF INDEPENDENCE para. 1–2 (U.S. 1776).

<sup>24</sup> See U.S. CONST. amend. I.

<sup>25</sup> *Id.* art. VI.

<sup>26</sup> See THE FEDERALIST NO. 33, at 224 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (“[T]he danger which most threatens our political welfare is that the State governments will finally sap the foundations of the Union.”). By narrowly interpreting the Necessary and Proper Clause, Hamilton argues that the power of the federal government is limited and enumerated, in contrast with the broader power of the state governments. *Id.*

<sup>27</sup> Michael V. Hernandez, *A Flawed Foundation: Christianity's Loss of Preeminent Influence on American Law*, 56 RUTGERS L. REV. 625, 628, 655–56 (2004).

<sup>28</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*38–41 (“[W]hen the supreme Being formed the universe, and created matter out of nothing, He impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be.”).

theory,<sup>29</sup> exemplified by Thomas Aquinas's refinement of Greek and Roman legal thought, the development of human law involves all forms of human reason (inductive, deductive, and analogical) to discern God's design for human governance.<sup>30</sup> In the seventeenth century, two prominent English theists who influenced the development of the common law, Francis Bacon and Edward Coke, disagreed over the proper use of reason for law. Bacon advocated treating law as a natural science, repudiated traditional authority and Aristotelian deductivism, and embraced inductivism.<sup>31</sup> By contrast, Coke championed Aristotelian deductivism combined with English custom, advocating what became known as "historical jurisprudence."<sup>32</sup> Ambivalent toward natural law and inductive reasoning, Blackstone instead embraced historical jurisprudence.<sup>33</sup>

Given the influence of the *Commentaries* on American common law, it was not surprising that early American law followed the lead of Coke and Blackstone, not Bacon. Although historical jurisprudence was not universally accepted by the Founders, it eventually produced the deductive formalism seen in early nineteenth century American common law.<sup>34</sup> Natural legal scientists advocated legal reform through the use of natural law and inductive and analogical reasoning to complement the deductive application of legal norms.<sup>35</sup> Regrettably, natural legal science never achieved preeminence.<sup>36</sup>

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<sup>29</sup> Some commentators have referred to this as the Scholastic Natural Law. See, e.g., Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493 (1942). I avoid the use of this label because of the negative connotations attached to it by legal realists, such as Jerome Frank. See *infra* notes 69–73, 81–87 and accompanying text.

<sup>30</sup> See Hernandez, *supra* note 27, at 663–64.

<sup>31</sup> *Id.* at 665 (citing Howard Schweber, *The Science of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 LAW & HIST. REV. 421, 442 (1999)). As Bacon wrote, "Formations of notions and axioms by means of true induction is certainly an appropriate way to banish *idols* and get rid of them." FRANCIS BACON, *THE NEW ORGANON* 48 (Lisa Jardine & Michael Silverthorne eds., Cambridge Univ. Press 2000) (1620).

<sup>32</sup> *Id.* at 665–66 (citing Howard Schweber, *The Science of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 LAW & HIST. REV. 421, 442 (1999)).

<sup>33</sup> *Id.* at 667 (citing GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW* 34 n.75 (1986) (discussing Blackstone's ambivalence toward natural law)).

<sup>34</sup> *Id.* at 668. One commentator decried this "Pseudo-Natural Law of 19th Century American Jurisprudence . . . which decapitated the sound philosophy of the founding fathers." Lucey, *supra* note 29, at 493.

<sup>35</sup> See Hernandez, *supra* note 27, at 668–69.

<sup>36</sup> *Id.* at 669.

Instead, Christopher Columbus Langdell's inductive scientific approach to legal reasoning became the predominant methodology of legal reform.<sup>37</sup> Langdell rejected "natural law, Blackstone's *Commentaries*, common law deductivism, and [a] moral foundation [for] law."<sup>38</sup> Like Oliver Wendell Holmes, Jr. and John Chipman Gray, Langdell espoused the Darwinian view that law is an evolving human convention, solely an instrument to serve social demands.<sup>39</sup>

Several schools of thought competed with Langdell's inductivism.<sup>40</sup> Arguably none rivaled legal realism, which was perhaps the most controversial and influential legal philosophy of the early twentieth century.

#### IV. LEGAL REALISM

##### A. *Father Realist Holmes*

Although Holmes was technically not a realist because his scholarly work mostly predated the movement,<sup>41</sup> legal realists frequently cited Holmes, lauding him as the father of their philosophy.<sup>42</sup>

Holmes's experiences in the Civil War influenced his embrace of secular relativism. As a Harvard student, Holmes revealed openness to theistic belief and higher moral values.<sup>43</sup> Two months before his graduation, Holmes joined the Union forces, and he was wounded three times during the War, once nearly fatally.<sup>44</sup> Confronting his mortality while lying on a hospital bed, Holmes became convinced

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<sup>37</sup> See *id.* at 669–70 (citing William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 565 (1974)).

<sup>38</sup> *Id.* at 670 (citations omitted).

<sup>39</sup> See *id.* at 652–53. Langdell asserted in the introduction to his contracts casebook that each legal principle "has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries." C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at vi (Legal Classics Library 1983) (1871).

<sup>40</sup> See, e.g., ROSCOE POUND, LAW AND MORALS (1924) (analyzing philosophical, historical, and analytical jurisprudence).

<sup>41</sup> JEFFREY A. BRAUCH, A HIGHER LAW: READINGS ON THE INFLUENCE OF CHRISTIAN THOUGHT IN ANGLO-AMERICAN LAW 140 (2d ed. 2008).

<sup>42</sup> See Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1037–38 (1961).

<sup>43</sup> Hernandez, *supra* note 27, at 706 (citing ALBERT W. ALSCHULER, LAW WITHOUT VALUES 41–42 (2000)).

