“DEAD TO THE LAW:”
PAUL’S ANTINOMIANISM

Jeremy Waldron*

I

I have often wondered whether there is anything of interest for general jurisprudence in the hostility to law expressed in Saint Paul’s Letter to the Romans and his Letter to the Galatians.1 There has been little discussion of this. In the law review literature I have seen, there is a certain amount of discussion of Paul’s suggestion about the importance of our being subject to the higher powers, i.e., to political authority on Earth.2 There is also some discussion of the natural law implications of Paul’s observations about Gentiles “who do not have the law, [but who] by nature do what the law requires,”3 and some discussion, too, of the idea of fundamental equality expressed in Paul’s insistence that “[t]here is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus.”4 But there is very little on what seems to be Paul’s antinomianism—that is, his sharp attack on law and legality in the course of his argument that faith and not works—not legalistic righteousness, not compliance with the law—is the only basis of salvation.5

Paul says some harsh things about law. He says that “all who rely

---

* Professor of Law, New York University. I am grateful to the participants at the conference (at Cardozo School of Law) at which this paper was presented, particularly Suzanne Last Stone and Martin Stone. I am also grateful to Rev. Victor Austin for many conversations on these themes.

1 Hereinafter, I refer to these as “Romans” and “Galatians” respectively, followed by chapter and verse number. All quotes are from the English Standard Version of the Bible.


4 Galatians 3:28; see, e.g., Mary Anne Case, Reflections on Constitutionalizing Women’s Equality, 90 CAL. L. REV. 765, 774 (2002).

5 But see Jerome Hall, Paul, the Lawyer, on Law, 3 J.L. & RELIGION 331 (1985) (for a useful account).
on works of the law are under a curse,”⁶ that “our sinful passions [have been] aroused by the law,”⁷ that “if it had not been for the law, I would not have known sin,”⁸ and that law came into existence “to increase the trespass.”⁹ Law was our tutor or “custodian” in the infancy of man; but we have moved now to a new age, in which “we are no longer under a custodian.”¹⁰ Since the law is such that almost no human can keep it,¹¹ since the law of our flesh drives us to constant violations of the law,¹² salvation, Paul asserts, is available only apart from the law, in fact only through grace.¹³

Now obviously this is all put forward in a very particular theological context. When he says “law,” Paul mostly¹⁴ means something quite specific—Torah, the law given to Moses 430 years after the promise to Abraham.¹⁵ When he talks about salvation, he means not just any old felicity, but an escape from death, eternal life.¹⁶ And when he talks about grace, not law, as a means to salvation, he means quite specifically the grace of our Lord Jesus Christ.¹⁷ So it might be thought that apart from the context of this theological argument—about Torah and salvation, and about the Torah’s being superseded by Christian grace—there is nothing here that is of broader interest, nothing of general interest to jurists (at least to jurists who are uninterested in salvation). At best, Paul’s jurisprudence is particular jurisprudence, not general jurisprudence,¹⁸ and—even leaving aside the difficulties with his analysis—it would be very dangerous to infer from it any conclusions about law as such.

But perhaps that is too hasty. Let us grant that Paul is particularly interested in a particular body of law: he thinks Torah is insufficient for salvation, that it might even be a stumbling block.¹⁹ This could be on

---

⁶ Galatians 3:10.
⁷ Romans 7:5.
⁸ Romans 7:7.
⁹ Romans 5:20.
¹⁰ Galatians 3:24-25.
¹¹ Romans 3:9-10.
¹² Romans 7:21-23.
¹⁴ Mostly, except in the passage, Romans 7:21-23, where he talks of the law of one’s flesh, which drives one to violate the Mosaic law.
¹⁵ Galatians 3:17.
¹⁶ 1 Corinthians 15:51-57.
¹⁷ Romans 5:21.
¹⁸ For the contrast between “general jurisprudence” and “particular jurisprudence,” see John Austin, Lectures on Jurisprudence or the Philosophy of Positive Law 147-59 (Robert Campbell ed., London, John Murray 1885) (Lecture XI). Particular jurisprudence might be the philosophical study of Islamic Law, or Common Law, or Roman Law, or International Law. A separate distinction is between general jurisprudence and special jurisprudence; special jurisprudence is the philosophical study of particular areas of law such as tort law or criminal law.
¹⁹ Romans 9:31-33 (“Israel who pursued a law that would lead to righteousness did not succeed in reaching that law. Why? Because they did not pursue it by faith, but as if it were
account of something that distinguishes the Torah or Mosaic law from other law, or it could be on account of something that distinguishes the Torah or Mosaic law from other aspects of Jewish tradition and religion. If the latter—i.e., if Paul’s concern is about the Torah qua law—then potentially there is something that might be of more general interest. For it might be the case that law generally has the feature—call it feature X—which poses the particular difficulty for the case that Paul is addressing, so that any law would afford this sort of obstacle to salvation. Or, slightly less ambitiously, it might be the case that X is typical of law of a certain sort, a sort not confined to the Torah, though perhaps not coextensive with the most general understanding of law. Or it might be the case that given what law is like (or given what a certain type of law is like), there is a standing danger that law generally (or law of that type) will come to have the feature, X, that Paul finds problematic in the specific case of Torah, even though law as such (or law of that type) is not necessarily X.20 (We say something like this, for example, about the vice called legalism: law is not necessarily legalistic, in the vicious sense of “legalistic;” still, legalism is one of the vices specific to law, and there is a standing danger that law might become legalistic.)21

Even this might be of only very narrow interest if the type of purpose that is obstructed by law as such (or by some usual feature of law of a certain kind, or by features that law is typically in danger of exhibiting) is a very particular purpose—albeit something as momentous as salvation. Most law does not purport to secure anything like salvation, but instead has much more ordinary goals. If X is only a stumbling block to salvation, then it is not of much interest to us as jurists.

Or consider this: the reason that law does not, or cannot, secure salvation might be a jurisprudentially uninteresting relation between the two. It might just be that God, in sending Jesus Christ into the world as redemption for our sins, has determined that salvation cannot be achieved through law, even though in the absence of such divine determination it could be. We might be dealing here with a version of the Euthypro dilemma: does the law preclude salvation because God has ordained it, or has God ordained other means to salvation because law

---

20 For the concept of what law (law as such, or law of a certain kind) might well be or become, see Jeremy Waldron, *All We Like Sheep*, 12 CANADIAN J.L. & JURISPRUDENCE 169, 171 (1999).

21 “Legalism” is not always used to connote a vice of legal systems; for a more neutral use in which legalism may or may not be a vice, see Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (1964).
I am going to assume that Paul’s attack on law is best read in the second way (though there are hints of the first view). But we should always keep the possibility of the first branch of the Euthypro dilemma in mind.

As for the particularity of alleged telos of the law, we might grant that jurisprudence as such is not interested in salvation. But there can be ultimate aims and intermediate aims. The law might present itself as aiming at salvation on the basis of a particular quality of law-abidingness: let us call it righteousness. Law aims at salvation by establishing the requirements of righteousness on which salvation is based. So, salvation is the ultimate aim; righteousness the intermediate aim.

Now if “righteousness” means something like “the state of being in full compliance or good standing with the law,” then arguably it is something in which we are interested in jurisprudence. We may not be interested in it as a condition of eternal life, but it may be important for other purposes in jurisprudence. We are interested, for example, in the question of the general action-guiding function of law. It makes a difference to how we understand law whether we think law aims primarily to have its subjects comply voluntarily with all its demands or whether law’s primary aim is to identify and do something about transgressions or violations (that it regards as more or less inevitable). The debate between H.L.A. Hart and Hans Kelsen, for example, about whether legal norms should be understood as directed (in the first instance) at ordinary subjects or primarily at officials (telling them to apply sanctions to ordinary subjects) implicates this issue.

The issue is also implicated in the ideal of the Rule of Law, with its requirements of consistency and practicability. We say that a system satisfies the Rule of Law only if it is possible for each legal subject to actually perform all that the law requires of him. If we think of law as essentially action-guiding, then we will be worried by any

---

22 Plato, Euthypro, in Five Dialogues: Euthypro, Apology, Crito, Meno, Phaedo 1, 13-14, ll. 10c-11c (G.M.A. Grube trans., 2d ed. 2002).
23 There is a strange hint in Galatians 3:19 that law was set up “through angels by an intermediary” to postpone salvation: “Why then the law? It was added because of transgressions, until the offspring should come to whom the promise had been made; and it was ordained through angels by an intermediary.” Galatians 3:19.
24 Romans 2:13.
25 For a rough equivalent to “righteousness,” see the discussion of “law-abiding” as an important general attribute for citizens to aspire to, in John Finnis, Natural Law and Natural Rights 316-17 (1980).
28 See Joseph Raz, The Rule of Law and Its Virtue, in The Authority of Law 210, 214 (1979) (“This is the basic intuition from which the doctrine of the rule of law derives: the law must be capable of guiding the behaviour of its subjects. . . . Most of the requirements which
demonstration that its demands are such that it is impossible for a single person to satisfy them all (so far as they relate to him). More broadly, if we think of the law as reasonable—or of reasonableness as a minimal demand that may be placed on a decent system of law—then we will think of law-abidingness as something which does not require saintly or superhuman powers, but is within the ability of every ordinary person who is willing to try to do what the law requires. If we do not or cannot make such a demand on law—the demand that righteousness in regard to a given body of law be possible, practicable, and reasonable—then we may start to think of law in quite a different light. We may begin to think of it primarily as a revenue device, as officials use its provision mainly to keep track of infractions. Or we may think of it in terms of terrorization: Lon Fuller imagined the subjects of King Rex complaining to their monarch, “a command that cannot be obeyed serves no end but confusion, fear and chaos.”29 In these various ways, the availability or unavailability of the concept of righteousness in regard to a given body of law may make a difference to how, in general, that body of law is regarded.

