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THEISTIC LEGAL REALISM AND NORMATIVE PRINCIPLES OF LAW

Michael V. Hernandez[†]

I. INTRODUCTION

Theorists have long pondered the proper role of faith in the public square. In line with that tradition, this timely Symposium has explored both historical and contemporary conceptions of natural law. In a world threatened by secularists who want to strip the public square of all vestiges of religion on one extreme, and radical Muslims who want to impose *Shari'a* law on the other,¹ a correct understanding of the proper interplay between faith, reason, and the law is imperative. This article, which reflects an explicitly Christian perspective, will focus on the proper substantive basis for normative assertions in law. Part II will explain moral realism, in which a concept I call “theistic legal realism” is rooted. Parts III and IV will explain the core principles of theistic legal realism and why this theory provides the proper methodology for discerning and applying foundational normative legal principles. Parts V and VI critique theonomy and natural law, explaining how these theories differ from theistic legal realism. Part VII provides concluding thoughts.

II. (THEISTIC) MORAL REALISM

The concept I label *theistic legal realism* is related to theistic moral realism. Moral realism is a philosophical belief in objective moral values common to humanity.² There are foundational principles of right and wrong for, and knowable by, all rational creatures.³ *Theistic moral realism* recognizes the Creator as the source of common objective values and reflects the belief that the pattern of the Creator’s purpose is revealed in creation and written on the heart of mankind. There are two important presuppositions to theistic moral realism.

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1. This is not to suggest that all Muslims share this view. *See infra* note 105.

2. RUSS SHAFER-LANDAU, *MORAL REALISM: A DEFENSE* 2 (2004).

3. *Id.* at 17.

First, and perhaps most importantly, God is good,⁴ and He desires to bless His creation, especially humanity.⁵ Second, as Creator, God has designed us in a specific way, and we should act in accordance with God's inherently good design.⁶ God created us to live in harmony with objective moral values that are also inherent in our created nature. We experience blessings (e.g., justice, peace, joy, good relations with others, etc.) as we adhere to these values, and troubles (e.g., inner and interpersonal brokenness, shame, lack of peace, social disorder, etc.) as we do not.⁷

We access God's inherently good objective values by the exercise of right reason and conscience. This does not involve just any mental process, but the proper exercise of the natural reason God gave man. It is 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. For example, humans naturally have the capacity to know that murder is wrong⁸ or to learn that $2+2=4$,⁹ but no one knows these truths at birth.¹⁰ Objective truth is not the *fruit* of reason; rather, the exercise of *right* reason, as God designed it, *reveals* or *leads to the discernment of* objective truth.

Theistic moral realism is grounded in common objective moral principles (*general revelation*) rather than principles attainable only by faith or a particular

4. See, e.g., *Psalm* 25:8-10, 86:5, 100:3-5, 107:1, 118, 135:1-3, and 136:1-9. All Scripture quotations herein are from the New American Standard Bible, unless otherwise noted.

5. See, e.g., *Genesis* 1 and 12:1-3; *Psalm* 67 and 145; *John* 3:16.

6. See, e.g., *Psalm* 139.

7. 1 WILLIAM BLACKSTONE, COMMENTARIES *40-41 (1765-69).

8. J. BUDZISZEWSKI, WHAT WE CAN'T NOT KNOW: A GUIDE 14 (2003).

9. DEWEY J. HOITENGA, JR., FAITH AND REASON FROM PLATO TO PLANTINGA: AN INTRODUCTION TO REFORMED EPISTEMOLOGY 177 (1991); J. Budziszewski, Natural Law for Lawyers, Lecture at the Regent University Summer Program in Christian Jurisprudence (Aug. 1, 2005).

10. This is reflective of the principle of broad foundationalism, which asserts that many beliefs are properly basic and thus can, consistent with epistemic duties, be accepted without evidence or argument. RONALD H. NASH, FAITH & REASON: SEARCHING FOR A RATIONAL FAITH 86-91 (1988); cf. ROBERT P. GEORGE, MAKING MEN MORAL 12-13 (1993):

As first principles of practical thinking, basic reasons for action are, as Aquinas held, self-evident (*per se nota*) and indemonstrable (*indemonstrabilia*). The human goods that provide basic reasons for action are fundamental aspects of human well-being and fulfillment, and, as such, belong to human beings as parts of their nature; basic reasons are not, however, derived (in any sense that the logician would recognize) from methodologically antecedent knowledge of human nature, such as is drawn from anthropology or other theoretical disciplines. Rather, they are grasped in non-inferential acts of understanding by the mind working inductively on the data of inclination and experience.

religious belief (*special revelation*).¹¹ An example of general revelation is the belief that murder is wrong, while a principle of special revelation is the belief that Jesus is the Son of God. Regarding the substance of the basic objective principles of moral truth, as Thomas Aquinas wrote, the “first precept of law [is] that good is to be done and pursued, and evil is to be avoided.”¹² More specifically, these principles include honesty in relationships, family loyalty, personal dignity, concern for others, temperance, justice, and respect for and preservation of life.¹³

An excellent summary of the general revelation principles at the core of theistic moral realism can be found in C.S. Lewis’s book *The Abolition of Man*, which discusses how objective principles of truth are reflected across cultures and time.¹⁴ Lewis identifies several principles or laws, which, although not comprehensive, summarize timeless, universal, objective truths.¹⁵ The *Law of General Beneficence* proscribes murder, oppression, cruelty, slander, harmful words, treating another in a way you would not want to be treated, and hating others, and prescribes preservation of life, educating, enriching and instructing others, kindness, giving to meet the needs of others, and doing to others as you would have them do unto you.¹⁶ The *Law of Special Beneficence* includes the love and support of family and spouse, natural affection toward others, and support of rulers.¹⁷ The concept of *Duties to Parents, Elders and Ancestors* concerns honoring parents and elders and showing proper respect to those that have gone before us.¹⁸ The concept of *Duties to Children and Posterity* reflects that the love of offspring is natural and involves showing great respect and kindness to children.¹⁹ The *Law of Justice* forbids adultery/respects marital ties, forbids stealing, prefers honest loss to dishonest gain, respects property, forbids

11. See *Romans* 1:19-20 (noting that God has made truth known to all men, and that truth is understood through what God has created); *Romans* 2:14-15 (“For when Gentiles who do not have the Law do instinctively the things of the Law, these, not having the Law, are a law to themselves, in that they show the work of the Law written in their hearts, their consciences bearing witness, and their thoughts alternately accusing or else defending them”).

12. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. 1-II, q. 94, a. 2, at 1009 (Christian Classics 1981).

13. 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*, SAC. BEE, Jan. 15, 1994, at 10). Rev. Chinn was praising Pope John Paul II’s encyclical *Veritatis Splendor*.

14. See generally C.S. LEWIS, *THE ABOLITION OF MAN* (1947).

15. See *id.* at 95-121.

16. See *id.* at 97-100.

17. See *id.* at 101-03.

18. See *id.* at 104-05.

19. See *id.* at 107-08.

false witness, and requires fair and impartial judging.²⁰ The *Law of Good Faith and Veracity* requires honesty, no false oaths, good faith in dealings with others, and no perjury.²¹ The *Law of Mercy* prescribes taking care of the poor and sick; praying for the weak; giving to those in need; men not striking women; taking care of the infirm, widows and orphans; and being compassionate.²² Finally, the *Law of Magnanimity* includes defending against injustices, enjoying life but not fearing death, being prepared to die for the truth, chastity and propriety, keeping the mind focused on higher things and living in accordance with them, the spirit leading the soul which should lead the body, and being willing to die to self or lose one's life for a higher calling.²³ These laws reflect core principles of theistic moral realism.

III. THEISTIC LEGAL REALISM

Theistic legal realism, which is rooted in theistic moral realism, provides the proper basis for discerning legal norms. "Theistic" reflects the Creator as the ultimate source of binding norms; "legal" suggests the focus on civil or human law; "realism" indicates reality. Theistic legal realism therefore refers to the true nature of legal norms.²⁴ It includes two core principles: civil rulers must (1) base law solely on principles of general revelation, not principles unique to any faith, and (2) vigorously protect and preserve religious liberty and expression for all.

A. *The Law of the State Must Be Based on General, Not Special, Revelation*

First, because the state may not rule the conscience, and consequently there are separate jurisdictions of church and state, law must be grounded in principles of general, not special, revelation. Principles that can only be accepted by faith—principles of special revelation, including uniquely Christian principles²⁵—are not suitable for civil law but instead fall solely within the jurisdiction of the church. Jesus acknowledged the jurisdictional boundary between church and state when, in response to the Pharisees' test regarding the payment of taxes, he distinguished what belongs to Caesar, that is, the limited

20. See *id.* at 109-11.

21. See *id.* at 112-13.

22. See *id.* at 115-16.

23. See *id.* at 117-21.

24. The use of this label is a conscious attempt to confront and remediate errors in the prevailing modern legal philosophy of legal realism. A full analysis of those errors is, however, beyond the scope of this article and thus a topic for future consideration.

25. This point relates solely to *substantive/normative principles of law*, not, e.g., Christian theories or principles about government or law. See *infra* Part IV.

role of the civil ruler, from what belongs to God.²⁶ Similarly, *Romans* chapter thirteen teaches that God has ordained government for the limited purpose of punishing wrongdoers to do justice, resulting in good order,²⁷ rather than to usher in the kingdom of God.

This jurisdictional distinction is further reflected by Jesus' ministry and delegation of authority to believers. The Old Testament foreshadowed Christ's coming as both Savior and King.²⁸ Although the Jews expected an earthly king, Jesus came first as Savior and will return as King.²⁹ During his earthly ministry, Jesus refused to take up the sword or to assert temporal, governmental authority.³⁰ He flatly rejected a request to resolve an inheritance dispute, stating dismissively, "Man, who appointed Me a judge or arbiter over you?"³¹ Jesus opposed Peter's effort to use the sword to fight Jesus' arrest and crucifixion.³² When facing the Roman Governor Pilate, Jesus declared, "My kingdom is not of this world. If My kingdom were of this world, then My servants would be fighting, that I might not be delivered up to [be crucified]; but as it is, My kingdom is not of this realm."³³ Jesus thus did not seize, but rather deferred to, civil authority.³⁴ Most importantly, after his resurrection, Jesus declared that *all* authority in heaven *and* on earth had been given to Him,³⁵ but he delegated *only spiritual, not temporal or governmental*, authority to believers.³⁶ He told his disciples to "[g]o . . . and make disciples of all the nations, baptizing them in the name of the Father and the Son and the Holy Spirit, teaching them to observe all that I commanded you; and lo, I am with you always, even to the end of the age."³⁷ Jesus thus authorized the disciples to spread the Gospel to the nations, not to impose civil rule on them. His directive

26. See *Matthew* 22:21.

27. *Romans* 13:1-7.

28. See, e.g., *Isaiah* 9:1-7, 42:1-13, 53:1-12, and 61:1-11.

29. I am indebted to Regent University Professor Joseph A. Kickasola for this insight.

30. See David M. VanDrunen, *Natural Law, the Lex Talionis, and the Power of the Sword*, 2 LIBERTY U. L. REV. 946, 949 (2009) (noting that both Luther and Calvin affirmed that the state, not the church, wields the earthly sword; the church instead bears the "spiritual sword" by preaching the Word and ministering the sacraments).

31. *Luke* 12:14.

32. *John* 18:10-11.

33. *John* 18:36.

34. Even Pilate appeared to understand this jurisdictional principle, for he initially indicated that the Jews who sought to have Jesus crucified should judge Jesus according to their own law and that he could not put Jesus to death because Jesus had committed no civil crime to justify Pilate's exercise of authority. See *John* 18:28-19:6.

35. *Matthew* 28:18.

36. See *Matthew* 28:19-20.

37. *Id.*

that others should be taught “to observe all that [He] commanded” referred to new disciples, not all people. Between Christ’s first and second coming, the church is empowered to spread the Gospel, not to impose Gospel principles in civil law. The Old Testament law foreshadows Christ’s *future* earthly reign as King; it does not establish the church’s interim authority as regent. The early church clearly understood and complied with this principle, avoiding entanglement between church and state for the first few centuries of church history.³⁸

Basing law only on principles of general revelation also ensures a fair and just legal system. People cannot impose or conform to principles they do not understand. True principles of special revelation are discernible by the Holy Spirit and thus can only be fully understood by believers.³⁹ As the Apostle Paul explained in his *First Epistle to the Corinthians*, the Gospel is foolishness to the world.⁴⁰ Principles of general revelation alone can fairly govern both believers and non-believers.

