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

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by

Gerald R. Ferrera* & Mystica Alexander**

“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.”

— 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 referenced above by United States Supreme Court Justice Elena Kagan. What a judge really believes is often culled out of the judge’s written opinions as court observers and commentators attempt to opine on the judge’s constitutional values. Underpinning this process are various philosophical theories adopted by judges that contribute to their judicial beliefs.

This paper suggests that judicial opinions, including statutory interpretations, 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 philosophers or is any apparent relationship mere coincidence? This paper suggests that this is not mere

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coincidence, but rather that a judge’s belief system, education, and experiences include the adoption of judicial philosophies, the expression of which can be found in his or her written opinions.

“Political, 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.”

— Samuel D. Warren & Louis D. Brandeis, The Right to Privacy

Justice Brandeis was quite right in recognizing the “eternal youth” of the common law as it evolves to meet the new demands of society. 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 seeking to understand a judge’s judicial philosophy is not necessarily to focus on one theory to determine how a legal dispute is resolved but rather to identify the underlying theories of philosophy that support the court's decision. An understanding of case and statutory law from an ethical and philosophical perspective will be discussed.

This paper will introduce prominent philosophers and explain their theories of justice emphasizing how they relate to jurisprudential analysis. It further argues that the process in understanding legal analysis should include an appreciation of the ethical theories that underlie the judicial resolution of legal issues.

“Lawsuits matter in another way that cannot be measured by money or liberty. There is inevitably a moral dimension to any action at law, and so a standing risk of a distinct forum of public injustice.”

— RONALD DWORKIN, LAW’S EMPIRE

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2 James Barron, A New York Bloc on the Supreme Court, N.Y. TIMES, May 12, 2010, at A1 (reflecting on the fact that if Elena Kagan is confirmed the court will, for the first time in its history, have four judges that hail from the boroughs of New York).


Professor Ronald Dworkin’s reminder that lawsuits have a “moral dimension” with a consequent “risk of public injustice” is an intriguing proposition that is useful in resolving a legal dispute. The “moral dimension” of a case that lends itself to this judicial analysis is best explored in identifying the ethical aspects by first seeking out the “ethical dilemma” posed by the salient issues. How does one identify the “ethical dilemma?” While there are a number of useful methods that will help in identifying an ethical dilemma, one of the more common is “stakeholder analysis.”

Stakeholder analysis starts with an examination of the parties that will be affected by the decision. For instance, if the case involves corporate entities, a series of “stakeholders” including the employees, suppliers, stockholders, customers, banks as lenders, corporate boards and executives, the local and perhaps the global community, and others may be affected by the decision. 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 ethical dilemmas are identified it becomes necessary to offer possible proposals to seek their resolution. This is a significant judicial challenge since often stakeholders may have to endure giving up rights for the common good. Classic examples are found in the United States Constitution in the eminent domain clause that provides for a government taking of private property with “just compensation.” 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. Ethical theories are found in the writings of the ancient Greeks, philosophers of the Enlightenment, and contemporary philosophers. The selected theories discussed in this paper are among many with no attempt to exhaust the field.\(^5\) The paper discusses how philosophical theories apply to an understanding of our jurisprudence and provides a better appreciation of a judge’s

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judicial philosophy. It’s informative to note that a judge may utilize many judicial philosophies in deciding a case and, depending on the nature of the dispute or statutory interpretation, adopt various schools of philosophy in developing h/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. The relationship of law to moral and ethical reasoning should be understood by legal scholars and judges who continue to influence our jurisprudence and public policy.

B. IS PHILOSOPHICAL THEORY RELEVANT TO OUR JURISPRUDENCE?

Since appellate court cases decide rights and obligation of the litigants, it would be helpful to understand the courts' substantive findings including the moral and ethical underpinnings of the judges’ reasoning. Law books and law review articles generally avoid this process being content with an explanation of substantive and procedural analysis. If we argue and debate contemporary legal issues without an appreciation of the philosophy that supports the courts' rationale, it will be difficult to fully recognize and understand the jurisprudential theory that shapes our legal landscape.