Consider also the issue of interpretation: jurisprudence is always interested in the interpretation of law. Patently, it makes a difference to how we should interpret a text, what law’s relation to action is supposed to be. If it is intended primarily to guide the actions of ordinary persons and if that intention is realistic, then one strategy for interpretation may be appropriate. If it is intended to do something other than guide the actions of ordinary persons, for example, keep track of inevitable violations, or if action-guiding is a subordinate or quixotic purpose of the normative system in question, then we may want to approach the issue of interpretation on a different basis. Anything we interpret, we interpret under a description; we interpret it as a story, or as a practical prescription, or as a declaration of principle, or whatever. Paul is not particularly interested in interpretation in the passages I have mentioned; but he is intensely interested in what Mosaic law can be seen as. For our part, we (here today) may or may not be interested in problems of interpretation of the Torah. But we are interested in ways of viewing law and we ought to be interested in how approaches to interpretation vary with different ways of viewing law. Paul’s comments may add something to our repertoire of ways of viewing systems of law. And in that sense they may be relevant to our general discussion of interpretation in legal philosophy.

One other point. I am asking whether Paul’s critique of law tells us anything of general interest for the philosophy of law. But it may

---

29 FULLER, supra note 27, at 37.
also be interesting for systems of norms that go beyond the philosophy of law, and for practical reasons generally. We may be particularly interested in what Paul’s critique tells us about the prospects for morality. Some ethical systems have features that are formidably law-like: they comprise a set of uncompromising demands, they are imbued with a general spirit of obligation, they are devoted to the minute disciplining of certain aspects of behavior, and they exhibit intricate systems of rights and duties. Some moral philosophers have wondered whether these characteristics are entirely healthy features of an ethical system. The features seem to be definitive of what Bernard Williams called “[m]orality—the [p]eculiar [i]nstitution,”30 and they seem to do violence towards many aspects of our nature and our ethical life. It will be interesting to see how far Paul’s critique of law makes similar criticisms. Moral systems, like legal systems, work with concepts of righteousness—for example, Kant’s notion of the good will or the informal notion of a good person.31 Once again, we should be interested in the prospects for these roles in relation to a given system of morality or ethics. There are also a number of interesting questions surrounding the application of the maxim “Ought implies can.”32 We know that something that is literally impossible cannot be morally required. But there have been interesting discussions of moral conflict in this regard and discussions of the character of the consistency we should want to insist on in regard to a whole system of morality.33 Moreover, we sometimes debate how demanding we should expect our morality to be. That a putative requirement demands too much of us—even though it is not literally impossible—is sometimes cited as a reason for denying that it is really a moral requirement.34

Let me pull all these threads together. Possibly Paul is interested in a very particular connection between a very particular body of law (the Torah) and a very particular goal (salvation). But we might possibly draw a discussion of somewhat more general interest from his account. There might be a general feature, X, typical of a certain sort of legal system, such that legal systems with X are very difficult for individuals to comply with comprehensively, given the attributes of reasonable people. Philosophizing about such systems of law and evaluating them will have to do without the concept of righteousness or law-abidingness as a touchstone of systemic virtue. It will have to

32 See the discussion in Robert Cover, Justice Accused: Antislavery and the Judicial Process 121-30 (1975).
33 See Bernard Williams, Ethical Consistency, in Problems of the Self 166, 170-71 (1973).
34 For example, see Samuel Scheffler, Human Morality 17-28 (1992).
develop a logic and a theory of interpretation that credits the norms in question with some other practical function. And that may be an interesting result, of which Paul’s critique of the Torah provides an interesting prototype, for our understanding of bodies of human law that have some of the frustrating and apparently self-defeating features that Paul attributes to the Torah.

II

Though it does have its distinctive features, the body of law on which Paul is focusing has a number of features that are quite familiar in general jurisprudence. In this Part, I want to talk about these familiar features as they are presented or understood in Paul’s account. The features will help us in our discussion of the specific content of Paul’s claims (in Part III) and of the implications of those claims (in Part IV). Throughout this account, however, we must remember that Paul presents an understanding of the law with his overall polemical purpose in mind; and he highlights those aspects of it—both positive and negative (in his eyes)—that are important to his thesis about the law’s being superseded by the coming of Jesus Christ.\(^{35}\)

What are the familiar legal features that the Torah presents, in Paul’s account? First of all, Torah exists as positive law. Although it is divine in origin, it is what John Austin called revealed divine law.\(^{36}\) It presents itself canonically in written form, as a book\(^{37}\) or a code.\(^{38}\) People can be instructed in the law; it is something that can be quoted, studied, and taught.\(^{39}\) Nothing but its divine origin distinguishes it from other forms of positive law, i.e., posited law.\(^{40}\)

---

\(^{35}\) There is of course a crucial question of whether Paul gives an accurate account of Torah in his epistles. Paul was of course a Pharisee learned in Torah, but that doesn’t mean he had no incentive to distort his understanding for the polemical purposes of Romans and Galatians.


\(^{37}\) Galatians 3:10.

\(^{38}\) Romans 2:27. The written character of law is cited in Paul’s Second Letter to the Corinthians as a contrast to the spiritual character of true faith: “[Y]ou are a letter from Christ delivered by us, written not with ink but with the Spirit of the living God, not on tablets of stone but on tablets of human hearts.” 2 Corinthians 3:3.

\(^{39}\) Romans 2:18.

\(^{40}\) Paul also offers some observations on the possibility of forms of access to God’s law which do not involve revelation through the written Mosaic tradition. He says that:

[When Gentiles, who do not have the law, by nature do what the law requires, they are]
Secondly, as to its normative structure, the body of law that Paul is considering is understood to be a series of “precepts,” indicating what is to be done and what is not to be done, both generally and in various special circumstances. The law names the actions that it requires and prohibits, individuating them clearly from others with which they might be confused. Normatively, its orientation is towards action, not just towards moral approval or disapproval, i.e., it requires us to do (or not do) certain things, not merely to approve (or not approve) certain things.

Many of the law’s specific requirements and prohibitions are focused on external matters—the law is concerned with behavior, with external aspects of one’s dealings with others, with ceremony, with the care and use of the body, and in the case of circumcision, with actual markings on the body. I shall not say much about the circumcision issue, though of course it is key to Paul’s actual concerns. It is noteworthy that he considers circumcision not as a first-order requirement of the law, but as a marker of one’s identity as a person subject to the law, as one of the people to whom the law was particularly given, and as one who has invested his hope of salvation in the law. Indeed Paul is sometimes prepared to use the term “circumcision” to mean only “marked for salvation,” and at least rhetorically to dissociate it from the law altogether.

Circumcision aside, the law for Paul is primarily concerned with outward conduct, not inner character, i.e., with behavior—“works”—

---

41 Romans 2:26.
43 Paul was embroiled in controversy with members of the Jesus-community in Jerusalem, many of whom insisted that gentiles who convert to Christianity must be circumcised before acceptance. Paul apparently prevailed in the controversy, although there is a question about how decisively he prevailed. See Acts 15:1-29 and Galatians 2:1-16 (for Paul’s own account).
44 Hence Romans 2:25-26: “For circumcision indeed is of value if you obey the law, but if you break the law, your circumcision becomes uncircumcision. So, if a man who is uncircumcised keeps the precepts of the law, will not his uncircumcision be regarded as circumcision?” Id.
45 And he does this too with Jewishness: “For no one is a Jew who is merely one outwardly, nor is circumcision outward and physical. But a Jew is one inwardly, and circumcision is a matter of the heart, by the Spirit, not by the letter.” Romans 2:28-29.
not with (what Immanuel Kant would call) the goodness of one’s will.\textsuperscript{46} However, the proposition that the law (in Paul’s view) commands outward works, and not mental states, needs to be qualified. Some precepts of the law actually command or prohibit certain moral attitudes: the best known is the Tenth Commandment prohibition on coveting. As we shall see in Part III, this qualification is key to some critical points that Paul makes about a possible causal relation between knowing the law and sinning.