<sup>44</sup> *Id.* at 707 (citing ALBERT W. ALSCHULER, LAW WITHOUT VALUES 106 (2000)).



that he, not a higher power, was his ultimate source of strength.<sup>45</sup> Given his experiences in the horrific war that divided and almost destroyed America, it was hardly surprising that Holmes came to embrace force as the remedy for conflict.<sup>46</sup> Holmes also believed experience is the essence of law.<sup>47</sup> Advocating jurisprudence devoid of eternal values,<sup>48</sup> Holmes “sounded the principle theme of twentieth-century jurisprudence when he wrote that moral preferences are ‘more or less arbitrary. . . . Do you like sugar in your coffee or don’t you . . . ? So as to truth.’”<sup>49</sup>

Like Langdell, Holmes rejected deductive formalism and a fixed, moral foundation of law.<sup>50</sup> But Holmes opposed Langdell’s view that law is a closed inductive science.<sup>51</sup> Holmes’s famous assertion that “[t]he life of the law has not been logic, but experience” not only re-

<sup>45</sup> *Id.*

[W]hen I thought I was dying the reflection that the majority vote of the civilized world declared that with my opinions I was *en route* for Hell came up with painful distinctness—Perhaps the first impulse was tremulous—but then I said—by Jove, I die like a soldier anyhow—I was shot in the breast doing my duty up to the hub—afraid? No, I am proud—then I thought I couldn’t be guilty of a deathbed recantation—father and I had talked of that and were agreed that it generally meant nothing but a cowardly giving way to fear—Besides, thought I, can I recant if I want to, has the approach of death changed my beliefs much? & at this I answered—No— . . . .

*Id.* (quoting OLIVER WENDELL HOLMES, JR., *TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR.* 27–28 (Mark DeWolfe Howe ed., 1946)).

<sup>46</sup> *Id.* at 707.

<sup>47</sup> *Id.* at 707–08 (citations omitted). As Professor Albert Alschuler observed,

With the smell of war in his nostrils, Holmes concluded that every cause—the abolition of human slavery included—was a personal taste of no notable significance. The postwar Holmes ranked the prewar Holmes with the Trotskyites, the pacifists, and the Christian Scientists. He evidently thought himself a fool to have believed in a cause beyond himself. Experiencing the death of comrades, the flow of senseless orders, the sight of lifeless bodies piled deep in the trenches, the rush of blood from his mouth, a bullet in the neck, a bullet in the chest, and a bullet in the ankle, Holmes concluded that right could never be more than the will of the strongest . . . .

ALBERT W. ALSCHULER, *LAW WITHOUT VALUES* 185 (2000).

<sup>48</sup> Hernandez, *supra* note 27, at 708 (citing ALSCHULER, *supra* note 47, at 41, 184–86).

<sup>49</sup> ALSCHULER, *supra* note 47, at 1 (quoting Letter from Oliver Wendell Holmes to Lady Pollock (Sept. 6, 1902), in 1 *THE HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932*, at 105 (Mark DeWolfe Howe ed., 1961)).

<sup>50</sup> See Hernandez, *supra* note 27, at 670.

<sup>51</sup> *Id.* (citations omitted).

flected his belief that society's norms and preferences determine the substance of law, but it was also a repudiation of Langdell's scholarship on the law of contracts, which Holmes considered overly formalistic.<sup>52</sup> More importantly for the development of legal realism, and perhaps reflecting an implicit confession, Holmes argued that legal decisions were grounded in the judge's experiences, preferences, and personal values in the context of prevailing norms.

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. . . . The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient. . . .<sup>53</sup>

Holmes correctly challenged both Langdell's virtually exclusive reliance on inductive reasoning and the rigid deductive formalism of early nineteenth-century law. His insistence that law must work in context to reach a proper result—and that experience matters<sup>54</sup>—accurately reflects the dynamic and synergistic process necessary to maintain a just legal system. By believing that law is subjective, pragmatic, and evolving, however, Holmes embraced relativism and rejected the influence of morals on law. His views were the foundation for emerging legal realist thought.

### B. *The Rise and Fall of Legal Realism*

Legal realism arose in American jurisprudence in the aftermath of the First World War and during the zenith (the Roaring '20s) and nadir (the Great Depression) of American capitalism. Although realism was also prevalent in Europe, American legal realism was unique in its principal focus on judge-made law.<sup>55</sup> It arose at a time of, and

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<sup>52</sup> *Id.* at 670–71.

<sup>53</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (ABA Publishing 2009) (1881).

<sup>54</sup> Holmes's belief that experience is the foundation of law ironically echoes natural law theory, although excised from its moral foundations. Hernandez, *supra* note 27, at 671.

<sup>55</sup> GARY J. AICHELE, *LEGAL REALISM AND TWENTIETH-CENTURY AMERICAN JURISPRUDENCE: THE CHANGING CONSENSUS* 100 (1990) ("Focusing on the personality of the individual judge, realism urged good men to give their nation good laws, and to accept once and for all the responsibility which attends the presumption of judge-made law."). European legal realism did not principally influence judge-made American law because much of Europe uses a civil-law system in which judicial precedent is less influential. JAMES G. APPLE & ROBERT P. DEYLING, *FED. JUDICIAL CTR., A PRIMER*

arguably due to, the increased influence of the judiciary reflected by a rapid acceleration in printed case reports in the late nineteenth century.<sup>56</sup> The central controversy surrounding legal realism came to the fore in a heated exchange in the *Harvard Law Review* between Dean Roscoe Pound and Karl Llewellyn in 1931.

Pound had contributed to the effort to reform the increasingly formalistic common law.<sup>57</sup> His sociological jurisprudence involved a modern pragmatism that believed law must be effective to achieve just results in current contexts:

[T]here are many approaches to juristic truth and . . . each is significant with respect to particular problems of the legal order; hence [we must value] these approaches, not absolutely or with reference to some one assumed necessary psychological or philosophical basis of jurisprudence, but with reference to how far they aid law maker, or judge, or jurist in making law and the science of law effective, the one toward the maintaining, furthering, and transmitting of civilization, the other toward organizing the materials and laying out the course of the legal order.<sup>58</sup>

Pound, however, became alarmed by what he considered to be the excesses of the legal realist reformers. He took the realists to task in his article, *The Call for a Realist Jurisprudence*,<sup>59</sup> which described a number of flaws in legal realist thought, some of which will be addressed below.<sup>60</sup> The most authoritative explanation of legal realism can be found in a rebuttal to Pound's article offered by Llewellyn,<sup>61</sup> perhaps the most renowned legal realist.

