
ARTICLES

APPELLATE JUDGES AND PHILOSOPHICAL THEORIES: JUDICIAL PHILOSOPHY OR MERE COINCIDENCE?

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“The kind of inquiry that would contribute most to understanding and evaluating a [judicial] nomination is...discussion first, of the nominee’s broad judicial philosophy and, second, of her views on particular constitutional issues.”¹

— Elena Kagan, Supreme Court Justice

I. INTRODUCTION

She is much too liberal, too conservative, a judicial activist, a strict constructionist: all are characterizations used to explain and discover a judge’s judicial philosophy, an endeavor discussed above by now-Supreme Court Justice Elena Kagan. A judge’s opinions often serve as fodder for court observers and commentators as they attempt to cull a general picture of the judge’s constitutional values from the text. Underpinning this process are various philosophical theories adopted by judges that contribute to their judicial beliefs.

This paper suggests that judicial opinions often reflect a judge’s position on what is ethical and useful in the real world of constitutional values. It further suggests that an appreciation of legal philosophical theory assists one in understanding the ethical and public policy dimensions of a court’s opinion. Do judges’ opinions parallel philosophical theories constructed by

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1. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 935 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1995)).

philosophers or is any apparent relationship mere coincidence? This paper suggests the former—that a judge’s belief system, education, and experiences² include the adoption of judicial philosophies, the expression of which can be found in his or her written opinions.

Samuel D. Warren and Louis D. Brandeis observed that “[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society.”³ Justice Brandeis was right to recognize the “eternal youth” of the common law as it evolves to satisfy societal needs. Judicial philosophy often embraces an ethical and social dimension in its analysis, representative of the law’s “eternal youth.” To better understand a judge’s judicial philosophy it is useful to appreciate how appellate judges often construct legal arguments by following a legal philosophical theory. The purpose of investigating a judge’s judicial philosophy is not necessarily to focus on one theory as it applies to the resolution of a legal dispute, but rather to contextualize the influence of theory as it exists on a continuum of both past and future development.

This paper introduces theories of justice created by prominent philosophers and explains how they relate to jurisprudential analysis. It further argues that the process of understanding legal analysis should include an appreciation of the ethical theories that underlie the judicial resolution of legal issues. Ronald Dworkin reminds us that “[l]awsuits matter in another way that cannot be measured in money or even liberty. There is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of public injustice.”⁴ This proposition is useful to the study of resolutions to a legal dispute. The “moral dimension” of a case relevant to this judicial analysis is best explored by extrapolating any salient “ethical dilemmas” from the facts of the case.

How does one identify ethical dilemmas? While there are a number of useful methods, one of the more common is “stakeholder analysis.” Stakeholder analysis starts with an examination of the parties affected by the decision in the case. For example, if the case involves corporate entities, “stakeholders” would include the employees, suppliers, stockholders, customers, lender banks, corporate boards and executives, and any other

2. James Barron, *A New York Bloc on the Supreme Court*, N.Y. TIMES, May 12, 2010, at A1 (noting that if Elena Kagan were confirmed the court would, for the first time in its history, contain four judges born in New York City).

3. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

4. RONALD DWORKIN, *LAW’S EMPIRE* 1 (Harvard Univ. Press 1995) (1986) (emphasis added).

communities affected by the corporation's operation. If the stakeholders are unjustly deprived of moral or legal rights there is an "ethical dilemma" to be resolved by the courts.

A. Resolution of an Ethical Dilemma

Once critics of judicial philosophy discover these ethical dilemmas they should attempt to resolve them. This is a significant challenge since often stakeholders may have to endure giving up rights for the common good. This tension is exemplified in cases that examine eminent domain, a government taking of private property with "just compensation."⁵ The private property owner may be convinced the taking was unjust and the compensation inadequate. So it is important to recognize the impossibility of a decision equitable to all stakeholders.

A number of prominent ethicists have created various methods and ethical theories that are useful in discussing and resolving judicial disputes. The ancient Greeks, philosophers of the Enlightenment, and contemporary philosophers have all written about ethical theories. The selected theories discussed in this paper are selected from among many, with no attempt to exhaust the field.⁶ The paper discusses how such theories apply to an understanding of our jurisprudence and provides a better appreciation of a judge's judicial philosophy. It is important to note that a judge may utilize many judicial philosophies in deciding a case and, depending on the nature of a dispute, adopt various philosophical theories in developing his or her legal argument.

Legal scholars should be acquainted with the predominant philosophers who have formulated the moral and ethical foundations of our contemporary judicial thinking. Legal scholars and judges who continue to influence our jurisprudence and public policy should understand the relationship of law to moral and ethical reasoning.

B. IS PHILOSOPHICAL THEORY RELEVANT TO OUR JURISPRUDENCE?

Since appellate court cases decide litigants' rights and obligations, it is informative to understand the courts' substantive findings, including the moral and ethical underpinnings of a judge's reasoning. The legal academy generally avoids this process, content with an explanation of substantive and procedural analysis. If the academy argues and debates contemporary legal

5. U.S. CONST. amend. V.

6. *See, e.g.*, THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Jules Coleman & Scott Shapiro eds., 2002).

issues without an appreciation of the philosophy that supports the courts' rationales, it will be difficult to fully recognize and understand the jurisprudential theory that shapes the legal landscape.

Critics of contemporary court decisions should understand and relate to ethical theory found in natural law, legal positivism, utilitarianism, legal realism, and social relativism. This process has been referred to as "ethical legalism"⁷ and should be useful in understanding the relationship between law and ethics. What theories of justice are currently forming our contemporary notions of due process, equal protection, and equal opportunity? Jurisprudential analysis should engage in a resolution of that inquiry using deontological and teleological ethical theories used in court decisions.

This paper selects for discussion classical and contemporary philosophers and legal scholars who have contributed to current judicial thinking. There are others whose theories have made significant contributions to jurisprudence that are not mentioned in the text. The selection is based on those philosophers and scholars most often discussed in contemporary legal literature. Part II introduces prominent philosophers who have added to our jurisprudence. A more exhaustive review of their philosophy is beyond the scope of this paper and is available in copious encyclopedic works. Part III applies the theories discussed to a recent reverse discrimination Supreme Court case⁸ that illustrates how judges follow a particular judicial philosophy. This paper argues that judges often referred to by jurisprudential labels are following ethical theories inherent in their thought processes that contribute to their jurisprudential analysis. Part IV argues that an understanding of legal philosophical theory is necessary to identify a judge's judicial philosophy and should be useful in clarifying the oversimplification and often misleading characterization of a judge as being either liberal or conservative. Furthermore, it asserts that an understanding of how a court adopts a legal philosophy in deciding a case is useful in appreciating the moral and ethical dimensions of a decision.

7. Gerald R. Ferrera, *Ethics in Legal Education: An Augmentation of Legal Realism*, 36 AM. J. JURIS. 39, 52–53 (1991).

8. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

II. PHILOSOPHICAL THEORIES OF LAW

A. NATURAL LAW — Thomas Aquinas (1226-1274)

Natural law first appears in Cicero's explanation of the Greek Stoic philosophers who emphasized virtue, morals and ethics⁹ as appropriate guiding principles of behavior. Starting with Homer, Greek philosophers developed their theory of natural law in an attempt to explain the human conditions that are subject to nature's laws.¹⁰ The Greek philosophers deferred to the cosmic order of things and reconciled "fate" as following the laws of nature and order in the universe.¹¹

From the Romans, who adopted the Greek culture, up to the time of Thomas Aquinas, there existed various theories of the Greek version of natural law.¹² However, Aquinas, in his *Summa Theologiae*, developed natural law as God's guiding Providence, establishing God as the center of all order.¹³ Aquinas argued:

Among all others, the rational creature is subject to divine providence in the most excellent way, insofar as it partakes of a share of providence, being provident both for itself and for others. Thus it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end. This participation of the eternal law in the rational creature is called natural law.¹⁴

In order to best appreciate Aquinas's theory of natural law one should start with his understanding of human nature. In Question 75 in the *Summa* he states: "We shall treat first of the nature of man, and secondly of his origin."¹⁵ He refers to Dionysius, who stated that "three things are to be found in spiritual substances — essence, power, and operation...."¹⁶ Aquinas argues the soul is "the form of a body."¹⁷ His position is that "the nature of the species belongs [to] what the definition signifies; and in natural things the definition

9. See LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 39–40 (1987) (presenting an analysis of legal positivism and natural law).

10. See ALF ROSS, *ON LAW AND JUSTICE* 228–29 (3d ed. 2007).

11. Roscoe Pound, *Law and Morals*, 1 J. SOC. FORCES 350, 351 (1923) ("All discussion of . . . the relation of jurisprudence to ethics, goes back to the Greek thinkers . . .").

12. See generally Edward J. Damich, *The Essence of Law According to Thomas Aquinas*, 30 AM. J. JURIS. 79, 79 (1985) (arguing that for Aquinas an unjust law may have some legal attributes but does not have all the definitional elements and is not really a law).

