
January 2005

Jurisprudential Underpinnings of Law, Especially International Law: The Basis for True Progress & Reform

Morse Hyun-Myung Tan
University of Texas School of Law

Follow this and additional works at: <https://trace.tennessee.edu/tjlp>



Part of the [Law Commons](#)

Recommended Citation

Hyun-Myung Tan, Morse (2005) "Jurisprudential Underpinnings of Law, Especially International Law: The Basis for True Progress & Reform," *Tennessee Journal of Law and Policy*. Vol. 2 : Iss. 1 , Article 3.

Available at: <https://trace.tennessee.edu/tjlp/vol2/iss1/3>

This Article is brought to you for free and open access by Volunteer, Open Access, Library Journals (VOL Journals), published in partnership with The University of Tennessee (UT) University Libraries. This article has been accepted for inclusion in Tennessee Journal of Law and Policy by an authorized editor. For more information, please visit <https://trace.tennessee.edu/tjlp>.

Jurisprudential Underpinnings of Law, Especially International Law: The Basis for True Progress & Reform

Cover Page Footnote

Senior Research Fellow, the University of Texas School of Law; JD, Northwestern University School of Law. The author would like to thank Professors Anthony D'Amato and Victor Rosenblum for reviewing drafts of this article. Thanks to Anna Sabayrac and Fabio Moon for their research assistance.

JURISPRUDENTIAL UNDERPINNINGS OF LAW, ESPECIALLY
INTERNATIONAL LAW:
THE BASIS FOR TRUE PROGRESS & REFORM

*Morse Hyun-Myung Tan**

I. Introduction

Notwithstanding current postmodern² wariness regarding universal, objective norms, an immutable and perennial jurisprudence of international law³ must hold true for all people everywhere.⁴ If it is not for all people everywhere, how truly and rightfully “international” or

* Senior Research Fellow, the University of Texas School of Law; JD, Northwestern University School of Law. The author would like to thank Professors Anthony D’Amato and Victor Rosenblum for reviewing drafts of this article. Thanks to Anna Sabayrac and Fabio Moon for their research assistance.

² See GENE EDWARD VEITH, JR., *POSTMODERN TIMES: A CHRISTIAN GUIDE TO CONTEMPORARY THOUGHT AND CULTURE* (Crossway Books 1994) (presenting a trenchant evaluation of postmodernism). Richard Rorty goes so far as to call this culture, sadly enough, “post-metaphysical.” RICHARD RORTY, *CONTINGENCY, IRONY & SOLIDARITY*, intro., ch. 1 (Cambridge Univ. Press 1989). Rorty’s term and work, taken descriptively, accurately takes the pulse of the culture, but does not provide the best prescription for the malady.

³ Conversation with Anthony D’Amato, Judd and Mary Morris Leighton Professor of Law at Northwestern University School of Law (Spring 2001). D’Amato asserted that jurisprudence serves as the proper foundation of international law. This foundation presently remains visible, but perhaps more subtly in its applicability to law in general.

⁴ Harold J. Berman, who held an endowed chair at Harvard Law School, states, “The conventional concept of law as a body of rules derived from statutes and court decisions—reflecting a theory of the ultimate source of law in the will of the lawmaker (‘the state’)—is wholly inadequate to support a study of a transnational legal culture.” HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 11 (Harvard Univ. Press 1983).

“transnational” would it be?⁵

Stale legal thinking, stuck in a relativistic and closed positivism,⁶ lags behind the renewal of scholarship in philosophy and segments of the social sciences that increasingly recognize the realities of justice,⁷ virtue,⁸ and a higher standard, sometimes referred to as “higher law.”⁹ The reputation of the legal profession and the quality of legal systems hinge on the type of response elicited—whether the legal world joins in the renewal found in other

⁵ The father of international law, Hugo Grotius, wrote prodigiously on higher law and justice vis-à-vis international law. *See, e.g.*, HUGO GROTTIUS, *DE IURE PRAEDAE COMMENTARIUS: COMMENTARY ON THE LAW OF PRIZE AND BOOTY* (Gwladys L. Williams & Walker H. Zeydel trans., Oceana Publications 1964) (1604); HUGO GROTTIUS, *ON THE RIGHTS OF WAR & PEACE* (William Whewell, trans. Cambridge Univ. Press 1853).

⁶ *See, e.g.*, JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* (Robert Campbell ed., 5th ed. 1985) (1885); JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832); JOHN CHIPMAN GRAY, *NATURE AND SOURCES OF THE LAW* (2d ed., MacMillan 1948) (1909); HANS KELSEN, *THE PURE THEORY OF LAW* (Max Knight trans., Univ. of Cal. Press 1967) (1923); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (Anders Wedberg trans., Harvard Univ. Press 1946). Kelsen and Austin are both deemed leading proponents of legal positivism. Although not as easily recognized as such, Gray also qualifies as a type of legal positivist of a different mold from Kelsen and Austin.

⁷ *See* ANALYTIC JURISPRUDENCE ANTHOLOGY 249-89 (Anthony D’Amato ed., Anderson Publishing Co. 1996) (discussing justice); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS*, ch. 7, 12 (Oxford Univ. Press 1980) (same).

⁸ *See e.g.*, PETER KREEFT, *BACK TO VIRTUE* (Ignatius Press 1992) (bringing back classical understandings of virtue); ALASDAIR MACINTYRE, *AFTER VIRTUE* (Univ. of Notre Dame Press 1984) (laying out the limits of emotivism and discussing moral crisis); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (Univ. of Notre Dame Press 1988) (critiquing the exclusion of virtue).

⁹ *See* EDWARD CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (Cornell Univ. Press 1928).

disciplines, or whether it stays in fashionable or trendy ruts.

Principles of justice, higher law, and virtue form the best foundation of any legal system and for the practitioners therein. The need and desirability of such a foundation are even more pronounced when it comes to the international realm. These principles encompass the search for the uniting, universal umbrellas built into the very fabric of the universe, as well as the common ground of humanity across cultures. Put another way, this article proposes the unifying theory of jurisprudence, which I contend provides the best basis for law and legal systems worldwide. Anything less than this common denominator would prove unfit as the groundwork for international legal regimes, because member state cultures can vary considerably.

Harold Koh, the current Dean of Yale Law School, writes:

During the classical period of international law, the causal question of why nations obey was generally conflated with the normative question of why they *should* obey, which was in turn usually answered by “semi-theological” reference to the “higher law”—the “law of nature,” of which international law was but a part. Before the Roman empire, religion served as the paramount source of the law of nations. In Roman law, Gaius defined *jus gentium* in terms of “law common to all men.” The Preface to Justinian's *Institutes*, published in 533 A.D., began with observations about the relationship between the law of nations and natural law. . . . Nor did medieval legal scholars distinguish municipal from international law, instead viewing the law of

nations, understood as *jus naturae et gentium*, as a universal law binding upon all mankind. . . . The law of nations was thought to embrace private as well as public, domestic as well as transborder transactions, and to encompass not simply the “law of states,” such as rules relating to passports and ambassadors, but also the law between states and individuals . . . international and domestic law together constituted a unified legal system, with domestic institutions acting as important interpreters and enforcers of international legal norms.¹⁰

The pedigree of this perspective is extensive over millennia, and still today, it provides a foundation for law in general, and international law especially.

The Nazi Holocaust starkly demonstrates the need for an international jurisprudence based upon higher law, virtue, and justice. Atrocities were done “legally” at times under German law and at the command of German authorities.¹¹ In order for one outside of German society,

¹⁰ Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2604-05 (1997) (citations omitted).

¹¹ The Hart-Fuller debate in the *Harvard Law Review* concerning the jurisprudential implications of the case of the grudge informer places the contrast between higher law and positivism in sharp relief. Lon F. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 648-57 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 90, 616-20 (1958). This case concerns a woman in Nazi Germany, who, pursuant to the Nazi Act of 1934, reported insulting remarks about Hitler made by her husband as a pretext for getting rid of him. The husband received a death sentence, which was commuted to a military assignment at the front. Later, a West German court convicted her pursuant to the German Criminal Code of 1871 for illegally depriving a person of his freedom. Most notably, the court of appeals called the statute the woman used as her pretext “contrary to the sound conscience and sense

such as the Nuremberg Court, to decry these murders and other abuses, there had to be some basis independent of German positive¹² law.¹³ There seems to be no better grounding than higher law and justice.¹⁴

Cicero, for example, advanced a higher law, virtue, and justice position. Among many passages, Cicero wrote:

But if Justice is conformity to written laws and national customs, and if, as the same persons claim, everything is to be tested by the standard of utility, then anyone who thinks it will be profitable to him will, if he is able, disregard and violate the laws. It follows that Justice does not exist at all, if it

of justice of all decent human beings.” Hart, *supra* note 11, at 619.

¹² The Nazis used the positive pronouncements of Oliver Wendell Holmes to justify the neutering of the mentally handicapped in Germany. *Buck v. Bell*, 274 U.S. 200, 207 (1927) (“Three generations of imbeciles are enough.”). Given Holmes’ positivism there exist few resources in his jurisprudence to criticize such eugenic practices. *See, e.g.*, Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918) (elucidating Holmes’s positivism and rejecting natural law); Oliver Wendell Holmes, *The Path of the Law* 10 HARV. L. REV. 457 (1897) (same).

¹³ The Nuremberg Trials marked the first instance in history where international war crimes were tried in a court. The Chief Prosecutor, U.S. Supreme Court Justice Robert Jackson, explicitly grounded the prosecution in higher law.

¹⁴ If there does *not* exist an objective, just basis from which to say the Holocaust was wrong, would it not be intensely problematic then to try the Germans on an *ex post facto* basis in an unprecedented, international tribunal? On what basis was there legitimate, actual notice that the Germans who legally obeyed orders from legitimate authorities to gas their victims were guilty of a crime if not that these Germans also have the higher law and a sense of justice within them? Conscience is a beacon of the higher law and justice, and every person has a conscience. Granted, conscience can become dulled, seared, tainted, or skewed, but it does exist in every human being, a classic notion accepted by most of Western Civilization during the past two millennia.

does not exist in Nature, and if that form of it which is based on utility can be overthrown by that very utility itself. And if Nature is not to be considered the foundation of Justice, that will mean the destruction [of the virtues on which human society depends]. For where then will there be a place for generosity.¹⁵

Thus Cicero, widely hailed as the greatest legal mind of his time, directly repudiates legal positivism and selfish utilitarianism, and vouches for higher law, virtue, and justice as the soundest basis for law, including international law.

This article does not attempt to delineate and demarcate all the contours of higher law, virtue, and justice because such a task extends beyond its scope. It merely seeks to establish the existence of higher law, virtue, and justice so that those who have categorically excluded such notions, especially those who have done so without much thought, would at least have the opportunity to consider or reconsider these notions.

Ironically enough, even those who categorically exclude virtue, justice, and higher law typically hold to them nonetheless in some way, shape, or form. For example, the murder of innocent human beings is held to be an injustice that violates higher law and virtue by practically all people everywhere. This simple observation reflects that we humans, of whatever society, bear the imprint of a conscience, the faculty of perceiving the virtue, justice, and higher law.¹⁶

¹⁵ CICERO, LAWS §§ I, XV, *reprinted in* THE GREAT LEGAL PHILOSOPHERS 48 (Clarence Morris ed., Univ. of Penn. Press 1997).

¹⁶ As Berman writes:

[T]he underlying legal principles had not only a logical aspect,

The jurisprudential view this article asserts does not belong exclusively to any political party or government; it remains the common inheritance of all humans everywhere. It refuses to wear the Emperor's new clothes¹⁷ particular to every age and place.

