ARTICLE

CAN A MERCHANT PLEASE GOD?: THE CHURCH'S HISTORIC TEACHING ON THE GOODNESS OF JUST COMMERCIAL ACTIVITY AS A FOUNDATIONAL PRINCIPLE OF COMMERCIAL LAW JURISPRUDENCE

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I. INTRODUCTION

Can a merchant please God? To modern readers that question undoubtedly seems unusual. Perhaps some are offended by such a question, feeling that it is intolerant and should not even be asked in public discourse.[1] Others might view it as an example of a quaint concern from a bygone era when God was believed to exist and therefore His opinion of things seemed quite important. Persons holding to this view might well consider this question to be entirely irrelevant.[2] Perhaps others still view a

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1. Such people would likely see theology, or perhaps the preferred term now is spirituality, as a purely private matter that has no part in the public discourse. While to many this may seem natural and the way things have always been, it is, in fact, a very recent and unfortunate development. Of this development, Professor Berman writes that

> the significant factor in this regard—in the nineteenth century and even more in the twentieth—was the very gradual reduction of traditional religion to the level of a personal, private matter, without public influence on legal development, while other belief systems—new secular religions (ideologies, "isms")—were raised to the level of passionate faiths for which people collectively were willing not only to die but also to live new lives.

HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 31 (1983).

2. There is likely a range of opinions in this group. Some would say it is irrelevant to them, but it could be relevant for an individual who views such things as important in his

question like this as very important for their personal lives as they desire to please God with all they do.[3] These persons could be said to view this question, and others like it, to be of great spiritual importance. However, very few people indeed would imagine that such a question might be of grave *legal* importance, in addition to any spiritual significance it might have.[4]

Yet, the issue of whether a merchant can please God was one of paramount importance to jurists and theologians, not to mention

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own private life. Oftentimes, they would also consider it to be entirely irrelevant and even inappropriate to ask such a question in the public square or to make it a part of a policy consideration. Some in this category view any kind of religious thought, such as this, as a mere crutch for those who need such things to deal with life. This author was at one point an atheist, and he, at that time, viewed religion in this manner.

Finally, there are others, such as Christopher Hitchens (recently deceased), Richard Dawkins, and others among the so-called "new atheists," who are much more militant to such views. These men view the belief in God as something that is positively dangerous for society. Therefore, they would likely label the question "can a merchant please God?" as one that is destructive even to consider. *See, e.g.*, CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING (2007) ("The human invention of god is the problem to begin with."); RICHARD DAWKINS, THE GOD DELUSION 348 (2006) ("Faith can be very very dangerous, and deliberately to implant it into the vulnerable mind of an innocent child is a grievous wrong.").

3. Modern evangelicals, conservative Catholics, and others would fall within this category. As a conservative evangelical, this author would fall into this category as he hopes to do everything that he does for the glory of God, and he does believe that God exists and finds His opinion to be the most important one in the universe.

The Westminster Shorter Catechism would reflect this view in its very first question, which asks, "What is the chief end of man?" The answer given is that "[m]an's chief end is to glorify God, and to enjoy him for ever [sic]." Westminster Assembly, *The Westminster Shorter Catechism*, *in* WESTMINSTER CONFESSION OF FAITH 287 (Free Presbyterian Publications 1994) (1646). Further, the biblical support for this position is voluminous. *See, e.g.*, 1 *Corinthians* 10:31 ("Whether, then, you eat or drink or whatever you do, do all to the glory of God.") (New American Standard Bible: Updated Edition (hereinafter all Scripture quotations are taken from the New American Standard Bible: Updated Edition, unless otherwise specifically noted)); *Colossians* 3:23-24 ("Whatever you do, do your work heartily, as for the Lord rather than for men, knowing that from the Lord you will receive the reward of the inheritance. It is the Lord Christ whom you serve.").

4. The author also falls into this small minority of people who believe that the teachings of the Bible are highly relevant for all of life, including any legal system. While this represents a minority view now, it was once assumed across virtually all of Western Civilization. *See, e.g.*, BERMAN, *supra* note 1 at 115 ("All these laws were considered to be subordinate to the precepts contained in the Bible (both the Old and New Testaments) and in the writings of the early church fathers . . . ."); STEPHEN D. SMITH, LAW'S QUANDARY 45-48 (2004); *see generally*, Stuart Banner, *When Christianity was Part of the Common Law*, 16 LAW & HIST. REV. 27 (1998).

merchants, during the high middle ages. This question was central to the consideration of commercial law during the period when the Western legal tradition, Western commercial law, and the institutions therein, were being formed.[5] The answer to this theological question impacted the development of the Law Merchant and therefore ultimately still impacts Western commercial law to this day.[6] Accordingly, this Article considers how the answer to this question was resolved during that time and suggests that perhaps this understanding could form the foundation for understanding the jurisprudence of commercial law today.