13. Patrick Halligan, *The Environmental Policy of Saint Thomas Aquinas*, 19 ENVTL. L. 767 (1989) (arguing that Aquinas would not have given nonhuman creatures juridical standing to sue).

14. THOMAS AQUINAS, *SUMMA THEOLOGICA* 997 (Fathers of the English Dominican Province trans., 1915) (1274).

15. *Id.* at pt. I, q. 75.

16. *Id.*

17. *Id.* at pt. I, q. 75, art. 5.

does not signify the form only, but the form and the matter.”¹⁸ His treatise on natural law is found in the *Summa*, Questions 90 to 108. Aquinas begins with a definition of law as “a rule and measure of acts, whereby man is induced to act or is restrained from acting... the rule and measure of human acts is the reason, which is the first principle of human acts...law is something pertaining to reason.”¹⁹ A principal contribution of Aquinas’s theory on natural law is its reference to reason and the common good.²⁰ From Aquinas’s theological perspective he views man as a composition of body and soul capable of sensorial perceptions and argues that natural law was discernible by all.²¹ Reason, assisted by Revelation, became the human expression of God’s eternal law. Aquinas states that “[t]he natural law is promulgated by the very fact that God instilled it into man’s mind so as to be known by him naturally.”²²

The Catholic Church continues to adopt Aquinas’s natural law as its philosophical doctrine.²³ However, apart from its theological foundation in Catholic doctrine, natural law after Aquinas began to decline.²⁴ The Enlightenment philosophers — Hobbes,²⁵ Locke,²⁶ Rousseau²⁷ and Kant²⁸ — all made references to natural law, although within different constructs, as

18. *Id.* at pt. I, q. 75, art. 4.

19. *Id.* at pt. I-II, q. 90, art. 1.

20. *Id.* at pt. I-II, q. 90, art. 3 (“A law, properly speaking, regards first and foremost the order to the common good.”).

21. See SAMUEL WELLS & BEN QUASH, *INTRODUCING CHRISTIAN ETHICS* 91 (2010)

22. *Id.* at pt. I-II, q. 90, art. 4.

23. See POPE JOHN PAUL II, *VERITATIS SPLENDOR* 71 (Vatican trans., St. Paul Books & Media 1993) (explaining the foundations of Catholic moral theology and asserting “the immutability of the natural law itself, and thus the existence of ‘objective norms of morality’”).

24. Charles E. Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 *WAKE FOREST L. REV.* 539, 559 (1989) (“Application of the natural law is not limited to those who accept Catholic teaching.”).

25. See THOMAS HOBBS, *LEVIATHAN* 189 (Penguin Books 1968) (1651) (expressing the sentiment that natural law can be known through reason and that the individual has a natural right to preserve his or her own life). For a further explanation of Hobbes’ view of natural law, see NORBERTO BOBBIO, *THOMAS HOBBS AND THE NATURAL LAW TRADITION* (Daniela Gobeth trans., 1993); see also John Gahbauer, *Natural Law Theory Through the Eyes of Hobbes, Grotius and Pufendorf*, 2 *EUDAIMONIA: GEO. PHIL. REV.* 38, 39 (2005) (concluding that “there is little concordance as to what constitutes the natural law”).

26. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 264 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690) (The law of nature “willeth [sic] the peace and preservation of all mankind.”). For an analysis of Locke’s view of natural law, see Steven Forde, *Natural Law, Theology, and Morality in Locke*, 45 *AM. J. POL. SCI.* 396 (2001) (exploring Locke’s position that morality is grounded in natural law).

27. See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 9 (G.D.H. Cole trans., E.P. Dutton & Co. 1950) (1762) (“[R]enunciation [of liberty] is incompatible with man’s nature.”).

28. See, e.g., Jerome B. Schneewind, *Kant and Natural Law Ethics*, 104 *ETHICS* 53 (1993) (explaining the relationship between Kant’s moral philosophy and natural law interpretation of morality).

promulgations of the natural order. Contemporary defenders of natural law, within a jurisprudential context, view it as an assertion that “law is a part of ethics.”²⁹

Indeed, natural law principles are used to infuse ethical concepts into legal analysis.³⁰ The Greeks and Romans used natural law as an objective standard that measured civil laws. What are the objective ethical standards of justice?³¹ Consider the following objective legal standards of our common law such as “due care” in a negligence suit, “good faith” in a contracts claim, “reasonable care,” “due process of law” and “equality” that all have their origin in natural law theory. It is of interest to note that the Framers of the United States Constitution did not define many of our cherished notions of equality, due process and freedom of speech. A natural law proponent would argue they are inherent in our reasoning process based on our natural desire for justice.

Roscoe Pound, in his *Introduction to the Philosophy of Law* stated:

It was not that natural law expressed the nature of man [...] [Here he differs from Aquinas.] [R]ather it expressed the nature of government. One form of this variant was due to our doctrine that the common law of England was in force only so far as applicable to our conditions and our institutions. The attempt to put this doctrine philosophically regards an ideal form of the received common law as natural law and takes natural law to be a body of deductions from or implications of American institutions or the nature of our polity.³²

One could argue the common law has incorporated natural law principles such as “good faith” in a contract, “due care” and “reasonable care” in a negligence suit, and the notion that individuals are protected by the Bill of Rights.

John Finnis,³³ in his *Natural Law and Natural Rights*, argues that positive laws ought to conform to objective normative principles of natural law.³⁴ Finnis suggests that we are led to an understanding of the objective normative

29. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (Oxford Univ. Press 1980) (describing natural rights as having their foundation in natural law).

30. David O. Brink, *Legal Positivism and Natural Law Reconsidered Again*, 2 *CANADIAN J. L. & JURIS* 171 (1989) (suggesting that “we should distinguish, within legal philosophy, between theories of *legal validity* . . . and theories of *adjudication* . . .”); Igor Grazin, *Natural Law as a Forum of Legal Studies*, 37 *AM. J. JURIS* 1 (1992); Patrick Halligan, *The Environmental Policy of Saint Thomas Aquinas*, 19 *ENVTL. L.* 767 (1989).

31. R. George Wright, *Legal Obligation and the Natural Law*, 23 *GA. L. REV.* 997, 1011 (1989) (“What humans ought to do, what they are morally bound to do, flows from their distinctive nature.”); Rice, *supra* note 24, at 559.

32. ROSCOE POUND, *INTRODUCTION TO THE PHILOSOPHY OF LAW* 50 (Yale Univ. Press 1922).

33. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). For a critique of Finnis, see Anthony J. Lisska, *Finnis and Veatch on Natural Law in Aristotle and Aquinas*, 36 *AM. J. JURIS* 55 (1991) (critiquing Finnis’s natural law ethics); Valerie Kerruish, *Philosophical Retreat: A Criticism of John Finnis’ Theory of Natural Law*, 15 *U. W. AUSTRALIA L. REV.* 224 (1983); Ian Duncanson, *Finnis and the Politics of Natural Law*, 19 *U. W. AUSTRALIA L. REV.* 239 (1989).

34. See Lisska, *supra* note 33, at 60–61.

principles not by rigorous differential analysis but rather by “careful reflection, or meditation, directly to an awareness of self-evident, indemonstrable truths.”³⁵ Finnis and Aquinas regard the principles of natural law as self-evident. Lloyd L. Weinreb, in his *Natural Law & Justice*, agrees but finds that Finnis’s “extract[ion] of Aquinas’s doctrine of natural law from its context and treat[ment] [of] it as separable from the idea of a universal order according to the Eternal Law of God not only radically distorts Aquinas’s philosophy as a whole but misconceives the doctrine of natural law itself.”³⁶ He explains that deontologically there is an argument that “[l]aw’s very nature... impresses on it a minimum moral content.”³⁷ Whatever that “minimum moral content” might be determines the natural law advocates’ position that unjust laws need not be obeyed.³⁸

It is important to note that one need not have a religious belief to be a natural law proponent.³⁹ Robert George, another contemporary proponent of the natural law, posed the following question during a scholarly lecture: “[C]an natural law... provide the basis for a regime of human rights law without consensus on the existence and nature of God and the role of God in human affairs?”⁴⁰ In response, George goes on to say: “In my view, anybody who acknowledges the human capacities for reason and freedom has good grounds for affirming human dignity and basic human rights.”⁴¹

The critical doctrine of natural law is the principle that our positive law must comply with objective standards of fundamental rights that assure equality for all. Humankind has an absolute dignity that natural law recognizes and protects. Indeed, in his *Letter from Birmingham Jail*, Reverend Martin Luther King, Jr. invoked the natural law:

How does one determine whether a law is just or unjust? A just law is a man made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust.⁴²

35. WEINREB, *supra* note 9, at 109.

36. *Id.*

37. *Id.* at 101.

38. *Id.*

39. See, e.g., Lloyd L. Weinreb, *The Case for Natural Law Reexamined*, 38 AM. J. JURIS. 1 (1993); Jerome B. Schneewind, *Kant and Natural Law Ethics*, 104 ETHICS 53 (1993); R. George Wright, *Legal Obligation and the Natural Law*, 23 GA. L. REV. 997 (1989).