Intentionally, I do not focus on applying the foundation herein to any particular legal, political, or social issue,¹⁸ except in passing or as a brief example, lest the reader's position in one direction or another obfuscate the desirability of this framework in general. Also, a foundation does not form an entire edifice, and certain portions of the edifice may directly touch on the foundation more than others. Similarly, one can analyze where this jurisprudential foundation touches more or less directly on variegated aspects of the entire edifice of law.¹⁹ Such

being subject to reason, but also a moral aspect, being subject to conscience. Therefore, not only an analytical or logical systematization was required, which would strive for consistency in the law, but also a moral systematization, which would strive for equity The logical, moral and political aspects of basic legal principles were summarized in the concept of natural law. This was a substantially different concept for that held by the Greeks and the Romans. The earlier natural law had been defined as the right of every man—as it was put in the first title of Justinian's Digest—to receive what was his due; natural law was justice, equity, what was right; it was an ideal law, the law not of the state but of nature itself, to which the law of the state might or might not conform.

Berman, *supra* note 4 at 253-54.

¹⁷ This refers to the well-known Hans Christian Anderson story of an Emperor, who is cleverly persuaded that wearing only his undergarments is in vogue.

¹⁸ For such application to various issues and policies, see NATURAL LAW AND CONTEMPORARY PUBLIC POLICY (David F. Forte ed., Georgetown Univ. Press 1998).

¹⁹ For example, this paper would have more direct relevance to the common law idea of *malum in se*, than *malum prohibitum* in criminal

analysis, however, lies largely outside the scope of this article.

Though higher law can be used as a pretext for assorted forms of mischief, its abuse should not lead to a denial of its existence. Indeed, these ideas of virtue, justice, and higher law themselves would seek to bring a corrective to such abuse. This article simply attempts to show the existence and helpfulness of higher law, virtue, and justice employed correctly, so that at least a few more glimmers may emerge from its relative eclipse in both modern and postmodern legal scholarship.²⁰

A. Relevance

The most important and foundational relevance for this framework is that it proposes the unifying, universal foundation of jurisprudence, which itself is the proper foundation for law. Such relevance is more striking in international law,²¹ which cuts across national cultures. To state it differently, not a single facet of law can live completely independent of justice, virtue, and higher law and still flourish in good health.²² The convocation of

law. Another example is the differing notions of viciousness, as opposed to virtue, found in adjusting the requisite *mens rea* proportionately with the punishment levels in criminal law. The relegation of this example to a footnote perhaps helps accentuate the idea that specific applications of this jurisprudential foundation would fall to other writings besides this one.

²⁰ See Peter Kreeft, *Darkness at Noon: The Eclipse of Permanent Things*, July 1990, available at

www.ewtn.com/library/THEOLOGY/FR91102.HTM (last visited Jan. 18, 2006).

²¹ This relevance emerges time and again for this legal academic, who has taught courses such as Public International Law, International Organizations, and Human Rights.

²² For example, even a seemingly unrelated legal provision, such as stop signs at a crowded intersection, still has virtuous and just goals—as well as principles touching on higher law. Trying to prevent injury

sources in this article primarily seeks to establish the existence of justice, virtue, and higher law that can serve as an efficacious filter and a perspicuous lens through which to interpret, analyze, synthesize, and critique not only transnational and international law, but also positive law as a whole.

The widespread convergence of this recognition by some of the most enduring thinkers from both the East and the West,²³ which I trace below, gives tremendous credibility to the common reality and truths that they present. Taken as a group, they do not speak from the same cultural, temporal, or professional prejudices, biases, and patches of ignorance particular to any specific slice of society.²⁴

If such truth is immutable, how recently these people acknowledged this reality is irrelevant. If anything, the range of scholarship helps to assure us that they are not speaking from the same cultural, temporal, and professional prejudices, biases, provincialities, or patches of ignorance particular to any specific group, including twenty-first

or death to innocent human beings would be one. The benefits of order instead of chaos or anarchy constitute another. Fairness is implicated in that the first to arrive has the right of way. Moreover, recklessly rushing through a stop sign without stopping and causing an accident would violate the virtue of prudence.

²³ As an example, the work of Mencius, Mo Tzu, Plato, Aristotle, and others will be discussed below.

²⁴ It can broaden us beyond our particular time and place with its myopic focus on the recent, while providing needed correctives. Chronological, geographical, ethnic, or other types of snobbery or narrowness have no place in the academy, jurisprudence, law, or anywhere else for that matter. Therefore, what these classic Western and Eastern sources say should not receive summary dismissal by anyone. See C.S. Lewis, *Introduction to ATHANASIUS, DE INCARNATIONE* (1945); see also C.S. LEWIS, *THE ABOLITION OF MAN* (7th ed., Macmillan 1962), which some consider the best book of the 20th Century on this topic.

century legal scholars.²⁵

The present legal academic world regularly celebrates some of the dimensions of justice, virtue, and higher law, even if these ideals sometimes fall under different rubrics. After all, cases such as *Brown v. Board of Education*,²⁶ clearly did not follow the then existing line of positive law or certain elements of the then current, broader culture of its time. Yet, cases such as *Brown* are widely celebrated today as a paragon of justice and higher law—a case virtuously brought and justly decided. The existence of transcultural justice, virtue, and higher law is relevant everywhere and forms, where necessary, the basis for legal reform.²⁷

Similarly, we find massive corroboration in these virtuoso thinkers and writers of sound, even outstanding, intellect and sense of justice themselves. Therefore, these classic Western and Eastern sources should not receive deprecation, be ignored, or be dismissed. Indeed, the more erudite one is, the more likely one will have a familiarity with such major thinkers. This article mines from major veins, although the Eastern sources are generally not well-known or appreciated in the West.

Basic metaphysical questions not only are addressed by, but also arise from, this article.²⁸ However, merely a few questions among the many that may be raised

²⁵ See LEWIS, *supra* note 24.

²⁶ 349 U.S. 294 (1955).

²⁷ One need only look at whatever legal reform movement that one champions in order to realize that a relativistic positivism (law as it currently exists and finds enforcement by those with power) would foreclose the possibility of reform. If one touts the notion of “progress,” such progress must be based upon some standard toward which society is progressing. To the extent a society violated justice, virtue, and higher law, it would regress proportionately.

²⁸ Questions of ontology, epistemology, and ethics abound in this area and cannot possibly receive comprehensive treatment in a single essay of this length.

will be singled out for treatment hereinafter to clear some of the detritus that can obscure the view of justice, higher law, and virtue—realities that impact all of mankind, whether consciously or not.

B. Relevant Objections and Other Challenges

1. Epistemological Issues

The scientific method, including empirical methodologies, has proven a fruitful and useful *modus operandi* for many things. It can be used productively, especially in the so-called natural sciences, but also to a lesser extent in the so-called social sciences or humanities including law. Some of the greatest gifts that the Enlightenment and modernism periods have bequeathed upon us derive from knowledge garnered through the sound and rigorous application of these methods. An epistemology that limits itself to scientific methodologies *alone*, however, necessarily impoverishes itself and proves impractical, unwittingly self-contradictory, or both.

As the leading philosopher, Arthur F. Holmes,²⁹ philosopher of science, Delvin Ratzsch,³⁰ and other contemporary and historical sources point out, even so-called “neutral” applications of scientific methodologies necessarily predicate themselves on principles unprovable solely by scientific methodologies.³¹ Otherwise, it becomes tautological, self-contradictory, or at best, begs

²⁹ See, e.g., ARTHUR HOLMES, *ETHICS* (Inter-varsity Press 1984).

³⁰ DELVIN RATZSCH, *SCIENCE AND ITS LIMITS: THE NATURAL SCIENCES IN CHRISTIAN PERSPECTIVE* 101 (2d ed., Inter-varsity Press 2000).

³¹ For example, scientific assumptions unprovable by science include: (a) that the senses, sometimes with instrumental aid, can access reality; (b) that the human mind can then inductively ascertain truths from what the senses apprehended; (c) that there exist knowable truths about the reality of the physical world.

the questions: why exalt scientific methodologies above all others and why exclude other methodologies and frameworks?

One may respond—because it works. But then, why must pragmatic, practical, or utilitarian considerations be deemed foundational?³² Something may be pragmatic yet brutal, practical but vicious, utilitarian yet unjust. For example, it may be pragmatic for the purpose of retaining power for a dictator to relegate conscientious dissidents who are neither treasonous nor treacherous to heavy labor, torture, and execution in concentration camps. Such pragmatism collides directly with virtue, justice, and higher law. At the same time, pragmatic or utilitarian³³ considerations, rationales, or justifications do not necessarily a priori exclude all other methodologies and frameworks.

Another may say—because it comports with reality and facts. Herein lies a better response, but one that also contains some untenable dichotomies such as the fact-value split. Since knowledge, including the scientific kind, should accord with truth, which conforms to reality, scientific methods can provide valuable tools.

Yet, they are not the only tools that can access objective reality. As a matter of fact, just and virtuous realities are not best established by scientific methodologies. Just as scientific methodologies function through direct sensory or instrumental apprehension, the work of a healthy conscience,³⁴ especially a well-cultivated and developed one, can directly apprehend just and

³² CORWIN, *supra* note 8, at 4-5. These philosophies cannot justify themselves by themselves; otherwise, they are reduced to tautologies.

³³ See JEREMY BENTHAM, *THE UTILITARIANS: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (Columbia Univ. Press 1946); JOHN STUART MILL, *UTILITARIANISM* (2d ed., Hackett Publishing 2001) (1863).

³⁴ See J. BUDZISZEWSKI, *THE REVENGE OF CONSCIENCE: POLITICS AND THE FALL OF MAN* (Spence Publishing Co. 2004).

virtuous realities comporting with higher law better than the best scanning electron microscope. Excruciating torture of a child for no other reason than the torturers' sadism is readily apprehended as being unjust by those who possess even a half-decent conscience.³⁵ It is possible, however, for a conscience to be clouded, seared, calloused or twisted, just as different physical pathologies can hinder proper body function. The acknowledgment of conscience, which can apprehend justice, higher law, and virtue, should be no more impugned than the existence of DNA.

2. The Basis for This Basis

A healthy conscience is the standard by which one judges normality in the moral sense. That is why ignorance of the law is generally no excuse in Anglo-American criminal law. In other words, the conscience engraved into a person, regardless of whether the person has ever even heard of the handiwork of the legislatures, judiciaries, or executives, should prevent the occurrence of crime. Various higher law theories, which are the mainstreams of the common law tradition,³⁶ establish this point.³⁷

³⁵ This counterexample refutes utilitarian calculus. To put it another way, if you have a large enough crowd of sadists torturing an innocent child, who derive massive amounts of pleasure that exceed the pain of the lone child, then such behavior would be allowed under utilitarianism because the total pleasure would outweigh the total pain. That such an approach is morally reprehensible is readily apparent to those with even a half-functioning conscience. Thus, such actions are correctly deemed unconscionable, as violative of justice, virtue, and higher law.

³⁶ See ROBERT D. STACEY, *SIR WILLIAM BLACKSTONE AND THE COMMON LAW: BLACKSTONE'S LEGACY TO AMERICA* (ACW Press 1989). In Anglo-American history, Blackstone's writings constituted a standard part of legal education. His works formerly graced the desks of law offices throughout the United States and England.