B. The Protection of Religious Liberty and Expression for All

The second foundational principle of theistic legal realism is the protection of religious liberty and expression for all. The law must ensure that no unique principle of faith, Christian or otherwise, is imposed on others. When the government mandates or censors religious speech or activity, such as King Nebuchadnezzar and King Darius did to Daniel, Shadrach, Meshach, and Abednego,⁴¹ it intrudes on the individual conscience and oversteps its God-given, limited authority. The apostles Peter and John affirmed this principle while confronting the Sanhedrin, the highest Jewish tribunal that had authority over criminal and administrative matters as well as wide civil jurisdiction under Old Testament law.⁴² After Peter healed a lame beggar and proclaimed that Jesus was the resurrected Christ, the Sanhedrin ordered Peter and John not to speak or teach in Jesus’ name.⁴³ Peter and John refused, noting that they must

38. EDWARD L. CUTTS, TURNING POINTS OF GENERAL CHURCH HISTORY 13-127 (1890). The church’s avoidance of entanglement with the affairs of state ended with the reign of Constantine. *See id.* at 128 (discussing Constantine’s use of his office to further Christianity, including recognizing Christianity as the religion of the state).

39. *See, e.g.*, 1 *Corinthians* 1:18-2:16; *Hebrews* 10:15-16.

40. 1 *Corinthians* 1:18-25, 2:6-8, 2:14, 3:18-19.

41. *See Daniel* 3 (King Nebuchadnezzar put Shadrach, Meshach, and Abednego in the fiery furnace because they refused to worship the king’s golden idol); *Daniel* 6 (King Darius threw Daniel in a lion’s den for refusing to pray only to the king).

42. THE NEW BIBLE DICTIONARY 1142-43 (J.D. Douglas ed., 1962).

43. *Acts* 3:1-4:18.

obey God rather than civil authority.⁴⁴ Notably, because Jesus fulfilled the Old Testament law,⁴⁵ Peter and John could have argued that the Sanhedrin should complete the law by requiring obedience to Christ's teachings. Rather than seeking to impose Christian belief by law, however, the apostles simply insisted on their right to speak and act in accordance with their faith and conscience.

The preservation of religious liberty serves the common good⁴⁶ and facilitates the proclamation of the Gospel. Christians should not advocate preserving religious liberty solely to vindicate the rights of the believer. For the Christian, preserving religious liberty protects the rights of conscience of all, including people of no faith,⁴⁷ while allowing the Gospel to be preached so that the world may truly, intimately, fully, *and freely* know Jesus Christ and the blessings of the kingdom of God.⁴⁸

44. *Acts* 4:19-20.

45. *Matthew* 5:17.

46. See Pope Benedict XVI, Address to the General Assembly of the United Nations (Apr. 18, 2008), <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 . . . 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

47. See *id.* (“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.”).

48. See Jesus' words to his disciples in *Matthew* 28:18-20 (“All authority has been given to Me in heaven and on earth. Go therefore and make disciples of all the nations, baptizing them in the name of the Father and the Son and the Holy Spirit, teaching them to observe all that I commanded you; and lo, I am with you always, even to the end of the age.”); *John* 6:33, 35 (“For the bread of God is that which comes down out of heaven, and gives life to the world

The two foundational principles of theistic legal realism have a long history in Christendom. Augustine thoroughly described and distinguished the City of God and the City of Man.⁴⁹ Martin Luther similarly discussed the differences between God's kingdom and man's.⁵⁰ He believed that if every person were a "real Christian []," there would be "no need for temporal law or sword," since the population would be rooted in the fruits of the Spirit.⁵¹ As for man's kingdom, Luther acknowledged that temporal authority was necessary to restrain evil, including misdeeds of Christians, who imperfectly practice a perfect faith, and of non-Christians.⁵² Building on his Two Kingdoms doctrine, Luther believed that "[i]t is out of the question that there should be a common Christian government over the whole world, or indeed over a single country or any considerable body of people"⁵³

In early America, Roger Williams, the founder of the colony of Rhode Island, espoused the two foundational principles of theistic legal realism in his 1644 work, *The Bloody Tenent, Of Persecution for Cause of Conscience*. Williams summarized his thesis in twelve statements:

First, That the blood of so many hundred thousand soules of *Protestants* and *Papists*, split in the *Wars* of *present* and *former* *Ages*, for their respective *Consciences*, is not *required* nor *accepted* by *Jesus Christ* the *Prince of Peace*.

I am the bread of life; he who comes to Me shall not hunger, and he who believes in Me shall never thirst."); *John* 10:9-10 ("I am the door; if anyone enters through Me, he shall be saved, and shall go in and out, and find pasture. The thief comes only to steal, and kill, and destroy; I came that they might have life, and might have it abundantly."); and *John* 15:11 ("These things I have spoken to you, that My joy may be in you, and that your joy may be made full.").

49. See generally AUGUSTINE OF HIPPO, *CITY OF GOD* (Henry Bettenson trans., Penguin Books 2003) (1467).

50. MARTIN LUTHER, *Temporal Authority: To What Extent It Should Be Obeyed*, in LUTHER, *SELECTED POLITICAL WRITINGS* 51, 54 (J.M. Porter ed., J.J. Schindel & Walther I. Brandt trans., Fortress Press 1974).

51. *Id.* Luther explained that laws would serve no purpose, because "Christians have in their heart the Holy Spirit, who both teaches and makes them to do injustice to no one, to love everyone, and to suffer injustice and even death willingly and cheerfully at the hands of anyone." *Id.*

52. *Id.* at 55. Luther captured this concept in the following metaphor: "[A] savage wild beast is bound with chains and ropes so that it cannot bite and tear as it would normally do, even though it would like to; whereas a tame and gentle animal needs no restraint, but is harmless despite the lack of chains and ropes." *Id.*

53. *Id.* at 56.

Secondly, Pregnant *Scriptures* and *Arguments* are throughout the Worke proposed against the *Doctrine* of *persecution* for the *cause* of *Conscience*.

Thirdly, *Satisfactorie* Answers are given to *Scriptures*, and objections produced by Mr. *Calvin*, *Beza*, Mr. *Cotton*, and the Ministers of the New English Churches and others former and later, tending to prove the *Doctrine* of *persecution* for cause of *Conscience*.