40. Robert George, *Natural Law*, 31 HARV. J. L. & PUB. POL’Y 171, 182 (2008).

41. *Id.*

42. MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM JAIL (Apr. 16, 1963), *reprinted in* 26 U.C. DAVIS L. REV. 835, 840 (1993).

We see natural law sentiments invoked in judicial decisions as well. The ruling that privacy is a fundamental implied constitutional right found in the Ninth Amendment is an example of a natural law theory.⁴³ More recently, the Court in *McDonald v. City of Chicago* upheld the right to bear arms as a fundamental right “necessary to our system of ordered liberty.”⁴⁴ Responding to Justice Breyer’s concern in his dissenting opinion that applying this right to state and local gun control laws would necessarily limit the “legislative freedom of the State,”⁴⁵ Justice Alito, writing for the majority, reiterated the Court’s earlier pronouncement that “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.”⁴⁶ It is of interest to recognize the use of natural law principles by both a reputedly liberal Justice (Breyer) and a reputedly conservative Justice (Alito). Concepts of “freedom” and “the enshrinement of constitutional rights” are inherently reasonable theories necessary for a just society.⁴⁷

B. LEGAL POSITIVISM — John Austin (1790-1854)

*“The matter of jurisprudence is positive law.”*⁴⁸

— John Austin, *Lectures on Jurisprudence*

John Austin, the founder of legal positivism, was the Chair of Jurisprudence at the University College London.⁴⁹ During his tenure as Chair, Austin published his lectures under the title of *The Province of Jurisprudence Determined*. Austin’s theory of legal positivism is useful in critical legal thinking as a reminder that law is not wholly dependant on a system of morality, but rather on a combination of utilitarian rights, duties, and obligations.⁵⁰ However, Austin does not deny that law can be analyzed from a moral perspective. In fact, Austin stressed just the opposite and insisted that law has a moral perspective.⁵¹

43. See *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

44. 130 S. Ct. 3020, 3042 (2010).

45. *Id.* at 3050.

46. *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008)).

47. *McDonald*, 130 S. Ct. at 3050 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008)).

48. 1 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* 88 (Robert Campbell ed., 3d ed. 1869).

49. See Stanley L. Paulson, *The Theory of Public Law in Germany 1914-1945*, 25 OXFORD J. LEGAL STUD. 525, 525 (2005).

50. Luke Robinson, *Moral Principles Are Not Moral Laws*, 2 J. ETHICS & SOC. PHIL. 3 (2008); Margot Stubbs, *Feminism and Legal Positivism*, 3 AUSTRALIAN J. L. & SOC’Y 63 (1986).

51. See DAVID LYONS, *ETHICS AND THE RULE OF LAW* 7 (1984); Carlos Santiago Nino, *Positivism and Communitarianism: Between Human Rights and Democracy*, 7 RATIO JURIS 14 (1994); Deryck Beyleveld & Roger Brownsword, *The Practical Difference Between Natural Law Theory and Legal Positivism*, 5 OXFORD J. LEGAL STUD. 1 (1985); H. Hammer Hill, *H.L.A. Hart’s Hermeneutic Positivism: On Some Methodological Difficulties in the Concept of Law*, 3 CANADIAN J. L. & JURIS. 113 (1990).

Austin divided the laws that guide human behavior into (1) divine law, (2) positive law and (3) positive morality.⁵² Divine law would include Revealed Law established by God.⁵³ Positive law is created by the sovereign of a community, such as a legislative body.⁵⁴ Positive morality would include positive laws and contemporary attitudes.⁵⁵ Positive law is judged to be moral or immoral depending on how it serves the welfare of others.⁵⁶ Austin admits to an objective morality founded in a theological conception of Divine Law.⁵⁷ He believed that all laws are coercive commands that must serve the general welfare. According to Roscoe Pound, Austin defines a right as “a ‘faculty’ residing in a determinate person by virtue of a given rule of law which avails against and answers to a duty lying on some other person.”⁵⁸

H. L. A. Hart formulated in his *The Concept of Law* the most widely accepted theory of Austin’s positive law.⁵⁹ Hart views law as social facts formed by individuals who internalize a standard and thereby create a rule.⁶⁰ Hart believes that moral obligations are determined by socially accepted rules.⁶¹ Hart makes a distinction between primary and secondary rules wherein the former create rights and duties, while the latter establish how and by whom primary rules may be enacted, amended or extinguished.⁶² Both Austin and Hart view law as a social phenomenon subject to empirical analysis.⁶³ Writing for the majority in *Citizens United v. Federal Election Commission*, Justice Kennedy ruled that “[t]here is simply no support for the

52. 2 JOHN AUSTIN, *supra* note 48, at 175–76.

53. *Id.* at 294

54. *Id.* at 337

55. Hill, *supra* note 51, at 115 (arguing “that moderate externalism cannot bear the weight that Hart places upon it”); David Dyzenhaus, *Why Positivism is Authoritarian*, 37 AM. J. JURIS. 83 (1992).

56. Hill, *supra* note 51, at X.

57. 2 JOHN AUSTIN, *supra* note 48, at 175–76.

58. Roscoe Pound, *Fifty Years of Jurisprudence*, 50 HARV. L. REV. 557, 571 (1937); *see also* LYONS, *supra* note 51, at 7.

59. H.L.A. HART, *THE CONCEPT OF LAW* (1961); *see also* *THE AUTONOMY OF THE LAW, ESSAYS ON LEGAL POSITIVISM* (Robert George ed., 1999) (exploring the current state of legal positivism in a series of essays written by leading contemporary philosophers of the law); LYONS, *supra* note 51, at 51; Rosina L. Hunt, *Natural Law v. Positive Law: Interpreting Morality*, 28 NEW ENG. L. REV. 231 (1993).

60. William C. Starr, *Law and Morality in H.L.A. Hart’s Legal Philosophy*, 67 MARQ. L. REV. 673, 682 (1984) (“Hart holds that law is an instrument of social control.”); Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart and Sacks*, 29 ARIZ. L. REV. 413 (1987).

61. *See* Starr, *supra* note 60, at 681.

62. Wellman, *supra* note 60, at 474 (“Dworkin’s kinship with Hart . . . implies that the Legal Process tradition is more vital than has commonly been supposed.”).

63. *See generally* David Dyzenhaus, *Why Positivism is Authoritarian*, 37 AM. J. JURIS. 83 (1992) (arguing that contemporary positivists collaborate in an authoritarian political project); Deryck Beyleveld & Roger Brownsword, *The Practical Difference Between Natural Law Theory and Legal Positivism*, 5 OXFORD J. LEGAL STUD. 1, 9 (1985) (“Revelation, Austin holds, is an incomplete guide to the will of God, utility is no index of it, and appeals to conscience are a cloak for superstition and ignorance.”); Margot Stubbs, *Feminism and Legal Positivism*, 3 AUSTRALIAN J. L. & SOC’Y 63 (1986); Pound, *supra* note 58.

view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations.”⁶⁴ Quoting from the dissent in *United States v. Automobile Workers*, Justice Kennedy states:

Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important—vitaly important—that all channels of communications be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.⁶⁵

Hart’s version of positive law would argue that we have a moral obligation based on the Constitution to include all political points of view in the election process.

C. UTILITARIANISM — John Stuart Mill (1806-1873)

“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”⁶⁶

— John Stuart Mill, *On Liberty*

John Stuart Mill was one of the most influential philosophers in England during the nineteenth century.⁶⁷ Mill was an empiricist and would accept and believe a proposition only if it could be experienced.⁶⁸ One could trace the logic of the American legal realism movement to his theory of utilitarianism. Ronald Dworkin, in his text *Taking Rights Seriously*, states that Mill “deploys a pessimistic theory of human nature, emphasizes the value of cultural and historical constraints on egotism, and insists on the role of the state in educating its citizens away from individual appetites and toward social conscience.”⁶⁹ David Lyons, in his text *Ethics and the Rule of Law*, argues that Mill attempted to reconcile moral rights as the principle of justice on utilitarian grounds.⁷⁰ Professor Lyons states “the idea that people have natural rights can be understood apart from dubious ideas about ‘self-evidence.’... [A moral right is one] that does not depend for its existence (as some legal rights

64. 130 S. Ct. 876, 906 (2010).

65. *Id.* at 901 (quoting *U.S. v. Int’l Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting)).

66. JOHN STUART MILL, *ON LIBERTY* 6 (Longmans, Green, & Co. 1913).

67. Fred Wilson, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, *John Stuart Mill* (Edward N. Zalta ed., 2009), available at <http://plato.stanford.edu/entries/mill/>.

68. *See id.*

69. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 260 (1978).