If so, this would be a welcome development for there is much confusion as to the purpose, concept, or jurisprudence of commercial law.[7] A few

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5. BERMAN, *supra* note 1, at 336-39 (addressing the issue of commercial law and theology in particular, and the book as a whole discusses the formation of the Western legal tradition). This book won the 1984 SCRIBES Book Award awarded by the American Bar Association for the best new book on a legal subject. Professor Berman had a long and distinguished career as a Professor of Law at Harvard Law School and Emory University School of Law.

In this excellent work, Professor Berman persuasively argues that the Western legal tradition was formed during the eleventh and twelfth centuries. Professor Berman refers to this period, which is often referred to as the Gregorian Reforms under Pope Gregory VII, as "the Papal Revolution of 1075-1122." *Id.* at 19. He uses the word "revolution . . . to refer to . . . epoch-making periods" such as the Protestant Reformation and the American and French Revolutions. *Id.* at 19-20. His study details the immense changes in the religious, educational, societal, economic, and legal systems of Western Europe during this period that led to the formation of the Western legal tradition. One of those changes was a shift in the church's attitude toward merchants and commercial activity, which serves as the topic of this article. The author is persuaded by Professor Berman's work, and therefore, this work proceeds under the assumption that the Western legal tradition was formed during the Papal Revolution, and the term "Papal Revolution" is therefore borrowed and used herein to refer to this period for the sake of convenience. If the reader takes issue with this conclusion regarding the formation of the Western legal tradition, the author would respectfully direct him to Professor Berman's work. To set forth fully those arguments is well beyond the scope of this Article.

6. This Article does not take the position that modern commercial law, and its primary manifestation in the United States of America—the Uniform Commercial Code ("UCC")—*is* the modern law merchant. That is a matter open to scholarly debate and discussion. *See, e.g.*, Jim C. Chen, *Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant*, 27 TEX. INT'L L.J. 91 (1991). Rather, this Article merely makes the rather unremarkable and hopefully uncontroversial assumption that the UCC has in its lineage an ancestor known as the Law Merchant and that an understanding of the Law Merchant might help in understanding its descendants—Western commercial law in general and perhaps the UCC in particular.

7. Professor Steven D. Smith suggests that confusion reigning in the law as a whole today comes from the abandonment of what he describes as the classical approach to law,

scholars have attempted to address this confusion. For example, in an article in 1978, Professor Hal Scott lamented that "[t]here is no real jurisprudence of commercial law. We are presently prisoners of the conception that commercial law embodies the law merchant and that the Uniform Commercial Code merely furnishes businessmen with a clear statement of their rules."[8] In that article, Professor Scott asserts that commercial law should not be understood as deriving from the law merchant or merely as providing a clear set of rules for businessmen.[9] Rather, he asserts that "commercial law rules are instead to be understood as largely regulatory in import."[10] What this regulatory regime is primarily concerned with, according to Professor Scott, is the allocation of risk among the transacting parties.[11]

In a 2009 article, Professor John Linarelli quotes, apparently with agreement and approval, Professor Scott's lament regarding the lack of a coherent jurisprudence explaining the conception of commercial law.[12] However, he does not appear to share Professor Scott's conclusion that commercial law is concerned merely with risk allocation.[13] "Legal scholars have relinquished the task of 'jurisprudential' thought about commercial law to law and economics,"[14] he writes.[15] Rejecting the idea "that economics

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which was very much based upon Christianity and the God of the Bible. *See* SMITH, *supra* note 4, at 45-51, 151-53, 155-57, 174-75 (2004).

8. Hal S. Scott, *The Risk Fixers*, 91 HARV. L. REV. 737, 737 (1978).

9. *Id.*

10. *Id.* at 738.

11. *Id.* at 737.

12. John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, 114 PENN ST. L. REV. 119, 120 (2009).

13. *Id.* at 213-14.