³⁷ The present McCormick Chair at Princeton, Robert George, writes cogently from this school of thought in several works. See, e.g.,

Some would claim that justice is simply defined socially. Such a stance undermines individual responsibility.³⁸ For a physician at Ravensbruck or Auschwitz to *refuse* to perform crude experimentation on an unwilling patient that severely injures and eventually kills the innocent concentration camp prisoner would be to exercise virtue in accordance with justice and higher law—a law higher than Nazi dictates, no matter how legitimate or exalted the government or military source within German society. Nazi judges who refused to condemn innocent people in spite of formalistic or positivistic pressures, such as the Nuremberg Code, would be exercising virtue in accordance with justice and higher law. If such virtue, justice, and higher law did not exist, on what basis could one critique, redress, or reform atrocities carried out during the Holocaust, or in places such as the former Yugoslavia, Rwanda, or East Timor?³⁹

This view necessarily undermines various forms of

ROBERT GEORGE, *THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS* (ISI Books 2001); ROBERT GEORGE, *IN DEFENSE OF NATURAL LAW* (Oxford Univ. Press 1999); ROBERT GEORGE, *NATURAL LAW AND MORAL INQUIRY* (Georgetown Univ. Press 1998).

³⁷ See, e.g., Nuremberg Code, available at <http://www.hhs.gov/ohrp/references/nurcode.htm> (last visited Feb. 25, 2006).

³⁸ Long-time Harvard University Professor Lawrence Kohlberg deems this level of moral development to be the highest of the six that he proposes. See Lawrence Kohlberg, *The Development of Modes of Moral Thinking & Choice in the Years 10 to 16* (December 1958) (unpublished Ph.D. dissertation, University of Chicago); LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* (1st ed., Harper & Row 1981).

³⁹ Other examples of international infamy along these lines include the former Yugoslavia and Rwanda, for which the U.N. established special tribunals; East Timor, for which a separate country was recently formed; and Colombia and Peru, which often have come under the judgment of both the Inter-American Commission of Human Rights, as well as the Inter-American Court of Human Rights.

determinism,⁴⁰ whether biological, social, socio-biological, or otherwise, which seek to eliminate the existence of volition and responsibility.⁴¹ Such determinisms presumably attract their adherents by eradicating culpability, a convenient, but incorrect way to deal with guilt and shame. It should be noted that removing culpability negates responsibility, which pushes society towards anarchy, anomie,⁴² and antinomianism,⁴³ conditions that adherence to virtue, justice, and higher law prevent.

A common, albeit irresponsible, escape attempt is an agnostic skepticism, which is a position in and of itself. If seeking logical consistency, why not be skeptical or agnostic about skepticism and agnosticism?⁴⁴

Another error lies in embracing contradictory, relativistic pluralism.⁴⁵ While recognizing that common

⁴⁰ For a discussion of this point, *see* the philosophy of science works of Oxford Professor Alister McGrath, who holds a Ph.D. in microbiology, available at <http://users.ox.ac.uk/~mcgrath/> (last visited Feb. 25, 2006).

⁴¹ FYODOR DOSTOEVSKY, *NOTES FROM UNDERGROUND* (Mirra Ginsburg trans., Bantam Books 1974). Dostoevsky satirizes rationalistic, empirical determinism extensively.

⁴² The term is used particularly in the sociological sense as employed by scholars such as Emile Durkheim.

⁴³ A term indicating lawlessness—not a condition favorable to the existence of legal systems, institutions, or legal professionals to say the least.

⁴⁴ No one could function with a thoroughgoing skepticism or agnosticism. If I did not firmly believe in the existence of this computer on which I am typing this article or in the law journal member who will read it, I would not be typing it right now. If I did not believe in the existence of the chair I am sitting in, I would not attempt to sit in it for the many hours I have in preparing this article. Even functionally, thoroughgoing skepticism and agnosticism fail. I am skeptical of the soundness of skepticism, yet *not* agnostic about existing pitfalls in agnosticism. Most honest and sensible people could not correctly claim to hold a thoroughgoing skepticism or agnosticism; those who do, paralyze themselves.

⁴⁵ *See* LESSLIE NEWBIGIN, *TRUTH TO TELL: THE GOSPEL AND PUBLIC*

ground often exists between various worldviews, this view plainly violates the law of noncontradiction when particular worldviews adhere to mutually exclusive positions. Either an objective standard of justice exists, or an objective standard of justice does not exist. Both statements cannot be true and concomitantly comport with reality.

This does not impugn true paradoxes or antinomies, which only *seem* to contradict, but in reality do not.⁴⁶ Rather, I am talking about clear-cut *A* and *not A* instances which cannot both be true and also correspond with reality, according to this basic axiom of logic, philosophy, and mathematics. To give another example, a person cannot both have biological children and *not* have biological children at the same time in any unified, literal sense. To say otherwise would fly in the face of common sense.

As a leading Hindu philosopher acknowledged, epistemological arms that embrace all views lead to self-strangulation. As stated by G.K. Chesterton, the open mind, like the open mouth, is intended to close down upon something.⁴⁷ That something includes the truths of justice, virtue, and higher law that accord with the highest design of human nature.⁴⁸ This position is cohesive and comports

TRUTH (W.B. Eerdmans 1991) (providing a sound treatment of pluralism).

⁴⁶ For example, I do not presently deny such paradoxes as the wave or particle duality of light, the way certain sub-atomic particles seem to behave, elements of both genders existing in hermaphrodites, the Trinity, or all three states of H₂O (water vapor, liquid water, and solid ice) existing at the triple point.

⁴⁷ This epigram comes from the British author G.K. Chesterton. *See, e.g.,* G.K. CHESTERTON, *ALL IS GRIST: A BOOK OF ESSAYS* (Books for Libraries Press 1931); G.K. CHESTERTON, *ALL THINGS CONSIDERED* (Sheet & Ward 1956); G.K. CHESTERTON, *AS I WAS SAYING* (Books for Libraries Press 1966).

⁴⁸ *See, e.g.,* American Declaration of the Rights and Duties of Man, Nov. 22, 1969, *available at* <http://www.cidh.oas.org/Basicos/-basic2.htm> (last visited Feb. 25, 2006) (basing its pronouncements on this premise).

with objective reality.

3. Lesser Alternatives

Historically, it was recognized that the common law permits the correction of errors.⁴⁹ Formalistic or positivistic cowardice should not prevent those with authority to modify positive law from abandoning unjust laws.⁵⁰ Thus, we should not believe that human lawmakers, adjudicators, or executors are so constrained to maintain unjust laws—unless they unduly bind themselves with formalist or positivistic shackles.⁵¹ Nothing contained herein, however, should be construed as necessarily violative of constitutional order, as far as the allocation and separation of powers are concerned. Nor should it be employed as a pretext for judicial usurpation of legislative or executive power—or any other usurpation of authority.

⁴⁹ See JEFFREY A. BRAUCH, *IS HIGHER LAW COMMON LAW? READINGS ON THE INFLUENCE OF CHRISTIAN THOUGHT IN ANGLO-AMERICAN LAW* (F.B. Rothman 1999).

⁵⁰ See ANTHONY D'AMATO, *JURISPRUDENCE: A DESCRIPTIVE & NORMATIVE ANALYSIS OF LAW* (Brill Academic Publishers 1984).

⁵¹ The doctrine of stare decisis or custom, as convenient and helpful as it may be as an approach to procedure and order, should not be exalted over justice. The common law does not advocate such a stance, and international law should not embrace it. Yet, such a stance is not rare de facto. Instead, virtue, justice, and higher law should reign above slavish devotion to stare decisis or custom. See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“*Stare decisis* is not an inexorable command; rather it is a principle of policy and not a mechanical formula of adherence to the latest decision.”); see also Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 87 (2001) (“The American commitment to stare decisis gradually strengthened during the nineteenth century, due mainly to the emergence of reliable law reports and a positivist conception of law.”). *Contra id.* at 71 (“Precedent, though it be Evidence of law, is not Law itself, much less the whole of the Law.”). Eschewing an overly rigid application of stare decisis allows the overturning of cases such as *Scott v. Sandford*, 60 U.S. 393 (1857).

In other words, it accords, rather than clashes with, respect for duly constituted authority including the legislative powers of Congress.⁵²

Rabelais satirizes formalist insufficiencies in *Gargantua & Pantagruel*.⁵³ In this satire, the judge has an elaborate array of formalities and procedures, but in the end decides to make a random decision. This satire implies that procedural integrity ipso facto is not enough to ensure substantive justice.

Rather, substantive justice, as the dominant goal, should be served by fair procedures.⁵⁴ Harold J. Berman notes:

⁵² Berman writes of an approach that “should bring the three traditional schools of jurisprudence – the political school (positivism), the moral school (natural-law theory), and the historical school (historical jurisprudence) – together in an *integrative* jurisprudence.” Berman *supra* note 4, at 44. Such an approach acknowledges the descriptive, structural, and social order roles of positivism, the prescriptive function of higher law, and the benefit of historical study to bring correctives to bear as well as expose blind spots and provincialities of this time and place. The more these three schools of thought can be harmonized, applied, and integrated in a way that reflects the strength of each, the better.

⁵³ RABELAIS, *GARGANTUA & PANTAGRUEL* (Jacque Le Clerq trans., Random House 1963).

First I view and review, read and re-read, ponder, weigh, thumb and digest the bills of complaint, subpoenas, appearances by proxy, reports of hearings, investigations, instruments of deposition, petitions, articles of evidence, allegations, rejoinders, rebuttals, requests, inquests, surrejoinders, surrebuttals, confirmation of former testimony, acts, writs, bulls, exceptions taken, grievances, objections, counter-objections . . . I decided in favor of the party who won at the judiciary, tribonian and praetorial throw of the dice.

Id. at 440-41.

⁵⁴ Attorneys and judges sometimes look for procedural pretexts to advance substantive concerns.

The system of procedure was said to be designed “to inform the conscience of the judge”—a phrase later used in the equitable procedure of the English chancery. . . . Indeed, the principles of reason and conscience were proclaimed by the ecclesiastical jurists as weapons against the formalism and magic of Germanic law.⁵⁵

The fictional Justice Keen is a prototypical positivist, who can excel in the description of the particular law in a given society.⁵⁶ Positivism also does well to acknowledge and give due deference to the formulations of legitimate authority, a primary position that the higher law acknowledges, yet does not treat as an absolute guide to substantive justice. On the negative side, however, positivism often adopts a false dichotomy between facts and values.⁵⁷ According to this position, facts are public and objective while values are only private and presumably subjective.⁵⁸ If higher law and justice do in fact exist, why should they find themselves relegated to private life alone?⁵⁹ Such a view leads to hypocrisy, undermining the integrity of the unitary, whole person in society.⁶⁰

⁵⁵ Berman, *supra* note 4, at 251.

⁵⁶ Lon Fuller, *Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949) (making each of the fictional judges prototypical of a school of jurisprudential thought).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See NEWBIGIN, *supra* note 46, at 63.

⁶⁰ See VIRTUES: CONTEMPORARY ESSAYS ON MORAL CHARACTER (Robert B. Kruschwitz & Robert C. Roberts eds., 1987). It impoverishes public life and leads to the double lives of those who put on the façade of a public *persona* that masks an execrable life outside the public eye. Those in the legal or political realm cannot excuse themselves from this in saying that though they consider something an injustice as a “private citizen,” they must mechanically maintain the

The question stares us in the face—do international law and other law have their basis in higher law and justice? Or is it nothing more than a product of the politics of professionals, politicians, diplomats, and other power brokers, who may or may not have a firm, objective basis, and who alone have sovereignty to decide the norms and structures of society?⁶¹

If no justice or higher law exists, then every reform and every critique would fall into the morass of merely subjective opinion. If all that exists is each person's subjective opinion, then no grounds from which one could say that one opinion is better than another exist. If not, then on what permanent foundation would law stand or toward what would it progress? If one removes the cleansing cascade of higher law, virtue, and justice, then a raw, cynical calculus of so-called *Realpolitik* would remain like a crusted stain.