Additionally, in a number of places Paul indicates that the law generally commands love and that the detail of the law is, so to speak, epitomized in the commandment: “You shall love your neighbor as yourself.”\textsuperscript{47} Paul seems to think that this suggests an alternative path to fulfillment of the law: “[T]he one who loves another has fulfilled the law. . . . Love does no wrong to a neighbor; therefore love is the fulfilling of the law.”\textsuperscript{48} This is important because a general commandment of love differs somewhat in its normative character from a specific requirement to do or not to do this or that. It is similar to the familiar distinction between rules and principles, inasmuch as love seems to sum up the spirit of the law, whereas the letter of the law lays down particular rules of behavior. Paul also cites other broad attitudes, other aspects of the spirit that are supposed to pervade the law and lie behind its more particular commandments: “[T]he fruit of the Spirit is love, joy, peace, patience, kindness, goodness, faithfulness, gentleness, self-control; against such things there is no law.”\textsuperscript{49} This contrast between rule-like and non-rule-like aspects of the law will also be important in what follows. In Part III, we will be asking the following question: when Paul explains the problematic character of the law, is he referring to law in both these aspects, or is he using one aspect (love) to explain the problematic character of the other aspect (the particular rules)?

Thirdly, the law is associated with sanctions, with penalties, and with rewards—specifically, death and eternal life. Its prohibitions convey, in effect, “God’s decree that those who practice such things deserve to die.”\textsuperscript{50} This is seen as a matter of strict desert or entitlement, both as to death and as to eternal life. The metaphor Paul uses to express the rigor of this is the image of wages:\textsuperscript{51} one receives one’s wages for work done, not out of compassion for work that one might have done but was not able to. A worker keeps an account of his work

\textsuperscript{46} See Kant, supra note 31, at 7-14; Immanuel Kant, The Metaphysics of Morals 45-47, 185-87 (Mary Gregor ed. & trans., Cambridge Univ. Press 1991) (1797).
\textsuperscript{47} Romans 13:9.
\textsuperscript{48} Romans 13:8,10.
\textsuperscript{49} Galatians 5:22-23.
\textsuperscript{50} Romans 1:32.
\textsuperscript{51} Romans 4:4.
and so does his employer. And the law makes us accountable to God for what we do with our selves, our bodies, and our actions. Of course Paul does not forget the role of mercy and the hope of salvation that one might have simply by trusting in the mercy of the Lord. But his position is that the hope of mercy is a hope established quite apart from the law. It is not intended within the framework of the law as a sort of wild card (a “Get out of hell free” card) or as a way of making up for or overlooking a shortfall. It is an utterly independent route to salvation.

To sum up Paul’s characterization of the law: it is a written code of positive law, divinely inspired, presenting itself in canonical form as a set of rules naming and specifying actions which are commanded or prohibited, precepts whose fulfillment is associated with the promise of eternal life, as wages are associated with payment.

III

What exactly does Paul have against law, so described? Paul claims that it is impossible (or close to impossible) for anyone to fully comply with the law. This is partly because the law itself is so demanding and partly because the law itself seems to stimulate the very acts (and attitudes) that it prohibits. In light of this, he argues, we have to rethink our understanding of the purpose of the law. What is the purpose of the enactment and existence of a body of law that is more or less bound to be violated? What is the purpose of propounding it, teaching it, and orienting one’s conduct and conscience to it, if in effect it is not possible to fully comply with it?

Paul offers a tentative answer to these questions, and both the questions and his answer have some interest for jurisprudence. The argument as it is presented in Romans and Galatians goes through several steps:

(a) It is almost impossible for creatures like us to avoid transgressions of the law.

(b) In fact, the law—or consciousness of the law—has features that play a role in law-breaking by actually stimulating transgressions.

(c) So a person’s being in good standing in relation to the law (a

52 Romans 3:19.
53 Romans 4:5-8.
54 I should say, of course, that all of this is tremendously controversial among theologians, many of whom despair of finding a consistent line of argument in Paul’s writings on the relation between law and sin. See, for example, HEIKKI RÄISÄNEN, PAUL AND THE LAW 11 (1983) (“[C]ontradictions and tensions have to be accepted as constant features of Paul’s theology of the law.”). For a critique of Räisänen’s despair, see Jeffrey A. D. Weima, The Function of the Law in Relation to Sin: An Evaluation of the View of H. Räisänen, 32 Novum Testamentum 219 (1990).
(d) So unless the law is completely pointless (or malign), it must have some other function than one that depends on a person’s or persons’ being in good standing in relation to it.

(c) That other function should be the basis on which we understand, interpret, and debate the application of the law.

Let me now elaborate these propositions, so we can follow in detail the direction and difficulties of Paul’s argument.

(a) On the first proposition,—that it is almost impossible for creatures like us to avoid transgressions of the law—Paul draws on the point that the law seeks to regulate in detail the appetites and actions of a carnal being. We are not the sort of creatures that can effectively be regulated this closely. Even if I want to obey the law, willing my compliance as hard as I can, the result is transgression: “I have the desire to do what is right, but not the ability to carry it out. For I do not do the good I want, but the evil I do not want is what I keep on doing.” Nor is this just the accident of the occasional power of fleshly appetites. Paul says, “I see in my members another law at war with the law of my mind.” The correlation between trying to obey the law and failing is itself almost law-like: “I find it to be a law that when I want to do right, evil lies close at hand.”

(b) Paul says that the inevitability of our transgressing the law is not just a matter of our nature. It is also a matter of what the law is like, relative to our nature. Law itself—or consciousness of the law—actually has a hand in stimulating transgressions: it is a cause of sin. This is intended as a substantial point, I think, not a verbal one. True, when Paul says that “where there is no law there is no transgression,” we could give that a trivial interpretation: transgression logically presupposes law. But the triviality would be easily avoided. Sin and sinfulness—the evils which the law ostensibly seeks to combat—might be understood in ways that do not involve the logic of transgression, and thus might be seen as independently existing evils which law sets out to battle. So, to understand Paul’s point, we should ask whether there is anything about law that makes it more likely that sin—in a sense defined independently of law—will flourish. With regard to this substantive possibility, Paul alludes to two features of law. One is its deontic character as a system of rules, which might mean it combats sin

---

55 Romans 7:14.
56 Romans 7:18-19.
57 Romans 7:23.
58 Romans 7:21.
59 Romans 4:15.
60 By analogy: although “tort” is a technical legal term, and someone might say there are no torts apart from law, still we might reply that there are accidents apart from law, and some of those accidents are caused by carelessness, and that is what tort law is trying to address.
at the cost of sometimes defeating the purposes, motives, and virtues that really define the point of combating sin. The other is its nominative or naming aspect: by individuating and naming sins, law familiarizes us with sin in a new and perhaps provocative way.

The first theme, which is somewhat muted (though definitely present) in Paul’s account, is that the precepts of the law sometimes seem at odds with the spirit or ethos of the love that is supposed to imbue it. As we saw in Part II, although the law consists largely of detailed deontic precepts, it is also supposed to be captured by more general policies, purposes, and principles such as loving one’s neighbor. But although this is implicit in the law, the law itself is characterized by its letter and not by its spirit, and the letter of its deontic requirements may well seem under- or over-inclusive relative to these principles or purposes. A general effort to be good or loving, then, may well lead us against the current of the law’s specific requirements. The law is imbued with love, and love expresses the purpose, point, or justification of the law; but in some cases what love requires may conflict with what the detailed legal rules require. The point here is a logical point, not a psychological one. It is not that love can motivate transgressions, but that love can justify transgressions; and if love is also supposed to stand in a justificatory relation to the law, then there is a question about whether we should follow the justification or follow the rule that seems to have drifted away from its justification.

The other feature of law which helps explain the inevitability of

61 Galatians 5:14; see also Romans 13:10 (“[L]ove is the fulfilling of the law.”).
62 For the letter/spirit contrast, see also 2 Corinthians 3:6 (“[T]he letter kills, but the Spirit gives life.”). But it may be wrong to put too much emphasis on exactly this contrast, as though it were a contrast between the letter of the law and the spirit of the law, rather than between the letter of the law and the Spirit (of something other than the law, like the Gospel). See Karl Kertelge, Letter and Spirit in 2 Corinthians 3, in PAUL AND THE MOSAIC LAW, supra note 36, at 117, 122 n.9.
63 Cf. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 32 (1991) (“Whether it be ‘No dogs allowed’, ‘Speed limit 55’, ‘No one under the age of 21 shall consume alcoholic beverages’, . . . the factual predicate of a rule is a probablistic generalization with respect to some (usually but not necessarily unstated) justification. Insofar as some dogs would not create annoying disturbances, some driving at greater than 55 miles per hour is not dangerous, some people under the age of 21 can use alcohol responsibly, . . . the generalization of the rule’s factual predicate is over-inclusive. It encompasses states of affairs that might in particular instances not produce the consequence representing the rule’s justification, even though the state of affairs, as a type, is probabilistically related to the likelihood or incidence of the justification. A rule’s factual predicate bears a probabilistic relationship to the concerns of the rule, but that relationship leaves open the possibility that in particular cases the connection between the justification and the consequence is absent. The ‘No dogs allowed’ example allowed us to see not only that some dogs might not cause annoying disturbances, but also that some annoying disturbances might be caused by agents other than dogs. The factual predicate is thus under-inclusive as well as over-inclusive.”).
64 There are a number of instances of this in the Gospels, mainly concerning Jesus’ healing on the Sabbath. See Matthew 12:10-14; Luke 13:11-16; John 5:1-16.
violations is psychological, and it is much more explicit in Paul’s account, and much more disturbing. Paul suggests that, by naming and individuating particular transgressions, the law actually puts them before our minds in a way that heightens their appeal to us. I remember as a boy in Sunday School being very excited to find out that there was something called “adultery,” excited in part by the tight-lipped discretion with which Sunday School teachers responded to my impertinent questions on the issue.65 We might take this as an example of “sinful passions, aroused by the law.”66 Paul’s own example is coveting: “I would not have known what it is to covet if the law had not said, ‘You shall not covet.’ But sin, seizing an opportunity through the commandment, produced in me all kinds of covetousness.”67 Paul’s choice of a law that forbids a certain mental state is interesting in this regard. To understand what that law is, I have to understand “coveting” and there’s a sort of hermeneutic sense in which I cannot understand coveting without knowing what it is like to covet,68 without being familiar in some sense with that mental state. It is not clear that I can know what it is like to covet without having at some stage coveted; or, to put it the other way, learning what coveting is amounts to something disturbingly close to learning how to covet.