14. *Id.* at 128. This is an important and interesting statement given the dominance of law and economics as a jurisprudential system. In the preface to his immensely popular and influential "textbook-treatise" on law and economics entitled ECONOMIC ANALYSIS OF LAW, Judge Richard A. Posner asserts that law and economics "is the foremost interdisciplinary field of legal studies." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW xxi (8th ed. 2010). In support of this statement, he writes:

> The former dean of the Yale Law School, a critic of the law and economics movement, nevertheless has called it "an enormous enlivening force in American legal thought" and says that it "continues and remains the single most influential jurisprudential school in this country." More recently we read that "there is no dispute that law and economics has long been, and continues to be, the dominant theoretical paradigm for understanding and assessing law and policy."

is almost all there is to commercial law," he states that "[o]ne of the major gaps in the philosophy of law canon is the near total absence of a philosophical account for commercial law."[16] His "article aim[ed] to fill that gap"[17] by "us[ing] conceptual analysis to articulate a cosmopolitan conception of legal positivism and to develop it into a concept of commercial law as a transnational normative order."[18]

Apparently Professor Scott's erudite article was not able to dispel the mystery surrounding the conception and purpose of commercial law, at least in the eyes of Professor Linarelli, given that Professor Linarelli's article is still struggling with the issue some twenty-one years later. Whether Professor Linarelli's article will be any more successful on this front only time will tell. However, recognizing the risks of prognostication, this author does not believe that Professor Linarelli's learned article will succeed where Professor Scott's has apparently failed.

This predication derives not from a low view of Prof Scott, Professor Linarelli, or the other scholars who have attempted to clarify the jurisprudence of commercial law. Rather, it stems from the author's conviction that the conception and purpose of commercial law is so baffling to modern scholars because its historical jurisprudential roots have become obscured by virtue of being primarily theological. In the intervening centuries since the formation of the Western legal tradition in general and the birth of commercial law within that tradition in particular, Western civilization has forgotten or rejected the theology that served as the foundation for its law in general and its commercial law in particular. Without a proper understanding of commercial law's historically theological roots, it does appear that commercial law, and indeed much of the rest of Western law, lacks any satisfactory conceptual explanation.

In his excellent book *Law and Revolution: The Formation of the Western Legal Tradition*, Professor Harold J. Berman discusses this development in the Western legal tradition that has so obscured the jurisprudential foundations of not just commercial law but nearly all of Western law.

Id. (quoting Anthony T. Kronman, *Remarks at the Second Driker Forum for Excellence in the Law*, 42 WAYNE L. REV. 115, 160 (1995)). Professor Linarelli offers a form of modified positivism as an alternative to a law and economics approach.

15. Professor Smith seems to agree regarding the dominance of law and economics. He writes, "the law and economics movement [is] perhaps the most influential development in legal thought in the second half of the century." *See* SMITH, *supra* note 4, at 78.

16. Linarelli, *supra* note 12, at 128.

17. *Id.*

18. *Id.* at 213.

> [The] basic institutions, concepts, and values of Western legal systems have their sources in religious rituals, liturgies, and doctrines of the eleventh and twelfth centuries . . . Over the intervening centuries, these religious attitudes and assumptions have changed fundamentally, and today [in 1983] their theological sources seem to be in the process of drying up. Yet the legal institutions, concepts, and values that have derived from them still survive, often unchanged. *Western legal science is a secular theology, which often makes no sense because its theological presuppositions are no longer accepted.*
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> . . .
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> [T]he legal systems of all Western countries, and of all non-Western countries that have come under the influence of Western law, are *a secular residue of religious attitudes and assumptions which historically found expression first in liturgy and rituals and doctrine of the church and thereafter in institutions and concepts and values of the law. When these historical roots are not understood, many parts of the law appear to lack any underlying source of validity.*[19]

Commercial law, accordingly, appears to "make[] no sense" and "lack any underlying source of validity" because "its theological presuppositions are no longer accepted" or even understood.

Professor Steven D. Smith has also written on this confusion that pervades jurisprudence in the modern legal community in his excellent book entitled *Law's Quandary.*[20] Beyond a discussion on commercial law jurisprudence, Professor Smith exposes how all modern jurisprudential schools are operating in ontological gaps, i.e., their generally accepted ontological inventories are insufficient to guide, explain, or justify their views of the law.[21] Modern jurisprudence lacks the foundation that the "classical approach" had in abundance and all as a result of the worldview with which the legal scholars and theologians prior to the modern era approached law.[22] "Blackstone and Story were, after all, heirs of a worldview that assumed that God was real—*more* real than anything else, in fact, or *necessarily* rather than just *contingently* real—and had created the universe according to a providential plan."[23]

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19. BERMAN, *supra* note 1, at 165-66 (emphasis added).
20. *See* SMITH, *supra* note 4.
21. *Id.* at 5-37, 157, 175.
22. *Id.* at 45-48.
23. *Id.* at 46.