70. LYONS, *supra* note 51, at 128.

seem to do) on some sort of social recognition or enforcement.”⁷¹ Utilitarian ethics, according to Mill, establish principles of justice as “moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life.”⁷² Holly Smith Goldman asserts that utilitarianism

identifies effects on human welfare as the criterion to use in assessing social phenomena... [and] presents us with a single rule which covers all decision-making... [and] promises to provide us with a precise formula for making decisions... by a process of calculating the effect on human welfare which is relatively invulnerable to the whims and biases of all-too-human decision makers.⁷³

This “single rule” is the utilitarian principle of the greatest good for the greatest number, which contemplates a grand scheme of benevolence and seeks out the greater happiness of the stakeholders.⁷⁴ Utilitarianism may be analyzed by dividing its theory into two principles: act-utilitarianism and rule-utilitarianism.

Act-utilitarianism considers the net happiness for all the stakeholders.⁷⁵ It has been criticized as an ethical theory that may justify violating a person’s rights for the long-range benefit and happiness of society.⁷⁶ Act-utilitarianism is a teleological ethical theory that is more concerned with the consequences of the act on society, than with the morality of the act itself.⁷⁷ An example of this is section 230 of the Communications Decency Act, which grants federal immunity from liability to a provider of an interactive web site for content posted by an outsider.⁷⁸ The Supreme Court took a utilitarian approach in *United States v. American Library Ass’n*, holding that federal legislation requiring libraries to utilize Internet filtering software as a prerequisite to receiving federal funding did not violate patrons’ First Amendment rights.⁷⁹ Writing for the plurality, Justice Rehnquist stated that “the government has broad discretion to make content-based judgments in deciding what private

71. *See id.*; *see also* Marco J. Jimenez, *The Value of a Promise: A Utilitarian Approach to Contract Law Remedies*, 56 UCLA L. REV. 59, 126 (2008) (“[T]he utilitarian approach helps reconcile consequentialism and nonconsequentialism within contract law by maximizing efficiency through the mechanism of promise keeping.”).

72. JOHN STUART MILL, UTILITARIANISM 75 (Forgotten Books 2008).

73. Holly Smith Goldman, *Rawls and Utilitarianism*, in JOHN RAWLS’ THEORY OF SOCIAL JUSTICE: AN INTRODUCTION 346–47 (Gene Blocker & Elizabeth H. Smith eds., 1980).

74. *See id.* at 346.

75. *See* Internet Encyclopedia of Philosophy, Ethics, <http://www.iep.utm.edu/ethics/> (last visited Mar. 23 2011).

76. *Id.*

77. *See id.*

78. 47 U.S.C. § 230(c) (2011).

79. *United States v. Am. Library Ass’n*, 539 U.S. 194, 214 (2002) (plurality opinion).

speech to make available to the public.”⁸⁰ In a decision some say “undermines the court’s landmark ruling in *Miranda v. Arizona*, which has helped preserve the constitutional right to remain silent for more than four decades,”⁸¹ the Supreme Court held in *Berghuis v. Thompkins* “an accused who wants to invoke his or her right to remain silent [must] do so unambiguously.”⁸² The Court found that when the defendant responded to a detective’s question after a three hour interrogation during which he primarily remained silent, that response was a sufficient waiver of his right to remain silent.⁸³ Seemingly adopting a utilitarian approach that focuses on the benefit to society, Justice Kennedy writing for the majority stated: “A requirement of an unambiguous invocation of Miranda rights results in an objective inquiry that ‘avoid[s] difficulties of proof and... provide[s] guidance to officers’ on how to proceed in the face of ambiguity.”⁸⁴

Rule-utilitarianism relies on case precedent but allows for judicial review authorizing the overruling of a law that is no longer effective. It is yoked to tradition and less concerned with subjective personal judgments.⁸⁵ Although not based on the formal principles of Kant’s “categorical imperatives,” it does rely on empirical consequences that are often aimed at the long-range benefit to society.⁸⁶ According to both act and rule utilitarianism the good consequences of the act must be the happiness of society for it to be ethical.⁸⁷

D. LEGAL REALISM — Justice O. W. Holmes, Jr. (1841-1935)

*“The real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire.”*⁸⁸

— Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*

80. *Id.* at 204.

81. Steven Shapiro, *The Thompkins Decision: A Threat to Civil Liberties*, WALL ST. J., June 8, 2010, at A19.

82. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010).

83. *Id.*

84. *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 458–59 (1994)).

85. See Andrew R. Strauss, Note, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1563–64 (2002).

86. *Id.* at 1563 (citing Marcia Baron, *Kantian Ethics*, in THREE METHODS OF ETHICS: A DEBATE 3 (1997)); see also *infra* Part II.E.

87. M. Francis Reeves, *Ethical Theories: Tools for Decision Making* 31, 38, 40, app. 22 (unpublished notes).

88. OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210, 238 (1920).

Justice Holmes is considered to be the founder of legal realism.⁸⁹ Holmes rejected legal fundamentalism that used the rule of law as an objective standard of jurisprudence. Legal realism is a method of analyzing a transaction and allowing the facts to dictate their own rules rather than imposing external regulations.⁹⁰ William L. Twining of the University argues that legal realism affected social change and legal reform by appealing to values that are not found in appellate court decisions or other material traditionally used in law school education.⁹¹ Karl N. Llewellyn believes that legal realism was not an ideology or coherent legal philosophy but rather a method or technique, which could be used by legal scholars regardless of their philosophy.⁹² This notion of legal realism as a method or technique to assist one in understanding the value orientation of a legal decision is a viable option to scholars who are concerned with the philosophical implications of decisional law.⁹³ Roscoe Pound, a legal realist and the founder of sociological jurisprudence, suggested as early as 1910 that law professors should be students of sociology, economics and politics to remedy the backwardness of law in meeting social problems.⁹⁴ Current law school curricula follow that counsel with their many diverse elective courses and legal movements in such areas as Law & Society, Technology & Law, Law & Economics, Protecting the Environment, and Feminist Studies.

What eventually emerged from the legal realism movement was a belief that law is political and involved with social phenomena.⁹⁵ One can look to the Supreme Court's decision in *Massachusetts v. EPA* to find evidence of

89. See Thomas A. Reed, *Holmes and the Paths of the Law*, 37 AM. J. LEGAL HIST. 273, 301 (1993) ("To talk of reasoning from behind 'the veil of ignorance' would have been for Holmes to talk nonsense. People are social creatures, marked by sex, race, intellectual capacity. To decide without reference to oneself, or to our culture's place in history, was to Holmes absurd, misguided and arrogant . . .").

90. N.E.H. Hull, *Some Realism About the Llewellyn-Pound Exchange Over Realism: The Newly Uncovered Private Correspondence, 1927-1931*, 1987 WIS. L. REV. 921, 966 (1987).

91. See WILLIAM L. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 5-7 (1973).

92. KARL N. LLEWELLYN, THE COMMON LAW TRADITION DECIDING APPEALS 510 app. B (1960).

93. Bruce W. Brower, *Dispositional Ethical Realism*, 103 ETHICS 221, 222 (1993) ("Dispositional ethical realism is the view that ethical properties are specified by empirically discoverable, reductive accounts that treat moral properties as . . . dependent on evaluators' responses or dispositions to respond.").

94. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 35-36 (1910).

95. See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 524 (1990) ("The truth about legal realism for lawyers mandates that legal ethics acknowledge the distinction that lawyers have to shape the . . . legal rules Legal ethics owes the profession and society a credible account of how that distinction should be exercised."); see also Jeffrey Goldsworthy, *Realism About the High Court*, 18 FED. L. REV. 27, 39 (1988) ("[I]f people are told that the Court has never been, and cannot be, apolitical . . . then many will conclude that 'anything goes' — the only question being whether the judges' politics are to be 'conservative' or 'progressive', a question to be settled (as it is now in the United States) at the time of their appointment."); Allan Ides, *Realism, Rationality and Justice Byron White: Three Easy Cases*, 1994 B.Y.U. L. REV. 283, 283-86; John O. McGinnis & Michael Rappaport, *David Souter's Bad Constitutional History*, WALL ST. J., June 14, 2010, at A15 ("A judge, [Souter] said, must determine which of the conflicting constitutional values should become our fundamental law by taking account of new social realities.").

legal realism.⁹⁶ In that case the Court recognized Massachusetts' right to sue the EPA over the negative impact of global warming on the state.⁹⁷ The Supreme Court determined that The Clean Air Act "authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a 'judgment' that such emissions contribute to climate change."⁹⁸ Recognizing that "[a] well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere,"⁹⁹ Justice Stevens concluded that "[the] EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore 'arbitrary, capricious... or otherwise not in accordance with law.'"¹⁰⁰ The Court's reliance on other disciplines, in this case evidence from the scientific community, as a means to resolve a legal dispute is a hallmark of legal realism.

The Court also adopted a legal realist approach in *Bilski v. Kappos*.¹⁰¹ In affirming the patentability of business methods, the Court recognized that "times change [and] [t]echnology and other innovations progress in unexpected ways."¹⁰² Quoting the Court's decision in *Diamond v. Chakrabarty*, the Court went on to state that "[a] categorical rule denying patent protection for 'inventions in areas not contemplated by Congress... would frustrate the purposes of patent law.'"¹⁰³ The legal realists were interdisciplinary and their legal casebooks acknowledged the reliance on history, economics, sociology and psychiatry as relevant to legal education.¹⁰⁴ As technology and business methods continue to co-evolve, courts can be expected to modify rules of law based on the theory of legal realism, such as by integrating science with traditional legal syllogism when resolving disputes.