Fourthly, The *Doctrine* of *persecution* for cause of *Conscience*, is proved guilty of all the *blood* of the *Soules* crying for *vengeance* under the Altar.

Fifthly, All *Civill States* with their *Officers* of *justice* in their respective *constitutions* and *administrations* are proved *essentially Civill*, and therefore not *Judges*, *Governours* or *Defendours* of the Spirituall or Christian State and Worship.

Sixthly, It is the will and command of *God*, that (since the coming of his Sonne the *Lord Jesus*) a *permission* of the most *Paganish*, *Jewish*, *Turkish*, or *Antichristian* consciences and worships, bee granted to all men in all *Nations* and *Countries*: and they are onely to bee *fought* against with that *Sword* which is only (in *Soule matters*) *able* to *conquer*, to wit, the *Sword* of *Gods Spirit*, the *Word* of *God*.

Seventhly, The *State* of the Land of *Israel*, the *Kings* and *people* thereof in *Peace & War*, is proved *figurative* and *ceremoniall*, and no *patterne* nor *president* for any *Kingdome* or *civill State* in the *world* to follow.

Eighthly, *God* requireth not an *uniformity* of *Religion* to be *inacted* and *inforced* in any *civill State*; which *inforced uniformity* (sooner or later) is the greatest occasion of *civill Warre*, *ravishing* of *conscience*, *persecution* of *Christ Jesus* in his servants, and of the *hypocrisie* and *destruction* of *millions* of *souls*.

Ninthly, In holding an *inforced uniformity* of *Religion* in a *civill state*, wee must necessarily *disclaime* our desires and hopes of the *Jewes conversion* to *Christ*.

Tenthly, An inforced *uniformity of Religion* throughout a *Nation* or *civill State*, confounds the *Civill* and *Religious*, denies the principles of Christianity and civility, and that *Jesus Christ* is come in the Flesh.

Eleventhly, The permission of other *consciences* and *worships* then a state professeth, only can (according to God) procure a firme and lasting *peace*, (good *assurance* being taken according to the *wisedome* of the *civill State* for *uniformity of civill obedience* from all sorts.)

Twelfthly, lastly, true *civility* and *Christianity* may both flourish in a *state* or *Kingdome*, notwithstanding the *permission* of divers and contrary *consciences*, either of *Jew* or *Gentile*.⁵⁴

Contemporary Christian theorists have advocated similar principles. John Warwick Montgomery has argued that “the great insight of Augustine in separating the City of God from the City of Man and Luther’s fundamental distinction between Law and Gospel and the Two Kingdoms” ought to be

brought to bear on the issue of church-state relations [and] on the vital collateral question of the proper jurisdiction of human courts Ought we not to keep before us the fundamental distinction between God’s tribunal and man’s, between His kingdom and ours, between eternal and temporal law? Our task is not to correct every moral failing by human legislation; we are rather to legislate where provable harm to the body politic will arise in the absence of law.⁵⁵

Charles Colson has written *God and Government*, in which he describes the “confusion and conflict over the respective spheres of the religious and the political.”⁵⁶ Colson argues that

both church and state have clear and distinct roles ordained by God Christ did not give the keys of the Kingdom of Caesar nor the sword to Peter In God’s provision the state is not to seize authority over ecclesiastical or spiritual matters, nor is the church to seek authority over political matters Tension between church and state is inherent and inevitable For from the constant

54. ROGER WILLIAMS, THE BLOODY TENANT, OF PERSECUTION FOR CAUSE OF CONSCIENCE (1644), in 1 CHURCH AND STATE IN THE UNITED STATES 199 (Anton Phelps Stokes ed., 1950).

55. JOHN WARWICK MONTGOMERY, THE LAW ABOVE THE LAW 80, 82 (1975).

56. CHARLES COLSON, GOD AND GOVERNMENT 48 (2007).

tension—the chafing back and forth—a certain equilibrium is achieved. To maintain this balance the church and the state must fulfill their respective roles. One cannot survive without the other; yet neither can do the work of the other. Both operate under God’s rule, each in a different relationship to that rule.⁵⁷

Addressing the issue of religious liberty at the time of Vatican II, Pope Paul VI noted:

The religious acts whereby men, in private and in public and out of a sense of personal conviction, direct their lives to God transcend by their very nature the order of terrestrial and temporal affairs. Government therefore ought indeed to take account of the religious life of the citizenry and show it favor, since the function of *government* is to make provision for the common welfare. However, it would *clearly transgress the limits set to its power, were it to presume to command or inhibit acts that are religious.*⁵⁸

Catholic natural law scholar John Finnis has similarly emphasized the “limits on the competence of the state which have been clarified by recent [Catholic] Church teaching regarding the instrumental character of political society’s common good, the principle of subsidiarity, . . . and religious liberty.”⁵⁹

IV. CHRISTIAN RULERS AND CHRISTIAN THEORY

The combination of the two foundational principles of theistic legal realism—law based solely on principles of general revelation and the protection of religious liberty—informs the use of biblical principles in the public square. On the one hand, everyone should be free to express his or her personal views, religious or otherwise. Yet, there is a difference between public speech and the proper substance of law. A critical distinction must be drawn between the proper activities of a governmental ruler and those of a private citizen or theorist. This

57. *Id.* at 127, 137.

58. POPE PAUL VI, *DIGNITATIS HUMANAE* (Dec. 7, 1965) (emphasis added), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

59. John Finnis, *Public Good: The Specifically Political Common Good in Aquinas*, in *NATURAL LAW AND MORAL INQUIRY: ETHICS, METAPHYSICS, AND POLITICS IN THE WORK OF GERMAIN GRIZEZ* 174, 174 (Robert P. George ed., 1998). Subsidiarity is the principle of Catholic social thought that authority ought to be exercised by the smallest and simplest organization—for example, matters that can be handled at any level of government ought to be addressed at the local level. David A. Bosnich, *The Principle of Solidarity*, 6 *RELIGION & LIBERTY* 9, 9 (1996), available at http://www.acton.org/files/rl_v06n4.pdf.

distinction has important implications for the use of the Bible and Christian principles in the public square.