Indeed, as Professors Berman and Smith aptly point out, not only are the theological foundations of the law, to use Professor Berman's phraseology, or the classical approach to the law to use Professor Smith's, no longer accepted nor understood, they are no longer even considered as a proper knowledge base from which to draw in developing, critiquing, or understanding the law. In our post-modern world, "for the first time, religion has become largely a private affair, while law has become largely a matter of practical expediency."[24] This hearkens back to Professor Scott's lament that commercial law often appears as little more than a set of rules according to which businessmen may govern their affairs. The bankruptcy of such a view of law is obvious, and it is not surprising therefore that it does not inspire confidence or lend itself to a consistent jurisprudence.

In fact, Professor Berman notes that these changes in the way that not just commercial law but all of law is viewed have led to a crisis of confidence in the law. He writes that "[a]lmost all the nations of the West are threatened today by a cynicism about law, leading to a contempt for law."[25] Further, the alternatives offered are not up to the task of dispelling the current cynicism because they do not provide a view of the law that is consistent, comprehensive, and that corresponds to reality.[26] The only jurisprudential system that can possibly offer a consistent, comprehensive, and corresponding view of the law is the "classical approach," or, as Dean Jeff Tuomala calls it, "law of nature" jurisprudence.[27]

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24. BERMAN, *supra* note 1, at vi.

25. *Id.* at 40.

26. Berman stated that

> Cynicism about the law, and lawlessness, will not be overcome by adhering to a so-called realism which denies the autonomy, the integrity, and the ongoingness of our legal tradition. In the words of Edmund Burke, those who do not look backward to their ancestry will not look forward to their posterity.

Id. at 41. Further, as Professor Smith demonstrates, the various modern jurisprudential alternatives are not able to rescue law from that charge that it does not make sense. SMITH, *supra* note 4, at 65-96.

27. *See, e.g.*, SMITH, *supra* note 4, at 151-53, where Professor Smith notes that the classical approach might be able to rescue us from our current "quandary," but then laments that

> [w]e are by now far removed, of course, from times in which such an account could be presented openly and discussed respectfully. For many of us, the classical account is a distant memory; for others it is not even that. So perhaps all we can confidently say is that the classical account, if it were admissible and believable, *might* be of some help.

Id. at 151-52.

Unfortunately, as Professors Berman and Smith point out, this view of the law is generally considered to be an inappropriate basis for public discourse or academic argumentation. Professor Berman laments that religion has been relegated to a purely private role, and Professor Smith notes that the religious ontology, though possibly able to rescue the law from its present quandary, is intellectually unacceptable due to "[t]he taken-for-granted 'fact' of [inevitable] secularization."[28] Professor Smith notes that the clear result of this "inevitable secularization" has been

> that academics have internalized a norm prescribing that religious beliefs are inadmissible *in academic explanations*. Historians may believe in God, but they do not explain historical events by reference to the workings of God in history (as was once common). Scientists may be religious believers, and they may even argue that science provides support for religious belief, but they typically do not resort to religious explanations for specific natural phenomena in the way that even "Enlightened" thinkers like Jefferson once did. With respect to the legal academy, Laycock himself draws this conclusion: "One inference is that the believers feel obliged to be quiet about [their beliefs]" in an academic context.[29]

This article endeavors to violate this norm by looking to the classical approach to law in order to begin to develop a consistent, comprehensive, and corresponding view of commercial law.

That said, a fully developed and thorough-going jurisprudence of commercial law is beyond this single work. Instead, the goal of this article is to take a look at the historical theological developments surrounding the birth of commercial law within the Western legal tradition. By considering the theological issues that surrounded commercial law at this formulatory state of the Western legal tradition, it is hoped that a better view of the overarching purpose of commercial law can be seen. Such a purpose, while not establishing a thorough-going jurisprudence of commercial law, has promise to prove most helpful in the goal of beginning to develop one. In order to accomplish this goal, this article employs the classical approach to law. In order to do that, it considers the church's historic answer to the question with which this paper began—"can a merchant please God?"

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28. *Id.* at 35.
29. *Id.* at 36 (alteration in original) (footnotes omitted).