96. See *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

97. *Id.* at 505.

98. *Id.* at 528.

99. *Id.* at 504–05 (2007).

100. *Id.* at 534.

101. See 130 S. Ct. 3218 (2010).

102. *Id.* at 3227.

103. *Id.* (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980)).

104. See LAURA KALMAN, *LEGAL REALISM AT YALE 1927–1960*, at 4 (1986). The guidelines established for business schools by the American Association of Collegiate Schools of Business have adopted a similar interdisciplinary attitude toward business education.

E. THE CATEGORICAL IMPERATIVES — Immanuel Kant (1724-1804)

*“Enlightenment is man’s emergence from his self-incurred immaturity.... For enlightenment of this kind; all that is needed is freedom. And the freedom in question is the most innocuous form of all: freedom to make public use of one’s reason in all matters.”*¹⁰⁵

— Immanuel Kant, *Was ist Aufklärung* [*What is Enlightenment?*]

Kant is considered by many authorities as the most prominent philosopher of his generation, and he wrote extensively about morals and ethics. With respect to ethics he is best known for his “categorical imperatives.”¹⁰⁶ For example: “I ought never to act except in such a way that I can also will that my maxim should become a universal law.”¹⁰⁷ One could paraphrase that to mean: What if everyone did what I am about to do? What would be the result of my conduct on society?

Another of his famous categorical imperatives is: “Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.”¹⁰⁸ This means that an act should be moral or ethical as an end in itself and not merely as a means to accomplish an ulterior motive. Kant’s moral philosophy is a deontological theory.¹⁰⁹ One could say that deontology demands that we follow a duty arising from a contract or a relationship that obligates a certain course of action. Kant’s categorical imperatives are useful in case analyses based on violated contract or fiduciary relationships. The law of contracts and torts relies on duties imposed by law, with a Kantian obligation to obey their dictates. In *United States v. Philip Morris USA* the DC Circuit affirmed a district court ruling that leading tobacco companies had committed fraud

105. Immanuel Kant, *An Answer to the Question: “What is Enlightenment?”* in KANT: POLITICAL WRITINGS 54–55 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 1970).

106. See Internet Encyclopedia of Philosophy, Kant, <http://www.iep.utm.edu/kantmeta> (last visited Mar. 23, 2011).

107. IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 14 (James W. Ellington trans., Hackett Publishing Co. 3d ed. 1993).

108. *Id.* at 36.

109. See Larry Alexander & Michael Moore, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *Deontological Ethics* (Edward N. Zalta ed., 2008), available at <http://plato.stanford.edu/entries/ethics-deontological/> (noting that:

The word deontology derives from the Greek words for duty (deon) and science (or study) of (logos). In contemporary moral philosophy, deontology is one of those kinds of normative theories regarding which choices are morally required, forbidden, or permitted. In other words, deontology falls within the domain of moral theories that guide and assess our choices of what we ought to do (deontic theories)).

against the general public for several decades.¹¹⁰ In reaching his conclusion, District Court Judge Kessler held, in part:

[I]t is absurd to believe that the highly-ranked representatives and agents of these corporations and entities had no knowledge that their public statements were false and fraudulent. The Findings of Fact are replete with examples of C.E.O.s, Vice-Presidents, and Directors of Research and Development, as well as the Defendants' lawyers, making statements which were inconsistent with the internal knowledge and practice of the corporation itself.¹¹¹

Judge Kessler's holding adopts Kant's categorical imperative of "truth telling" expressed as: "I ought never to act except in such a way that I can also will that my maxim should become a universal law."¹¹² The record clearly indicates that the Philip Morris executives violated that imperative.

F. THE ORIGINAL POSITION — John Rawls (1921 – 2002)

*"A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled."*¹¹³

— John Rawls, *A Theory of Justice*

John Rawls's *A Theory of Justice* established a renaissance in political theory.¹¹⁴ His analysis of justice is useful to a discussion of ethics and how it applies to contemporary decisional law, and his criticism of our notions of liberty and equality has been widely discussed in law review literature.¹¹⁵

110. 566 F.3d 1095, 1127 (D.C. Cir. 2009).

111. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 853 (D.D.C. 2006).

112. Immanuel Kant, *Groundwork of the Metaphysics of Morals* 70 (H.J. Paton ed., HarperCollins 2009) (1785).

113. JOHN RAWLS, *A THEORY OF JUSTICE* 235 (Oxford Univ. Press 1971).

114. See Victoria Meikle, Book Review, 36 MCGILL L. J. 692 (1991) (reviewing CHANDRAN KUKATHAS & PHILIP PETTIT, *RAWLS "A THEORY OF JUSTICE" AND ITS CRITICS* (1990)) (providing a critique of Rawls' contractarian argument).

115. See, e.g., Michael P. Zuckert, *The New Rawls and Constitutional Theory: Does It Really Taste That Much Better?*, 11 CONST. COMMENT. 227, 227–28 (1994); Rex Martin, *Rawls's New Theory of Justice*, 69 CHI.-KENT L. REV. 737 (1994); S. A. Lloyd, *Relativizing Rawls*, 69 CHI.-KENT L. REV. 709 (1994); Stephen M. Griffin, *Political Philosophy Versus Political Theory: The Case of Rawls*, 69 CHI.-KENT L. REV. 691 (1994); Joan A. Pisarchik, *A Rawlsian Analysis of the Immigration Act of 1990*, 6 GEO. IMMIGR. L. J. 721, 731 (1992) ("[I]mmigrants are generally those who are worst off because they have the fewest social and economic rights. They are the recipients of unequal treatment and such unequal treatment is allowable in a Rawlsian framework only if . . . the least advantaged members of society benefit.").

Legal scholars would do well to expose themselves to his ideas as an approach to understanding our legal system in a new light, one that is especially sensitive to minority interests.

In *A Theory of Justice*, Rawls writes:

During much of modern moral philosophy the predominant systematic theory has been some form of utilitarianism. One reason for this is that it has been espoused by a long line of brilliant writers who have built up a body of thought truly impressive in its scope and refinement.... Those who criticized them... failed... to construct a workable and systematic moral conception to oppose it.... What I have attempted to do is to generalize and carry to a higher order of abstraction the traditional theory of the social contract.... The theory that results is highly Kantian in nature.¹¹⁶

Rawls posits relationships between individuals and the community and develops two principles of justice that he believes would be applied by people in “the original position” (*i.e.*, a group of people who are unaware of their social status in society and come together to form a social contract).¹¹⁷

He defines the “original position” as a community that would apply “principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association.”¹¹⁸ Rawls uses the original position as a hypothetical situation where

no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like. The principles of justice are chosen behind a veil of ignorance.... Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.¹¹⁹

Rawls argues that two principles of justice would be chosen by those in the original position.¹²⁰ First, the Equal Liberty Principle: “[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.”¹²¹ Notice how this differs from a utilitarian position of “the greater good for the greater number” that necessitates the “lesser number” will not be granted “equal rights.” Many case decisions and legislative laws adopt the utilitarian theory and sacrifice minority interests.¹²²

116. RAWLS, *supra* note 113, at vii–viii.

117. Leif Wenar, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *John Rawls* (Edward N. Zalta ed., 2008), available at <http://plato.stanford.edu/entries/rawls/>.

118. *Id.* at 11.

119. *Id.* at 12.

120. *Id.*

121. *Id.*

122. See *supra* notes 102–122 and accompanying text.

Second, the Democratic Equality Principle: “[S]ocial and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.”¹²³

Rawls would insist that equality and freedom are the two basic political principles that must be applied by those who deliberate in the original position behind a veil of ignorance and establish contractual rules for their public institutions and individual welfare. Members of his hypothetical group would not need to reject their personal beliefs and values providing their credence to a personal philosophy; moral standards or religious beliefs are not imposed on others.¹²⁴ Judicial philosophy that argues for affirmative action would support a Rawlsian theory. Cases such as *Regents of the University of California v. Bakke*¹²⁵ and *Grutter v. Bollinger*,¹²⁶ which uphold affirmative action policies in institutes of higher education, illustrate judicial adoption of Rawls’ philosophical principles of equal liberty and democratic equality.

G. PRIMA FACIE DUTIES — W.D. Ross (1877-1971)

*“Our duty, then, is not to do certain things which will produce certain results. Our acts, at any rate our acts of special obligation, are not right because they will produce certain results — which is the view common to all forms of utilitarianism.”*¹²⁷

— William David Ross, *The Right and the Good*

W.D. Ross was a “moral intuitionist” who established prima facie duties that are generally binding, irrespective of their results, based on a moral obligation to perform.¹²⁸ For instance he stated, “[u]nless stronger moral obligations override, one ought to keep a promise.”¹²⁹ He argues, however, that it is more important that our duties fit the facts than Kant’s absolute obligation to always tell the truth regardless of the consequences.¹³⁰ Ross states that in exceptional cases “the consequences of fulfilling a promise...