Llewellyn began with a pithy encapsulation of the rise and beliefs of realism:

Ferment is abroad in the law. The sphere of interest widens; men become interested again in the life that swirls around things legal. Before rules, were facts; in the beginning was not a Word, but a Doing. Behind decisions stand judges; judges are men; as men they have human backgrounds. Beyond rules, again, lie ef-

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ON THE CIVIL-LAW SYSTEM 36 (1995), available at [http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf).

<sup>56</sup> Gilmore, *supra* note 42, at 1041.

<sup>57</sup> See AICHELE, *supra* note 55, at 30–32.

<sup>58</sup> Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 711 (1931).

<sup>59</sup> See generally *id.* at 697.

<sup>60</sup> See *infra* Part IV.C.

<sup>61</sup> Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

facts: beyond decisions stand people whom rules and decisions directly or indirectly touch.<sup>62</sup>

In other words, (1) legal realism was a revolutionary force that was reinvigorating dead law; (2) facts lead to rules, rather than rules assessing facts; (3) judges' subjective views determine how those facts are adjudicated; and (4) outcomes matter—law must be “real” and take into account its impact on the people it affects.<sup>63</sup> Llewellyn concurred with Pound's belief that realism means

fidelity to nature, accurate recording of things as they are, as contrasted with things as they are imagined to be, or wished to be. Insistent . . . on beginning with an objectively scientific gathering of facts. Psychological exposure of the role of reason in human behavior, of the extent to which so-called reasons come after action as explanations instead of before action as determining factors, has made a profound impression upon the rising generation of jurists. Looking at precepts and doctrines and institutions with reference to how they work or fail to work, and why. There is a distinct advance in their frank recognition of the alogical or non-rational element in judicial action which the legal science [philosophy?] of the nineteenth century sought to ignore.<sup>64</sup>

Llewellyn then developed a detailed list of points of disagreement with Pound, purporting to establish his views by an objective assess-

<sup>62</sup> *Id.*

<sup>63</sup> Another principle that permeates Llewellyn's introduction is hostility toward Christianity and higher law thinking. “[I]n the beginning was not a Word, but a Doing” was a transparent and blasphemous play on John 1:1. John's Gospel begins with this declaration of Jesus's divinity, creative preeminence, and oneness with the Father:

In the beginning was the Word, and the Word was with God, and the Word was God. He was in the beginning with God. All things came into being through Him, and apart from Him nothing came into being that has come into being. In Him was life, and the life was the Light of men. The light shines in the darkness, and the darkness did not comprehend it.

*John* 1:1–5 (New American Standard). Llewellyn's insensitivity, if not outright hostility, to orthodox Christianity was also revealed in his later remark about how legal realism was creating “a touch of frenzy among the locust-eaters”—i.e., the formalists committed to *stare decisis*. Llewellyn, *supra* note 61, at 1238. In a footnote, Llewellyn explained that he borrowed the phrase “locust-eater” from Matthew 3:1, 2, 4. *Id.* at n.37. This scriptural passage describes how John the Baptist ushered in Jesus' ministry and makes a passing reference to the fact that John ate locusts and wild honey. See *Matthew* 3:1–4. Llewellyn had to know that Christians would not appreciate the life story of a revered historical biblical figure being used as a basis for an epithet.

<sup>64</sup> Llewellyn, *supra* note 61, at 1224 (internal citations and quotation marks omitted).

ment of the scholarly literature.<sup>65</sup> Most importantly, Llewellyn provided a detailed summary of “real realism,” which he described as:

- (1) The conception of law in flux . . . and of judicial creation of law.
- (2) The conception of law as a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purpose, and for its effect . . . .
- (3) The conception of society in flux . . . so that the probability is always given that any portion of law needs reexamination to determine how far it fits the society it purports to serve.
- (4) The temporary divorce of Is and Ought for the purposes of study [with the initial focus being on what the law is, only later turning to what it should be.]
- (5) Distrust of traditional legal rules and concepts insofar as they purport to *describe* what either courts or people are actually doing. . . .
- (6) . . . [D]istrust of the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing court decisions. . . .
- (7) The belief in the worthwhileness of grouping cases and legal situations into narrower categories than has been the practice in the past. . . .
- (8) An insistence on evaluation of any part of law in terms of its effects . . . .
- (9) Insistence on *sustained and programmatic attack* on the problems of law along any of [the above] lines.<sup>66</sup>

Another, and perhaps the most radical, legal realist, Jerome Frank, attacked the “myth” of rule certainty based on his belief in law as a father-substitute,<sup>67</sup> noting that “[c]hildish dread of uncertainty and unwillingness to face legal realities produce a basic legal myth that law is completely settled and defined.”<sup>68</sup> Frank believed that “confronted by the law, men tend to be baffled by feelings stimulated by the father-substitute which law represents, and therefore use narcotizing and paralyzing words to pursue what are relatively childish aims.”<sup>69</sup> Frank used several dismissive and derisive labels for higher law, including “legal absolutism,” “Platonism,” “legal fundamental-

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<sup>65</sup> *Id.* at 1224–33.

<sup>66</sup> *Id.* at 1236–38.

<sup>67</sup> Frank borrowed this theory from child psychologist Jean Piaget. Julius Paul, *Jerome Frank’s Attack on the “Myth” of Legal Certainty*, 36 NEB. L. REV. 547, 548 (1957).

<sup>68</sup> JEROME FRANK, *LAW AND THE MODERN MIND* 45 (Transaction Publishers 2009) (1930).