If objective bases in higher law and justice do not exist, then ideological and *Weltanschauung*⁶² chaos, conflict, and confusion follow. Epistemic despondence and narrowness then tend to rear their ugly heads. Rather than having no better grounds than the instability of relativism or uneasy, but logically incompatible pluralism, many authors aver a justice, virtue, and higher law foundation for

present law in their public capacities when it is manifestly unjust albeit politically inexpedient for their own self-interested considerations. While failure is common, it should not deny the goal of a virtuously integrated person, virtuous, including just, and moral in private as well as public life. Legislators, legal practitioners, judges, and other professionals often have public dimensions to their lives that should be no less moral or virtuous than their private lives. This applies to the domestic realms and international spheres, as well as the interactions between the domestic and international systems.

⁶¹ See MACHIAVELLI, *THE PRINCE AND OTHER WRITINGS* (Wayne Rebhorn trans., Barnes and Noble Classics 2003); Alexander Obolsky, Law & Psychiatry Lecture at Northwestern University School of Law (Fall 1999).

⁶² This is the German term for worldview.

the super-structures of law. This convergence and confluence of great scholars bears witness to the fact that virtue, justice, and higher law do, in fact, exist independently of the vagaries of any mortal individual or group.⁶³ They serve as the best basis for law, especially international law.

When this reality is ignored and a society allows oppressive laws to reign, the results can be nothing short of catastrophic. Nazi Germany, Maoist China, and Stalinist Russia are but three twentieth century examples of totalitarian regimes that abused law and used it as a weapon for oppression and repression.⁶⁴ Mass executions, gulags, cruel human experimentation, and concentration camps resulted.⁶⁵

As a positive contrast, by way of contemporary introduction and treatment, it is fitting to include one shining example of courageous communication of these unpopular, yet no less just, realities: Nobel Laureate Aleksandr Isayevich Solzhenitsyn. Few, if any, people in the twentieth century had more effectively borne eloquent witness to higher law, virtue, and justice in reference to such horrendous regimes, especially the brutal oppression that Solzhenitsyn himself suffered. His writings and addresses give hope that the truth of sound virtue, justice,

⁶³ Various passages in Sophocle's *Antigone* bring this point out lyrically. See SOPHOCLES, *THE OEDIPUS PLAYS OF SOPHOCLES* (Paul Roche trans., Mentor 1958) [hereinafter *OEDIPUS PLAYS*].

⁶⁴ RANDALL L. BYTWERK, *BENDING SPINES: THE PROPAGANDAS OF NAZI GERMANY AND THE GERMAN DEMOCRATIC REPUBLIC* (Michigan State Univ. Press 2004); RHOADS MURPHEY, *HISTORY OF ASIA* 351-54, 379-82 (Addison-Wesley 1992).

⁶⁵ While this response does not purport to provide a historical survey of the practices of such regimes, even a cursory scan would reveal that many such historical treatments have well-documented the inhumane and barbarous acts done in the name of law, or at least with the permission of, including improper application or enforcement of decent laws that were violated. The primary documents in the Nuremberg trials are a case in point.

and higher law can and will triumph over miswielded force.⁶⁶ In this way, Solzhenitsyn addresses the larger questions of law with its best metaphysical moorings. For these attainments, he has been heralded widely as a great voice in an ethical and legal wilderness.

These questions are often ignored to our peril. The accumulated experience and wise interpretation of history make it not too sweeping a statement to claim that all people in all places and times, contrary to socialized or other ethical relativisms, must heed justice, virtue, and higher law in order to thrive, whether in domestic or international spheres.

As one acknowledges such ethical virtuosos as Solzhenitsyn in our time, one can also remove oneself from chronological snobbery and geographic provincialism in order to stand on the broad shoulders of giants from both the East and the West. Mencius, Mo Tzu, Plato, and Aristotle allow one to see further and more clearly than the constraints of ethical relativism or legal positivism or formalism would allow.⁶⁷ A truly international jurisprudence should be founded on that which is common to the East and the West for all time. The fixation with the recent and contemporary must make room for the wisdom of the ages, which does not change with the shifting sands

⁶⁶ As a singular contrast in the midst of the Soviet oppression, Nobel Laureate Aleksandr Isayevich Solzhenitsyn powerfully conveys the ideals of higher law. From his bombshell Commencement Address at Harvard University in 1978 to the Hoover Institute at Stanford University, from the *Gulag Archipelago* to *The Oak and the Calf*, Solzhenitsyn stunningly asseverates higher law. See, e.g., Aleksandr Isayevich Solzhenitsyn, Address at Harvard University (1978); ALEKSANDR ISAYEVICH SOLZHENITSYN, *THE OAK AND THE CALF* (Harry Willetts trans., Harper & Row 1980); ALEKSANDR ISAYEVICH SOLZHENITSYN, *GULAG ARCHIPELAGO* (1st ed. 1985).

⁶⁷ To borrow and modify a modest disclaimer by Sir Isaac Newton, "If I have seen further, it is because I have stood on the shoulders of giants." Letter from Sir Isaac Newton to Robert Hooke (Feb. 5, 1676).

of time.⁶⁸

Helping to dig a truly transnational and international jurisprudential foundation toward a more widespread recognition of the existence of objective justice, virtue, and higher law is an important foundation to consider before asking questions about any particular legal system, international and domestic alike. These first sections have introduced this topic, demonstrated its relevance, and addressed objections that exist to justice, virtue, and higher law as a jurisprudential basis. This treatment now extends to a constructive case with a view from the East, in conjunction with classical sources from the West.

II. A View From the East

Classical Eastern philosophers, often ignored or given scant treatment in the West, have much to teach us about the necessity of adhering to justice and higher law in order for law and the *polis* to flourish, domestically or internationally. They write much of virtue, which merges with broader notions of justice—indeed justice itself is a classic, linchpin virtue. Virtue also always comports with the higher law. In order to regain a more adequate adherence to virtue, justice, and higher law, most notably for transnational or international law, one must delve into the relevant portions of Eastern philosophies.

Around 1122 BC, the Chou Empire conquered the Shang people. Instructions issued by a Chou ruler to one of his vassals said, “I will explain to you how virtue should control the use of punishments. . . . Make your judgments

⁶⁸ If international law and other law do not more fully regain their moorings in just reality, virtue, and higher law, then we will reap much bitter fruit in the future of the world. Much positive law begging for conscientious objections may then increase.

justly and sincerely.”⁶⁹ Even a ruler of these marauding conquerors not only referred to, but also exhorted, the exercise of just judgments. Such just judgments surely rise above the arbitrary and capricious, the inconsistent and unfair. Thus, justice grounded in the higher law is a prized virtue.

Mo Tzu, who was primarily raised on Confucianism, started his own school of thought, comparable to classical Confucianism. About the need for the just administration of law and order, he articulated a theory applicable to both the international and domestic arenas. Tzu writes:

Now all the rulers desire their provinces to be wealthy, their people to be numerous, and their jurisdiction to secure order. But what they obtain is not wealth but poverty, not multitude but scarcity, not order but chaos—this is to lose what they desire and obtain what they abhor. Why is this?

This is because the rulers have failed to exalt the virtuous and to employ the capable in their governments. When the virtuous officers become numerous in a state, order will be stable. Therefore the task of the lords lies no where but in multiplying the virtuous. But what is the way to multiply the virtuous?

Suppose, for example, that one wishes to cause good archers and charioteers to be numerous. In this case one will certainly enrich them, give them rank, respect them, and laud them. Once these things are done,

⁶⁹ THE SHE KING 396-97 (James Legge trans., Trubner & Co. 1875).

good archers and charioteers will become numerous. How much more should this be done in the case of the virtuous and excellent who are rich in virtuous conduct, versed in argumentation, and experienced in the arts of the Way? These are certainly the treasures of the nation and the supports of the state. They too must be enriched, given rank, respected, and lauded; once this is done, they too will be numerous.⁷⁰

The passage quoted above outlines both the wisdom and method of instilling virtue, of which justice is a central one, and installing virtuous leaders.⁷¹ Both results bring greater justice to a society and encourage greater adherence to higher law. Such objectives rise higher than a behaviorism⁷² unattached to magnanimous ends, such as advancing the common good.

Mo Tzu apparently agreed with Confucius that the hereditary rulers should transfer the administration of their governments to men of virtue and capacity.⁷³ At its best, it should not be reduced into a purely pragmatic, behaviorist, or utilitarian calculus—although it can appear that way on its face and can reduce to such calculi in its crasser forms.

⁷⁰ MOTSE, THE ETHICAL AND POLITICAL WORKS OF MOTSE 30-31 (Mei Yi-Pao trans., Probsthian 1929).

⁷¹ See Douglas W. Cassel, Jr., *Somoza's Revenge: A New Judge for the Inter-American Court of Human Rights*, 13 HUM. RTS. L.J., 137 n.4 (1992) (discussing the debate surrounding the moral qualification for a justice on the Inter-American Court of Human Rights).

⁷² See IVAN PAVLOV, EXPERIMENTAL PSYCHOLOGY AND OTHER ESSAYS (Philosophy Library 1957); B.F. SKINNER, CONTINGENCIES OF REINFORCEMENT: A THEORETICAL ANALYSIS (Appleton-Century-Crafts 1969).

⁷³ MOTSE, *supra* note 71, at 19.

A. Mencius

In the midst of a high-water mark for the popularity of Mo Tzu's way of thinking, the so-called "agricultural school" of Mencius emerged.⁷⁴ It maintained that "a wise and virtuous ruler tills the soil together with his people in order to get his food; along with governing, he cooks his own meals morning and night."⁷⁵ Underlying this notion is the principle that those who rule and judge should know the life of the people they rule or judge.

Apparently, Mencius followed the example of Confucius in a number of ways.⁷⁶ Mencius eloquently asserted the claim of the scholar and the man of virtue to a place of honor above that which is conferred by the pomp of princes. Such a man, as expressed by Mencius, should regard worldly success and failure with indifference, secure in the knowledge that, if his character is as it should be and the world fails to acclaim him, the fault lies not with himself but with the world.⁷⁷ That is the sort of virtue that is worthy of notice, and refreshing in an age of hype and celebrity production. Describing the just and virtuously great person, Mencius says:

⁷⁴ Mencius' opinion foreshadows and antedates by millennia the views of this nation's founders such as George Washington, who tilled the soil himself at Mount Vernon, and Thomas Jefferson, who had greater trust in the hard-working, ordinary agrarian than some of his oligarchic contemporaries.

⁷⁵ THE FOUR BOOKS, 3 (2) 10 (James Legge trans., Commercial Press 1966).

⁷⁶ For example, he was as democratic as Confucius in accepting students regardless of their socioeconomic or political standing, demonstrating an unusually egalitarian educational ethic. THE FOUR BOOKS, *supra* note 76, at 19.

⁷⁷ *Id.* at (1) 9.

Dwelling in the wide house of the world, occupying his correct place in the world, walking in the great way of the world; when his desire for office is fulfilled, practicing his principles along with others; when that desire is disappointed, practicing them alone; riches and honors cannot corrupt him, poverty and mean condition cannot change him, authority and power cannot make him bend the knee: such is the truly great man.⁷⁸

Earlier, Confucius told the rulers to transfer the administration of their governments to men of virtue, ability, and education,⁷⁹ which Mencius fully concurs with as the previous quote partially describes.