123. *Id.*

124. See LYONS, *supra* note 51, at 190.

125. 438 U.S. 265, 318 (1978) (holding that the use of race as a criterion for admission at higher education institutions is permissible).

126. 539 U.S. 306, 341 (2003) (“[I]n the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School’s race-conscious admissions program does not unduly harm nonminority applicants.”).

127. WILLIAM DAVID ROSS, *THE RIGHT AND THE GOOD* 46 (1930).

128. Jan Garrett, *A Simple and Usable (Although Incomplete) Ethical Theory Based on the Ethics of W.D. Ross*, W. KY. UNIV. (Aug. 10, 2004), <http://www.wku.edu/~jan.garrett/ethics/rossethc.htm>.

129. *Id.*

130. ROSS, *supra* note 127, at 18–19.

would be so disastrous to others that we judge it right not to do so.”¹³¹ From a legal perspective his “promise keeping” duty is useful in developing legal arguments based on contractual obligations or implied tortious duties. Of special interest is his insistence that “[t]he moral order... is just as much part of the fundamental nature of the universe... as is the spatial or numerical structure expressed in the axioms of geometry or arithmetic.”¹³² This proposal compels Ross to develop his ethical theory on the basis of conflicting duties that often create ethical dilemmas that can always be resolved because one of his prima facie duties has preference over another. Selecting the most important duty is his way of resolving an ethical dilemma.

Since our judiciary is often called upon to resolve cases where the facts create conflicting duties, for instance in employment disparate-treatment (the employer’s implied duty not to engage in intentional discrimination) and disparate-impact (the employer’s implied duty prohibiting unintentional discrimination),¹³³ it is useful to review Ross’s prima facie duties as obligations implied as promises and observe how our jurisprudence often reflects a Rossian ethical theory.¹³⁴

Ross argues that an actual duty is accompanied by a moral duty to perform and he provides a list of prima facie duties to be used as guidelines in resolving ethical dilemmas.¹³⁵ Courts often apply these duties when confronted with a dispute, thereby adopting moral obligations into our jurisprudence.

The first duty, of fidelity, relates to promise keeping that may be contractual, express or implied, under the circumstances.¹³⁶ From a legal perspective one can trace contractual duties from the contract terms and conditions and implied duties from a fiduciary relationship¹³⁷ or from duties implied under tort law. Court decisions that discuss duties expressed or implied in law are following Ross’s notion of prima facie duties of fidelity as obligations to keep and perform promises. Next, the duty of reparation is

131. *Id.* at 18.

132. *Id.* at 29–30.

133. *See infra* Part III.

134. ROSS, *supra* note 127, at 46–47.

135. *Id.*

136. *Id.* at 21.

137. In 1939 the Supreme Court of Delaware in *Guth v. Loft* ruled that corporate directors owe the fiduciary duties of care and loyalty to the corporation and its shareholders. 5 A.2d 503, 510 (Del. 1939). These fiduciary duties continue to be recognized by the courts. *See, e.g.*, *Brown v. Brewer*, 2010 U.S. Dist. LEXIS 60863, at *8 (C.D. Cal. June 17, 2010) (“[A]ll directors and officers of a corporation owe their shareholders fiduciary duties of loyalty and care.”).

a duty to compensate for injuries done to others.¹³⁸ Contract and tort damages are based on the defendant's duty to compensate the aggrieved plaintiff for loss resulting from the wrongful acts or omissions of the defendant.¹³⁹ When a court awards punitive damages, it is engaging in providing compensation to the plaintiff based on the prima facie duty of reparation for the defendant's egregious harmful conduct.¹⁴⁰ The duty of gratitude is founded on an obligation when granted a benefit, individual or social, without cost, and has relevance to a philanthropic undertaking, including the tax advantages attributable to non-profit corporations.¹⁴¹ The non-profit entity, in return for the tax advantage provided by the state, has a duty to perform a social service to the public. Our common law of negligence is based on the duty of non-malefeasance—not to harm others.¹⁴² This obligation is resolved by the courts¹⁴³ where a duty to perform carefully has been unintentionally violated resulting in injury to the defendant.

Duty to prevent harm. One could argue that statutes such as Title VII of the Civil Rights Act¹⁴⁴ that prohibit employment discrimination utilize this duty to prevent harm to the employee. With the duty of beneficence,¹⁴⁵ Ross is concerned with a duty to enhance the well-being of others. Statutory laws often follow that precept in an attempt to remedy a social malady.¹⁴⁶ The duty of self-improvement¹⁴⁷ relates to laws that obligate individuals to help themselves, such as probation and compulsory driver's education in driving under the influence cases. Ross's duty of justice¹⁴⁸ makes for an interesting comparison with Rawls's Equal Liberty Principle. Ross, along with Rawls, finds a social duty to distribute societal benefits fairly. The federal tax code

138. WILLIAM DAVID ROSS, FOUNDATIONS OF ETHICS 289 (Clarendon Press 1949).

139. *See, e.g.*, U.C.C. §§ 2-702 (sellers' remedies for breach), 2-711 (buyers' remedies for breach) (2004).

140. *See Williams v. Philip Morris, Inc.*, 176 P.3d 1255, 1258 (Or. 2008). The Oregon Supreme Court upheld a \$79.5 million award against the cigarette manufacturer.

141. ROSS, *supra* note 127, at 21–27; *see* 26 U.S.C. § 501(e)(3) (2006).

142. ROSS, *supra* note 127, at 21, 26.

143. *See, e.g.*, *Wyeth v. Levine*, 129 S. Ct. 1187, 1204 (2009) (upholding a decision of the Vermont Supreme Court that allowed a plaintiff to recover from a drug manufacturer for an inadequate warning label).

144. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

145. ROSS, *supra* note 127, at 21.

146. *See, e.g.*, 26 U.S.C. § 213 (2006) (authorizing a tax deduction for medical and dental expenses).

147. ROSS, *supra* note 127, at 21.

148. *Id.* at 23.

contains provisions that follow this duty.¹⁴⁹ The Patient Protection and Affordable Care Act¹⁵⁰ is based on a duty to distribute health care to all as a precept of social justice.

A judge's application of Ross's prima facie duties to a case relates to his or her subsequent characterization as being liberal or conservative, a judicial activist or a strict constructionist. Ross provides useful guidelines in analyzing a case from a philosophical and ethical perspective.

III. PHILOSOPHICAL THEORY AND *RICCI V. DESTEFANO*

*"Learned Hand, who was one of America's best and most famous judges, said he feared a lawsuit more than death or taxes.... People often stand to gain or lose more by one judge's nod than they could by any general act of Congress or Parliament."*¹⁵¹

— Ronald Dworkin, *Law's Empire*

In *Law's Empire*, Ronald Dworkin sets the stage for the development of judicial philosophy by indicating the power of the judiciary over the average person's life. How judges decide cases and use this power involves their background, personal experience and philosophy. Supreme Court decisions reflect not only how the institution has functioned throughout American history but also how jurists think.¹⁵²

A. Philosophical Analysis of *Ricci v. DeStefano*

The facts of the case disclose a New Haven, Connecticut, firefighter exam used to fill vacant lieutenant and captain positions.¹⁵³ The results of the exam indicated that white candidates scored higher than minority candidates, and the City decided to disregard the results based on statistical racial disparity.¹⁵⁴ White and Hispanic firefighters who passed the exam sued the City when it refused to certify the test results, alleging that such actions discriminated against them based on their race in violation of Title VII of the Civil Rights Act of 1964.¹⁵⁵

149. One such provision is the Earned Income Tax Credit offered to low to moderate income families to either offset a tax liability or generate a refund. See 26 U.S.C. § 32 (2006).

150. Pub. L. No. 111-148, 124 Stat. 119 (2010).

151. DWORKIN, *supra* note 4, at 1.

152. Justice Holmes' essay *The Path of the Law*, written while he was a member of the Supreme Judicial Court of Massachusetts, emphasized legal study as the prediction of a judge's decision. *Id.* at 461.

153. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664 (2009).

154. *Id.*

155. *Id.* See also Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified

The City responded that had it certified the test results it could be accused of adopting a practice having a disparate impact on minority firefighters.¹⁵⁶ The district court granted summary judgment for the defendants and the Second Circuit affirmed.¹⁵⁷ The Supreme Court disagreed with the lower courts and held that in disregarding the tests results the City intentionally discriminated against the plaintiffs in violation of Title VII.¹⁵⁸

Justice Kennedy delivered the opinion of the Court joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito.¹⁵⁹ Justice Ginsberg filed a dissenting opinion joined by Justices Stevens, Souter and Breyer.¹⁶⁰ Of interest is that the so-called conservative block joined Justice Kennedy, and the liberal block joined Justice Ginsburg in her dissent.