<sup>69</sup> *Id.* at 98–99.

ism,” “Bealism” (after former Harvard law Professor Joseph H. Beale),<sup>70</sup> and “scholasticism.”<sup>71</sup>

The influence of Holmes on Llewellyn, Frank, and other legal realists was readily apparent. Applying modern psychological theory, the legal realists believed that judges routinely engage in *rationalization*—justifying the desired result after the fact rather than truly and consistently following preexisting rules. Legal realists rejected deductive formalism. They were concerned about the impact of the law on the parties and society at large and that the law would truly “work.” Legal realists also saw the law as an evolutionary process not tethered to transcendent norms.

There were, however, several unique aspects of legal realist thought. First, legal realists insisted on the temporary divorce of the “is” from the “ought”—reflecting a heavy emphasis on fact and a desire to force judges to come to terms with their biases and preconceptions.<sup>72</sup> Second, legal realism involved a more systematic approach to grouping cases in narrow categories based on factual distinctions.<sup>73</sup> Third, legal realists expressed great faith in science, especially psychology, to assess the motivations for judicial action and to establish legal principles to resolve disputes.<sup>74</sup> Finally, legal realists were committed to an intentional, systematic, and programmatic attack on existing legal theories.<sup>75</sup>

### C. A Theistic Legal Realist Critique of Legal Realism

Legal realism is undeniably true in many respects. Some rules are arbitrary. Law does involve more than logic. Judges do allow personal preferences and prejudices to affect their decisions. Beliefs, ideology, and other factors have influenced legal decisions. Not all results can be deduced logically and easily. Science should impact law, because true science is of right reason, the foundation of just law. A consistent application of the temporary is/ought divide—considering the facts of the case and existing law before assessing how the controversy ought to be resolved—would help expose and minimize judicial bias. Perhaps most importantly, law must be assessed in light of its effects on litigants and

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<sup>70</sup> Paul, *supra* note 67, at 550.

<sup>71</sup> *Id.* at 548.

<sup>72</sup> See, e.g., Llewellyn, *supra* note 61, at 1236–37.

<sup>73</sup> See *id.* at 1237.

<sup>74</sup> See, e.g., FRANK, *supra* note 68, at 98–99.

<sup>75</sup> See Llewellyn, *supra* note 61, at 1237–38.

society, and a rule that is no longer efficacious should be revised or repealed. The theistic legal realist would readily agree with all of these propositions.

Yet, skepticism and relativism undermined legal realism. As Pound charged, legal realists were much more skilled at criticism than constructive analysis.<sup>76</sup> As young revolutionaries, the legal realists were too inclined to throw out the baby with the bathwater. Not all judges base decisions solely on their personal biases and preferences.<sup>77</sup> Healthy skepticism is profitable, but pervasive distrust of judicial motives undermines the rule of law and the efficacy of the legal process. Most importantly, given their belief that judges base rules on subjective preferences, legal realism offered no effective guide for how to determine the “ought” after assessing the “is.” Legal realism was undermined by its own relativism.

In a passionate rebuttal to Pound’s charge that legal realism was a school of thought, Llewellyn essentially conceded that the legal realist movement offered no coherent “ought” or normative framework for law:

What, then, *are* the characteristics of these new fermenters? One thing is clear. There is no school of realists. There is no likelihood that there will be such a school. There is no group with an official or accepted, or even with an emerging creed. There is no abnegation of independent striking out. We hope that there may never be. New recruits acquire tools and stimulus, not masters, nor over-mastering ideas. Old recruits diverge in interests from each other. They are related . . . only in their negations, in their skepticisms, and in their curiosity.

There is, however, a *movement* in thought and work about law. The movement, the method of attack, is wider than the number of its adherents. It includes some or much work of many men who would scorn ascription to its banner. . . . Their differences in point of view, in interest, in emphasis, in field of work, are huge. . . .

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<sup>76</sup> See Pound, *supra* note 58, at 699.

<sup>77</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 605–06 (2003) (Thomas, J., dissenting) (noting that he would not vote for an anti-sodomy statute, which he called “silly,” and yet affirming the right of the Texas legislature to enact the law); *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting) (describing a Connecticut anti-contraception statute as “uncommonly silly” but finding no constitutional hindrance to its implementation).

... The trends are centered in no man, in no coherent group. There is no leader. Spokesmen are self-appointed. They speak not for the whole but for the work each is himself concerned with—at times with little or no thought of the whole, at times with the exaggeration of controversy or innovation...

....  
When the matter of *program in the normative aspect* is raised, the answer is: *there is none*. A likeness of method in approaching Ought-questions is apparent. If there be, beyond that, general lines of fairly wide agreement, they are hardly specific enough to mean anything on any given issue...

....  
... When writers of realistic inclination are writing in general, they are bound to stress the need of more accurate description, of Is and not of Ought. There lies the *common* ground of their thinking; there lies the area of new and puzzling development... As to whether change is called for, on any *given* point of our law, and if so, how much change, and in what direction, there is no agreement. Why should there be? A *group* philosophy or program, a *group* credo of social welfare, these realists have not. They are not a group.<sup>78</sup>

Llewellyn's argument reveals legal realism's ultimate flaw. Law is normative by nature. A just system cannot be based on pure subjective preference. Legal realism contributed significantly and positively to legal reform by exposing unprincipled jurisprudence and opening law to constructive influences from scientific sources. But it offered no solutions for how to reform law in a consistent, principled, and just way. As philosophical realist C.J. Friedrich noted in his review of Llewellyn's last book, *Jurisprudence: Realism in Theory and Practice*.

The realism of Llewellyn's jurisprudence would by many historians of philosophy and ethics be called "naïve" realism... My basic hesitation about Llewellyn's approach to the law and its reality is his failure to appreciate that in the broad sense which matters to the philosopher of law, the science of the law is primarily concerned with norms, that they constitute the focus, the dimension of *reality*. His tendency to dichotomize rules and behavior, rights and behavior, precepts and behavior, obscures the fact that rules, rights, precepts—norms, in short—constitute a summing up of conclusions derived from past behavior, not only as it was but also as it ought to have been... Law *is* a rule of right reason, and right reason is *a* faculty of human beings, and their actual

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<sup>78</sup> Llewellyn, *supra* note 61, at 1233–34, 1251, 1254–56.



behavior is subject to evaluation in terms of such right reason, not only outside the law but more particularly inside it.<sup>79</sup>

Although Pound shared some of the realists' relativistic and fermenting tendencies,<sup>80</sup> he realized that a viable legal theory required a normative framework:

As the analytical jurist insisted on the pure fact of law [the new realist] seeks the pure fact of fact. But facts occur in a multifarious mass of single instances. To be made intelligible and useful, significant facts have to be selected, and what is significant will be determined by some picture or ideal of the science and of the subject of which it treats.