Ethical theory found in natural law, legal positivism, utilitarianism, legal realism, and social relativism should be understood and related to contemporary court decisions. Legal scholars should explore which predominant philosophical and ethical theories the judiciary uses in deciding appellate cases. An understanding of philosophy and its application to court decisions will assist in this analysis. This process has been referred to as “ethical legalism”\(^6\) 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 liberty,” and “equal opportunity?” Jurisprudential analysis should engage in a resolution of that inquiry utilizing deontological and teleological ethical theories used in court decisions.

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Selected for discussion in this paper are classical and contemporary philosophers and legal scholars who have contributed to our 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, *Philosophical Theories of Law*, introduces prominent philosophers who have made a contribution to our jurisprudence. An exhaustive review of their philosophy is beyond the scope of this paper and is available in copious encyclopedic works.

Part III, *Philosophical Theories and Ricci v. DeStefano*, applies the theories discussed to a contemporary reverse race discrimination United States Supreme Court case that illustrates how the judges follow a particular judicial philosophy. Judges are often referred to as liberal or conservative, strict constructionist or judicial activist without understanding the philosophical theories that support their jurisprudence. The paper argues they are following ethical theories inherent in their thought process that contributes to their jurisprudential analysis.

Part IV, *Conclusion*, argues that an understanding of legal philosophical theory is necessary in identifying a judge’s judicial philosophy and should be useful in clarifying the over simplification and often misleading characterizations of a judge being a liberal or conservative. Furthermore, an understanding of how the courts adopt a legal philosophy in deciding a case is useful in appreciating the moral and ethical dimensions of a decision.
II. PHILOSOPHICAL THEORIES OF LAW

A. NATURAL LAW — THOMAS AQUINAS (1226-1274)

“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.”

— THOMAS AQUINAS, SUMMA THEOLOGIAE

Natural law is first found in Cicero’s Latin explanation of the Greek Stoic philosophers who emphasized virtue, morals and ethics as appropriate guiding principles of behavior. Starting with Homer, the classical Greek philosophers developed their theory of natural law in an attempt to explain the human conditions that are subject to nature’s laws. The Greek philosophers deferred to the cosmic order of things and reconciled “fate” as following the laws of nature and order in the universe.

Between the Romans who adopted the Greek culture and up to the time of Thomas Aquinas, an Italian Dominican friar and theologian, there were various theories of the Greek version of natural law. However, it was Aquinas who in his Summa Theologiae developed natural law as God’s guiding Providence with God as the center of all order.

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.” An immediate reference is made to the ancient Greek Dionysius who stated that “three things are to be found in spiritual substances — essence, power, and operation . . . .” Aquinas argues

7 THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II, q. 91, art. 2 (Fathers of the English Dominican Province trans., 1915) (1265-1274).
9 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 . . . .”).
10 See generally Edward J. Damich, The Essence of Law According to Thomas Aquinas, 30 AM. J. JURIS. 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).
11 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).
12 AQUINAS, supra note 7, at pt. I, q. 75.
the soul is “the form of a body.”

His position is that “the nature of the species belongs [to] what the definition signifies; and in natural things the definition does not signify the form only, but the form and the matter.”

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.”

A principal contribution of Aquinas’s theory on natural law is its reference to reason and the common good.

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. 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.”

The Catholic Church continues to adopt Aquinas's natural law as its philosophical doctrine. However, apart from its theological foundation in Catholic doctrine, natural law after Aquinas began to decline. The Enlightenment philosophers — Hobbes, Locke, Rousseau and Kant — all made references to natural law.

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13 Id. at pt. I, q. 75, art. 5.
14 Id. at pt. I, q. 75, art. 4.
15 Id. at pt. I-II, q. 90, art. 1.
16 Id. at pt. I-II, q. 90, art. 3 (“A law, properly speaking, regards first and foremost the order to the common good.”).
17 Id. at pt. I-II, q. 90, art. 4.
18 See JOHN PAUL II, VERITATIS SPLendor 71 (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’”).
20 See THOMAS HOBBES, 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 HOBBES 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), http://www8.georgetown.edu/departments/philosophy/eudaimonia/eudaimonia_2005.pdf (concluding that “there is little concordance as to what constitutes the natural law.”).
21 See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 6 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690) (The law of nature “wills 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).
law, although within different constructs, as 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.”