“One who outrages the human virtues is called a brigand; one who transgresses against righteousness is called a ruffian. I have heard that the fellow called Chou was put to death, but I have not heard that this was killing a sovereign.”⁸⁰ In regards to the regicide of the last Shang ruler, Mencius stated this when asked about it by the King of Ch’i. Evidently, Mencius then placed just and virtuous character above brute power or position, even the position of king. For Mencius, might does not equal right, nor does positional authority by itself necessarily denote the exercise of justice. Hence, the basic postulate of Mencius’ sociopolitical and legal program asserted that virtues such as justice, above all else, breed success in the most

⁷⁸ *Id.* at 3 (2) 2.3. As we shall see later in this study, similar notions also occurred in prominent Western thinkers. We need many more such great and just people, who not only reflect higher law in their jurisprudence, but also in their very lives.

⁷⁹ See CONFUCIUS, *THE ANALECTS* (David Hinton trans., Counterpoint 1998); CONFUCIUS, *THE ANALECTS* (Raymond Dawson trans., Oxford Univ. Press 1993).

⁸⁰ THE FOUR BOOKS, *supra* note 76, at 1 (2) 8.

profound sense of the word.⁸¹

Mencius directly counters a representation of one of Mo Tzu's principal arguments on its face, namely that the necessity of something's utility or profitableness as bedrock. This argument could also be said to counter Western utilitarian arguments advanced by scholars such as John Stuart Mill⁸² and Jeremy Bentham,⁸³ who rehash some of the same hackneyed utilitarianism much later in another part of the world.

The following passage also emphasizes the necessity of going beyond the narrowness of short-term, shortsighted personal utility and profitability. The book of *Mencius* begins:

Mencius *went* to see King Hwuy of Leang. The king said, "Venerable sir, since you have not counted it far to come here, a distance of a thousand li, I presume that you are likewise provided with counsels to profit my kingdom?" Mencius replied, "Why must Your Majesty use the word 'profit'? What I am 'likewise provided with, are *counsels* to benevolence and righteousness, and these are my only topics. If Your Majesty say, 'What is to be done to profit my kingdom?' the great officers will say, 'What is to be done to profit our families?' and the inferior officers and the common people will say, 'What is to be done to profit our persons?' Superiors and inferiors will

⁸¹ The point here is not an advocacy of regicide or other killing of a judge or sovereign. Rather, it dramatically underscores the importance of justice and virtue in any legal and political system.

⁸² MILL, *supra* note 33.

⁸³ BENTHAM, *supra* note 33.

try to snatch this profit the one from the other, and the kingdom will be endangered.”⁸⁴

Clearly, a simplistic profit-seeking and utilitarian perspective fails to reach that just and virtuous height that Mencius advocates. Those who advance justice and higher law typically do not obsess about profit—and may indeed sacrifice in various ways for higher causes.⁸⁵

Continuing this argument, Mencius points out that such a condition will put the king in the precarious position of losing his life to a subordinate who covets his position and his wealth. He continues:

There never has been a man trained to benevolence who neglected his parents. There has never been a man trained to righteousness who made his sovereign an after consideration. Let Your Majesty also say, ‘Benevolence and righteousness, and these shall be the only themes.’ Why must you use that word—‘profit’?⁸⁶

Such a stance undermines reductionistic “bottom line” pursuits of profit to the exclusion of virtue, an approach unworthy of the more exalted calling of justice and higher law.

Similar to Confucius’s and Aristotle’s contentions, Mencius claimed that the good is that which is most fully congruent with human nature.⁸⁷ But, the Legalists of

⁸⁴ THE FOUR BOOKS, *supra* note 76, at 429-31.

⁸⁵ For example, surveys demonstrate that public interest attorneys make the least income, yet have the highest satisfaction in their work of any segment of the legal profession. They often make greater impacts for justice too.

⁸⁶ THE FOUR BOOKS, *supra* note 76, at 432.

⁸⁷ *Id.*

China would contend that Mencius had an unduly optimistic view of human nature.⁸⁸ All of them, however, agreed with the necessity of actions in accordance with sound justice and other virtues, and the necessity of higher law beyond brute force or sheer authority alone.

Returning to Mencius, he vouched for “education” chiefly as a means to cultivate a good sense of justice in accordance with original human nature.⁸⁹ He observes, “That which differentiates men from the birds and beasts is very slight; ordinary men discard it, superior men preserve it.”⁹⁰

B. Tao

A basic principle of Taoism is that one should be in harmony with, not in rebellion against, the foundational laws of the universe.⁹¹ Such a tenet presupposes the existence of foundational laws of the universe—in other words, higher law.⁹²

According to contemplative Taoism, living in accordance with the fundamental laws of the universe includes maintaining insouciance towards power, position, or honors in this world.⁹³ Taoist works speak of various sages who declined the offices of prime ministers and did

⁸⁸ *Id.*

⁸⁹ The argument that education cultivates justice is similar to Platonic “memory” or analogous to a pre-fall state of Edenic innocence in the Judeo-Christian view. See *Genesis* 1:1-3:24.

⁹⁰ THE FOUR BOOKS, *supra* note 76, at 14 (2) 19.1. Mencius’ position implicitly endorses the proposition that one must always act justly and virtuously because everything one does will impact, for good or ill, the development of one’s own character. That statement would necessarily include everything that one does within the legal profession.

⁹¹ *Id.*

⁹² U.S. legal scholars in the present period of history certainly do not hold such an assumption universally, which accentuates the need for its rediscovery.

⁹³ THE FOUR BOOKS, *supra* note 76, at 14 (2) 19.1.

not seize the offer of thrones.⁹⁴ Thus, a Taoist living according to these ideals would live above the vainglory, conceit, and arrogance that often accompany rulership in this life.

The Taoist position is more susceptible to the critique of erring too far towards a phlegmatic, even at times irresponsible, indifference to such matters. For example, it also fails to provide a sufficient notion of resource stewardship in its flight away from materialism, greed, and selfish ambition. If taken too far, Taosim almost crowns apathy as a virtue. It would be no virtue, for example, to be apathetic or phlegmatic to international human rights violations that should be upheld worldwide. Nonetheless, Taoism still adheres to a form of higher law.

C. Hsuntze

The philosopher Hsuntze also notes the self-interested proclivities of humans that Taoism apparently attempts to remedy.⁹⁵ Hsuntze's views contrast with the Taoists in what he considers "natural." While a Taoist considers becoming "natural" as the crux of the answer, Hsuntze sees our "natural" condition as problematic from birth.⁹⁶ He says:

The original nature of man to-day is to seek for gain. If this desire is followed, strife and rapacity results, and courtesy dies. Man originally is envious and naturally hates others . . . Therefore to give rein to man's original nature, to follow man's feelings, inevitably results in strife and rapacity,

⁹⁴ *Id.*

⁹⁵ See XUNZI, THE WORKS OF HSUNTZE (Homer H. Dubs trans., Probstein 1928).

⁹⁶ *Id.*

together with violations of etiquette and confusion in the proper way of doing things, and reverts to a state of violence. Therefore the civilizing influence of teachers and laws, the guidance of the rules of proper conduct (Li) and justice (Yi) is absolutely necessary . . . By this line of reasoning it is evident that the nature of man is evil and his goodness is acquired.⁹⁷

This view not only serves as a counter point to the views of Mencius, but it also impinges upon other perspectives. What some thinkers consider the motivating forces (*e.g.*, *a la* Adam Smith⁹⁸ and other capitalists), others (*e.g.*, Karl Marx and Mao Tse-Tung) see as problems with capitalistic systems. These systems, Hsuntze would likely say, beg for virtues of temperance, justice, and content generosity through the fostering of character, education, and laws consonant with the higher law. Legal systems ideally work as safeguards against the self-interested tendencies of humanity.

To give another example, an extended but selective quote from Hsuntze elaborates on key elements of his vision of justice, especially in regard to virtuous contentment (not to be confused with a smug complacency) contrasted with disgruntled greed. The level of justice, virtue, and accordance with higher law would increase with its application. It contrasts moral laxness with morality, materialism with satisfaction, anxiety with peace, and anhedonia with virtuous pleasure and happiness. It would accord well with Aristotle's notions of *arete* and *eudaimoniam*, which translate to virtue and happiness. Hsuntze writes:

⁹⁷ *Id.* at 301.

⁹⁸ See ADAM SMITH, THE WEALTH OF NATIONS 10 (C.J. Bullock ed., P.F. Collier & Son 1909).

[T]here is no one who in their purpose despises moral principles, who does not value material things; and that there is no one who does not externally value material things and is not inwardly anxious; and that there is no one whose actions deviate from moral principles who is not in dangerous circumstances; and that there is no one who is in dangerous circumstances who is not inwardly fearful. When the mind is anxious and fearful, though the mouth be holding meat, it will not recognize the flavour thereof; though the ears hear bells and drums, they will not recognize the sound thereof . . . though the clothes be light and warm, and he be sitting on a rush or fine bamboo mat, the body will not recognize the comfort thereof; for he may enjoy the goodness of all things, yet he cannot be contented. If he gains a respite and contentment, his anxiety and fear nevertheless do not leave him. For though he be enjoying the goodness of all things, yet he is greatly anxious; though he be absorbing the benefit of all things, yet he gains great injury . . . Although this sort of man be made a marquis and called a prince, he would be no whit different from a common man or a robber; although he were to ride in a nobleman's coach or wear a crown, he would be no whit different from a footless cripple. Then he could well be called one who makes himself the servant of material things. If the heart is tranquil and contented, though the colours be below the

ordinary, they can nourish the eyes; though sounds be below the ordinary, they can nourish the ears; coarse food and vegetable soup can nourish the taste; coarse cotton clothes and coarse hemp sandals can nourish the body; a straw hut for a house, reed screens for doors, straw beds, ancient plain stands and mats can nourish the form. For a person may be without the goodness of all things, yet he can foster his enjoyment; he may be without a position of high rank, but he can foster his fame. If such a man were given the empire, it would mean much for the empire, but it would mean little for his contentment and joy. Thus he could be called one who makes his personality important and makes material things his servants.⁹⁹

Such a passage can serve a salubrious purpose if more faithfully applied by those responsible for legal systems. Indeed, Hsuntze's description may also be a virtuous prescription that falls within higher law and justice for societies and individuals everywhere.

D. Neo-Confucianists From Chu Hsi

We now move to one of the greatest, if not the greatest, of the Neo-Confucianists, Chu Hsi. His interpretations of some of the classics were considered authoritative on the official Chinese government exams for almost six centuries, specifically from 1313 until 1905 when the government abrogated the exams. Addressing the structure of justice and higher law built into the universe, Chu Hsi avers that “[p]rinciples or *li* . . . are without birth

⁹⁹ XUNZI, *supra* note 96, at 298-99.

and indestructible.”¹⁰⁰ Changeless, they are all part of the one great *li*, the Supreme Ultimate, which Chu Hsi equates at times with the *Tao*. He recognized that principles of justice and higher law are both equally applicable in the Western Hemisphere as they have been in the East.

In reference to Mencius, another leading Neo-Confucianist, Tai Chen states, “The ancients who wished to illustrate illustrious virtue throughout the kingdom, first ordered well their own states . . . they first cultivated their persons. Wishing to cultivate their persons, they first rectified their hearts.”¹⁰¹ Chen helped revive the centrality of character development through virtue, a result that flows from the pursuit of justice and higher law.