....

Radical neo-realism seems to deny that there are rules or principles or conceptions or doctrines at all, because all judicial action, or at times much judicial action, cannot be referred to them; because there is no definite determination whereby we may be absolutely assured that judicial action will proceed on the basis of one rather than another of two competing principles; because there is a no-man's land about most conceptions so that concrete cases have been known to fall down between them; because much takes place in the course of adjudication which does not fit precisely into the doctrinal plan. Such a view is not without its use as a protest against the assumption that law is nothing but a simple aggregate of rules. But nothing would be more unreal—in the sense of at variance with what is significant for a highly specialized form of social control through politically organized society—than to conceive of the administration of justice, or the legal adjustment of relations, or, for that matter, the working out of devices for the more efficient functioning of business in a legally ordered society, as a mere aggregate of single determinations.<sup>81</sup>

Pound therefore called for “[r]ecognition of the significance of the individual case, as contrasted with the absolute universalism of the last century, without losing sight of the significance of generalizations and conceptions as instruments toward the ends of the legal order.”<sup>82</sup>

Interestingly, the most ardent legal realists eventually conceded, at least to some degree, the validity of and necessity for legal norms. Frank's last book contained a chapter assessing the value of natural law

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<sup>79</sup> C.J. Friedrich, *Karl Llewellyn's Legal Realism in Retrospect*, 74 ETHICS 201, 206 (1964).

<sup>80</sup> See *supra* notes 58, 64 and accompanying text.

<sup>81</sup> Pound, *supra* note 58, at 700, 707–08.

<sup>82</sup> *Id.* at 710.

and the teachings of Thomas Aquinas.<sup>83</sup> Frank remained highly critical of the form of natural law rooted in fatalistic naturalism<sup>84</sup> and also of Social Darwinism, which he believed was a variant of natural law that opposed all legislation designed to better the common lot of mankind.<sup>85</sup> Nevertheless, Frank at least partially recanted some of his previous attacks on scholasticism.<sup>86</sup> He praised Roman Catholic/Scholastic/Thomistic Natural Law for recognizing both basic and secondary general precepts of universal law and the need for positive law principles to vary with time, place, and circumstances.<sup>87</sup> Frank acknowledged that “no decent non-Catholic can fail to accept the few basic Natural Law principles or precepts as representing, at the present time or for any reasonably foreseeable future, essential parts of the foundation of civilization.”<sup>88</sup> Ultimately, Frank saw natural law as a mixed lot:

Natural Law yields, at best, a standard of justice and morality for critically evaluating the man-made rules, and, perhaps, for ensuring a moderate amount of certainty in those rules; but it furnishes no helpful standard for evaluating the fact-determination of trial courts in most law-suits, and no assistance in ensuring uniformity, certainty, or predictability in such determinations.<sup>89</sup>

Max Radin, whom Llewellyn identified as a prominent realist,<sup>90</sup> more explicitly acknowledged the need for moral norms in law:

Realist jurists may keep themselves aloof, if they like and if they can, from any form of metaphysics or of non-metaphysics. But they cannot be realists unless they are well aware, either as judges or critics of judges, that the business of judgment is to decide between a better and a worse readjustment of the human relations disturbed by an event, and that the terms better or worse imply a valuation and a standard. . . .

. . . .  
. . . I have no hesitation in declaring my belief that a realist examination of existing social and economic facts indicates defects in our social structure and that where a judgment will have the result of enlarging or lessening this defect, it is unrealistic to pre-

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<sup>83</sup> JEROME FRANK, COURTS ON TRIAL 346–73 (2d prtg.1950).

<sup>84</sup> *See id.* at 361.

<sup>85</sup> *Id.* at 353.

<sup>86</sup> Paul, *supra* note 67, at 549 n.5.

<sup>87</sup> FRANK, *supra* note 83, at 362–65.

<sup>88</sup> *Id.* at 364–65.

<sup>89</sup> *Id.* at 367.

<sup>90</sup> *See* Llewellyn, *supra* note 61, at 1226–28 n.18.

tend that this is not so, and that it is no business of the judge to consider that fact. That commits us to a particular standard of better and worse. And where no such result is obvious or likely, I like to think of realists boldly facing the fact that their final problem is an ethical one and that good or bad is determined by moral ideals.<sup>91</sup>

Radin argued, “There is nothing subjective . . . about applying a standard of conduct which the overwhelming majority . . . would at once recognize.”<sup>92</sup>

Perhaps most surprisingly, in a 1939 article initially published in the *Notre Dame Lawyer* and reprinted in his last book, *Jurisprudence: Realism in Theory and Practice*, Llewellyn acknowledged that natural law was compatible with legal realism. Llewellyn began by discussing the difference between the philosopher’s natural law and the lawyer’s natural law.<sup>93</sup> He then stated that the lawyer’s natural law “affords a concrete guide to the making of proper positive law, and a concrete guide for the correction of positive law which has gotten itself badly and aberrantly made.”<sup>94</sup> After noting many commonalities between realists and natural law adherents, Llewellyn concluded,

[I]t is difficult for me to conceive of the ultimate legal ideals of any of the writers who have been called realists in terms which do not resemble amazingly the type and even the content of the principles of a philosopher’s Natural Law.