Indeed, natural law principles are used to infuse ethical concepts into legal analysis. The Greeks and Romans used natural law as an objective standard that measured civil laws. What are the objective ethical standards of justice? 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, a renowned scholar and former Dean of Harvard Law School, in his book *Introduction to the Philosophy of Law* stated:

> It was not that natural law expressed the nature of man [here he differs from Aquinas] rather 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.

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.

24 JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1979) (describing natural rights as having their foundation in natural law).
27 ROSCOE POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 50 (Yale Univ. Press 1922).
Professor John Finnis, a leading contemporary philosopher of natural law at Oxford University and Notre Dame Law School, in his book *Natural Law and Natural Rights*, argues that positive laws ought to conform to objective normative principles of natural law. Finnis suggests that we are led to an understanding of the objective normative principles not by rigorous differential analysis but rather by “careful reflection, or meditation, directly to an awareness of self-evident, indemonstrable truth.” Finnis and Aquinas regard the principles of natural law as self-evident.

Professor Lloyd L. Weinreb of Harvard Law School, in his book *Natural Law & Justice*, agrees but finds Finnis’s “extraction of Aquinas’s doctrine of natural law from its context and treat[ing] 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.” He explains that deontologically there is an argument that “[l]aw’s very nature . . . impresses on it a minimum moral content.” Whatever that “minimum moral content” might be determines the natural law advocates’ position that unjust laws need not be obeyed.

It is important to note that one need not have a religious belief to be a natural law proponent. Robert George of Princeton University, another contemporary proponent of the natural law, posed the following question during a scholarly lecture presented at Harvard Law School: “[C]an natural law . . . provide the basis for a regime of human rights law without the consensus on the existence and nature of God and the role of God in human affairs?” In response, George goes on to say: “In my view, anybody who

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32 Weinreb, *supra* note 8, at 101.

acknowledges the human capacities for reason and freedom has good grounds for affirming human dignity and basic human rights.”  

The critical doctrine of natural law is the principle that our positive law must comply with objective standards of fundamental rights that assures 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.”

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. 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.” 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,” 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.’” 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.

37 130 S.Ct. 3020, 3042 (2010).
38 Id. at 3050 (quoting District of Columbia v. Heller, 128 S. Ct. 2783, 2822 (2008).
B. **LEGAL POSITIVISM — JOHN AUSTIN (1790-1854)**

“The matter of jurisprudence is positive law.”

— John Austin, *Lectures on Jurisprudence*

John Austin, the founder of legal positivism, was the student of the great legal reformer, Jeremy Bentham, the founder of utilitarianism. Bentham was instrumental in the founding of the University College London, and the appointment of John Austin to the Chair of Jurisprudence at the University. 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 legislation and case law are not morally dependant but rather a combination of utilitarian rights, duties, and obligations. However, Austin does not deny that law can be analyzed from a moral perspective. In fact, Austin stressed just the opposite and insisted law has a moral perspective.

Austin divided the laws that guide human behavior into (1) divine law, (2) positive law and (3) positive morality. Divine law would include Revealed Law established by God. Positive law is created by the sovereign of a community, such as a legislative body. Positive morality would include positive laws and contemporary attitudes. Austin taught that God's law was superior to positive law, but he believed we cannot have direct knowledge of God's will. Positive law is judged to be moral or immoral depending on how it serves the welfare of others. Austin admits of an objective morality founded in a theological conception of Divine Law. He believed that all laws are coercive commands that must serve the general welfare. According to Dean Roscoe Pound, Austin defines a right as “a ‘faculty’ residing in a determinate

43 Hill, *supra* note 43.
person by virtue of a given rule of law which avails against and answers to a duty lying on some other person.\textsuperscript{44}

Professor H. L. A. Hart (1907-1992), formerly of Oxford University, formulated in his \textit{The Concept of Law} the most widely accepted theory of Austin's positive law.\textsuperscript{45} Hart views law as rules that are social facts formed by individuals who internalize a standard and thereby create the rule.\textsuperscript{46} Hart believes that moral obligations are determined by socially accepted rules. 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.\textsuperscript{47} Both Austin and Hart view law as a social phenomenon subject to empirical analysis.\textsuperscript{48} Writing for the majority in \textit{Citizens United v. Federal Election Commission},\textsuperscript{49} Justice Kennedy ruled that “[t]here is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations.”\textsuperscript{50} Quoting from the dissent in \textit{United States v. Automobile Workers}, Justice Kennedy went on to state:

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.\textsuperscript{51}

\begin{footnotes}
\item[44] Roscoe Pound, \textit{Fifty Years of Jurisprudence}, 50 HARV. L. REV. 557, 571 (1937); see also LYONS, supra note 43, at 7.
\item[47] Wellman, supra note 48, at 474 (“Dworkin’s kinship with Hart . . . implies that the Legal Process tradition is more vital than has commonly been supposed.”).
\item[48] See generally David Dyzenhaus, \textit{Why Positivism is Authoritarian}, 37 AM. J. JURIS. 83 (1992) (arguing that contemporary positivists collaborate in an authoritarian political project); Deryck Beyleveld & Roger Brownsword, \textit{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.”); Margaret Stubb, \textit{Feminism and Legal Positivism}, 3 AUSTRALIAN J. L. & SOC’Y 63 (1986); Roscoe Pound, \textit{Fifty Years of Jurisprudence}, 50 HARV. L. REV. 557 (1937).
\item[49] 130 S.Ct. 876 (2010).
\item[50] Id. at 906.
\item[51] Id. at 901 (quoting United States v. Int’l Union United Auto., Aircraft & Agric. Workers of Am., 352 U.S. 567, 593 (1957))
\end{footnotes}
Hart’s version of positive law would argue 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.”

— JOHN STUART MILL, ON LIBERTY

John Stuart Mill was one of the most influential philosophers in England during the nineteenth century. Mill was a protégé of his father, James Mill, who was a proponent of Jeremy Bentham (the founder of utilitarianism) and John Austin (the founder of legal positivism) both of whom were utilitarian philosophers. J.S. Mill was also greatly influenced by his wife, Harriet Taylor, who worked closely with him in the development of his theories. Mill was an empiricist and would accept and believe a proposition only if it could be experienced. One could trace the logic of the American legal realism movement to his theory of utilitarianism. Ronald Dworkin, a professor at New York University School of Law, 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.” Professor David Lyons of Cornell Law School, 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. Professor Lyons argues that “the idea that people have natural rights can be understood apart from dubious ideas about ‘self-evidence’ . . . a right that does not depend for its existence (as some legal rights seem to do) on some sort of social recognition or enforcement.”

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(Douglas, J., dissenting)).

52 JOHN STUART MILL, ON LIBERTY 6 (Longmans, Green & Co., 1913) (1859).
54 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 260 (1978).
Utilitarian ethics, according to Mill, establishes 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 . . . .”

Professor Holly Smith Goldman at the University of Illinois, 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.

This “single rule” is the utilitarian principle of “the greatest good for the greatest number” that evokes a grand scheme of benevolence and seeks out the greater happiness of the stakeholders, those who are involved in and affected by the decision. Utilitarianism has been analyzed by dividing its theory into two principles: act-utilitarianism and rule-utilitarianism.

*Act-utilitarianism* considers the net happiness for all the stakeholders. 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. Act-utilitarianism is a teleological ethical theory concerned with the consequences of the act on society, more than with the morality of the act itself. An example of this is section 230 of the Communications Decency Act that grants federal immunity to a provider of an interactive web site in a libel suit for defamatory content posted by an outsider. In 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, the Supreme Court took a utilitarian approach. Writing for the majority, Justice Rehnquist stated that “the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public.” In a decision which 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

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decades,” the Supreme Court has ruled that “an accused who wants to invoke his or her right to remain silent must do so unambiguously.” In *Berghuis v. Thompkins* 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. Seemingly adopting a utilitarian approach that was focused 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 ‘avoids difficulties of proof and . . . provide[s] guidance to officers’ on how to proceed in the face of ambiguity.”

*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. Although not based on the formal principles of Kant’s “categorical imperatives” (*see infra* Part II.E.), it does rely on empirical consequences that are often aimed at the long-range benefit to society. According to both act and rule utilitarianism the good consequences of the act must be the happiness of society for it to be ethical.

**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.”

— OLIVER WENDELL HOLMES, JR., *LAW IN SCIENCE AND SCIENCE IN LAW*

Justice Holmes is considered to be the founder of legal realism. Holmes rejected legal fundamentalism that used the “rule of law” as the 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

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61 Berghuis v. Thompkins, 2010 WL 2160784, at *8 (U.S. June 1, 2010).
62 Id.
64 Oliver Wendell Holmes, Jr., *Law in Science and Science in Law* (1899), in COLLECTED LEGAL PAPERS 210, 226 (1920).
65 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 . . . .”)