II. CAN A MERCHANT PLEASE GOD?: THE CHURCH'S TEACHINGS PRIOR TO THE PAPAL REVOLUTION

"Can a merchant please God?" This question had enormous spiritual implications for the people of Western Christendom in the medieval period. The people of the middle ages were consumed with the question that the Philippian jailor asked Paul and Silas, "What must I do to be saved?"[30] Hell and purgatory seemed very real in those days, and the issue of how to avoid the eternal punishment of God was on the order of first importance in nearly everyone's mind. Thus, it was critically important to a merchant, and indeed the jurists and theologians, of the time to answer the question whether a merchant can ever be pleasing to God.

Further, the medieval period knew nothing of the modern idea of the "separation of church and state," which to most modern elites means something more along the lines of the "separation of religion and state."[31] Rather, in the medieval period, when the Western legal tradition was born, and indeed throughout most of its history, there has existed an integral

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30. This question arose from an incident in what is commonly referred to as Paul's second missionary journey. Paul and Silas were ministering in Philippi in Macedonia. Paul cast a demonic spirit out of a slave girl whose masters had been profiting from the spirit's purported ability to tell the future through the girl. Upon seeing that they could no longer profit in this way, her masters stirred up the crowd against Paul and Silas. *See Acts* 16:11-21. Luke writes:

> The crowd rose up together against them, and the chief magistrates tore their robes off them and proceeded to order them to be beaten with rods. When they had struck them with many blows, they threw them into prison, commanding the jailer to guard them securely; and he, having received such a command, threw them into the inner prison and fastened their feet in the stocks.
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> But about midnight Paul and Silas were praying and singing hymns of praise to God, and the prisoners were listening to them; and suddenly there came a great earthquake, so that the foundations of the prison house were shaken; and immediately all the doors were opened and everyone's chains were unfastened. When the jailer awoke and saw the prison doors opened, he drew his sword and was about to kill himself, supposing that the prisoners had escaped. But Paul cried out with a loud voice, saying, "Do not harm yourself, for we are all here!" And he called for lights and rushed in, and trembling with fear he fell down before Paul and Silas, and after he brought them out, he said, "Sirs, what must I do to be saved?"

Acts 16:22–30. Paul and Silas answered, "'Believe in the Lord Jesus, and you will saved, you and your household.'" *Acts* 16:31.

31. Such a separation is, in fact, not possible. The myth of a neutral, secular arena where religions (or worldviews) do not matter is just that—a myth. However, that myth has been used very shrewdly in our time to silence all arguments in the public square that are based upon religious conviction.

connection between law and theology, religion and state. Indeed, during this time, law developed under the influence of theology.[32] Most relevant to this paper, Professor Berman asserts that the Law Merchant,[33] which had its origins during the time of the Papal Revolution, developed under the influence of the church's teachings on commercial transactions. He writes:

> From the point of view of the Christian social theory which prevailed in the formative period of Western commercial institutions, the economic activities of merchants, like other secular activities, were no longer to be considered as necessarily "a danger to salvation"; on the contrary, they were considered to be a path to salvation, if carried on according to the principles laid down by the church. These principles were spelled out in the canon law. From the church's point of view, the law developed by the merchants to regulate their own interrelationships, the *lex mercatoria*, was supposed to reflect, not contradict, the canon law. The merchants did not always agree with that. *They did not disagree, however, that the salvation of their souls depended on the conformity of their practices to a system of law based on the will of God as manifested in reason and conscience.*
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> Thus the social and economic activity of merchants was not left outside the reach of moral issues. *A social and economic morality was developed which purported to guide the souls of merchants toward salvation. And that morality was embodied in law. Law was a bridge between mercantile activity and the salvation of the soul.*[34]

Thus, according to Professor Berman, the Law Merchant, the ancestor to modern commercial law, developed in light of the church's teachings on commercial activity during a time in which the worldview of Western Civilization was undeniably Christian. As stated, the law governing merchants and commercial activity was designed as a guide to salvation. The Law Merchant helped to answer, in large part, the burning question in the mind of the merchant—"what must I do to be saved?" "Law was a bridge between mercantile activity and the salvation of the soul."[35]

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32. And, at times, theology developed under the influence of the law.

33. Professor Berman typically refers to the Law Merchant in his book as the Mercantile Law. *See* BERMAN, *supra* note 1, at 333.

34. *Id.* at 339 (emphasis added).