. . . [T]his “realist” welcomes the modern Natural Law movement—including those parts of it which he doubtless does not yet understand.<sup>95</sup>

The excesses of realism may have been a function of the time in which the theory arose. The world was undergoing cataclysmic change in the 1920s and 1930s. The first worldwide military conflict had just ended. The American economy had hit unprecedented highs and lows, resulting in untold suffering. In this environment, the yearning for change and improvement was understandable. But a jurisprudence that offered neither a blueprint for substantive progress nor norms to protect life, liberty, and the pursuit of happi-

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<sup>91</sup> Max Radin, *Legal Realism*, 31 COLUM. L. REV. 824, 825 (1931).

<sup>92</sup> FRANK, *supra* note 83, at 368.

<sup>93</sup> Karl Llewellyn, *One “Realist’s” View of Natural Law for Judges*, 15 NOTRE DAME LAW. 3 (1939), reprinted in KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 111–12 (1962).

<sup>94</sup> *Id.* at 5, reprinted in LLEWELLYN, *supra* note 93, at 113.

<sup>95</sup> *Id.* at 8, reprinted in LLEWELLYN, *supra* note 93, at 115; see also Friedrich, *supra* note 79, at 202–03 (noting Llewellyn’s surprising endorsement of natural law).

ness provided no lasting answers. A mere decade later, the world confronted the atrocity of the Holocaust. Although legal realism could assess and expose the root causes of totalitarianism, the absence of a framework to assess the “ought” left it powerless to offer law and society a basis to guard against future governmental abuses. As Radin, Frank, and Llewellyn eventually conceded, common ethical base norms are essential for just law. The lack of a consistent, coherent basis for those norms was a glaring omission in legal realist theory.

#### V. RAWLS’S PUBLIC REASON

When considering a theory to fill the gap left by legal realism, John Rawls’s public reason theory is perhaps the most thoughtful, comprehensive, and influential contemporary attempt to explain the proper source of legal norms.<sup>96</sup> The primary focus here is on Rawls’s concept of public reason as explained in his 1997 article, *Public Reason Revisited*,<sup>97</sup> rather than his political liberalism theory generally.

Rawls was born in 1921, as the legal realism movement was emerging. Although he was not a jurist, Rawls was a moral philosopher who wrote extensively about government, justice, and law.<sup>98</sup> His seminal work, *A Theory of Justice*,<sup>99</sup> built on social contract theory to propose “justice as fairness.” In his later work, *Political Liberalism*, Rawls advocated the principles of “reasonable pluralism” and “overlapping consensus” to address how adherents to differing comprehensive doctrines could participate in liberal democracy.<sup>100</sup> Shortly after the publication of *Political Liberalism*, Rawls gave a lecture on public reason at the University of Chicago Law School, which he revised and published in the *Chicago Law Review*.<sup>101</sup> His final book, *Justice as Fairness: A Restatement*,<sup>102</sup> which he completed shortly before his death, was both a compilation of years of lecture notes in the course he taught on political philosophy at Harvard and an attempt to clarify and summarize his prior works, including

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<sup>96</sup> For a thoughtful discussion of the integration of Rawlsian principles to contract remedies, see C. Scott Pryor, *Principled Pluralism and Contract Remedies*, 40 *McGEORGE L. REV.* 723, 733–40 (2009).

<sup>97</sup> John Rawls, *The Idea of Public Reason Revisited*, 64 *U. CHI. L. REV.* 765 (1997).

<sup>98</sup> See JOHN RAWLS, *LECTURES ON THE HISTORY OF MORAL PHILOSOPHY* (2000).

<sup>99</sup> JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

<sup>100</sup> See JOHN RAWLS, *POLITICAL LIBERALISM* 141 (expanded ed. 2005).

<sup>101</sup> Rawls, *supra* note 97.

<sup>102</sup> JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (2001).

his theory of public reason premised on his notion of political liberalism.

Rawls advocated several principles with which a theistic legal realist could agree. Rawls's concept of the *original position* posits the principles of justice that would prevail in a society that involved free and fair cooperation between citizens. In the original position, however, representatives are placed behind a "veil of ignorance" which keeps them from assessing fully the individuating characteristics of their citizens.<sup>103</sup> These concepts approximate the principle of right reason, drawn from general revelation, and the notion that the imperfection of man clouds that reason. Similar to the distinction between special and general revelation, Rawls differentiated transcendent values, such as salvation and eternal life, and the reasonable political values, based on an overlapping consensus of comprehensive doctrines, that must govern society.<sup>104</sup> Political liberalism views all comprehensive doctrines, both religious and secular, as belonging to first philosophy and moral doctrine and thus outside the more limited political domain.<sup>105</sup> This principle approximates the requirement of theistic legal realism that law must not be based on principles of special revelation, accessible only by faith.

By contrast,

[L]iberal political principles and values, although intrinsically moral values, are specified by liberal political conceptions of justice and fall under the category of the political. These political conceptions have three features:

First, their principles apply to basic political and social institutions (the basic structure of society);

Second, they can be presented independently from comprehensive doctrines of any kind (although they may, of course, be supported by a reasonable overlapping consensus of such doctrines); and

Finally, they can be worked out from fundamental ideas seen as implicit in the public political culture of a constitutional regime. . . .<sup>106</sup>

The concept of liberal political principles and values approximates the notion that law must be based only on generally accessible principles (general revelation).

<sup>103</sup> See RAWLS, *supra* note 100, at 22–28.

<sup>104</sup> See Rawls, *supra* note 97, at 780.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 776.

Similarly, under Rawls's concept of *the proviso*, [R]easonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, provided that in due course proper political reasons—and not reasons given solely by comprehensive doctrines—are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support.<sup>107</sup>

The proviso presupposes reasonableness, which Rawls refines in the principle of *reciprocity*:

Citizens are reasonable when, viewing one another as free and equal in a system of social cooperation over generations, they are prepared to offer one another fair terms of cooperation according to what they consider the most reasonable conception of political justice; and when they agree to act on those terms, even at the cost of their own interests in particular situations, provided that other citizens also accept those terms.<sup>108</sup>

Public reason also includes a commitment to pluralism and liberty of religion and conscience:

[P]ublic reason is a political idea and belongs to the category of the political. Its content is given by the family of (liberal) political conceptions of justice satisfying the criterion of reciprocity. It does not trespass upon religious beliefs and injunctions insofar as these are consistent with essential constitutional liberties, including the freedom of religion and the liberty of conscience. There is, or need be, no war between religion and democracy. In this respect political liberalism is sharply different from and rejects Enlightenment Liberalism, which historically attacked orthodox Christianity.<sup>109</sup>

Theistic legal realists would find significant agreement with each of the above concepts.