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regulations. Professor Twining of the University of Miami School of Law 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. Professor Llewellyn, formerly of Columbia Law School, believed 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. 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. Professor 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. Our current law school curriculum follows that counsel with its 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. One can look to the court’s decision in Massachusetts v. EPA to find evidence of legal realism. In that case Massachusetts’ right to sue the EPA over the negative impact of global warming on the state was recognized. 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

69 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.”).
71 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.”); 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 now is 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; 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.”).
forms a ‘judgment’ that such emissions contribute to climate change.” Recognizing that “[a] well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere,”72 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.’”73 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 in Bilski v. Kappos also adopted a legal realist approach. In affirming the patentability of business methods, the Court recognized that “times change [and] [t]echnology and other innovations progress in unexpected ways.”74 Quoting the Court’s decision in 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.’”75 The legal realists were interdisciplinary and their legal casebooks acknowledged the reliance on history, economics, sociology and psychiatry as relevant to legal education.76 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.

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73 Id. at 534.
74 130 S.Ct. 3218, 3227 (2010).
75 Id. (quoting Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980)).
76 LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 2 (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.”

— Immanuel Kant, *Was ist Aufklärung (What is Enlightenment?)*\(^\text{77}\)

Kant is considered by many authorities as the most influential and greatest philosopher of the seventeenth century. Professor Kant was a curious person who, with all of his intelligence, spoke only his native German language and never traveled far from his University in Eastern Germany. He was, nevertheless, the most prominent philosopher of his generation and his works on reasoning and ethics are found in three major treatises: *Critique of Pure Reason*, *Critique of Practical Reason*, and *Critique of Judgment*. His essay on freedom, *Was ist Aufklärung*, insists on self-expression based on our own intellectual freedom and not that of another person or institution.

Kant had a lot to say about morals and ethics. In the world of ethics he is best known for his “categorical imperatives.” For instance: “I ought never to act except in such a way that I can will that my maxim should become a universal law.”\(^\text{78}\) 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 so that you always use humanity, in your own person as well as in the person of every other, never merely as a means, but at the same time as an end.”\(^\text{79}\) This means that a moral or ethical act always treated an individual with the greatest respect as an end in themselves and not merely manipulated as a means to accomplish an ulterior motive. Kant’s moral philosophy is a deontological theory.\(^\text{79}\) One could say that “deontology” demands that we follow a duty

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\(^\text{78}\) IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF METAPHYSICS OF MORALS AND CRITIQUE OF PRACTICAL REASON (1785).

\(^\text{79}\) See Deontological Ethics, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/ethics-deontological/ (last visited June 19, 2010) (“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).”).
arising from a contract or a relationship that obligates a certain course of action. Kant’s categorical imperatives are useful in case analysis that often is based on contract or fiduciary relationships that were violated causing injury to another. The law of contracts and torts relies on relationships; either by contract or a duty imposed by law, with a Kantian obligation to obey their dictates. In *United States v. Philip Morris USA* the U.S. Court of Appeals for the DC Circuit confirmed a district court ruling that leading tobacco companies had committed fraud against the general public for several decades. In reaching its 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.  

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 will that my maxim should become a universal law.” 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.”

— JOHN RAWLS, A THEORY OF JUSTICE

John Rawls's classic 1971 book, *A Theory of Justice*, established a renaissance in political theory. His unique analysis of justice is useful in discussing ethics and how it applies to contemporary decisional law. Its critical thinking of our notions of liberty and equality has been widely discussed in the law review...
Legal scholars should be exposed to his *A Theory of Justice* as a helpful and useful approach to understand our legal system in a new light that is especially sensitive to minority interests.

In *A Theory of Justice* Rawls writes: “Perhaps I can best explain my aim in this book as follows. 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 attempt 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.”

Rawls posits relationships between individuals and the community and he developed two principles of justice that he believed 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).

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.” 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.”

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85 RAWLS, *supra* note 82, at vii-viii.