35. *Id.*

The preface to Johannes Nider's work *On the Contracts of Merchants* bears out Professor Berman's comments. The purpose of his work, according to Friar Nider, an "expert physician[] of souls," is to "separate what is just from what is unjust" in the dealings of merchants, such that rules can be determined "according to which it can be seen in some way or other when merchants may be more or less secure in their" commercial activity.[36] As the editor of the English translation of *On the Contracts of Merchants* rightly notes, Nider's "references to that which is 'just' . . . should be read as intended primarily to remind the reader that worldly action should be judged by churchly standards of morality."[37] Such a work as Nider's would have been respected in a time when the prevailing "social theory" was dominated by the Christian worldview, as was clearly the case in the Middle Ages. The preceding quote by Professor Berman demonstrates this to be the case. "The merchants did not always agree" that the Law Merchant should reflect the canon law, but they did agree "that the salvation of their souls depended on the conformity of their practices to a system of law based on the will of God."[38] Further, there was no doubt that, during the time of the formation of the Western legal tradition, the law was viewed as a "bridge" or "guide" for the "salvation of the soul."[39]

The dilemma for the merchant, and the theologian or jurist, concerned with such things prior to, and at the beginning of, the Papal Revolution was that the church's teachings on commercial activity prior to that time were decidedly negative. The church generally answered the question "can a merchant please God" with a resounding "no."[40] Many modern commentators assume, correctly in part, that the teachings of the church prior to the Papal Revolution were almost entirely opposed to merchants and commercial activity. Professor Berman asserts that the church, prior to the eleventh and twelfth centuries, had evinced a universally hostile attitude

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36. JOHANNES NIDER, ON THE CONTRACTS OF MERCHANTS xi (Robert B. Sherman, ed., Charles H. Reeves, trans., 1966) (circa 1430, 1468). In the introduction to ON THE CONTRACTS OF MERCHANTS, the editor writes "that Friar Nider's primary purpose for writing *De Contractibus Mercatorum* was to provide a moral guide to those" engaged in commercial activity. The guide was written "in terms of the author's understanding of the accepted views of the Roman Catholic Church of Western Europe." *Id.* at viii. ON THE CONTRACTS OF MERCHANTS is discussed in more detail herein as an example of the work of later Scholastics demonstrating their transformation of church doctrine regarding commercial activity.

37. *Id.* at viii.

38. BERMAN, *supra* note 1, at 339.

39. *Id.*

40. *See infra* notes 44-47 and accompanying text.

toward merchants and commercial activity.[41] He quotes "the great French social and economic historian Henri Pirenne" as remarking that "'the attitude of the Church . . . towards commerce [was] not merely passive but actively hostile.'"[42] Further, Professor Berman describes the church's teachings prior to the Papal Revolution as "fundamentally opposed to the profit motive"[43] and describes the church's view of commercial activity in general as "'a danger to salvation.'"[44]

Further, Professor Gerber has described "the church's tradition [as] filled with antipathy to commerce."[45] He states that "[f]rom its inception, church tradition had painted an overwhelmingly negative picture of commercial activity."[46] Speaking of the church's "intellectual encounter with the market" in the high middle ages, he writes:

> The patristic writings that were the primary sources of authority for the church's intellectual encounter with the market were replete with denunciations of mercantile activity. Heavily influenced by Greek, especially Platonic, philosophy, these works considered commercial activity incompatible with religious salvation. A merchant could not follow the church's precepts, it was thought, because commerce required lying, deception, exploitation and other sins. Moreover, the market was seen as a threat to the Christian community, because it undermined the ideas of fairness and cohesion on which that community was based. Early medieval writers who were used as authorities during the twelfth and thirteenth centuries typically either repeated the condemnations found in patristic writings or paid little heed to commercial activity.[47]

In a footnote, Professor Gerber elaborates on the hostility patristic writers held toward commercial activity by asserting that "[t]he only patristic writer

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41. BERMAN, *supra* note 1, at 336-39.

42. *Id.* at 336 (quoting HENRI PIRENNE, ECONOMICS AND SOCIAL HISTORY OF MEDIEVAL EUROPE 48-49 (1937)).

43. *Id.*

44. *Id.* at 339.

45. David J. Gerber, *Prometheus Born: The High Middle Ages and the Relationship Between Law and Economic Conduct*, 38 ST. LOUIS U. L.J. 673, 696 (1994).