The civil ruler who is formulating law may use biblical principles, but only to apply principles of general revelation. The Bible contains general principles in addition to unique principles of faith.⁶⁰ For example, the following biblical passages reflect the general revelatory laws Lewis describes in *The Abolition of Man*:⁶¹ prohibition of murder,⁶² slander,⁶³ or harmful words;⁶⁴ doing to others as you would have them do unto you;⁶⁵ love of family⁶⁶ and spouse;⁶⁷ natural affection toward others;⁶⁸ support of rulers;⁶⁹ honoring parents;⁷⁰ natural love of offspring;⁷¹ showing great respect and kindness to children;⁷² proscribing adultery and respecting marital ties;⁷³ prohibiting stealing;⁷⁴ preferring honest loss to dishonest gain;⁷⁵ forbidding false witness;⁷⁶ helping those in need;⁷⁷ caring for the infirm, widows and orphans;⁷⁸ showing compassion to others;⁷⁹ defending against injustices;⁸⁰ enjoying life but not fearing death,⁸¹ and being willing to die to self or lose your life for a higher calling.⁸² A civil ruler may use the

60. Some skeptics mistakenly question Christianity by noting the truth that some principles in the Bible are not unique and that some of Jesus' teachings reflect earlier philosophies. The overlap between Christianity and other philosophies is not surprising, because principles of general revelation are common to humanity and pre-existed Jesus' earthly ministry. Jesus reaffirmed and clarified known general truths while also living and proclaiming principles of special revelation.

61. See *supra* note 14 and accompanying text.

62. *Exodus* 20:13.

63. *Exodus* 20:16.

64. *Ephesians* 4:29.

65. *Matthew* 7:12.

66. *1 Timothy* 5:8.

67. *Ephesians* 5:22-33.

68. *1 Corinthians* 13.

69. *1 Timothy* 2:2.

70. *Exodus* 20:12; *Ephesians* 6:1-3.

71. *Ephesians* 6:4.

72. *Matthew* 18:3-6.

73. *Exodus* 20:14, 17.

74. *Exodus* 20:15.

75. *Proverbs* 16:8.

76. *Exodus* 20:16.

77. *Matthew* 25:31-46.

78. *James* 1:27, 2:14-26.

79. *John* 11:35 (Jesus weeping).

80. *Leviticus* 24:19-20.

81. *Philippians* 1:21.

82. *John* 12:24-25.

Bible to discern and apply principles of general revelation that provide the proper basis for civil law.

It may, however, not always be prudent or necessary for a Christian to cite Scripture to formulate law; sometimes the more effective strategy will be to extract the principles of reason imbedded in Scripture and advocate those principles without attribution. Nevertheless, the fact that the Bible contains principles of reason accessible to all disproves the secular objection to all religious expression in the public square. Principles of general revelation do not impose religious belief and can be understood by all. Indeed, non-believers sometimes understand and adhere to general revelatory principles better than people of faith do.⁸³ This may be why C.S. Lewis stated in *The Abolition of Man* that he was not attempting to make an indirect argument about theism.⁸⁴ Lewis apparently did not intend to suggest that theistic belief is not true, important or helpful to understand or ultimately ground truth, but rather that one does not need to be a theist to understand moral truth. There are nevertheless at least three reasons why theistic belief is preferable. First, a normative basis of truth requires a higher, ultimate, authoritative source.⁸⁵ Second, if God exists, the knowledge of Him is essential to a fuller understanding of truth.⁸⁶ Finally, the realization that we are dependent, and not fully autonomous, creatures, and that truth transcends us, should keep us humble.⁸⁷

83. A non-believer also sometimes comes to a more fruitful relationship with God than the believer who shares the truth about God with the non-believer. The account of the sailors on the ship with the prophet Jonah provides a biblical illustration. The sailors cried out to false gods when a violent storm threatened to overtake their ship. *Jonah* 1:4-5. When Jonah told the sailors about the true God from whom Jonah was running and confessed that his disobedience caused the storm, the men feared and worshipped God. *Jonah* 1:8-16. By contrast, Jonah blatantly defied God's directive to preach to the people of Nineveh and continued to complain to God even after the people of Nineveh turned to the Lord. *Jonah* 1:1-4:11. I am indebted to Dr. Ruffin Alphin for his insights on the first chapter of Jonah.

84. LEWIS, *supra* note 14, at 61.

85. Mark Liederbach, *Natural Law and the Problem of Postmodern Epistemology*, 2 LIBERTY U. L. REV. 781, 796 (2009) (quoting JACQUES MARITAIN, *NATURAL LAW: REFLECTIONS ON THEORY AND PRACTICE* 46-47 (William Sweet ed., 2001) ("If God does not exist, the Natural Law lacks obligatory power.")).

86. *Cf. Psalm* 14:1 ("The fool has said in his heart, 'There is no God.'").

87. *See James* 4:6 ("God is opposed to the proud, but gives grace to the humble."). The humble response when discerning a profound principle of truth is "Isn't this an *amazing principle of truth* that I have found?"—reflecting profound appreciation for the principle—rather than "Aren't I *amazing* for finding this principle of truth?" People who believe man is the measure of all things are likely to have the latter perspective, which reflects pride that ultimately hinders the pursuit of truth. Of course, people of faith face other temptations of pride.

When speaking or acting as a private citizen, rather than a civil ruler, including when espousing theory about law and government or, most importantly, when ministering to or from a religious community, a Christian may access and rely on all revelation. Special revelation complements and completes general revelation.⁸⁸ Christian advocates and theorists can fruitfully analyze issues of law and government from a fully-formed Christian perspective while respecting the jurisdictional boundaries of church and state by not imposing unique principles of faith in law.

Some Christian legal scholars⁸⁹ may argue that theistic legal realism undermines biblical integration. To the contrary, by insisting that believers distinguish principles that govern all humanity from principles that govern the church or individual conscience, theistic legal realism requires careful exegesis and application of Scripture, not the rejection of all biblical principles in the public square. For example, *Exodus* chapters twenty-one and twenty-two include numerous principles governing property disputes in Israel.⁹⁰ Although Scripture does not indicate that these rules are normative for civil government, the principles of reason embedded in them can be useful for modern law. The first fifteen verses of *Exodus* chapter twenty-two teach that one who wrongfully deals with the property of another should pay restitution and a penalty to the wronged party in proportion to the wrong committed.⁹¹ Christians can properly and fruitfully apply such justice principles in civil law. It would, however, be wrong to insist that *all* biblical principles *must* be codified or to impose uniquely Christian normative principles in civil law.⁹²

88. See I-II AQUINAS, *supra* note 12, q. 91, a. 4, at 998 (“In order . . . that man may know without any doubt what he ought to do and what he ought to avoid, it was necessary for man to be directed in his proper acts by a law given by God, for it is certain that such a law cannot err.”); 1 BLACKSTONE, *supra* note 7, at *41-42 (man’s faulty understanding and ignorance “has given manifold occasion for the benign interposition of divine Providence, which, in companion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law . . .”); Michael J. DeBoer, *John Calvin, the Civil Magistrate, and the Natural Law: Exploring and Applying John Calvin’s Understanding*, 2 LIBERTY U. L. REV. 649, 666-67 (2009) (discussing Calvin’s view that the written law in Scripture was provided in part to make clear what is unclear in the natural law); *infra* note 92 (arguing that Christianity fully developed the notion of religious liberty, but the underlying principle of the right of conscience is not unique to Christianity).