I guess the same point could be made with regard to other commandments, like the prohibitions on killing and stealing. True, these may be understood in the first instance in purely behavioral terms (stabbing, taking, etc.), so that understanding the actus reus part of them does not require us to grasp what it is like to kill, steal, etc. But inasmuch as they are associated with a certain mens rea—with murderousness and dishonesty, respectively—there are questions about how much we can really grasp these sins without knowing what it is like to think murderously, or what it is like to succumb to the temptation to theft or fraud.69 The external actions that these sins comprise may make no sense, may seem, as it were, shapeless apart from an understanding of what it is like to perform them or to want to perform them.70 On the

65 I remember that in our Sunday School coloring books there were illustrations for the various commandments of the behavior commanded or forbidden. For stealing, killing, graven images, and so on, the illustrations were pretty obvious. But for adultery, the illustration simply showed a man and a woman standing close together and looking rather shifty.

66 Romans 7:5.

67 Romans 7:7-8.


69 There is even a suggestion in the Gospels that these sins are defined by attitudes that spring from the human heart, not just by external behavior. See Matthew 15:19.

70 This adapts a suggestion of John McDowell’s concerning whether thick moral concepts can be understood in terms of separable descriptive and evaluative components. See John McDowell, Non-Cognitivism and Rule-Following, in Wittgenstein: To Follow a Rule 141, 144-45 (Steven H. Holtzman & Christopher M. Leich eds., 1981). But see Simon Blackburn, Rule-Following and Moral Realism, in Wittgenstein: To Follow a Rule, supra, at 163, 166-70.
other hand, one might also argue (as a matter of criminal law theory) that the mens rea aspect of these offenses only defines a condition of culpability, and that a grasp of that condition is not necessary for understanding the prohibition itself. All we need to know about the prohibition is that we are not to kill when the killing would be murder; in order to understand the law, we do not need to know what it is like to act or think murderously. But with coveting, there is no other aspect to the prohibition than our not being in the specified mental state.

Be that as it may, it looks as though we now have the bold suggestion that law is inherently counterproductive, that it is a generator, not a preventer of sin. That is antinomianism with a vengeance. Now Paul is definitely anxious to distance himself from this implication: “What then shall we say? That the law is sin? By no means! . . . Did that which is good, then, bring death to me? By no means! It was sin, producing death in me through what is good.”71 Law does something good, or at least necessary. It individuates and names the specifics and the details of our sinful nature, taking us beyond the situation in which we are and see ourselves as undifferentiated bundles of sin, appetite, etc. However, the cost of doing so is to inflame our curious and prurient natures, so that the sin in us works evil through the (basically) good offices of the law. The law gives us detailed knowledge of sin, and detailed knowledge of sin for creatures like us is a dangerous and inflammatory thing. There is, after all, a teaching at the very root of the Judaic tradition that the acquisition of the knowledge of good and evil is the beginning of our human sinfulness and intimately connected with the death that sin involves.72 Adam and Eve did not know that they were naked until they ate of the fruit of the tree of the knowledge of good and evil, but after they ate, nakedness was a concept for them, like covetousness for Paul.73 In the Genesis tradition, the bare attaining of knowledge of evil is forbidden (quite apart from the doing of evil), and in Romans, Paul sometimes toys with just this possibility: “[B]y works of the law no human being will be justified in [God’s] sight, since through the law comes knowledge of sin.”74 Actually, however, the best interpretation of this last passage is not that the knowledge condemns us qua knowledge, but that it condemns us because in some cases (or in all cases) the knowledge is closely related to being in the state of sin that the knowledge is

71 Romans 7:7, 13.
72 See Genesis 2:16-17 (“And the Lord God commanded the man, saying, ’You may surely eat of every tree of the garden, but of the tree of the knowledge of good and evil you shall not eat, for in the day that you eat of it you shall surely die.’”).
74 Romans 3:20.
knowledge of.
We have seen that Paul makes this argument retail as it were, with regard to particular sins, like coveting. And we wondered whether it could be applied, wholesale to all sins, or only to those that consist of being in a certain state of mind. But Paul also generalizes the point in another way. As a general matter, law rivets our attention on our bodily nature:

[T]hose who live according to the flesh set their minds on the things of the flesh, but those who live according to the Spirit set their minds on the things of the Spirit. To set the mind on the flesh is death, but to set the mind on the Spirit is life and peace. For the mind that is set on the flesh . . . does not submit to God’s law; indeed it cannot.

Though the law is holy, and though it ostensibly sets out to combat our carnal passions and appetites, the law, like the sin it combats, sets its mind on things of the flesh. To be preoccupied with the law, then, is to be preoccupied with fleshly things (like coveting), and Paul’s paradox is that this is true whether one’s orientation to fleshly things is positive (like that of the sinner) or negative (like that of the law). Even if it is negative, it is still a preoccupation with the flesh, and that—in and of itself—is dangerous for creatures like us.

(c) In light of all this, it is not surprising that Paul concludes that “[n]one is righteous, no, not one . . . [since] all have sinned and fall short of the glory of God.” It is tempting to attribute to Paul the suggestion that in Jewish law nothing less than absolute, comprehensive, and meticulous observance of the law is necessary to avoid God’s wrath. Paul seems to associate Jewish observance of the law with a sort of perfectionism, as though the smallest single transgression is sufficient for damnation. It is pretty obvious that this is inaccurate as a matter of the theology of Judaism, both now and at the time that Paul was writing. Observance of the law was a matter of one’s own relation (and of the Jewish people’s relation) to God’s grace, not a matter of a necessary condition for earning salvation as an entitlement. So—we may ask—what does it matter that some transgressions are inevitable, if perfection is not demanded?

The answer is complicated. For the purposes of this paper at least, we can read Paul’s interest as an interest in the logic of the law, rather than in the spirit of any particular religious tradition. The fact is that the law is presented to its addressees as a set of fairly rigorous, non-negotiable requirements, prescribing or proscribing the named action in

75 Romans 8:5-7.
76 Romans 3:10, 23.
77 Galatians 3:10, 5:3.
the specified circumstances, with the assumption that each transgression is wrong and each transgression counts as disobedience. The law is not presented as a set of guidelines, as though to encourage a sort of vague good faith half-hearted attempt—a sort of “college try”—at something approximating compliance. Nor are laws set out simply as rules of thumb or rather good ideas, that we would be well advised to look into or take seriously or treat as heuristics. Each of them is literally commanded—that is Paul’s point. From the point of view of the law qua law, none of these requirements is to be treated lightly. Nor are we only commanded to do the best we can or as much as possible so far as the whole list of law’s requirements is concerned: God’s commandment attaches to each requirement, not to the list as a whole (in a way that might allow us to play with percentages). It is a little like Robert Nozick’s point about goals and side constraints.79 Rights, on Nozick’s account, operate as side-constraints on action: whatever goals you are pursuing or trying to maximize, you are to pursue them by means that do not violate rights. This is quite different from regarding the rights as part of your goal, so that rights-violations are something you try to minimize. Violations are simply prohibited; they are not presented merely as something bad, to be reduced if possible, i.e., kept to a minimum. And that is true, as well, of the law as Paul conceives it.

Furthermore, Paul’s point about the inevitability of transgressions is not a point about the odd isolated instance, or about the difficulty of obtaining perfection. As we have seen, the two theses he defends seem to commit him to the view that creatures like us are likely to find ourselves in wholesale violation of the law, either because of the tension between the spirit and the letter of the law, or because of the interaction of our psychology with law’s nominative aspect. Indeed, in the latter regard, it is part of Paul’s claim that the very effort to comply with the law is what sets us up for transgressions.80 I do not mean that he is claiming that compliance is impossible, or that the precepts of the Torah violate the logical canon “ought implies can.” The point is rather that compliance must be expected to be quite spotty and haphazard for creatures like us, given the interaction between our psychology and the law.

Let me make one other point about perfect compliance. The more we insist that law is to govern not just the detail of our actions, but the detail of our thoughts and attitudes as well, the less likely it is that anyone will be able to keep track of whether he has in fact transgressed the law or not. Some individuals may not have, and so the class of those in good standing or in full compliance may not necessarily be

80 Romans 7:21.
empty. But belief that one is in this class is likely to be fallible and dangerous: apart from anything else, a boastful claim to one’s own righteousness may be sinful in itself and it may be difficult to avoid crossing the line between belief in one’s own righteousness and sinful versions of that belief. This is another way in which law seems to undermine itself. It requires us to keep track of our observances and transgressions, but in doing so it inflames transgressions and may distort our awareness of its observance.