Rawls's public reason theory nevertheless errs in two critical respects. First, Rawls was too inclined to believe that the arguments acceptable to a majority in a pluralistic constitutional democracy are reasonable. Rawls began *The Idea of Public Reason Revisited* by noting that his concept of public reason "belongs to a conception of a well ordered constitutional democratic society."<sup>110</sup> Although he noted that a hall-

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<sup>107</sup> *Id.* at 783–84.

<sup>108</sup> *Id.* at 770.

<sup>109</sup> *Id.* at 803–04.

<sup>110</sup> Rawls, *supra* note 97, at 765.

mark of constitutional democracy is reasonable pluralism<sup>111</sup>—a value theistic legal realism shares—Rawls embraced majoritarian relativism, not timeless, universal principles of truth:

Citizens are reasonable when, viewing one another as free and equal in a system of social cooperation over generations, they are prepared to offer one another fair terms of cooperation *according to what they consider the most reasonable conception of political justice* . . . .

[W]hen, on a constitutional essential or matter of basic justice, all appropriate governmental officials act from and follow public reason, and when all reasonable citizens think of themselves ideally as if they were legislators following public reason, the legal enactment *expressing the opinion of the majority* is legitimate law. . . .

. . . .

A citizen engages in public reason . . . when he or she deliberates within a framework of *what he or she sincerely regards as the most reasonable political conception of justice*, a conception that expresses political values that *others, as free and equal citizens might also reasonably be expected reasonably to endorse*. . . .

. . . .

. . . [W]hen hotly disputed questions . . . arise which may lead to a stand-off between different political conceptions, citizens must vote on the question *according to their complete ordering of political values*. . . . [T]he outcome of the vote . . . is to be seen as legitimate provided all government officials, supported by other reasonable citizens, of a reasonably just constitutional regime sincerely vote in accordance with the idea of public reason. This doesn't mean the outcome is true or correct, *but that it is reasonable and legitimate law, binding on citizens by the majority principle*.<sup>112</sup>

Rawls thus presupposed that “reasonable” arguments acceptable to a majority in a pluralistic constitutional democracy are legitimate, even if not “true” or “correct.” History has shown otherwise. A democratic majority pools both collective knowledge and collective ignorance. Our Founders established a representative republic and included a Bill of Rights in our Constitution that became a beacon of light to the world,<sup>113</sup>

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 770, 773, 798 (emphasis added). Here, Rawls echoes Holmes's statement that “truth was the majority vote of that nation that could lick all others.” Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).

<sup>113</sup> See, e.g., Soli J. Sorabjee, *Equality in the United States and India*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 94, 96 (Louis Henkin & Albert J. Rosenthal eds., 1990) (discussing the influence of the Bill of Rights on the framing of India's Constitution).

precisely because of a healthy mistrust of the passions of the majority.<sup>114</sup> Of course, no form of government perfectly protects from error. Our Founders and early leaders wrongly embraced race-based slavery and denied blacks and native tribes—most notably the Cherokee Nation—life, liberty, and property without due process of law, all via a representative, political process.<sup>115</sup> The will of the majority can be inherently unjust or misguided, particularly in an era of cultural relativism, and must be curbed when it is.

Second, Rawls's treatment of such divisive contemporary political issues as marriage, women's rights, and abortion reflected anti-traditionalism and a cramped view of the proper role of religious perspectives in the law. On each of these issues, Rawls unjustifiably asserted that appeals to traditional or historical mores constituted improper imposition of comprehensive doctrines.

Concerning marriage, Rawls argued:

[I]n a democratic regime the government's legitimate interest is that public law and policy should support and regulate, in an ordered way, the institutions needed to reproduce political society over time. These . . . include the family (in a form that is just), arrangements for rearing and educating children, and institutions of public health generally . . . . [T]he government would appear to have no interest in the particular form of family life, or of relations among the sexes, except insofar as that form or those relations in some way affect the orderly reproduction of society over time. Thus, appeals to monogamy as such, or against same-sex marriages, as within the government's legitimate interest in the family, would reflect religious or comprehensive moral doctrines. Accordingly, that interest would appear improperly specified.<sup>116</sup>

Rawls's equating of arguments against polygamy or same-sex marriage with comprehensive doctrines is unexplained and indefensible. A theistic legal realist would consider the nature of marriage across cultures and time, including an assessment of whether and how various forms of marriage supported a just society, to determine the propriety of polygamy and same-sex marriage. Based on right reason, this assessment would be accessible to all people and would not require the imposition of faith. Marriage is an institution inherent in the created order, not a

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<sup>114</sup> Cf. THE FEDERALIST NO. 51, at 321 (James Madison) (Isaac Kramnick ed., 1987) ("If a majority be united by a common interest, the rights of the minority will be insecure.").

<sup>115</sup> Hernandez, *supra* note 27, at 645–52.

<sup>116</sup> Rawls, *supra* note 97, at 779.



civil construct to be defined by a contemporary democratic majority. Rawls labeled these general revelatory arguments “religious” and wrongly argued that they should be precluded from public debate, thereby requiring people of faith to check their general revelatory principles at the door to the public square.

Regarding women’s rights, Rawls reasonably argued that the “equal rights of women and the basic rights of their children as future citizens are inalienable,” but then recommended that the law “protect them wherever they are.”<sup>117</sup> In other words, “the spheres of the political and the public, of the nonpublic and the private, fall out from the content and application of the conception of justice and its principles” so that the law—again, presumably the will of the majority—may regulate private husband/wife relations.<sup>118</sup> Rawls believed this is necessary to remedy “[a] long and historic injustice to women” from having to bear

an unjust share of the task of raising, nurturing, and caring for their children. . . .