The theories presented above provide insight into the judicial reasoning employed by the opinion writers in this case. Writing for the majority, Justice Kennedy expresses the following view of Title VII:

As enacted in 1964, Title VII's principal nondiscrimination provision held employers liable only for disparate treatment. That section retains its original wording today. It makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."¹⁶¹

The opinion goes on to explain the nature of disparate impact discrimination. "The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact."¹⁶² The Court recognized this prohibition in *Griggs v. Duke Power Co.*¹⁶³ and Congress later codified it in the Civil Rights Act of 1991.¹⁶⁴ "Under the disparate-impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses 'a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.'"¹⁶⁵

as amended at 42 U.S.C. §§ 2000e to 2000e-17).

156. 129 S. Ct. at 2664.

157. *Id.*

158. *Id.*

159. *Id.* at 2663.

160. *Id.*

161. *Id.* at 2672.

162. *Id.*

163. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

164. Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (codified as amended in 42 U.S.C. § 2000e-2(k) (2011)).

165. 129 S. Ct. at 2673 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006)).

Natural law. Recognizing that the Court should interpret statutory law to give effect to both disparate treatment and disparate impact concerns, Justice Kennedy stated:

The purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color. In searching for a standard that strikes a more appropriate balance, we note that this Court has considered cases similar to this one, albeit in the context of the Equal Protection Clause of the Fourteenth Amendment. The Court has held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a strong basis in evidence that the remedial actions were necessary.¹⁶⁶

This reference to the Equal Protection Clause in establishing a standard when disparate-impact and disparate-treatment are in conflict is of interest when searching for a judicial philosophy supporting the Court's position. The Bill of Rights is the foundation for developing government equality and freedoms based on a natural law theory of objective fundamental rights. The notion of applying the Equal Protection Clause as a remedy for past racial discrimination as the Court did in *Ricci* also appeals to a sense of fairness when there is empirical evidence to support the injustice of race discrimination. Natural law principles found in the Bill of Rights protect individuals from injustices including racial discrimination that violate human dignity and the common good.¹⁶⁷ Justice Scalia, concurring in *Ricci*, states: "Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection? The question is not an easy one."¹⁶⁸ The Court continues to be conscious of a potential conflict between Title VII and its implementation by an employer that could violate the Equal Protection Clause. This constitutional guarantee has its roots in the natural law principal of fairness as part of our social contract and a conservative justice would be reluctant to read into that clause a guarantee of equal protection.

In Roscoe Pound's *Introduction to the Philosophy of Law*, he states that "natural law [should] [express] the nature of government."¹⁶⁹ One could argue the nature of government is to provide equal protection of the law including preventing employment discrimination on the basis of race and color. Professor Pound further states that natural law principles are

166. *Id.* at 2675 (internal quotations omitted).

167. See AQUINAS, *supra* note 14, at 995 ("A law . . . regards . . . the order to the common good.").

168. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

169. POUND, *supra* note 32, at 50.

“protected by the Bill of Rights.”¹⁷⁰ The philosophical theory underlying the Equal Protection clause is a natural law principle obligating an employer to equally treat employees in a fair and equitable manner. Justice Ginsburg’s dissenting opinion stated in part:

In construing Title VII,... equal protection doctrine is of limited utility. The Equal Protection Clause, this Court has held, prohibits only intentional discrimination; it does not have a disparate-impact component.... Title VII, in contrast, aims to eliminate all forms of employment discrimination, unintentional as well as deliberate. Until today... this Court has never questioned the constitutionality of the disparate-impact component of Title VII, and for good reason. By instructing employers to avoid needlessly exclusionary selection processes, Title VII’s disparate-impact provision calls for a “race-neutral means to increase minority... participation” — something this Court’s equal protection precedents also encourage.... Observance of Title VII’s disparate-impact provision... calls for no racial preference, absolute or otherwise. The very purpose of the provision is to ensure that individuals are hired and promoted based on qualifications manifestly necessary to successful performance of the job in question, qualifications that do not screen out members of any race.¹⁷¹

Justice Ginsburg builds her argument on the legal theory that disparate-impact (unintentional discrimination) is not inconsistent with the constitutionality of Title VII and its very purpose calls for no racial preference. Its purpose is to assure that “individuals are hired and promoted based on qualifications... necessary to successful performance of the job in question.”¹⁷² The very essence of natural law would support the “no racial preference, absolute or otherwise” holding of Justice Ginsburg’s argument.¹⁷³ Lon Fuller would agree with Justice Ginsburg’s dissent as consistent with his position that the natural law’s essential function is to “achiev[e] a certain kind of order... through subjecting people’s conduct to the guidance of general rules by which they may themselves orient their behavior....”¹⁷⁴ The dissent relies on natural law insofar as it provides rules (*i.e.* Title VII) that require employers to behave in a manner that will achieve social justice.¹⁷⁵

Legal Positivism. Contemporary scholars continue to explore legal positivism. Professor Brian Bix of the University of Minnesota School of Law summarizes this theory as follows: “[i]n simple terms, legal positivism is built around the belief, the assumption or the dogma that the question of

170. ROSCOE POUND, *NEW PATHS OF THE LAW* 13 (Univ. Neb. Press 1950).

171. *Ricci*, 129 S. Ct. at 2700-01 (Ginsburg, J., dissenting) (citations omitted).

172. *Id.* at 2701.

173. *Id.*

174. Lon L. Fuller, *A Reply to Professors Cohen and Dworkin*, 10 *VILL. L. REV.* 655, 657 (1965).

175. *Ricci*, 129 S. Ct. at 2689–2710 (Ginsburg J., dissenting).

what is the law is separate from (and must be kept separate from) the question of what the law should be.”¹⁷⁶ Bix quotes Austin for further support:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.¹⁷⁷

When Congress enacted Title VII it recognized the social problem of discrimination and stated the prohibition creating a legal and moral duty based on the social phenomenon of race discrimination in the workplace.¹⁷⁸ Professor H.L.A. Hart in his text, *The Concept of Law*, argues that facts may internalize a standard and thereby create a rule.¹⁷⁹ In her dissent, Justice Ginsburg maintains that the plaintiffs have a right to sympathy, but not to relief under the law.¹⁸⁰ Justice Alito responds, seemingly adopting the notion of legal positivism in his concurrence:

The dissent grants that petitioners’ situation is “unfortunate” and that they “understandably attract this Court’s sympathy.” But “sympathy” is not what petitioners have a right to demand. What they have a right to demand is evenhanded enforcement of the law—of Title VII’s prohibition against discrimination based on race. And that is what, until today’s decision, has been denied them.¹⁸¹

Justice Alito’s conclusion illustrates that the legal positivist notion of unbiased enforcement of the law prohibits reverse discrimination and those scoring highest on the test should not be discriminated against simply because they are not in the minority.

Utilitarianism. In John Stuart Mill’s *Utilitarianism*, he argues that moral rules are “essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life....”¹⁸² Title VII is an example of “act-utilitarianism” that concerns itself with the net happiness for all the stakeholders for the long-term benefit and happiness of society. It recognizes, as a teleological theory, that the consequences of the act may not benefit all parties. Mill asserts:

176. BRIAN BIX, JURISPRUDENCE THEORY AND CONTEXT 35–36 (5th ed. 2009) (quoting JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 157 (1832)).

177. *Id.*

178. *See generally* S. REP. NO. 88-872 (1964), reprinted in 1964 U.S.C.A.A.N. 2355.

179. *See supra* note 58 and accompanying text.

180. Ricci v. DeStefano, 129 S. Ct. 2658, 2690 (2009) (Ginsburg, J., dissenting).

181. *Id.* at 2689 (Alito, J., concurring).

182. JOHN STUART MILL, UTILITARIANISM 87 (Forgotten Books 1925) (1863).

Act utilitarianism is contextual in nature. It is sometimes called “situational ethics.” On an act by act basis consider all the alternatives and choose the action that will produce the most happiness for all the stakeholders in the future. You count as one equally with others. Everyone impartially has equal weight. It does not mean everyone will be happy with your decision.¹⁸³

In her dissent, Justice Ginsburg acknowledges that allowing the City to disregard the test results would negatively impact some of the parties.¹⁸⁴ She states: “The white firefighters who scored high on New Haven’s promotional exam understandably attract this Court’s sympathy. But they had no vested right to promotion.”¹⁸⁵ Adopting a utilitarian approach, Justice Ginsburg seemingly concludes the greatest good to be that which results from disregarding the promotional exams despite the detriment to those who scored the highest on the exam.

In adopting a utilitarian approach, Justice Ginsburg reminds us that “[e]thics is not a matter of rigid rule keeping. It is rather a matter of being flexible in real situations and using your reason to maximize net long-range happiness for everyone.”¹⁸⁶ In this case, to ignore the existence of disparate impact concerns would adversely affect minority candidates in a field where there has been a long history of discrimination in the workplace.