So, according to Paul, we have a paradox. Normatively, law presents itself as a set of uncompromising, individually-commanded duties. But the idea of someone’s (of some human’s) living up to this set of normative demands is unrealistic. It is not going to happen: “none is righteous, no, not one.” There is not going to be anyone who is in the sort of good standing with the law that the tone and tenor of its normativity demands. Paul is not saying that there is anything incoherent about the idea of righteousness in relation to the law. We can describe it coherently by listing the actions to be performed and avoided, and attributing them in thought at least to the agency of one person. We can even imagine what it would be like for such law-observing righteousness to be the condition of salvation. But for us it is an unrealistic aspiration. So there is the difficulty: it is not clear how the law is supposed to be understood, given this inevitable shortfall, on the one hand, and the uncompromising deontic character of its normativity on the other.

(d) If we were talking about a human legislator, our discussion might proceed from this point under the heading of incompetence: we would be in the territory of Lon Fuller’s allegory of “King Rex,” illustrating various ways in which the legislative enterprise can fail.

81 Despite Romans 3:3.
82 However, when Paul talks of those who “boast in the law,” Romans 2:23, he has in mind those who boast of their having the law (as a people), rather than of their individual compliance with it.
83 Romans 3:10.
84 Galatians 3:21.
85 See Fuller, supra note 27, at 36-37 (“Once again the code was withdrawn for revision. By now, however, Rex had lost his patience with his subjects and the negative attitude they seemed to adopt toward everything he tried to do for them. He decided to teach them a lesson and put an end to their carping. He instructed his experts to purge the code of contradictions, but at the same time to stiffen drastically every requirement contained in it and to add a long list of new crimes. Thus, where before the citizen summoned to the throne was given ten days in which to report, in the revision the time was cut to ten seconds. It was made a crime, punishable by ten years’ imprisonment, to cough, sneeze, hiccup, faint or fall down in the presence of the king. It was made treason not to understand, believe in, and correctly profess the doctrine of evolutionary, democratic redemption. When the new code was published a near revolution resulted. Leading citizens declared their intention to flout its provisions. Someone discovered in an ancient author a passage that seemed apt: ‘To command what cannot be done is not to make law; it is to unmake law, for a command that cannot be obeyed serves no end but confusion, fear and chaos.’ Soon this passage was being quoted in a hundred petitions to the king.”).
The law is laid down to make us better; but through legislative incompetence it ends up making us worse.

But that will not do for the Pauline argument. The attribution of incompetence is not an option: this is God’s law, not Rex’s. Some commentators have wondered whether Paul’s reference to the law having been given to us by angels is supposed to be a suggestion as to its perverse or even demonic provenance—the angels in question wanting to provoke or incriminate us. But that reading is now generally dismissed. I indicated in Part I of this paper that we should consider whether we can infer anything from Paul’s account of the Torah that might be useful for the general jurisprudence of human law, and some readers may think that at this stage we are drifting away from that interest. But that is not quite right: the divine provenance of the law Paul is addressing means that we can consider features of that law—including possible functions that it might serve—undistracted by considerations of legislative incompetence of the King Rex variety. We have seen that God cannot be thought to have given the law with the idea of full compliance in mind. So we wonder what else He might have had in mind in giving us the law. And in this regard, we might consider (of course in idealized form) other functions—beyond securing full compliance—that any body of law, including human law, might be thought to have.

So what other sensible or ideal function might be attributed to the law that we have described? Three possibilities suggest themselves; they are not mutually exclusive. One is that the law serves a specific educative function, relative to which the costs noted above in (b) cannot be avoided. The second possibility is that law serves to impose special enumerated responsibilities; perhaps on a particular people. The third possibility is that law existed to ensure that all men were sinners and that salvation could arise only through grace.

The first possibility—that law might have an educative function—arises from a suggestion of Paul’s in Galatians:

> Before faith came, we were held captive under the law, imprisoned until the coming faith would be revealed. So then, the law was our guardian until Christ came, in order that we might be justified by faith. But now that faith has come, we are no longer under a guardian.

What exactly is the educative function based on this account? Paul

---

86 Galatians 3:19.
87 As the angel Satan sought to provoke and incriminate Job before God. Job 2:1-6.
88 See Hübner, supra note 73, at 26-28; Stanton, supra note 36, at 113.
89 I am not going to consider the perverse but apparently non-malign answer that Paul suggests: “[L]aw came in to increase the trespass, but where sin increased, grace abounded all the more.” Romans 5:20.
suggests that the law exists “in order that sin might be shown to be sin.”91 There was sin in the world before the law was given, but there was a less adequate basis for keeping track of it, identifying it, naming it, separating each sin in our moral awareness from each other sin, and so on. “[S]in indeed was in the world before the law was given, but sin is not counted where there is no law.”92 Before the law was given, sin was pervasive and undifferentiated. The law, however, changes all that, by making it absolutely clear what it is for something to be forbidden and for it to be deserving of punishment.93 As I said earlier, it individuates and names the specifics and the details of our sinful nature, taking us beyond the situation in which we are, and see ourselves as, undifferentiated bundles of sin, appetite, etc. Paul’s position is almost Hegelian in its implication that our ethical development must go through certain stages, and that these stages are not just individual stages, but historical stages in the general moral development of the human race. One of these stages—made possible historically by the giving of the law—involves progress from a general sense of sin (in an undifferentiated pervasive meaning) to an ability to recognize particular sins, in the category of offenses, primarily as they occur in one’s own desires and impulses.94

The development, as we have seen, has its costs. For if Paul is right in point (b) above, the pinning down of particular sins with particular names may introduce us to forms of sinfulness we would not have otherwise known, and make them attractive to us under these new characterizations. I suppose it might as easily distract us from (undifferentiated) forms of sin we would otherwise have committed. But there is no guarantee that this all will wash out in the end, and Paul seems to recognize this in the notorious passage about law’s coming into existence to multiply transgressions.95

The second possibility is that law is laid down as a way of giving people (or some people, or a people) special responsibilities, which cannot be understood without the sort of enumeration that law involves. For mankind generally, an undifferentiated understanding of sin may be sufficient. One is still liable to punishment, as for example the pre-Noachide world was punished.96 But God pays special attention to

---

91 Romans 7:13.
92 Romans 5:13.
94 There is another interpretation of the “custodian” passage, which treats the custodian’s role as more in the nature of restraint than education. See David J. Lull, “The Law Was Our Pedagogue”: A Study in Galatians 3:19-25, 105 J. BIBLICAL LITERATURE 481 (1986). But that is more difficult to reconcile with the provocative character of the law, as set out in (b) above.
95 Romans 5:20.
96 Genesis 6:5-7.
Israel by virtue of His covenant with it. He gives Israel special privileges, and with it special and enumerated responsibilities: “The Lord will establish you as a people holy to himself, as he has sworn to you, if you keep the commandments of the Lord your God and walk in his ways.”97 With special privileges comes a special sense of transgression and of the significance of transgression. Paul observes, for example, that transgressions by those who are under the law are in some sense a scandal in the world: “You who boast in the law dishonor God by breaking the law. For, as it is written, ‘The name of God is blasphemed among the Gentiles because of you.’”98 And so transgressions under the law attract a special and rather literal liability to punishment. In this connection, Jeffrey Weima draws attention to a passage in Amos 3:1-2, where God says that he will punish Israel in particular for its transgressions on account of his special relation with them: “You only I have known of all the families of the earth: therefore I will punish you for all your iniquities.”99

A third possibility is that law came into existence to settle the status of each and every human as a sinner, so that no one could reasonably hope for salvation except through faith and grace. On this account, the guardianship role referred to in Galatians100 is not that of an educator, but more in the way of a jailer: “The law has only one aim: . . . to constitute all men sinners, and like a gaoler to guard them, shut up under sin.”101 The valuable aspect of this is perhaps its equalizing function: “the law brings about the unity of all men after a negative fashion, by placing them all equally under the curse,”102 and equality that applies to Jew and Gentile alike, and that will be realized in the fullness of time by the fulfillment of Christ’s promise of redemption.

(e) The concluding suggestion, then, is that if we want to continue working with the law in light of this account, we should interpret and debate its application on the basis of an account of the law’s function of the kind we have just given. Paul himself does not pursue this agenda. But there are one or two obvious ways in which it can be pursued.

First, we might say that the Pauline approach undercuts any interpretation that rests on the assumption that law must not be unreasonably demanding. Such interpretations might be substantive or formal. For example, the law instructs us to love one’s neighbor as oneself. On the face of it, this is a pretty tall order, and in the interests

---

97 Deuteronomy 28:9.
99 Weima, supra note 54, at 230 (emphasis supplied).
100 Galatians 3:23-25.
102 Id.
of mitigating its rigor, we might want to place limits on who counts as one’s neighbor or look for something other than a literal understanding of “love one’s neighbor as oneself.” But the premise behind such reinterpretation would be that the law must be such that people have a reasonable prospect of complying with it. If we give up that premise—because it is not now licensed by any of the conceptions we have formed of the function of law—then there will be nothing to support these reinterpretations. We might as well read the command literally and reconcile ourselves to falling short of its demands. Something similar is true at the level of deontic form. We have already noted a tension between the deontic character of the law and what it seems could only be the open-ended aspirational character of its actual requirements. Surely loving one’s neighbor cannot be literally required, in the sense that any falling short as between the level of one’s love for one’s neighbor and one’s own self-regard means that one is guilty of wrongdoing. Perhaps we should reinterpret the form of the commandment so that it says: “It is good to love your neighbor as yourself,” rather than “You are required to do this, and it is wrong not to.” But again, on the approach developed here, there is nothing to motivate such a reinterpretation. The deontic form of the law should be taken at face value, and if it follows that we are all wrongdoers, so be it.