86 Id. at 11.

87 Id. at 12.
Rawls argues that two principles of justice would be chosen by those in the “original position.”

*The Equal Liberty Principle:* “Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.” 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.

*The Democratic Equality Principle:* “Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.”

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. Judicial philosophy that argues for affirmative action would support a Rawlsian theory. Cases such as *Regents of the University of California v. Bakke* and *Grutter v. Bollinger* upholding 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.”

— 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. For instance he stated, “[u]nless stronger moral obligations override, one ought to keep a promise.” 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. Ross states 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.” From a legal perspective his “promise keeping” duty is useful in developing legal arguments based on contractual obligations or implied tortuous 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.” 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), 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.

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. Courts often apply these duties when confronted with a dispute thereby adopting moral obligations into our jurisprudence.

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94 Id.
95 Id.
96 Id.
97 Id.
98 See infra Part III.
99 Ross, supra note 95.
100 Id.
Ross’s prima facie duties include:

**Duty of fidelity.** This duty relates to “promise keeping” that may be contractual, express or implied, under the circumstances. From a legal perspective one can trace contractual duties from the contract terms and conditions, implied duties from a fiduciary relationship[^101] or 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.

**Duty of reparation.** Reparation is a duty to compensate for injuries done to others. 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.[^102] When a finding for punitive damages is awarded by a court it is engaging in providing compensation to the plaintiff based on the prima facie duty of reparation for the defendant’s egregious harmful conduct.[^103]

**Duty of gratitude.** This duty is founded on an obligation for being granted a benefit, individual or social, without cost and has relevance to a philanthropic undertaking including the tax advantages attributable to non-profit corporations.[^104] 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.

**Duty of non-malfeasance.** Our common law of negligence is based on this duty not to harm others. This obligation is resolved by the courts[^105] 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 Act[^106] that prohibit employment discrimination utilize this duty to prevent harm to the employee.

[^101]: In 1939 the Supreme Court of Delaware in *Guth v. Loft*, 5 A.2d 503 (Del. 1939) ruled that corporate directors owe the fiduciary duties of care and loyalty to the corporation and its shareholders. 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.”).


[^103]: In *Williams v. Philip Morris, Inc.*, 176 P.3d 1255, 1258 (Or. 2008), the Oregon Supreme Court upheld a 79.5 million dollar award against the cigarette manufacturer.

[^104]: *See* I.R.C. § 501(c)(3) (2010).

[^105]: *See, e.g.*, Wyeth v. Levine, 129 S. Ct. 1187 (2009) (upholding a decision of the Vermont Supreme Court that allowed a plaintiff to recover from a drug manufacturer for an inadequate warning label).
Duty of beneficence. 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.\textsuperscript{107}

Duty of self-improvement. Laws often obligate a person to help themselves such as probation and compulsory driver’s education in driving under the influence cases.

Duty of justice. Of special interest is comparing Ross’s duty of justice with Rawls’s Equal Liberty Principle. Ross, along with Rawls, finds a social duty to distribute societal benefits fairly. Our federal tax code has provisions that follow this duty.\textsuperscript{108} The Patient Protection and Affordable Care Act\textsuperscript{109} is based on a duty to distribute health care to all as a precept of social justice.

How a judge would apply Ross’s prima facie duties to a case relates to their 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. DESTEMANO

“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 general act of Congress or Parliament.”

— RONALD DWORIN, LAW’S EMPIRE\textsuperscript{110}

Professor Ronald Dworkin, in his book Law’s Empire, 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. United States Supreme Court decisions reflect not only how the institution has functioned throughout American history but also


\textsuperscript{108} 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 (2010).


\textsuperscript{110} DWORIN, supra note 4, at 1.
how jurists think. Justice Holmes's essay *The Path of the Law*,\(^{111}\) written while he was a member of the Supreme Judicial Court of Massachusetts, emphasized legal study as “the prediction of a judge's decision.”\(^{112}\)

**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. The results of the exam indicated that white candidates scored higher than minority candidates raising some concern for the City that this exam might have a disparate impact on minority candidates. Threats of lawsuits from both sides emerged and the City decided to disregard the results based on statistical racial disparity. Petitioners were the white and Hispanic firefighters who passed the exam and sued the City when it refused to certify the test results alleging that ignoring the results discriminated against them based on their race in violation of Title VII of the Civil Rights Act of 1964.