89. Regent University School of Law, Ave Maria School of Law, the University of St. Thomas School of Law, and Liberty University School of Law are examples of schools committed to the explicit integration of Christian principles with the study of law.

90. *Exodus* 21:33-22:15.

91. *Exodus* 22:1-15.

92. I have asked several Christian scholars to identify a uniquely Christian principle that is

V. ERRORS OF THEONOMY

Theonomists (Reconstructionists) believe that man's law must be based on biblical law, including principles of special revelation.⁹³ Although there are relatively few theonomists today, colonial American laws commonly imposed theonomic principles, including specific citations to biblical passages. For example, "in the very first charter granted in the New World Sir Walter Raleigh was permitted to enact only statutes that 'be not against the true Christian faith.'"⁹⁴ In 1641, Massachusetts imposed the death penalty for twelve different crimes, eleven of which cited Scripture as legal authority.⁹⁵ Extreme examples included death for blasphemy, witchcraft, bestiality, adultery, homosexuality, bearing "false witnes[s]," and "worship[ing] any other god, but the lord [sic]." In 1650, Connecticut imposed the death penalty for being a "stubborn[] and rebellious" child and for "Curs[ing] or smit[ing]" a parent.⁹⁶ Pennsylvania's first state laws prohibited Sabbath breaking⁹⁷ and cursing in the Lord's name.⁹⁸ Early state constitutions also included explicitly Christian provisions. Article 22 of the Constitution of Delaware, drafted in 1776, required all officers to declare, "I . . . do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for

proper for civil law. So far, I have received only one reply, suggesting that the preservation of religious liberty is a uniquely Christian principle. Western nations, which have been influenced by the Christian tradition, have certainly had the strongest commitment to preserving religious liberty. However, non-Christians can understand and abide by the principle that religious liberty must be preserved, which constrains only those who insist on imposing their views on others. Moreover, Christians are not alone in advocating protection of the right of conscience. For example, Cicero argued that religion is "indispensable to private morals and public order . . . and no man of sense will attack it." See COLSON, *supra* note 56, at 51-52. Moreover, Enlightenment philosophers joined with Christian theorists in insisting that the state could not rule conscience and thus should not interfere with the church. *Cf. id.* at 135. Christian theory arguably fully developed the concept of religious liberty, but the base principle of preservation of conscience is not unique to Christianity.

93. See, e.g., ROUSAS JOHN RUSHDOONY, *INSTITUTES OF BIBLICAL LAW* 1-14 (1973), reprinted in JEFFREY A. BRAUCH, *IS HIGHER LAW COMMON LAW?* 349-62 (1999).

94. Dillard S. Garner, *The Almost-Forgotten Law Book*, 27 NOTRE DAME L. REV. 43, 46 (1951); see also CHARLES GROVE HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 52-53, 55-56 (1965).

95. *The Body of Liberties of 1641* (1641), reprinted in *THE COLONIAL LAWS OF MASSACHUSETTS* 55 (William H. Whitmore ed., 1889).

96. *THE CODE OF 1650*, at 28-29 (Charles A. Ingersoll ed., 1822).

97. *Laws Enacted in the Second Sitting of the Third General Assembly of the Commonwealth of Pennsylvania §§ 2, 4*, reprinted in *THE FIRST LAWS OF THE COMMONWEALTH OF PENNSYLVANIA* 181.

98. *Id.* at 182.

evermore; and I do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration.”⁹⁹ The Pennsylvania Constitution prescribed a similar declaration for assembly members: “I do acknowledge the Scriptures of the Old and New Testament to be given by divine inspiration.”¹⁰⁰

Fortunately, America has progressed beyond its theonomic roots. Theonomy errs by misconstruing or ignoring: the extent to which some principles of biblical law were uniquely applicable to Israel; the jurisdictional divide between church and state; Jesus’ future, rather than current, earthly rule as King; the inherent injustice of basing law on norms not accessible to all; and the need to protect religious liberty and expression.¹⁰¹ Furthermore, the Old Testament law was not comprehensive. For example, Moses had to adjudicate an issue the Old Testament law did not address when Zelophehad’s daughters asked to receive an inheritance after their father died without a son.¹⁰² Appealing to reason, the daughters argued it would be unfair for their father’s name to be withdrawn from the family, and for them to receive no inheritance, simply because their father had no son.¹⁰³ God instructed Moses to provide for an inheritance for family members when a man died without a son.¹⁰⁴ In addition to demonstrating that the Old Testament law was not comprehensive, this account reflects a mixture of special revelation—God spoke directly to Moses—and general revelation—the principle upon which the decision was based was of reason rather than being acceptable only by faith.

Theonomy also offers no effective defense to the imposition of other special revelatory principles, such as unique Islamic principles in Shari’a law.¹⁰⁵ The

99. CONSTITUTION OF DELAWARE – 1776, art. 22, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES, pt. 1, at 276 (Benjamin Perley Poore ed., 2d ed. 1878).

100. RICHARD B. MORRIS, WITNESSES AT THE CREATION: HAMILTON, MADISON, JAY, AND THE CONSTITUTION 219 (1985).

101. See *supra* Part III.

102. *Numbers* 27:1-11.

103. *Numbers* 27:4.

104. *Numbers* 27:7-11. In *Numbers* 36:1-9, God later added the restriction that the daughters had to marry within their father’s tribe. Zelophehad’s daughters obeyed this requirement. *Numbers* 36:10-12.