Chen reinforces these notions by recognizing the place of “virtues as the sense of shame, humility, and the knowledge of right and wrong.”¹⁰² Chen combines both emotivist and intellectual-cognitive dimensions in his conception of virtue. A reduction of virtue to either a emotivist or an intellectual-cognitive dimension alone, however, misses the mark. Chen was not a moral skeptic, but is often mired in the morass of doubt and despair in regards to the epistemology of ethics.

Perhaps his witnessing actual failures of justice, higher law, and virtue helps explain why Yen Fu, who studied at the University of Edinburgh and translated Western philosophical works into Chinese, brought a scathing indictment after the first World War. Yen Fu wrote, “It seems to me that in three centuries of progress the people of the West have achieved four principles: to be selfish, to kill others, to have little integrity, and to feel little shame.”¹⁰³ From one who had formerly admired

¹⁰⁰ H.G. CREEL, CHINESE THOUGHT FROM CONFUCIUS TO MAO TSE-TUNG 207 (The Univ. of Chicago Press 1953).

¹⁰¹ THE FOUR BOOKS, *supra* note 76, at 310-12.

¹⁰² CREEL, *supra* note 101, at 228-29.

¹⁰³ YEN FU, HSUEH HENG, No. 18 6-7 (1923).

Western culture, Yen Fu's words are sobering ones indeed. The four "principles" Fu describes certainly would not lead to a harmonious international or domestic legal system.

This survey identifies an Eastern pattern that recognizes the existence of justice, virtue, and higher law and points to various aspects of these principles—whether indicated in "right living," *Li*, morality, *Tao*, or other comparable terms. This reality, whichever appellation one chooses to give it, forms the best foundation for law, especially international law, which must carve out the common inheritance of humanity in the midst of diverse cultures.

III. The Pre-Socratics, Plato and Aristotle on Justice, Higher Law and Virtue

Turning now from Asia to ancient Greece, let us inquire into the Pre-Socratic, Platonic, and Aristotelian conceptions of justice, virtue, and higher law which are necessary to maintain the health of jurisprudence and the law.

A. Pre-Socratics

The Pre-Socratics stress their continuity with the past through the idea of a law-governed universe.¹⁰⁴ They explain that the ordered processes of nature relate to the growing ethical conviction, entrenched in their cultural heritage, that just principles are rooted in reality.¹⁰⁵ This emphasis has no part in the presumption that nature is value-free.¹⁰⁶ Modern meta-ethics, by contrast, puts on a

¹⁰⁴ See Gregory Vlastos, *Equality and Justice in Early Greek Cosmologies*, 42 CLASSICAL PHIL. 156-78 (1947).

¹⁰⁵ See TERENCE IRWIN, CLASSICAL THOUGHT (Oxford Univ. Press 1989).

¹⁰⁶ See *id.*; WERNER JAEGER, PAIDEIA: THE IDEALS OF GREEK CULTURE

façade of just discourse while denying the very existence of a higher law.

An example of a law-governed universe from Pre-Socratic literature is found in Aeschylus's *Oresteia*. Orestes becomes aware of a more rational justice than cruel vindictiveness, a rule of law that seeks to virtuously superintend, rather than further inflame, conflicting interests. In this conception, the rule of reason overcomes blind fate. This movement towards a more virtuous conception of higher law and an eternal, celestial court gives hope for eventual justice in spite of present injustices.

Sophocles puts the following words in heroine Antigone's mouth, which appeal to a higher law than the king's orders. In response to the inquiry of whether she flatly chose to disobey, she exclaims:

Naturally! Since Zeus never promulgated
Such a law. Nor will you find
That Justice publishes such laws to man
below.
I never thought your edicts had such force
They nullified the laws of heaven, which,
Unwritten, not proclaimed, can boast
A currency that everlastingly is valid;
An origin beyond the birth of man.
And I, whom no man's frown can frighten,
Am far from risking Heaven's favor by
flouting these.¹⁰⁷

This lyrical expression of the higher, heavenly law speaks to its pre-historic origin, its eternal applicability, and its binding position of ascendancy over even king-made positive law in a monarchy.

Along similar lines, Heraclitus wrote that human

(Oxford Univ. Press 1939).

¹⁰⁷ OEDIPUS PLAYS, *supra* note 64, at 179.

laws are nourished by one divine law that outlasts them all—the higher law.¹⁰⁸ Heraclitus seeks an enlargement of the rule of law beyond the city-state into a form of cosmic justice.¹⁰⁹ Heraclitus also discusses a harmony of opposites grounded in natural law, called *Logos*, which are somewhat similar to the concept of *yin* and *yang* in some Asian philosophies.¹¹⁰ At times, Heraclitus actually seems to identify *Logos* with the divine. A kind of cosmic justice, so to say, is thus rooted in the *Logos* reality.¹¹¹ This truth is foundational to an international jurisprudence especially, but also to domestic ones.

The Sophists, on the other hand, put forth a position widely held today—rhetoric shapes the appearance, which is what is perceived and which has no grounding in justice, virtue, or higher law. Such a stance can lead to the position, attributed to Thrasymachus, that justice amounts to the advantage of the more powerful, making it relative to whoever wields the power, a positivist position that antedates Hans Kelsen by many centuries.¹¹² No cosmology, no knowledge of a Divine Being, and no cosmic justice enter into this brutish¹¹³ and potentially brutal position.¹¹⁴ Thus, if we extend the logic of the

¹⁰⁸ See, e.g., J.M. ROBINSON, AN INTRODUCTION TO EARLY GREEK PHILOSOPHY (Houghton Mifflin Co. 1968); THE PRE-SOCRATICS (Philip Wheelwright ed., Odyssey Press 1966).

¹⁰⁹ See JONATHAN BARNES, THE PRE-SOCRATIC PHILOSOPHERS (Routledge & Kegan Paul 1979).

¹¹⁰ For an elaboration on the notion of *Logos*, see 1 W.K.C. GUTHRIE, A HISTORY OF GREEK PHILOSOPHY 419-34 (Cambridge Univ. Press 1962).

¹¹¹ See, e.g., ROBINSON, *supra* note 109; THE PRE-SOCRATICS *supra* note 109.

¹¹² PLATO, REPUBLIC (G.R.F. Ferrari ed., Tom Griffith trans., Cambridge Univ. Press 2000).

¹¹³ We would have the Hobbesian condition of “the life of man, solitary, [poor], nasty, brutish, and short” THOMAS HOBBES, LEVIATHAN 104 (E.P. Dutton 1950).

¹¹⁴ See THE PRE-SOCRATICS, *supra* note 109, at 239-50.

proposition that justice amounts only to the dictates of the powerful, oppression can, strangely enough, become “justice.” Such a position contorts itself thereby into a logical contradiction.

The Sophists present the specter of legal positivism and formalism that would preclude “[t]he Moment of Truth for a practicing attorney [which] occurs whenever a prospective client tells a story that seems morally compelling but legally hopeless. . . . Too much injustice persists in the world because tired legal thinking has accepted unjust patterns as inevitable.”¹¹⁵

It fell, then, to the great Socrates to recall Athens to the quest for true knowledge and justice, rather than settling for the superficial appearances and conventions of the Sophist “spin-doctors.” He thereby enabled Plato to re-address the deep conditions of the human soul, and in doing so, to bring into focus the idea of a structure of justice in the universe and its transcendent source, notions desperately needed in law, including international law, whether in the West or in the East.

B. An Account of Socrates

At the trial where his life hung in the balance, Socrates responded to the charge of corrupting the Athenian youth:

I do nothing but go about persuading you all, old and young alike, not to take thought for your persons or your properties, but first and chiefly to care about the greatest improvement of the soul . . . I tell you that virtue is not given by money, but that from virtue comes money and every other good of man, public as well as private. This is my

¹¹⁵ ANALYTIC JURISPRUDENCE ANTHOLOGY, *supra* note 7, at 289.

teaching, and if this is the doctrine that corrupts the youth, I am a mischievous person . . . I sought to persuade every man among you that he must look to himself and seek virtue and wisdom before he looks to his private interests. . . .The difficulty, my friends, is not to avoid death, but to avoid unrighteousness.

And will life be worth living, if that higher part of man be destroyed, which is improved by justice and depraved by injustice?¹¹⁶

Socrates both describes and exemplifies a laudable life, one that surely rose to supranormal¹¹⁷ proportions. Professor Anthony D'Amato wrote that "to Socrates, and presumably to the Athenian citizenry as a whole, judging from the evidence which exists, a trial and judgment was simply an attempt by the tribunal to apply 'the law,' an immutable concept which somehow had a separate, independent existence unchanged by specific cases."¹¹⁸ Herein lies another statement of the higher law, which every epoch, including the 21st century, ought to follow. Here is a noble example of magnanimity in the face of manifest *injustice*.

Although Socrates himself faced death, he believed that in the greater scheme of things, nothing ultimately

¹¹⁶ PLATO, APOLOGY 30, 36, 39, 49 (B. Jowett trans., Random House 1937).

¹¹⁷ Plato's life rose to the supernatural at least in the statistical, social-psychological sense, but more importantly in the sublime, moral sense. See THE SOCIOLOGICAL PERSPECTIVE: A VALUE-COMMITTED INTRODUCTION (Michael R. Leming et al. eds., Academic Books 1989)(drawing distinctions between variations of the term "normal" in chapter on social change in theory and practice).

¹¹⁸ ANALYTIC JURISPRUDENCE ANTHOLOGY, *supra* note 7, at 119, quoted in Anthony D'Amato, *Obligation to Obey the Law: A Study of the Death of Socrates*, 49 S. CAL. L. REV. 1079, 1080 (1976).

detrimental could happen to the good person.¹¹⁹ While this sacrificial speech extolling justice and virtue was the crowning achievement of Socrates' life, it is also a fitting introduction to Socrates' prize pupil Plato, and his contribution to this topic.

C. Plato

Many of Plato's dialogues concern the virtues, such as justice, wisdom, and prudence. Like many Asian philosophers, his political writings, including *Republic*, *Statesman*, and *Laws*, address the improvement of the soul.¹²⁰

In the *Republic*, Plato reasoned that the guardians were "to live together in the continual practice of virtue, which was to be their sole pursuit."¹²¹ One may question whether most politicians, attorneys, judges, and other national leaders actually believe that "[t]he art of politics has to do with the soul: what gymnastics and medicine are to the body, legislation and the administration of justice are to the soul."¹²² Thankfully, those who take seriously a jurisprudence of justice, virtue, and higher law still contemplate such statements. It hardly fits, however, the mold of a demagogue who runs roughshod over his own people.

Plato even criticized the renowned Pericles, saying that Pericles should have sought "to implant justice in their souls and take away injustice, to implant temperance and

¹¹⁹ SAINT AUGUSTINE, CITY OF GOD, (Marcus Dods trans., Hafner 1945). St. Augustine expresses similar notions in works such as the magisterial *De Civitatis Dei*, which many consider his magnum opus.

¹²⁰ See generally, PLATO, LAWS (Benjamin Jowett trans., Random House 1937); PLATO, REPUBLIC, *supra* note 113; PLATO, STATESMAN (Julia Annas & Robin Waterfield eds., Cambridge Univ. Press 1995).

¹²¹ PLATO, TIMAEUS 18 (Donald J. Zeyl trans., Hackett Pub. Co. 2000).

¹²² PLATO, GORGIAS 464 (Walter Hamilton trans., Penguin Books 1971).

take away intemperance, to implant virtue and take away every vice.”¹²³ Plato’s central thesis throughout his published works is that the most important task in this life is the improvement of the soul through virtue.¹²⁴ It is not a mere, surface behaviorism. Rather, it is more akin to Harold Koh’s notion of internalization.¹²⁵ One might question whether Plato’s central thesis might find more widespread and profounder application in international, as well as domestic, law.