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. The district court granted summary judgment for the defendants and the Second Circuit affirmed. 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.

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

A review of philosophical theories will illustrate how these theories influence judicial thinking and our jurisprudence. Writing for the majority, Justice Kennedy expresses the following view of Title VII:

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\(^{112}\) Id. at 460-61.
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." \(^{113}\)

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." \(^{114}\) This prohibition was recognized by the Supreme Court in *Griggs v. Duke Power Co.* \(^{115}\) and later codified in the Civil Rights Act of 1991. "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.'" \(^{116}\)

*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. \(^{117}\)

This reference to the Equal Protection Clause in establishing a standard when disparate-impact and disparate-treatment are in conflict is of interest in searching for a judicial philosophy supporting the Court’s position. Although the Equal Protection Clause is not defined in the Constitution, 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 only when there is a “strong basis in evidence” that the remedial actions were necessary also appeals to a sense of fairness when there is empirical evidence to support the injustice of


\(^{114}\) *Id.*


\(^{117}\) *Id.* at 2675 (internal quotations omitted).
race discrimination. Natural law principles are found in the Bill of Rights to protect individuals from injustices including racial discrimination that violates human dignity and the common good.\textsuperscript{118}

Justice Scalia, writing separately in a concurring opinion stated: “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.”\textsuperscript{119}

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 book, \textit{Introduction to the Philosophy of Law}, he states that “natural law [should] express the nature of government.”\textsuperscript{120} 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 “protected by the Bill of Rights.” The philosophical theory underlying the “equal protection” clause is a natural law principle of obligating an employer to equally treat employees in a fair and equitable manner.

Justice Ginsburg’s dissenting opinion stated in part:

\begin{quote}
In construing Title VII, I note preliminarily, 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
\end{quote}

\textsuperscript{118} \textsc{Roscoe Pound}, \textsc{Introduction to the Philosophy of Law} 14 (Yale Univ. Press 1922); \textit{See also Aquinas, supra} note 7, at pt. I-II, q.90, art. 3 (“A law . . . regards . . . the order to the common good.”).

\textsuperscript{119} \textit{Ricci}, 129 S. Ct. at 2682 (Scalia, J., concurring).

\textsuperscript{120} \textsc{Pound, supra} note 118.
promoted based on qualifications manifestly necessary to successful performance of the job in question, qualifications that do not screen out members of any race.121

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.”122 The very essence of natural law would support the “no racial preference, absolute or otherwise” holding of Justice Ginsburg’s argument. Professor Lon Fuller would agree with Justice Ginsburg’s dissent being consistent with his position on the natural law’s essential function being 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 . . . .”123 The jurisprudence of the dissent relative to disparate-impact has traces of the philosophical theory of natural law as providing rules (i.e. Title VII) that require employers to orient their behavior in a manner that will achieve social justice beyond the Equal Protection Clause that does not have a disparate-impact component.124

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:

In simple terms, legal positivism is built around the belief, the assumption or the dogma that the question of what is the law is separate from (and must be kept separate from) the question of what the law should be. The position can be summarised in the words of John Austin:

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.125

121 Ricci, 129 S. Ct. at 2700-01 (Ginsburg, J., dissenting) (citations omitted).
122 Id. at 2701.
123 Lon L. Fuller, A Reply to Professors Cohen and Dworkin, 10 VILL. L. REV. 655, 657 (1965).
124 Ricci, 129 S. Ct. at 2689-2710 (Ginsburg J., dissenting).
125 Brian Bix, JURISPRUDENCE THEORY AND CONTEXT 35-36 (Westview Press 1996) (quoting John Austin, The Province of Jurisprudence Determined 157 (1832)).
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. Professor H.L.A. Hart in his text, *The Concept of Law*, argues that facts may internalize a standard and thereby create a rule.

In her dissent, Justice Ginsburg maintains that the plaintiffs have a right to sympathy, but not to relief under the law. Justice Alito, seemingly adopting the notion of legal positivism, in his concurrence responds:

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.¹²⁶

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 classic book, *Utilitarianism*, he viewed moral rules as “essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life . . . .”¹²⁷ 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.