46. *Id.*

47. *Id.* at 697 (footnotes omitted).

of importance during the medieval period who placed any significant emphasis on justifying commercial activity was Augustine."[48]

Cited as authority by Professor Gerber, Dr. John W. Baldwin, Professor Emeritus of History at Johns Hopkins University, wrote in *The Medieval Merchant Before the Bar of the Canon Law* that:

> The Graeco-Roman civilization of the ancient Church Fathers nourished general misgivings about the respectability of business and merchants. A cursory sampling of the obviously prominent spokesman of Greek and Roman philosophy, such as Plato, Aristotle, and Cicero, shows attitudes less than complimentary to the practical functions of the tradesman. In their own way the Church Fathers also shared in this general feeling of suspicion toward the world of commerce. The Greek Basil the Great and the Latin Jerome made bitter impassioned attacks against the accumulation of great riches. This general feeling was accompanied with specific criticisms against the merchant. Ambrose, Bishop of Milan, for example, condemned merchants for monopolistic and speculative practices that manipulated markets and robbed the public. Many of the Fathers felt that mercantile activity could hardly be kept clean of the taint of greed or *cupiditas*. In a well-known passage Tertullian condemned the profits of trading in a syllogism based on the factor of greed, "Is trading fit for the service of God?" he asked. "Certainly," was the reply, "if greed is eliminated, which is the cause of gain. But if gain is eliminated, there is no longer the need of trading." Finally the fathers were generally convinced that essentially immoral means were necessary for the merchant to succeed, that the trader must lie, cheat, deceive, and commit all manner of fraud to sell his wares.[49]

Dr. Baldwin continues by noting that Pope Leo the Great saw "buying and selling [as] morally dangerous" activities and that "those undergoing penance [should] avoid such affairs because it is difficult to buy and sell

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48. *Id.* at 697 n.113 (citing John W. Baldwin, *The Medieval Merchant before the Bar of Canon Law*, 44 PAPERS OF THE MICHIGAN ACADEMY OF SCIENCE, ARTS AND LETTERS 287, 290 (1959)).

49. John W. Baldwin, *The Medieval Merchant before the Bar of Canon Law*, 44 PAPERS OF THE MICHIGAN ACADEMY OF SCIENCE, ARTS AND LETTERS 287, 289 (1959) (footnotes omitted).

without committing sin."[50] After noting that Cassiodorus in the sixth century often made similarly anti-commercial comments, he concludes that "[o]n the whole, therefore, the Church fathers considered the merchant as *persona non grata*, and in this attitude they were merely children of their times."[51]

While this anti-commercial, anti-mercantile teaching undoubtedly predominated the medieval period prior to the Papal Revolution, the views represented in the preceding paragraphs of the near universal nature of these teachings among the patristics seem to overstate the case. Looking more carefully at the patristic record reveals a more nuanced view of commercial activity among the church fathers, as hinted at by Dr. Baldwin.

The church fathers were quick to condemn greed, lying, cheating, hording, monopolies, and other sins associated with money and commercial activity.[52] These condemnations often came in sermons or polemic writings—like Dr. Baldwin's quote of Tertullian above—and therefore can sometimes carry an air of hyperbole or overstatement to make a point. Polemic or sermonic discourses often lack balance because the speaker or writer is trying hard to make a point. Just as it is a rule of sound hermeneutics to read any one passage in Scripture in light of the whole counsel of scripture, it is similarly necessary to understand any one specific sermonic or polemical writing in light of the entire corpus of the work of the preacher or writer. Therefore, to fully understand the position of the patristics on commercial activity, one must consider the record as a whole, allowing for the flourishes of sermons where the balance comes only at other times and places in the speaking or writings of the subject author.

For example, Dr. Baldwin quotes Tertullian for support that the patristics viewed all trading as evil. However, in the quoted passage Tertullian is primarily concerned with the avoidance of certain trades that he considers to be subject to greed and idolatry—of which greed is a form. He does make some harsh statements against trading, such as the one that Dr. Baldwin quotes. On the other hand, he makes other statements that seem to allow for a more positive view of commerce demonstrating that his position was more nuanced. For example, after the passage that Dr. Baldwin quotes, Tertullian immediately adds, "Grant now that there be some righteousness in business, secure from the duty of watchfulness against covetousness and

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50. *Id.* at 289-90.

51. *Id.* at 290.