105. It is very important to note that not all Muslims support the imposition of principles of Shari’a law that conflict with universally accepted norms. See, e.g., Abdullahi Ahmed An-Na’im, *Globalization and Jurisprudence: An Islamic Perspective*, 54 EMORY L.J. 25 (2005) (advocating, from an Islamic perspective, a theoretical framework to inform and guide an inclusive cross-cultural dialogue about an integrated jurisprudence); Abdullahi Ahmed An-Na’im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives, A Preliminary Inquiry*, 3 HARV. HUM. RTS. J. 13 (1990) (offering a methodology to make the dictates of Shari’a consistent with international human rights norms). Other

theonomist may reply that the Bible, not the Koran, is binding, but non-Christians do not obviously have to accept that assertion. Moreover, Scripture must be interpreted, and endless conflicts in Christian exegesis reflect the difficulty of establishing one true biblical approach.¹⁰⁶ The only recourse is an (un)holy war between combatants equally convinced their position is not only right but divinely mandated. As Roger Williams argued:

That the blood of so many hundred thousand soules of *Protestants* and *Papists*, spilt in the *Wars* of *present* and *former Ages*, for their respective *Consciencences*, is not *required* nor *accepted* by *Jesus Christ* the *Prince of Peace*.

. . . .

. . . *God* requireth not an *uniformity* of *Religion* to be *inacted* and *inforced* in any *civill State*; which *inforced uniformity* (sooner or later) is the greatest occasion of *civill Warre*, *ravishing* of *conscience*, *persecution* of *Christ Jesus* in his servants, and of the *hypocrisie* and *destruction* of *millions* of *souls*.¹⁰⁷

The wisdom of limiting civil law only to principles of general revelation is apparent by contrast.

VI. DISTINGUISHING NATURAL LAW

Theistic legal realism and natural law share the core belief that the law must be grounded in normative principles of timeless, universal truths accessible by right reason. There are nevertheless three important differences between theistic legal realism and natural law theory.

A. Theonomic Tendencies in Natural Law Theory

First, and most importantly, some schools of natural law fail to limit the norms suitable for civil law to principles knowable by all. Ironically, this failure replicates the theonomic error of imposing norms in civil law that should be applied only within the church. For example, although classical natural law

scholarship suggests that natural law provides a promising framework for Christian-Muslim dialogue. See, e.g., Russell Powell, *Toward Reconciliation in the Middle East: A Framework for Christian-Muslim Dialogue Using Natural Law Tradition*, 2 LOY. U. CHI. INT'L L. REV. 1 (2004).

106. Michael V. Hernandez, *A Flawed Foundation: Christianity's Loss of Preeminent Influence on American Law*, 56 RUTGERS L. REV. 625, 659-63 (2004).

107. WILLIAMS, *supra* note 54, at 199.

scholar J. Budziszewski acknowledges that “God does not intend the enforcement of Divine law upon non-believers,”¹⁰⁸ he nevertheless believes that the natural law, which is the proper source for human law,¹⁰⁹ is summarized in *all* of the Ten Commandments, including those governing man’s duties to God.¹¹⁰ Citing Aquinas, Budziszewski argues that faith is not just spiritual, but an intellectual virtue that enlightens the mind, thus making specified duties to God part of the natural law.¹¹¹ Although Budziszewski’s premises may be defensible, the implications of his argument are problematic.

Aquinas taught that human law must be derived from the natural law.¹¹² If so, Budziszewski’s argument necessarily implies that civil government could impose laws mandating “true” worship of God, which, ironically, would support the imposition of the theonomic laws like those in colonial America regulating activities such as witchcraft.¹¹³ Aquinas taught that “[s]ecular power is subject to the spiritual, even as the body is subject to the soul. Consequently . . . judgment is not usurped if the spiritual authority interferes in those temporal matters that are subject to the spiritual authority”¹¹⁴ Aquinas argued that the Church generally should not intrude on civil affairs if the state adheres to natural law, but the Church always has the authority to ensure that no one, including the state, transgresses the divine law.¹¹⁵ This apparent blurring of jurisdictional authority could be read to suggest a broader role for the church than Jesus delegated, overlooking that Jesus empowered the church to preach the Gospel, not to impose theonomic rule, between His first and second coming.¹¹⁶ Moreover, even if, as Budziszewski notes, “everyone does know that there is one true God and that he owes Him sole worship,”¹¹⁷ the proper way to facilitate honoring God is to ensure religious liberty, with the

108. J. BUDZISZEWSKI, WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW 63 (1997).

109. *Id.* at 62-63.

110. BUDZISZEWSKI, WHAT WE CAN’T NOT KNOW, *supra* note 8, at 28-29.

111. *Id.* at 29-31.

112. I-II AQUINAS, *supra* note 12, qq. 90-91, at 993-1001.

113. *See supra* notes 93-100 and accompanying text; *cf.* MONTGOMERY, *supra* note 55, at 82 (arguing against prosecuting belief in witchcraft).

114. I-II AQUINAS, *supra* note 12, q. 60, a. 6, r. 3, at 1445.

115. Dino Bigongiari, *Introduction*, THE POLITICAL IDEAS OF ST. THOMAS AQUINAS, at vii, xxxvi (Dino Bigongiari ed., 1953). Aquinas believed that “[m]ankind . . . is considered like one body, which is called the mystic body, whose head is Christ both as to soul and as to body. Christ has one vicar, the Pope, and the Pope is the head of the republic of Christ.” *Id.* at xxxv (emphasis omitted) (internal quotation marks omitted). Aquinas argued that the Pope usually foregoes exercising jurisdiction over civil authorities, because, as Christ’s agent, he has ceded the sword of earthly justice to the civil ruler. *See id.* at xxxvii.

116. *See supra* Part III.A.

117. BUDZISZEWSKI, WHAT WE CAN’T NOT KNOW, *supra* note 8, at 31.

church faithfully proclaiming and living the Gospel, rather than imposing theocratic civil rule.

B. The Shortcomings of “Natural Law” as a Label

Second, “natural law” is an outmoded and potentially misleading, if not inaccurate, label. Labels matter because they persuade—they either facilitate proper understanding or mislead into error. “Natural law” may have carried theistic connotations in a world that presupposed theistic belief, but it does not do so when the predominant worldview in secular society is premised on the belief that nature is the product of random chance. Clearly, a self-generating, non-created nature cannot be the source of binding normative principles, but it can mislead into relativistic error. “Natural law” also does not necessarily or adequately reflect the imperfect state of nature—principally, the effects of sin on human behavior.¹¹⁸ For example, the prevalence of fornication seemingly contradicts the conclusion that fornication is contrary to natural law. Similarly, shifting social norms regarding marriage might mislead some to believe that a more fluid definition of marriage is natural. Although a classical understanding of natural law may explain these problems,¹¹⁹ the imprecision of the label undermines the effort to discern and properly apply norms to resolve emerging social and legal issues.