“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.”¹²⁸

In her dissent, Justice Ginsburg acknowledges that allowing the City to disregard the test results would negatively impact some of the parties. She states, “The white firefighters who scored high on

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¹²⁶ *Ricci*, 129 S.Ct. at 2689 (Alito, J., concurring).
¹²⁷ *JOHN STUART MILL, UTILITARIANISM* 75 (Forgotten Books 1925) (1861).
¹²⁸ Reeves, *supra* note 65, at 38.
New Havens’s promotional exam understandably attract this Court’s sympathy. But they had no vested right to promotion.”\textsuperscript{129} 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.”\textsuperscript{130} 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.

\textit{Legal Realism.} A classic expression of legal realism relevant to the philosophy supporting Title VII is found in the statement of Justice O.W. Holmes, Jr. that “[t]he real justification of a rule of law, if there is one, is that it keeps bringing about a social end we desire.”\textsuperscript{131} The civil rights movement identified employment discrimination as a social evil needing legal reform. Legal realism recognized that law is political and the social phenomena of employment discrimination mandated social change to enhance the constitutional value of equal protection under law.

In both Justice Alito’s concurrence and Justice Ginsburg’s dissent there is mention of what role, if any, political motivation of the mayor 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 points out:

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 politically motivated; it is whether their attempt to score political points was legitimate (\textit{i.e.}, nondiscriminatory). Were they seeking to exclude white firefighters from promotion . . . or did they realize, a little belatedly, that their tests could be toppled in a disparate impact suit?’\textsuperscript{132}

\textsuperscript{129} \textit{Ricci}, 129 S.Ct. at 2690 (Ginsburg, J., dissenting).
\textsuperscript{130} Reeves, supra note 65.
\textsuperscript{131} Oliver Wendell Holmes, Jr., \textit{Law in Science and Science in Law} (1899), in \textit{COLLECTED LEGAL PAPERS} 210, 226 (1920).
\textsuperscript{132} \textit{Ricci}, 129 S.Ct. at 2709 (Ginsburg, J., dissenting) (citation omitted).
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 philosophically support Title VII. He stated to “always use humanity . . . never merely as a means, but at the same time as an end.” 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.\(^{134}\)

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.\(^{135}\)

In his concurrence, Justice Scalia appears to be utilizing Kant’s categorical imperative of treating individuals as an end in themselves. He states, “[T]he Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” Enforcement of the disparate impact guidelines in this context would, in Scalia’s view, amount to unprotected reverse discrimination.

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\(^{135}\) *Ricci*, 129 S. Ct. at 2671 & 2673-74.

\(^{136}\) *Ricci*, 129 S. Ct. at 2682 (Scalia, J. concurring).
John Rawls Theory of Justice: Rawls’s “Original Position” theory where judgments are made behind a veil of ignorance would imagine a group of people coming together to form a social contract unaware of their social status in society. Rawls stated: “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.”\textsuperscript{137} 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.\textsuperscript{138} 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”\textsuperscript{139} would support the value of Title VII legislation.\textsuperscript{140} 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”\textsuperscript{141} is a philosophical theory that justifies Title VII.

Justice Ginsberg’s stated 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 “re[lied] 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.”\textsuperscript{142}

The “important parts of the story” that Justice Ginsburg recites in her dissenting opinion are supportive of the Rawlsian “Equal Liberty Principal.” Of interest is that the development of her

\begin{footnotesize}
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\item[137] Rawls, supra note 82, at 137.
\item[138] 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 be based on factors that are arbitrary from a moral point of view.”).
\item[139] Id. at 60.
\item[140] Id. at 78.
\item[141] Id.
\end{enumerate}
\end{footnotesize}
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.”

**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. 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. 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[ied] on criteria unrelated to job performance,’ including nepotism or political patronage. . . . Such flawed selection methods served to entrench preexisting racial hierarchies.”

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” would support Justice Ginsburg’s dissent assuming this is an exceptional case based on historical evidence of race discrimination. How the evidence of a case is interpreted by a judge will indicate the 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 appreciating a judge’s orientation to dispute resolution or statutory interpretation. By analyzing a decision from a legal

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143 RAWLS, supra note 82, at 60.
144 Ricci, 129 S.Ct. at 2690 (Ginsburg, J., dissenting) (emphasis added).
philosophical perspective one better understands the judge’s judicial philosophy, which is more useful than the typical dichotomy of a judge having a 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.