More specifically, there is not going to be any particular difficulty (on the sort of account given here) in moving from an interpretation of the law that focuses on external conduct to an interpretation that focuses also on internal aspects of thought and desire. Jesus made this move and so did Paul. In some ways, as we have seen, this may mitigate the rigors of the law. But in other ways it aggravates them, since the thoughts and desires of our hearts are much less under our conscious control than our external actions. But if the point of law is not exactly to repay us for the choices we make, this may be less important. If we understand that the law is inevitably violated by creatures like us, and that one of its functions is to remind us of exactly what sort of creatures we are, then the fact that we are condemned for our inner lusts as well as our lustful actions will not seem necessarily unreasonable. The position is not entirely unfamiliar from secular ethics. In his account of the moral law, Immanuel Kant observes that although the basis of right action is a good will, no one can ever be sure that he has acted from a good will:

It is indeed sometimes the case that with the keenest self-examination we find nothing besides the moral ground of duty that

---

103 See supra text accompanying notes 76-85.
105 Romans 2:28-29.
106 See supra text accompanying notes 62-64.
could have been powerful enough to move us to this or that good action and to so great a sacrifice; but from this it cannot be inferred with certainty that no covert impulse of self-love, under the mere pretence of that idea, was not actually the real determining cause of the will.\textsuperscript{107}

The moral law is supposed to do its work in the miasma of consciousness, and we must not assume that because it is a \textit{practical} law, it must be possible to be conscious of when we are acting in accordance with it and when we are not.\textsuperscript{108} Therefore, it is not appropriate to oppose any interpretation of either the law Paul is talking about or the moral law Kant is talking about by complaining that, on the interpretation in question, none would ever be able to say for sure whether he had complied with it. As an example, consider a recent argument by Richard John Neuhaus, that the current campaign against sexual abuse by clergy covers so much in the way of feeling as well as action that no priest can ever be sure he is not guilty. This is the sort of predicament, said Neuhaus, that law is supposed to prevent: law is supposed to provide for us a clear sense of when we are guilty and when we are not, which it cannot do if it tries too hard to look into our hearts.\textsuperscript{109} But again, this premise about what law is supposed to do is not supported by the Pauline approach. The fact that the sort of vindication which comes from complete confidence in one’s righteousness would not be available on a given interpretation of the law is not in itself an adequate ground for opposing it.\textsuperscript{110}

IV

What interest is all of this for general jurisprudence in the modern world? At the beginning of this paper, I noted the view of many scholars of Paul that the arguments about law in Romans and Galatians are limited to Paul’s conception of Torah, and may have little or no application to other forms of law. Certainly it has been shown that it is dangerous to generalize the position of Paul that I have been outlining as some sort of all-purpose antinomianism.\textsuperscript{111} That warning must be

\textsuperscript{107} \textsc{Kant, supra} note 31, at 19.

\textsuperscript{108} See \textsc{Hannah Arendt, On Revolution} 96-97 (Penguin Books 1973) (1963), for the terrifying political effect of conceptions of virtue that have this character.


\textsuperscript{110} On the other hand, it is clear that Paul himself does not follow this through with full rigor. When it comes to issuing instructions to his own followers about who to keep company with, he seems to assume it \textit{is} possible to say unequivocally who is an immoral person and who is not. 1 \textsc{Corinthians} 5:9-13. For associational purposes, it seems, law does need an operational concept of righteousness!

\textsuperscript{111} See, \textit{e.g.}, \textsc{W. D. Davies, Paul and the Law: Reflections on Pitfalls in Interpretation}, 29 \textsc{Hastings L.J.} 1459 (1978).
borne in mind.

Nevertheless, Paul’s position with regard to Torah may be useful inasmuch as it considers ways of thinking about law—even if it is only, in the first instance, these ways of thinking about this law—that are helpful for modern jurists to have in their tool-kit. The history of jurisprudence has often been a matter of seeing beneath the surface: seeing through what law says it is or what it purports to be, to what it really is and what it really does. Since Paul’s particular jurisprudence is an essay in just such excavation—for he is asking: what on earth is going on with this body of law which seems calculated to promote rather than prevent transgressions—it may be a useful addition to the resources of our general jurisprudence. Even if most law is not like Paul’s account of the Torah, nevertheless, there may be forms of law which are like this (in some significant regards) or there may be aspects of all law that sometimes can be like this (in some significant regards). Either way, an understanding of Paul’s particular jurisprudence helps break the grip of a rather monolithic surface-level account of what we say, as analytic legal philosophers, law must be like.

In fact, it is not hard to think of bodies of human law that have some of the frustrating and apparently self-defeating features that Paul attributes to the Torah. Here is one example, from a context that seems very far removed from Pauline theology. In their book on policing policy, Above the Law: Police and the Excessive Use of Force, Jerome Skolnick and James Fyfe consider an interesting paradox in the way large municipal police forces are organized and disciplined in the United States. On the one hand, police officers (like soldiers) are subject to a very minute and meticulous set of regulations that appear to govern all aspects and details of their actions. On the other hand, unlike soldiers, indeed unlike low-level officials or workers in most large hierarchical organizations (e.g., welfare clerks or assembly-line workers), police officers on the street necessarily exercise enormous discretion without any immediate supervision and in a way which has momentous consequences for themselves and others in the stressed circumstances in which they find themselves. The rulebook is there as the police chiefs’ response to various forms of public and political concern about the control and accountability of the forces under their command, and the use of those forces to achieve goals thought important for the community. But the rulebook stands in a quite

---

112 For the distinction between general jurisprudence and particular jurisprudence, see supra note 18.
114 Id. at 118-19.
115 Id. at 119.
anomalous relation to the actual practice of policing:116

Trying to shoehorn street-level officers’ great discretion into the lowest levels of a military organizational style has resulted in the creation of elaborate police rulebooks that pretend to be definitive but provide little meaningful guidance for police officers. Hard and fast rules are viable in mechanical work situations, but they are of little assistance in dealing with the fluid discretionary situations that are the core of police work. No rigid directive can tell officers to arrest every time they witness a violation of the law; to do so would severely damage the ends of justice and drain the resources of the police and the rest of the criminal justice system. No directive . . . can precisely define the circumstances distinguishing cases in which arrest is appropriate from those in which it is not. Yet, especially in police agencies that aspire most directly to the ideal of military spit-and-polish philosophy, top administrators persist in perpetuating the myth that officers adhere to the ideal of full enforcement.

. . . .

In fact officers in even the most legalistic departments . . . routinely violate the letter of their departments’ rule books by issuing warnings rather than tickets and by releasing minor offenders, sometimes in exchange for information about more serious criminals. Nor do they follow closely the detailed rules that their administrators promulgate and use as a way of fixing blame at the lowest levels for things gone wrong. Indeed, if officers were to follow the rules of the most bureaucratized departments, their work would grind to a halt, as it occasionally does when police protest labor conditions by conducting rulebook slowdowns . . . .

Irrelevant or overly rigid police regulations also create the less readily visible tension of making it impossible for officers to do their jobs without routinely violating rules. . . .

You can’t go eight hours on the job without violating the disciplinary code. . . .

Consequently, office[r]s are inclined to devalue rules and find shortcuts around all of them, regardless of the justifications for their existence. . . . [O]fficers’ common rationalization for violating rules of any degree of merit was that “the job is not on the level.”117

The paradox is not quite as vicious here as the one that Paul seems to suggest. Skolnick and Fyfe are not arguing that regulation (or the sense of being regulated) actually stimulates infractions by the police. (They come close to this, however, in their suggestion that the perceived futility of some aspects of the way they are regulated tends to encourage

116 Just to be clear: although the police enforce legal rules against ordinary people, in this Part I am talking only of the rules that are applied to and enforced against low-level police officers by their superiors in the police hierarchy.

the taking of shortcuts around all regulations.\textsuperscript{118} But the idea is that as a way of governing what the police do at street-level, the regulatory exercise in its legalistic form is almost entirely misconceived. Irresponsible officers do not follow it and responsible officers also cannot reasonably be expected to follow it. It is inapt for the sort of situation police are in. Its legalistic rule-like features constrain necessary discretion in rigid and counterproductive ways, and its attempt to take care of everything—all actions, all situations, all circumstances—in detail makes a mockery of the fluid, open-ended, common-sense approach that officers are in fact expected to adopt.