The Sophists are akin to the American public’s perception of the legal profession. Plato roundly criticizes the Sophists’ use of rhetoric as solely a way to win wealth or power, rather than to instill virtue.¹²⁶ Plato shows the problems with Thrasymachus’s definition of justice as whatever benefits the stronger because it assumes that the strong really apprehend what is best, and thus, that they are wiser than the weak.¹²⁷ Thrasymachus’s definition suggests a move towards anarchy if people are constantly and illegitimately vying with each other for power and dominance, and it leads to ignoring justice or defending injustice as the better way to life.¹²⁸ These criticisms actually apply to misguided relativism as applied to law, and open the door to ill-conceived self-interest. This threatens what Thomas Hobbes subsequently referred to as the “[war] of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place.”¹²⁹ Furthermore, it can make no transcendently binding distinction between good and evil, justice and injustice. If what Gandhi called soul force does not prevail,

¹²³ *Id.* at 504, 513-14.

¹²⁴ PLATO, REPUBLIC, *supra* note 113, at 338-52.

¹²⁵ Koh, *supra* note 10.

¹²⁶ PLATO, REPUBLIC, *supra* note 113.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ HOBBS, *supra* note 114, at 112.

then other force—be it military, governmental, or legal—often does.¹³⁰ International law generally depends more on its stake in justice and higher law than the march of troops to enforce their orders. It usually must win voluntary acceptance of its jurisdiction and good-faith compliance with its orders. Thus justice, virtue, and higher law gain greater significance in the international law context.

In *Phaedrus*, Plato expresses concern about sophistical rhetoric¹³¹ that seems hauntingly applicable to what passes as law and international law. According to this view, the orator need only understand the beliefs of his judges, who judge him on the art of persuasion, not on the truth of the matter.¹³² The orator can extol evil as being good, and might persuade the public as well to do evil instead of good.¹³³ He influences their souls, but without true knowledge.¹³⁴ To what end does he sway others—merely self-interested ones? Such criticisms must be taken seriously if legal and political discourse is to rise above sophistry. This position does not, however, exclude prudential uses of rhetorical (yet honest) tools harnessed to just causes in accordance with higher law and justice because there is an important distinction between these two positions.

When distilled, one of the issues is between opinion and knowledge and the other between appearance and reality. When Protagoras expresses the opinion that man is the measure of all things, this notion, if logically pushed to its limits, affirms all opinions—including the opinion that his own opinion is false.¹³⁵ So even Protagoras must admit

¹³⁰ Dr. Samuel Ling, Asian History Lecture (Spring 1996).

¹³¹ PLATO, PHAEDRAS, in THE DIALOGUES OF PLATO 169-72, 177-79 (B. Jowett trans., 4th ed., Oxford Univ. Press 1964) (1871).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ PLATO, THEAETETUS, in 4 THE DIALOGUES OF PLATO 268-69, 288-90, 304-06, 308 (B. Jowett trans., 3d ed., Clarendon Press 1892).

that at least one opinion is wiser and truer than another; but this deduction makes the wiser and truer notions into the measure of things. Thus, man in general is not the measure of all things because not all opinions are equally valuable, true, wise, or worthwhile.¹³⁶ So there must be some anchor of justice, virtue, and higher law, such as the related set of honesty, veracity, and integrity, as contrasted with mendaciousness, duplicity and falseness, by which to ground such statements.

The relativist is deceived into thinking that, because the world is continually changing in its temporal particularities, justice, virtue, and higher law are also mutating. If so, then everything is in a process of becoming; unchanging "being," or in other words, permanent, essential ontologies, are then abolished. Noting that appearances and temporal contingencies change does not lead one ineluctably to conclude that the underlying *reality* changes too.

Plato's famous cave analogy speaks to this point.¹³⁷ The Sophist relativist is like a prisoner who, suffering from a form of amnesia and confined to a world of flitting shadows, supposes these appearances to be all the reality there is.¹³⁸ If he could think, if he could look behind himself, if he could exit the cave, his reality would be very different.¹³⁹ The Sophist fails because his rhetoric is not liberated by knowledge of the truth, but is instead a slave to opinions based on appearances, the convenience of expedience, temporal contingencies, prestige, or other factors that vary from place to place and from one individual to another.¹⁴⁰ Sophistical resistance to justice, other virtues, and higher law fails. This statement applies

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

to all sophistical opinions—whether by judicial, legislative, or executive branches.

Sheer pragmatism or formalism is not enough. Justice and injustice are not changing expedients for changing circumstances; they are rooted in a changeless reality indiscernible by the physical senses alone. So then it is not Socrates, but the Sophists, who impoverished the souls of Athenian youth by failing to extol justice, virtue, and higher law.

In *Timaeus*, Plato discusses how God set things in order and constructed the cosmos by giving to all things proportion, measure, and harmony.¹⁴¹ According to Plato, this cosmic harmony should extend to the law-governed city where justice means the harmony of right, just relationships, and proportionate treatment, and also to the good life ruled wisely by the virtue graced soul.¹⁴² As musical harmony depends on mathematical relationships between notes, so must human life be properly ordered if it is not to end in painful discord, dissolution, or even death. Indeed Plato declares, “The harmony of the soul is virtue.”¹⁴³ So the discussion again centers on virtue. Even modicums of virtue can help prevent some of the tragedies that legal systems repeatedly endure.

In *Republic*, Plato calls for rule by wise, philosopher-kings rigorously educated to disciplined habits aimed at true understanding and the continual pursuit of the good.¹⁴⁴ Such people can help add to the stature of legal systems and the profession.

Plato’s theory of forms as unchanging, transcendent ideals¹⁴⁵ becomes relevant here. Reason¹⁴⁶ does not

¹⁴¹ PLATO, *TIMAEUS*, *supra* note 122.

¹⁴² *Id.*

¹⁴³ PLATO, *LAWS*, *supra* note 121, at 653.

¹⁴⁴ PLATO, *REPUBLIC*, *supra* note 113.

¹⁴⁵ *Id.*

¹⁴⁶ The use of the term “reason” is in the broader, classical sense. It includes virtue and a healthy conscience along with rationality and

develop mere opinions about justice and then apply them in governing the appetites.¹⁴⁷ The mind does not fabricate virtues, but rather it discovers what is objectively and inherently good.¹⁴⁸ The goal is to attain, however imperfectly or fallibly, to what justice, virtue, and higher law really are, rather than how they appear to a Thrasymachus or to any other person. An objective rooting in real justice, virtue, and higher law still exists, and a just legal system, by definition, depends upon these realities and our best efforts to apprehend and apply them.¹⁴⁹

In *Laws*, Plato proposes the model of a law-governed community in which the people themselves value the good.¹⁵⁰ Indeed, a person's entire energy throughout life should be devoted to the development of virtue. Plato ultimately concludes that it is not mere mortals, but God who ought to be the measure of all things.¹⁵¹

It is important to note that Plato's conception of knowledge is not just a matter of knowledge as against ignorance or opinion, nor just an ability to define or describe a virtue.¹⁵² Discernment between good and evil is required, along with the practiced capacity for making sound judgments that recognize goodness when

logic.

¹⁴⁷ PLATO, *REPUBLIC*, *supra* note 113.

¹⁴⁸ *Id.*

¹⁴⁹ Many centuries later, scholars such as St. Thomas Aquinas and others built on this foundation. See, e.g., THOMAS AQUINAS, *TREATISE ON LAW* (R.J. Henle trans., Univ. of Notre Dame Press 1993). Presumably, one should not extend hate towards people, but to that which contravenes justice. Hating injustice because of loving [Greek: *agape*] people against whom the injustice is wrought deserves the label virtue. At the same time, that hate should not extend even to the perpetrator of the injustice.

¹⁵⁰ PLATO, *LAWS*, *supra* note 121.

¹⁵¹ See *id.* at 653, 717, 770.

¹⁵² See JOHN GOULD, *THE DEVELOPMENT OF PLATO'S ETHICS* (Russell & Russell 1972) (1955).

exemplified in particular cases.¹⁵³ Furthermore, it is not a detached, unemotional kind of thinking, but is filled with wonder at and a deep devotion to the good.¹⁵⁴ Such a framework exercises virtue, pursues justice, and comports with higher law.

Plato employs the analogy of a lover absorbed day and night with his beloved, or rather, with the ideals that the beloved exemplifies.¹⁵⁵ According to Plato, our calling in the legal and governmental spheres and in life is to romance and be romanced by justice, virtue, and higher law.

Similarly, in *Phaedrus* Plato likens the soul to a charioteer with two winged horses, one wanton and wild, the other spirited but controllable, soaring towards the sun in all its majesty.¹⁵⁶ As long as the wanton horse is uncontrolled, there can be no united effort and both horse and charioteer plunge down to the earth again and again.¹⁵⁷ But if the driver guides the spirited horse while giving it the lead, then its strength will control the wanton one so that they will pull together and soar to the heavens.¹⁵⁸ Plato speaks of the higher aspects of humans harnessing the appetitive or animal side.¹⁵⁹ The brute inside must be disciplined to soar to the heavens.¹⁶⁰ Otherwise, the host of horrors that parade through this world will march on.

Plato, as an encapsulation, states, "Wherefore we ought to fly away from earth to heaven as quickly as we can; and to fly away is to become like God, as far as this is possible; and to become like him is to become holy, just,

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ PLATO, PHAEDRAS *supra* note 132.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

and wise.”¹⁶¹ In other words, it is an exhortation towards a just and virtuous life under the highest possible law. This view has become all too rare as Western Civilization has reached what Harold Berman calls the “twilight of transcendence.”¹⁶²

Plato continues this same theme in *Laws* when he writes that “he who would be dear to God must, as far as is possible, be like him and such as he is.”¹⁶³ Several motifs emerge from these writings. First, this entire metaphysical discussion grounds itself in unchanging and transcendent Fact and Reality—in virtue, justice, and higher law. In this sense, law is a fact.¹⁶⁴ Second, Plato’s forms theory introduced a theory of universals with unchanging natures that dominated the jurisprudence of most of the history of Western Civilization, which continues to this day. This is the best foundational theory for international law and law in general.

In *Statesman*, Plato likens God to a statesman shepherding his people, but in *Laws* Plato offers his last and most detailed account.¹⁶⁵ Plato describes God as powerful, purposeful, intelligent, and good in an outgoing way because everything he designs is directed toward the overall goodness of the universe.¹⁶⁶ Individual virtue and the just city-state are supposed to be part of this cosmic

¹⁶¹ PLATO, *THEAETETUS*, *supra* note 136, at 235.

¹⁶² See BERMAN, *supra* note 4.

¹⁶³ PLATO, *Laws*, available at

<http://classics.mit.edu/Plato/laws.4.iv.html> (last visited Feb. 2, 2006). For an alternative translation, see also PLATO, *THE LAWS* 175 (Trevor J. Saunders trans., Penguin Books 1970) (“you must do your level best to make your own character reflect his, and on this principle the moderate man is God’s friend, being like him”).

¹⁶⁴ See Anthony D’Amato, *On the Connection Between Law and Justice*, 26 U.C. DAVIS L. REV. 527 (1993).

¹⁶⁵ See, e.g., PLATO, *LAWS*, *supra* note 121, at 894-903; PLATO, *STATESMAN*, *supra* note 121, at 269-75.