Legal Realism. Justice Holmes once stated that “[t]he real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire,” a classic expression of legal realism relevant to the philosophy supporting Title VII.¹⁸⁷ The civil rights movement identified employment discrimination as a social evil needing legal reform.¹⁸⁸ Legal realism recognized that law is political and the social phenomenon of employment discrimination mandated social change to enhance the constitutional value of equal protection under law.¹⁸⁹

In both Justice Alito’s concurrence and Justice Ginsburg’s dissent there is mention of what role, if any, the mayor’s political motivation to cater to a segment of his constituency may have impacted the city’s decision to disregard the test results. In her dissent, Justice Ginsburg observes:

As courts have recognized, ‘[p]oliticians routinely respond to bad press... but it is not a violation of Title VII to take advantage of a situation to gain political favor.’ The real issue then, is not whether the mayor and his staff were

183. Reeves, *supra* note 87, at 38.

184. 129 S. Ct. at 2690 (Ginsburg, J., dissenting).

185. *Id.*

186. Reeves, *supra* note 87, at 38.

187. COLLECTED LEGAL PAPERS, *supra* note 92, at 210, 238.

188. *See generally* 118 CONG. REC. 1817 (1972).

189. *Ricci*, 129 S. Ct. at 2687–88 (Alito, J., concurring).

politically motivated; it is whether their attempt to score political points was legitimate (*i.e.*, nondiscriminatory). Were they seeking to exclude white firefighters from promotion... or did they realize, at least belatedly, that their tests could be toppled in a disparate- impact suit?¹⁹⁰

Justice Ginsburg's acknowledgement of the possible role of politics in decision making with regard to enforcement of Title VII supports the legal realist's view of using law as a means of achieving social results.

Immanuel Kant. Kant's categorical imperatives support Title VII. He stated to "always use humanity... never merely as a means, but at the same time as an end."¹⁹¹ Kant would not agree with a workplace practice that discriminated on the basis of race as a means to placate other workers. Contemporary Kantian philosophers have expressed it this way:

Man's moral title to external freedom thus carries with it a correlative duty to respect the same right in others. And since men cannot be relied upon to observe this duty voluntarily, it must be enforced. This is the function of the Law and the office of the State which enforces those duties all men must observe so that each can enjoy the greatest external liberty compatible with the like liberty of everyone else.¹⁹²

In upholding the rights of the high scoring white and Hispanic firefighters, Justice Kennedy adopts this theory as expressed in the majority decision in *Ricci*:

[The district court] ruled that respondents' "motivation to avoid making promotions based on a test with a racially disparate impact... does not, as a matter of law, constitute discriminatory intent" under Title VII." And the Government makes a similar argument in this Court. It contends that the "structure of Title VII belies any claim that an employer's intent to comply with Title VII's disparate-impact provisions constitutes prohibited discrimination on the basis of race.".... But both of those statements turn upon the City's objective—avoiding disparate-impact liability—while ignoring the City's conduct in the name of reaching that objective. Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white.¹⁹³

In his concurrence, Justice Scalia appears to be utilizing Kant's categorical imperative of treating individuals as ends in themselves. He states: "[T]he Government must treat citizens as individuals, not as simply components of

190. *Id.* at 2709 (Ginsburg, J., dissenting) (quoting *Henry v. Jones*, 507 F.3d 558, 567 (7th Cir. 2007)).

191. JENS TIMMERMANN, *KANT'S GROUNDWORK OF THE METAPHYSIC OF MORALS* 96 (2007).

192. Gunnar Beck, *Immanuel Kant's Theory of Rights*, 19 *RATIO JURIS* 371, 375 (2006).

193. *Ricci*, 129 S. Ct. at 2671, 2673–74 (quoting *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 160 (D. Conn. 2006)).

a racial, religious, sexual or national class.”¹⁹⁴ Enforcement of the disparate impact guidelines in this context would, in Scalia’s view, amount to unprotected reverse discrimination.

John Rawls Theory of Justice: Rawls’s original position theory, in which judgments are made behind a veil of ignorance, imagines a group of people coming together to form a social contract unaware of their social status in society.¹⁹⁵ Rawls states: “First of all, no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength and the like.”¹⁹⁶ In that arrangement members in the group would not know their race and would be in agreement with a law such as Title VII that prohibits workplace discrimination.¹⁹⁷ His “equal liberty principle” that “[e]ach person is to have an equal right to the most extensive basic liberty compatible with similar liberty for others”¹⁹⁸ would support the value of Title VII legislation.¹⁹⁹ Further, his “democratic equality principle” that “[s]ocial and economic inequalities are to be arranged so that they are... to the greatest benefit of the least advantaged”²⁰⁰ is a philosophical theory that justifies Title VII. Justice Ginsberg states in her dissent:

The Court’s recitation of the facts leaves out important parts of the story. Firefighting is a profession in which the legacy of racial discrimination casts an especially long shadow. In extending Title VII to state and local government employers in 1972, Congress took note of a U.S. Commission on Civil Rights (USCCR) report finding racial discrimination in municipal employment even “more pervasive than in the private sector.” According to the report, overt racism was partly to blame, but so too was a failure on the part of municipal employers to apply merit-based employment principles. In making hiring and promotion decisions, public employers often “rel[ie]d on criteria unrelated to job performance,” including nepotism or political patronage. Such flawed selection methods served to entrench preexisting racial hierarchies. The USCCR report singled out police and fire departments for having “[b]arriers to equal employment... greater... than in any other area of State or local government,” with African-Americans “hold[ing] almost no positions in the officer ranks.”²⁰¹

194. *Id.* at 2682 (Scalia, J. concurring) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

195. *See supra* notes 120–22 and accompanying text.

196. RAWLS, *supra* note 116, at 137.

197. *See* MICHAEL J. SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO? 153 (2009) (“Underlying the device of the veil of ignorance is a moral argument that can be presented independent of the thought experiment. Its main idea is that . . . opportunity should not be based on factors that are arbitrary from a moral point of view.”).

198. RAWLS, *supra* note 113, at 60.

199. *Id.* at 61.

200. *Id.* at 83.

201. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2690–91 (2009) (Ginsburg, J., dissenting) (quoting H.R. Rep.

The “important parts of the story” that Justice Ginsburg recites in her dissenting opinion are supportive of the Rawlsian Equal Liberty Principal.²⁰² Of interest is that the development of her argument is based on a historical and contemporary racial segregation in the public employment sector. Her jurisprudence reflects the philosophical theory of Rawls’s *Theory of Justice* that “[e]ach person is to have an equal right to the most extensive basic liberty compatible with similar liberty for others.”²⁰³

W.D. Ross’s Prima Facie Duties. Ross’s duty to society would include a duty of justice to distribute the benefits of society in a fair manner.²⁰⁴ The strategy behind a standardized test for firefighters seeking the positions of lieutenants and captains is based on a fair distribution of these positions according to competency levels rather than race preference. The majority opinion, written by Justice Kennedy, did not find in the record evidence of the questions being unrelated to the job and held, under the “strong basis in evidence rule” that the City did not offer sufficient evidence to rescind the test results.²⁰⁵ One could argue that the examination constituted an implied promise to award the jobs to those who passed the exam and this created a prima facie “duty of fidelity” because the candidates relied upon the City’s offer. Justice Ginsburg’s dissent stated: “In making hiring and promotion decisions, public employers often ‘rel[ie]d] on criteria unrelated to job performance,’ including nepotism or political patronage.... Such flawed selection methods served to entrench preexisting racial hierarchies.”²⁰⁶ Ross’s position that in exceptional cases “the consequences of fulfilling a promise... would be so disastrous to others that we judge it right not to do so”²⁰⁷ would support Justice Ginsburg’s dissent assuming this is an exceptional case based on historical evidence of race discrimination. The manner in which a judge interprets the evidence of a case will indicate a philosophical orientation that is always fact sensitive.

IV. CONCLUSION

Jurisprudence, as the philosophy of the law, plays an important role in understanding how a court resolves a dispute. A court’s decision often reflects a legal philosophy that is useful in understanding and contextualizing a judge’s

No. 92–238 (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2152, and in 118 CONG. REC. 1817).

202. *Id.*

203. RAWLS, *supra* note 113, at 60.

204. ROSS, *supra* note 127, at 26–27.

205. 129 S. Ct. at 2681.

206. *Id.* at 2690 (Ginsburg, J., dissenting) (emphasis added).

207. ROSS, *supra* note 127, at 18.

decision-making methods. By analyzing a decision from a legal philosophical perspective, one better understands the judge's judicial philosophy, which is more useful than a superficial classification of "liberal" or "conservative" orientation. Constitutional values can be defended from the perspective of many legal philosophical theories, and judges and legislatures often utilize different philosophies for different purposes. It is important to recognize that a judge's decision will often adopt various legal philosophical theories, and conservative and liberal judges may follow principles established by different philosophers and judicial theorists. Recognizing a legal philosophical theory reflected in a judicial opinion provides an insightful perspective that exceeds the bare judicial argument stated in the decision. Comprehending the legal philosophy in a judge's decision provides a clearer understanding of the opinion and renders a more meaningful debate of the issues.