. . . .

. . . If a basic, if not the main, cause of women’s inequality is their greater share in the bearing, nurturing, and caring for children in the traditional division of labor within the family, steps need to be taken either to equalize their share, or to compensate them for it.<sup>119</sup>

The theistic legal realist would agree that the law must recognize the equal rights and dignity of men and women. Law should neither favor nor disfavor men or women based solely on gender. Rawls’s rejection of the traditional roles of men and women nevertheless reflected his relativism and hostility toward timeless universal truths, including the fact that men and women are biologically different in ways that necessarily affect parenting roles. On the most fundamental level, his suggestion that women have a greater share in bearing their children is both undeniably true and nonsense. It is a biological necessity that women bear children, and a significant reason women spend more time nurturing children is because women have breasts. One could reverse Rawls’s point by arguing that men should be compensated because they have been denied the equal privilege of bonding with their children, both before and after birth, and, as a consequence, have borne the greater burden in providing financially for their families. The futility, and inanity, of this debate, and of Rawls’s implicit quarrel with the Creator,

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<sup>117</sup> *Id.* at 791.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 790, 792–93.

should be apparent. Rawls offered no evidence to validate his assertion that it is in the public interest for law to divide spouses and regulate their private choices. The law of equal rights is just so long as the law does not force men and women to assume specified roles in the family and is consistent with timeless universal principles regarding the husband/wife relationship.

Rawls's political bias is perhaps most glaring regarding abortion. Rawls concluded that arguments on both sides of the issue could be of public reason, thus the matter should be decided by the will of the majority properly expressed through the political process.<sup>120</sup> In so doing, he lectured people of faith, particularly Roman Catholics, that they must accept that all pro-abortion arguments are of public reason and thus assent if the majority wants to preserve the right to an abortion:

Some may, of course, reject a legitimate decision, as Roman Catholics may reject a decision to grant a right to an abortion. They may present an argument in public reason for denying it and fail to win a majority. But they need not themselves exercise the right to abortion. They can recognize the right as belonging to legitimate law enacted in accordance with legitimate political institutions and public reason, and therefore not resist it with force. Forceful resistance is unreasonable: it would mean attempting to impose by force their own comprehensive doctrine that a majority of other citizens who follow public reason, not unreasonably, do not accept.<sup>121</sup>

Because he only offered abortion as an illustration rather than to analyze the substantive issues fully, Rawls did not elaborate on what he meant by "force."<sup>122</sup> If he meant violent resistance, such as shooting abortionists, then his point should be uncontroversial. His expressed aversion to people of faith imposing their comprehensive doctrine on the majority suggests, however, that he meant by *force of law*—that is, working to make abortion illegal, notwithstanding the presumed (but not proven) desire of the majority to the contrary. Moreover, Rawls assumed the arguments in favor of and against abortion are equally of public reason. Women (and men) surely have the right to liberty and, at least to some degree, to bodily integrity.<sup>123</sup> Abortion, however, implicates much more. Theistic legal realism would require that the law be

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<sup>120</sup> See *id.* at 798–99.

<sup>121</sup> *Id.*

<sup>122</sup> See Rawls, *supra* note 97, at 798–99.

<sup>123</sup> An absolute right to bodily integrity, which would reflect radical libertarianism, has of course not been universally accepted across cultures and time.

based not just on the will of the majority, but on timeless, universal principles regarding the right to life and liberty, the mother/child relationship before and after birth, the marital relationship as it pertains to childbearing, and, to the extent it is properly understood to exist, the woman's right to bodily integrity. The legal hierarchy of life, liberty, and pursuit of happiness would be at the core of this assessment. Life is the foundational right because the other rights are meaningless without it.<sup>124</sup> One does not have to be a faithful Catholic—or a person of faith at all—to understand or apply these principles.

Rawls's public reason falls short of its promise. The relativism inherent in Rawls's public reason does not provide an adequate normative basis for the substance of law, and Rawls's public reason theory wrongly excludes generally accessible, reasonable principles from the public square.

## VI. CONCLUSION

Legal realism and Rawlsian public reason significantly influenced modern American law, for the better in some notable respects. The legal realists properly insisted that judges should clearly articulate the true reasons for their decisions and that law must be effectual to be just. Law must be grounded in reality, assessed in part based on its impact on the parties at issue and society at large. Rawls admirably attempted to protect religious liberty while elaborating on the necessary distinction between norms appropriate for law and those left to individual conscience. Legal realists and Rawls nevertheless fell short because they failed to appreciate the need for timeless, universal base norms as the foundation of law.

In his debate with Llewellyn, Pound asserted that “we [have not] observed the phenomena of legal institutions among all peoples with sufficient accuracy and objectivity to be in a position to formulate any

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<sup>124</sup> See, e.g., Pope John Paul II, *Christifideles Laici: On The Vocation and the Mission of the Lay Faithful in the Church and in the World* ¶ 38 (Dec. 30, 1988) (transcript available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_30121988\\_christifideles-laici\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_30121988_christifideles-laici_en.html)).

The inviolability of the person which is a reflection of the absolute inviolability of God, finds its primary and fundamental expression in the *inviolability of human life*. Above all, the common outcry, which is justly made on behalf of human rights—for example, the right to health, to home, to work, to family, to culture—is false and illusory if *the right to life*, the most basic and fundamental right and the condition for all other personal rights, is not defended with maximum determination.

*Id.*

laws of legal development therefrom.”<sup>125</sup> Pound’s assertion may have been true eighty years ago, but it is no longer so. As theistic legal realism affirms, a detailed historical study of human experience and practice across cultures and time, using the resources of anthropology, sociology, psychology, and yes, theology (to assess general revelatory principles), is necessary to identify proper base legal norms. Contrary to Llewellyn’s scolionophobia,<sup>126</sup> I look forward to seeing a thriving school of theistic legal realists dedicated to that task.

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<sup>125</sup> Pound, *supra* note 58, at 698–99.

<sup>126</sup> See *supra* note 78 and accompanying text (insisting that there was no “school” of legal realists).