¹⁶⁶ See, e.g., PLATO, *LAWS*, *supra* note 121.

harmony. Because they imitate God's goodness, they are microcosms of the whole.¹⁶⁷ Each legal system, whether international or domestic, can aspire to such lofty objectives.

The chief purpose of *Timaeus* seems to be to link justice to the structure of the cosmos—higher law.¹⁶⁸ This higher law grounds itself in reality, in the forms, in the nature of the soul, in cosmic harmony, in the idea of the good, and in God. No better theoretical framework exists.

In contrast to secularized individualism, skepticism, and relativism that prevail in present legal culture, Plato tells the reader:

The ruler of the universe has ordered all things with a view to the excellence and preservation of the whole, and each part, as far as may be, has an action and passion appropriate to it . . . one of these portions of the universe is thine own, unhappy man, which, however little, contributes to the whole . . . and in order that the life of the whole may be blessed; and that you are created for the sake of the whole, and not the whole for the sake of you.¹⁶⁹

¹⁶⁷ *Id.*

¹⁶⁸ PLATO, *TIMAEUS*, *supra* note 122.

¹⁶⁹ PLATO, *Laws*, available at

<http://classics.mit.edu/Plato/laws.10.x.html>. For an alternate translation, see also PLATO, *THE LAWS* 437 (Trevor J. Saunders trans., Penguin Books 1970) ("The supervisor of the universe has arranged everything with an eye to its preservation and excellence, and its individual parts lay appropriate active or passive roles according to their various capacities . . . a mere speck that nevertheless constantly contributes to the good of the whole – is you, you who have forgotten that nothing is created except to provide the entire universe with a life of prosperity. You forget that creation is not for your benefit: you exist for the sake of the universe.").

Hence, Plato thinks the good is ultimately found in a more wholistic and community context, and ultimately, in the mind of God. If law does not contribute in this way, it loses an important facet of its *raison d'être*.

In their thinking about the cosmos, the early Greek philosophers struggled to distinguish between appearances and reality. Plato and Aristotle extended this concern into the metaphysical domain suggesting that what appears to some to be the good in reality may not be so.¹⁷⁰ Pleasure, wealth, power, or success may be sought as the highest ends, when in reality they are not. This confusion between appearance and reality in ethics underlies the contest between two dominant images of human life that Alasdair MacIntyre finds in a post-Homeric reflection—a life aiming at virtue or excellence (*arete*) and a life aiming at superficial “success” or power.¹⁷¹ Every branch of government would do well to pursue the former rather than the latter.

The former image of virtue or excellence (*arete*) is found in the works of Plato and Aristotle. The latter image of superficial success or power is also found in the writings of Aristotle's one-time student, Alexander the Great.¹⁷² Neither power nor success, nor pleasure, nor wealth is in reality the *highest* good, even though to some people they appear so. This claim does not deny the value of success, pleasure, or wealth in the service of virtuous ends.

Socrates, Plato, and Aristotle concerned themselves with the improvement of the soul and developed an ethic of virtue grounded in the ordered nature of reality as a whole.¹⁷³ Those in or influential to legal systems would be

¹⁷⁰ *Id.*

¹⁷¹ ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 88 (Univ. of Notre Dame Press 1988).

¹⁷² *Id.*

¹⁷³ See FINNIS, *supra* note 7, at ch. 8 (analyzing and synthesizing important strands of thought of these foremost Hellenic thinkers).

well advised to follow such an approach rather than making positivistic or formalistic excuses for injustice, vice, or violations of higher law. To Plato's student, Aristotle, we turn next for further grounding in justice, virtue, and higher law the best basis for law as a whole and international law especially.

D. Aristotle: Justice, Telos, Virtue, and the Higher Life through Higher Law

Aristotle merges the notion of justice with virtue by crowning justice as the apogee of virtue in relation to others:

Thus, this kind of justice is complete virtue or excellence, not in an unqualified sense, but in relation to our fellow men. And for that reason justice is regarded as the highest of all virtues, more admirable than morning star, and, as the proverb has it, "In justice every virtue is summed up." It is complete virtue and excellence in the fullest sense, because it is the practice of complete virtue. It is complete because he who possesses it can make use of his virtue in their own affairs, but who are incapable of using it in their relations with others. Therefore, the saying of Bias seems to be apt that "Ruling will show the man," for being a ruler already implies acting in relation to one's fellow men and within society. For the very same reason, justice alone of all the virtues is thought to be the good of another, because it is a relation to our fellow men in that it does what is of advantage to others, either to a ruler or to a fellow member of society.

Now, the worst man is he who practices wickedness toward himself as well as his friends, but the best man is not one who practices virtue toward himself, but who practices it toward others. For that is a hard thing to achieve.¹⁷⁴

Aristotle does not stop with justice as a perfect virtue in human relationships alone. In addition, he hints at the relation between human virtue, higher law, justice, and the divine.¹⁷⁵ Being is not morally neutral; in fact, the world of particulars is laden with issues of justice throughout,¹⁷⁶ including matters in the international law domain, as well as domestic law spheres.

Aristotle states:

If God is always in that good state in which we sometimes are, this compels our wonder: and if in a better state this compels it yet more. And God is in a better state. And life belongs to God; for the actuality of thought is life, and God is that actuality. . . . We say therefore that God is a living being, eternal, most good, so that life and duration continuous and eternal belong to God.”¹⁷⁷

The just and virtuous—the human *telos*¹⁷⁸—is the full development of this potential,¹⁷⁹ which is our highest

¹⁷⁴ ARISTOTLE, NICOMACHEAN ETHICS 114 (Martin Ostwald trans., Macmillan 1986) (internal citations omitted).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ ARISTOTLE, *Metaphysics*, available at <http://classics.mit.edu/Aristotle/metaphysics.12.xii.html>.

¹⁷⁸ In Greek, *telos* means “end” or “purpose.” “God and nature,” writes Aristotle, “create nothing that has not its use.” ARISTOTLE, ON THE HEAVENS, 271A.33 (Harv. Univ. Press 2000) (1957).

good. It is *eudaimonia*, usually translated “happiness,” but actually closer to “well-being,” although “well” simply reiterates “good” (“being” itself being good). Aristotle elaborates: the human good is the activity of the soul in accordance with virtue (*arete*).¹⁸⁰ Such activity never violates and always harmonizes with higher law.

Moral virtues are the excellence of the appetitive life, whereas intellectual virtues indicate excellence in the life of the mind.¹⁸¹ Such human flourishing is compromised, according to Aristotle, in those who live for pleasure, wealth, or honor. Other animals have such appetites too, yet only humans have the power to reason including the healthy functioning of the conscience and to guide those appetites.¹⁸² The human *telos* does not exclude pleasure or other such satisfactions; indeed, achieving the good brings its own pleasure.¹⁸³ No other species has courts, legislatures, or executive branches—or the deliberative processes found in legal, political, and academic discussions.

Actualizing such a life is a developmental process; the Maker grants the capacity, but to develop it requires just habits. Just habits require just choices repeatedly made and reinforced until they become second nature.¹⁸⁴ Just choices, in turn, must be determined by practical reason deliberating about what accords with higher law. The various appetites, as well as pleasure and pain in general, may be felt both too much and too little, and neither side of the spectrum from the balanced center is good.¹⁸⁵ But to

¹⁷⁹ Potential translates to *dunamis* in the Greek.

¹⁸⁰ ARISTOTLE, *NICOMACHEAN ETHICS* *supra* note 175; *see also* JOHN M. COOPER, *REASON AND HUMAN GOOD IN ARISTOTLE* ch. 1 (Harv. Univ. Press 1975).

¹⁸¹ ARISTOTLE, *Metaphysics*, *supra* note 178.

¹⁸² ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 175, at 16-17.

¹⁸³ *Id.* at 20-22.

¹⁸⁴ *Id.* at 33-35.

¹⁸⁵ *Id.* at 36-38.

feel them, at the right times, with reference to the right objects, towards the right people, with the right motive, and in the just way, mediates between these extremes and characterizes virtue.¹⁸⁶ Herein, we find Aristotle's famous Golden Mean between extremes.¹⁸⁷

So what are the implications for jurisprudence, for the state, and for laws? The "best kind of state exists not just to provide external goods but for the good of the soul—in effect, to make men good . . . the state therefore inculcates right habits by means of just laws."¹⁸⁸ Aristotle also states, "For legal judgment decides and distinguishes between what is just and what is unjust."¹⁸⁹ This venerable sage continues:

This is why we do not allow the rule of a man but the rule of reason because a man takes too large a share for himself and becomes a tyrant. A (true) ruler, however, is the guardian of what is just and as such, he is also the guardian of equality and fairness.¹⁹⁰

All in society, especially those distinctly responsible as leaders of the legal and political realms, should help further such ends that abide by the rule of law, nourished by higher law through justice.

Henry Veatch, an Aristotle scholar, tells us that the most important end of knowledge is not knowledge of humankind, because humans are not the most important entities in the universe.¹⁹¹ According to Aristotle, the very

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 111.

¹⁸⁸ ARISTOTLE, THE POLITICS, I.1-2, VII.1-3 (Steven Everson ed., Cambridge Univ. Press 1988).

¹⁸⁹ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 175, at 129-30.

¹⁹⁰ *Id.* at 130.

¹⁹¹ See HENRY B. VEATCH, ARISTOTLE: A CONTEMPORARY

nature of our being points us beyond ourselves; humans are not the measure of all things, for only God is perfectly good.¹⁹² In reality, the human *telos*, our highest end, is God.¹⁹³ Pursuing justice, virtue, and higher law created by the Uncreated¹⁹⁴ then justly becomes the virtuous pursuit of every state and every legal system, most vividly in the international sphere, but also in domestic realms.

IV. Conclusion

In any legal system, but especially international legal systems, this foundation of justice, virtue, and higher law alone will sustain long-term flourishing and fulfillment, both individually and societally. It points the way towards progress and needed reform of positive law. The accumulated weight of wise words over the centuries from both the East and the West¹⁹⁵ exhort us in this direction. It is a safeguard against such monstrosities as Nazi, Maoist, and Stalinist oppression, and acts as a beacon to light the way into the future of our global village.

The words of the great 20th-century Princeton McCormick Chairholder and jurisprudential scholar Edwin Corwin provide a fitting finale to this essay:

There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence,

APPRECIATION (Indiana Univ. Press 1974).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ As Dostoevsky indicated, if God is dead, then everything is permissible. See FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* (Ralph E. Matlaw ed., Constance Garnett trans., Norton & Co. 1976); see also, FYODOR DOSTOEVSKY, *CRIME AND PUNISHMENT* (Constance Garnett trans., Dutton 1963).

¹⁹⁵ See Finnis, *supra* note 7, at ch. 8 (handling profound thoughts from Plato, Aristotle, and Aquinas).

altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands. . . . They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration.¹⁹⁶

Thus, the pronouncements of every legal system, international especially, but also domestic, the judgments of every court, the formulations of every legislature, the decisions of every executive, should discover,¹⁹⁷ declare and follow accordingly. It would result in greater worthiness to lead and greater legitimacy for people to follow. Herein, lay the seeds of true progress¹⁹⁸ and reform.

¹⁹⁶ CORWIN, *supra* note 9, at 4-5 (emphasis in original).

¹⁹⁷ "In contrast, natural lawyers claim that morality is not so much to be defined as to be discovered; reality is not created but apprehended." NATURAL LAW AND CONTEMPORARY PUBLIC POLICY, *supra* note 18, at 8.

¹⁹⁸ While rejecting the notion of automatic, inexorable "progress," the use here nonetheless promises progress to the extent justice, higher law, and virtue are embraced.