C. Conflicting Theories Undermine Natural Law’s Efficacy

Finally, natural law theory includes numerous, conflicting schools of thought, such as the Thomistic classical school and modern/Lockean theories.¹²⁰ There are also non-theistic variants of natural law that seemingly disavow binding norms. For example, one scholar has argued that H.L.A. Hart’s positivism blurs the presumed boundaries between positivism and natural law and thus, “[i]n reconstructed form, a Hartian legal theory can be seen as a variant of natural law position.”¹²¹ Similarly, Dr. Wayne House, a panelist at this Symposium, has summarized the non-theistic versions of natural

118. See, e.g., Donald R. McConnell, *The Nature in Natural Law*, 2 LIBERTY U. L. REV. 797, 801 (2009) (noting how the fallenness of humanity creates confusion over natural law being “rooted in human nature”).

119. See, e.g., ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 6 (1999).

120. See BUDZISZEWSKI, WRITTEN ON THE HEART, *supra* note 108, at 108-33 (describing and critiquing the differences between classical/Thomistic and modern/Lockean natural law theories).

121. DANIEL W. SKUBIK, AT THE INTERSECTION OF LEGALITY AND MORALITY: HARTIAN LAW AS NATURAL LAW 2-3 (1990).

law found in the writings of Grotius and Hobbes.¹²² The confusion resulting from this multiplicity of irreconcilable perspectives undermines the efficacy of natural law as the source of normative principles for law.

VII. CONCLUSION

Modern theists owe much to the natural law tradition, but it is necessary to move forward toward a more precise basis for legal norms. Theistic legal realism provides the roadmap for doing so.

Although the label “theistic legal realism” is new, the concepts upon which the theory is based are well established. There are, nevertheless, important related issues still to be developed in scholarship, with promising efforts already underway. Professor Thomas Folsom, for example, has summarized principles of moral realism and discussed their relationship to law in his *Restatements of the Obvious*.¹²³ Folsom argues that human law is integrated to the extent it is positive (fiat law) and also based on reason and observation (reasonable law) or historical norms (historical law).¹²⁴ He lists a series of questions to be asked to assess whether a new law should be adopted or an existing law should be changed—is the proposal reasonable, good, articulate, authorized, predictable, compulsory, humane, consistent, systematic, purposeful, and validated?¹²⁵ He then describes the essence of justice as the right (paying debts), the fair, the lawful, and the good (a first set of related terms), as opposed to other terms, including justice understood to be the normative (in history and culture), merely a construct, the interest of the stronger, a correction of false consciousness, a process or jurisdictional matter, the empirical, or mere social or economic opportunity or results.¹²⁶ He also considers false conceptions of justice,

122. H. Wayne House, *The Influence of Natural Law Theology of the Declaration of Independence on the Establishment of Personhood in the U.S. Constitution*, 2 LIBERTY U. L. REV. 725, 731-33 (2009).

123. Thomas C. Folsom, *Evaluating Supernatural Law: An Inquiry into the Health of Nations (The Restatement of the Obvious, Part II)*, 21 REGENT U.L. REV. 105, 171-80 [hereinafter Folsom, *The Health of Nations*] (2008-09); Thomas C. Folsom, *The Restatement of the Obvious*, 16 REGENT U. L. REV. 347, 347-49 [hereinafter Folsom, *Restatement Part I*] (2003-04).

124. Folsom, *Restatement Part I*, *supra* note 123, at 347. These same three sources—fiat, reason, and history—if congruent in any given law or set of laws, create the conditions for a “rule of law” which a subject might be inclined voluntarily to obey. Folsom, *The Health of Nations*, *supra* note 123, at 131-34 (reframing the issue in terms of a normatively specified “rule of law”).

125. Folsom, *Restatement Part I*, *supra* note 123, at 347; Folsom, *The Health of Nations*, *supra* note 123, at 134-37 (reframing the issue in terms of the rule of law).

126. Folsom, *Restatement Part I*, *supra* note 123, at 348; Folsom, *The Health of Nations*,

such as *nomophobia* (fear of law) and “other-than-lawful.”¹²⁷ Folsom’s work, which is undergoing revision and elaboration,¹²⁸ could provide fertile ground for the exploration of principles of theistic moral realism and their relationship to law.¹²⁹

Some presentations at this Symposium have explored important related concepts. Dr. Joe Sprinkle has explained the useful concept of *principalizing*, by which principles of reason can be extracted from Old Testament law for modern use.¹³⁰ Dr. VanDrunen has shown how the *lex talionis* reflects a universal principle of justice recognized across cultures and time.¹³¹ These efforts are consistent with, and will further the understanding of, the core concepts of theistic legal realism, and will therefore help facilitate the proper interplay between faith, reason, and the law.

supra note 123, at 138-44 (extending the analysis, and reframing the competing conceptions of justice in terms of their contribution to a rule of law).

127. Folsom, *Restatement Part I*, *supra* note 123, at 348; Folsom, *The Health of Nations*, *supra* note 123, at 138-44.

128. Folsom, *The Health of Nations*, *supra* note 123, at 147-51 (deriving a “law & morality” basis for private law and outlining further work to elaborate and apply the principles to concrete legal problems in private law); Thomas C. Folsom, *Space Pirates, Hitchhikers, Guides and the Public Interest: Transformational Trademark Law in Cyberspace*, 60 RUTGERS L. REV. 825, 886-900, 906-07 (2008) (elaborating some of the principles of modern moral realism or normative jurisprudence to propose a specified law & morality solution to a current trademark law problem).

129. See Thomas C. Folsom, *The Health of Nations*, *supra* note 123, at 154 n.133 (addressing complementary perspectives, including theistic moral realism).

130. See Joe M. Sprinkle, *How Should the Old Testament Civil Laws Apply Today?*, 2 LIBERTY U. L. REV. 909 (2009).

131. See VanDrunen, *supra* note 30.