There is something perverse, then, about saying that the function of these rules is to guide the conduct of street-level officers. Certainly, that is the function so far as the normative form of the rulebook is concerned: it says that an officer is to do this or not do that, in this or that situation. But either the rulebook is utterly misconceived or the normative form is misleading as to its real function. Politically, the real function of the promulgated rulebook is to reassure a constituency that the police are “under control.” More proximately, the function of the rulebook is to provide supervisors and commanders with a clear basis for disciplinary intervention whenever they conceive, for whatever reasons, that disciplinary intervention is appropriate. In this sense, the rulebook, like the Torah on Paul’s view, keeps track of infractions, counts them, making them available as occasions for punishment. The idea is that punishing or not punishing will be an executive decision made for all sorts of reasons, in a way that is certainly not dictated by the law; but the role of the law is to ensure that charges can be drawn up whenever charges are necessary.

Now, conceivably, that role might be discharged secretly. We might imagine an organization in which commanders have a secret rulebook in reference to which street-level officers can be charged whenever the commanders like. And we might ask what point is served by making the rulebook available to the street-level officers if in fact—and this, remember, is the Skolnick and Fyfe thesis—full compliance is impracticable and regular transgression is more or less inevitable. Since the rulebook cannot guide conduct, why make it available to those whose conduct it applies to? Why promulgate it to the street-level officers? Why not promulgate it only to the supervisors charged with disciplining them? I can think of two possible reasons, both of which find echoes in Paul’s account.

One answer is that the point of promulgating the rulebook might be to coordinate the commanders’ and the subordinates’ sense of the subordinates’ accountability, so that police officers will understand that

\textsuperscript{118} Id. at 121.
they are in the position of being liable to discipline at any time. There 
is an echo here of Paul’s saying: “[W]e know that whatever the law says 
it speaks to those who are under the law, so that every mouth may be 
stopped, and the whole world may be held accountable to God.”119

The other answer is that even if the rulebook is largely 
impracticable, still, officers in possession of it will not ignore it 
altogether, but will make some sort of effort to follow some of the rules 
(perhaps an attempt to follow all of them some of the time, or some of 
them most of the time). Their doing this may or may not produce 
something approximating the results that a naive believer in the rules’ 
action-guiding function might expect. But whether it does or not, it 
may still have an effect on the discipline and morale of the officers, 
inasmuch as they become more conscious of their actions under the sort 
of descriptions that the rulebook uses and therefore more accustomed to 
referring their actions in detail to standards. And that may be a useful 
mentality to encourage—more or less for Foucauldian reasons120—
again, whether the officers by and large comply with the rules or not. 
Once more this has echoes of Paul’s position that the law serves a 
pedagogical function even for those who are more or less bound to 
brake it.

I have pursued this odd analogy between Paul’s view of the Torah 
and Skolnick and Fyfe’s view of the regulation of police forces because 
I wanted to illustrate two levels at which we can draw something of 
broader jurisprudential interest from Paul’s particular antinomianism.

At one very familiar level, Paul is a critic of legalism—the 
lawyerly preoccupation with the letter of the law, the perverse mentality 
that orients conduct so meticulously to the law that it loses sight of the 
law’s real point or purpose. Legalism is the mentality that insists on 
precise definitions and operationalized norms, and then uses those for 
all sorts of counterintuitive purposes. Law in the hands of such a 
mentality often seems perverse and self-defeating, getting people off on 
technicalities, betraying real justice, and undermining purposes that 
really matter. Moreover, realizing that detailed legal regulation is 
always liable to degenerate into this sort of legalism reminds us that law 
is not always the best way to govern an area of life or conduct. 
Sometimes it is better simply to frame and authorize discretion, 
governing it (if it is to be governed at all) with factors and standards 
rather than with detailed legalistic rules. The rule mentality is cold and 
calculating, but sometimes being cold or calculating may be inherently 
inappropriate, or sometimes we may want to encourage exactly the kind 
of calculation and coolness that is not promoted by legal rules. This

119 Romans 3:19.
120 Cf. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 177-84 (Alan Sheridan trans., Pantheon 
sort of critique of law is very old and very familiar, both from inside, and certainly from outside, the legal academy and the legal profession. It is the topic of a thousand lawyer jokes and the subject of innumerable books on the deleterious impact that lawyers and legalism have on a society like the one in the United States.

But there is a second level of insight to be gained from Paul’s critique, which is not so directly antinomian in its tendency, but rather helps to enrich our jurisprudence and enhance our sense of what is at stake in a number of controversies in legal philosophy. I am going to end this paper by commenting briefly on the bearing it may have on our understanding of the very basic proposition that the purpose of law is to guide conduct.

As we have seen, the guidance of conduct seems to be an elementary feature of the normativity of law. Joseph Raz regards it as the basic principle of the Rule-of-Law ideal: “[T]he law must be capable of guiding the behaviour of its subjects. . . . Most of the requirements which were associated with the rule of law before it came to signify all the virtues of the state can be derived from this one basic idea.” When one says “Thou shalt not do P” or “Q is to be done in circumstances R,” the very form of the verbiage is prescriptive. However, it may be a mistake to infer anything very much from this as to the real function of law. Law may be action-guiding in its normative character, and it may seem on the basis of our acquaintance with its terms that the lawmaker’s aim must be to guide people away from the doing of P or that his aim must be to guide them towards the doing of Q in circumstances R. The lawmaker, however, may have reasons besides those for prohibiting P or prescribing Q; I do not just mean ulterior reasons (like the legislative purpose for the prohibition on P), but reasons that do not require the non-occurrence of P at all. Paul seems to envisage this in suggesting that the point of prohibiting P may be to keep track of the number of times we perform action P or to accustom us to noticing P when we do it. And we considered in the Skolnick and Fyfe police case that the point of prohibiting P in circumstances where P is likely to occur anyway may be to render the norm-subjects permanently liable to punishment for P-ing, and to make

122 This may not be true of all normative language; R.M. Hare’s moral philosophy famously came to grief on the attempt to give purely prescriptive definitions of words like “good” and “bad” as well as “ought” and “shalt.” R. M. HARE, THE LANGUAGE OF MORALS (1952); see also Winston Nesbitt, Value-Judgments, Prescriptive Language, and Imperatives, 23 PHIL. Q. 253, 254-56 (1973).
123 And so Jules Coleman may be right to insist, in JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE 206 (2001), that a jurisprudence which says that the point of law is to guide conduct may yet not commit the jurist to any sort of substantial functionalism, let alone committing him to endorsing any particular function for law.
them aware of that liability, which may be a desirable state for them to be in from the point of view of their commanders.

Lon Fuller argued that practicability was one of the cardinal principles of what he called “the inner morality of law.” Law must not, he said, “require conduct beyond the powers of the affected party.”\(^\text{124}\) And some have read this purely as a logical condition of law’s instrumentality, i.e., as a condition of its being able to achieve anything at all in the way of guiding conduct.\(^\text{125}\) Yet in his more reflective comments on practicability, Fuller acknowledged that a lawmaker might have all sorts of reasons for commanding the impossible:

Such a law can serve what Lilburne called “a lawless unlimited power” by its very absurdity; its brutal pointlessness may let the subject know that there is nothing that may not be demanded of him and that he should keep himself ready to jump in any direction.\(^\text{126}\)

Or it may convey to him how completely he is at the mercy of the authorities that have issued the command. For if the command is impossible, there is nothing he can do to ensure that he is not liable to be restrained or punished.\(^\text{127}\) (Note that Fuller is not saying that these reasons morally justify commanding the impossible; rather he is saying that existence of these reasons help to make sense of the practice of commanding the impossible. He does this in order to show that the principle of practicability does not oppose mere instrumental irrationality, but must operate as a substantially moral part of the Rule of Law ideal.) More benignly, the lawmaker may prescribe what may turn out to be impossible in order to set a high target for his subjects to aim at, or he may issue the prescription simply to find out whether it is possible to comply with it.\(^\text{128}\) If this is true of impossibility, strictly

\(^{124}\) Fuller, supra note 27, at 39.


\(^{126}\) Fuller, supra note 27, at 70-71.

\(^{127}\) See also Hannah Arendt, The Origins of Totalitarianism 465 (new ed. 1973).

\(^{128}\) Fuller, supra note 27, at 71; see also Edward L. Rubin, Law and Legislation in the Administrative State, 89 Colum. L. Rev. 569, 401 (1989) (“In the modern context, impossibility comes in two forms—ex ante and ex post. It would be highly disruptive to say that the legislature cannot assign an agency a task that turns out to be impossible ex post. In many cases the agency’s most basic function is to determine the limits of the possible . . . . There may be no pragmatic way—perhaps even no theoretical way—for a legislature to assure itself that its goals are possible before enacting legislation. The avoidance of ex ante impossibility may seem more reasonable; if the legislature is convinced that the task is impossible, it should avoid assigning it. But much of our legislation is enacted in these circumstances. Regulatory statutes typically envisage full compliance, even though it is generally impossible to achieve. This may sometimes be a serious practical defect, but it has its uses, particularly in authorizing prosecutorial discretion. Fuller . . . takes a strong stand against statutes that define offenses broadly with the expectation that the implementation mechanism will pick the real bad guys from among the wider class of technical offenders. Empirical evidence, however, suggests that this may be one of the most effective enforcement strategies . . . . This approach does involve normative problems, but a consistent effort to domesticate it is much more realistic than any expectation that we could drive it to extinction.”).
understood (and of epistemic uncertainty about impossibility strictly
understood), how much more of this is likely also to be true of forms of
impracticability or the unreasonableness of expectations of full
compliance that fall short of actual impossibility?

It might be thought that the threat of sanctions (typically involved
in lawmaking) represents an attempt to make the impracticable (if not
the impossible) practicable by raising the costs of non-compliance and
motivating obedience. That may be the case. A directive to officials to
sanction those who do P may be intended as a way of trying to get
people not to do P or to motivate them not to do P. But it need not be.
There may be all sorts of other reasons for arranging for those who do P
to be sanctioned—from revenue-gathering, through the inculcation of
terror or discipline in the community, to the creation of opportunities for
last-minute mercy.129

Someone might say that if our aim in prohibiting P is not to bring it
about that A does not occur, then our real aim must be to do something
with sanctions. But that does not follow at all. It might still be the case
that the law is addressed to its ordinary subjects (the persons whose
doing P or not doing P is in question) even though the law does not
realistically aim to stop their P-ing. In other words, I am not suggesting
that we move from (say) H.L.A. Hart’s position, which takes seriously
law’s being addressed to its ostensible primary addressees—Thou shalt
not kill” being addressed to potential killers, etc.—to something like
Hans Kelsen’s position, according to which all law is addressed to
officials and there is no law against murder, just “a law directing
officials to apply . . . sanctions . . . to those who do murder.”130 Even if
the primary norm is impracticable, still there might be good reasons for
addressing it to the primary norm-subject and for reading it and
interpreting it as so addressed. The most familiar such reason is to put
the subject on warning about sanctions. Oliver Wendell Holmes’s “bad
man” may or may not intend to comply with the law—or may or may
not be able to bring himself to comply with it—but he wants to know
what sanctions he will face in the event of non-compliance, so he can
plan his affairs accordingly.131 (Some of Holmes’s language suggests
that the bad man’s only aim is to avoid the sanctions; but that need not
be so. He may simply want to know about their likely application, so
that he can make plans to deal with them—setting aside a certain
amount of money for fines or time for incarceration.) And actually the

129 Romans 5:20-21. For a well-known example of the relation between the proliferation of
capital crimes and the usefulness of the prerogative of mercy, so far as the legitimation of power
is concerned, see Douglas Hay, Property, Authority and the Criminal Law, in ALBION’S FATAL
TREE 17, 17-63 (1975).
130 This is H.L.A. Hart’s characterization of Hans Kelsen’s view in HART, supra note 26, at
36; see also HANS KELSEN, PURE THEORY OF LAW 108-119 (Max Knight trans., 1967).
131 Oliver Wendell Holmes, The Path of the Law, 1 BOSTON L. SCH. MAG., Feb. 1897, at 1, 2.
person who is not sure whether he can or will comply with the law may also have reasons for wanting to know what the law is—reasons which do not have anything to do with sanctions. He may just want to keep track of how bad a man he is becoming. There is a character in the George Cukor movie *Born Yesterday*\(^{132}\) who seems to me exactly in this position. The character is Jim Devery (played by Howard St. John), a corrupt lawyer working for a shady gangster/tycoon, who is evidently aware—sadly, acutely and painfully aware—of exactly how long he has been acting corruptly and of every unlawful and corrupt action he has performed (every bribe, every kickback, every forgery, every bit of unlawfulness). Indeed, as though he were playing exactly the role of Saint Paul’s “bad man,” Devery says to his boss’s fiancée (played by Judy Holliday) that he has been “dead” for seventeen years. It is a mistake to think the bad man is just interested in sanctions; he may be a self-aware bad man who is interested in the detail of his badness. By the same token, I think it is a mistake for H.L.A. Hart to suggest that the only alternative to the Holmesian bad man who wants to know about sanctions is some sort of good man who is perfectly willing to guide his actions by the law if only he can find out what it is.\(^{133}\) Hart seems to be suggesting that we should use, instead of the bad man, some sort of model or ideal of a person potentially in good standing, in full compliance—a righteous man, to use Paul’s language—as our touchstone for understanding the law.\(^{134}\) It seems to me one of the advantages of Paul’s account is that it shows why this need not be the case.

Let me offer two final observations. It is sometimes said not only that law aims to guide conduct, but that it aims to do so intelligently, and that law should be interpreted in a way that facilitates this task of intelligent guidance.\(^{135}\) This means interpreting the law not just in a literal way, but in a way that takes into account, first, the purpose of the provision we are interpreting, and second, what it is reasonable or unreasonable to expect of the subject as far as that purpose is concerned. But if we abandon the view that full compliance is practicable or to be

\(^{132}\) *Born Yesterday* (Columbia Pictures 1950)

\(^{133}\) *Hart*, supra note 26, at 40 (“It is sometimes urged in favour of theories like [Holmes’s] that, by recasting the law in a form of a direction to apply sanctions, an advance in clarity is made, since this form makes plain all that the ‘bad man’ wants to know about the law. This... seems an adequate defence for the theory. Why should not law be equally if not more concerned with the ‘puzzled man’ or ‘ignorant man’ who is willing to do what is required, if only he can be told what it is?”).

\(^{134}\) See *supra* text accompanying note 25.

expected, while still holding on to the view that the law in question may serve important functions, then we will need to break the link between “intelligent guidance” and “intelligent interpretation.” We do that already, I think, in cases where we ask whether the purpose of the legislation would be served by prosecuting a particular breach; that is, we focus the element of purpose not only on the law’s guidance of the individual’s conduct, but on its guidance of the official response to the individual’s conduct.

Secondly, if we accept anything like the sort of nominative and disciplining account I have offered for Paul’s legalism, then it is possible we may have a reason for eschewing purposiveness altogether. If the idea of legalistic regulation is simply to make its subjects more aware of their behavior, more attuned to its detailed characterization, then what most matters in the interpretation of the law will be clear categories of behavior, rather than intelligent relations between categories and purposes. Here I want to end by siding with H.L.A. Hart, this time against Lon Fuller. In their famous Harvard Law Review exchange in 1958, Fuller attacked Hart’s approach to interpretation along the following lines:

Throughout his whole discussion of interpretation, Professor Hart seems to assume that it is a kind of cataloguing procedure. A judge faced with a novel situation is like a library clerk who has to decide where to shelve a new book. There are easy cases: the Bible belongs under Religion, The Wealth of Nations under Economics, etc. Then there are hard cases, when the librarian has to exercise a kind of creative choice, as in deciding whether Das Kapital belongs under Politics or Economics, Gulliver’s Travels under Fantasy or Philosophy. But whether the decision where to shelve is easy or hard, once it is made all the librarian has to do is to put the book away. And so it is with judges, Professor Hart seems to say, in all essential particulars.

But, Fuller goes on, “[s]urely the judicial process is something more than a cataloguing procedure. The judge does not discharge his responsibility when he pins an apt diagnostic label on the case.” The judge must relate the use of any given word to the aim of the statute, so that legislation is treated as something purposeful, not just a text. That is what Fuller argues. Fuller’s argument certainly rings true for cases where the law is set up realistically to bring about a certain purpose by guiding the action of its primary subjects. We take it for granted that this is what most law does. But again Paul provides us with a counter-example. If law—despite the ostensible direction of its inherent

136 See supra text accompanying note 99.
137 Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 HARV. L. REV. 630, 666 (1958).
138 Id.
normativity—cannot reasonably expect compliance, then it may exist for other purposes. And those other purposes may make plausible something like the verbal “cataloguing” approach to interpretation that Fuller attributes to Hart. In other words, Hart’s approach, which looks silly on the reasonable-compliance account of law that the purposivist presupposes, may look quite sensible for the account of law that sees its main function as keeping track of infractions and bringing violations to the consciousness of those whose conduct cannot directly be bent to the purposes that the law ordains.

V

I do not think I have added anything in this paper to our understanding of Paul’s jurisprudence. There is a considerable literature on this in theology and biblical studies, and mostly I have drawn on that literature while trying to avoid most of the controversies with which it is riddled. My aim has been to render some of the highlights of Paul’s critique of law, and some of the points that are made by the commentators about Paul’s attitude towards the law, in terms that might illuminate any possible points of interest for general jurisprudence. I hope I have been careful to warn against any inference from Paul’s writing of a general antinomianism, that is a general hostility towards law. At the same time, I hope I have shown that there are features of his particular antinomianism that may be illuminating for areas of law other than the Torah and in relation to the assessment of law on some basis other than our prospects for salvation. Paul is interested in the apparently self-defeating character of the law that he is studying. It turns out that this self-defeating character, while not necessarily endemic in law as such, turns up in a number of places in modern secular law as well. The close regulation of behavior by a dense array of rules is something we see in a number of places in the practices of the modern administrative state. Sometimes it seems to operate in a way that makes no sense in relation to the wider goals of the system of which this regulation is a part. Paul’s diagnosis of a similar predicament with regard to the Torah opens up a number of new possibilities for thinking about these counter-intuitive situations. And, as I hope I have shown, it offers us a broader array of ways of understanding law as such—and its relation to conduct, sanctions, and discipline—than the options that have been traditionally available in conventional jurisprudence.