52. *See, e.g.*, JUSTO L. GONZALEZ, FAITH AND WEALTH: A HISTORY OF EARLY CHRISTIAN IDEAS ON THE ORIGIN, SIGNIFICANCE, AND USE OF MONEY (1990).

mendacity."[53] Further on in the same work, he says, "Let none contend that, in this way, exception may be taken to *all* trades."[54] Finally, in concluding, he states that, "No art, then, no profession, no trade, which administers either to equipping or forming idols, can be free from the title of idolatry."[55]

The writings of St. John Chrysostom provide another example. In a homily on Matthew 14:13, he condemns some trades, but not all, as evil. Speaking of the sandal-makers' trade, he says:

> And the sandal-makers' trade, so long as it makes sandals, I will not rob of the appellation of art; but when it perverts men to the gestures of women, and causes them by their sandals to grow wanton and delicate, we will set it amidst the things hurtful and superfluous, and not so much as name it an art.[56]

Chrysostom here does not condemn sandal-making or all trades, but rather indicates that he is willing to count them among the arts, which would seem to be a positive connotation. Further, his condemnation is not of the trade itself, but an abuse of the trade—the making of sandals that lead cause men to lust after the female wearers thereof. Again, this is a more nuanced position that recognizes the goodness of trading and commercial activity while also recognizing that it can be perverted to evil.

After making a much more exhaustive review of the patristic writings on money and wealth than is possible in this work, Dr. Justo L. Gonzalez concludes that:

> With respect to economic life, Ambrose stands practically alone in condemning trade, as he declares that God made the sea for fishing and not for sailing long distances in search of what the local area does not produce. Almost all other writers, however, agree that human interchange, both in goods and in other relationships, is part of the order created and intended by God. Chrysostom, in contrast with Ambrose, praises God for creating the sea so that people can travel long distances and meet each other's material needs through trade. Lactantius declares that just

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53. A. CLEVELAND COXE, THE ANTE-NICENE FATHERS, VOLUME III: LATIN CHRISTIANITY: ITS FOUNDER, TERTULLIAN 67 (Alexander Roberts, James Donaldson & A. Cleveland Coxe eds., 1903).

54. *Id.* (italics in original).

55. *Id.* at 68.

56. A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH, FIRST SERIES, VOLUME X: SAINT CHRYSOSTOM: HOMILIES ON THE GOSPEL OF SAINT MATTHEW 307 (Alexander Roberts, Philip Schaff & James Donaldson eds., 1888).

> as God gave antlers to the deer to defend itself, humankind has been given each other, so that through social life, mutual support, and trade we may defend ourselves.[57]

This is of course nearly diametrically opposed to the positions set forth at the beginning of this section.

The explanation for this discrepancy seems to be that the Scholastics of the Papal Revolution had inherited a traditional teaching that did strongly condemn commercial activity. The Scholastics, and indeed apparently many modern scholars, assumed that this teaching was held just as firmly by the patristics as it had been by those in the centuries of the middle ages preceding the Papal Revolution.[58] However, it seems more accurate to state that the patristics held a more positive view of merchants and commercial activity generally, but that the bombastic rhetorical flourishes of the patristics against the dangers relative to commerce were quickly transformed in the early middle ages into a strongly anti-commercial, anti-mercantile theology that dominated the thinking of the church until the Papal Revolution.

In addition, the Greeks and the Romans tended to have a negative view of merchants and commercial activity. Undoubtedly, this negative view did impact many of the church fathers to varying degrees. Therefore, it is possible that the writers in the early middle ages and the Scholastics (as well as many modern scholars) simply overstated the influence of Graeco-Romans on the early church fathers or conflated their beliefs with the beliefs

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57. GONZALEZ, *supra* note 52, at 228.

58. For example, the Scholastics believed that a famous church father, John Chrysostom, had written the *Opus imperfectum in Matthaeum.* (The *Opus imperfectum in Matthaeum* is an anonymous work that is discussed in much greater detail herein as the best example of the radical anti-merchant, anti-commercial teaching that came to dominate the Middle Ages prior to the Papal Revolution. For convenience sake, the *Opus imperfectum in Matthaeum* is sometimes referred to herein as simply the *Opus imperfectum.*) "The Scholastics falsely attributed [the *Opus imperfectum*] to St[.] John Chrysostom." ODD LANGHOLM, ECONOMICS IN THE MEDIEVAL SCHOOLS: WEALTH, EXCHANGE, VALUE, MONEY AND USURY ACCORDING TO THE PARIS THEOLOGICAL TRADITION 1200-1350, at 102 (1992). Professor Berman presumably follows the Scholastics in making this same mistake when he states of a quote from the *Opus imperfectum* that it "was first said by St. John Chrysostom (349-407)." BERMAN, *supra* note 5, at 618 n.5. Frederic W. Schlatter notes that "[t]he identity of the author of the *Opus imperfectum in Matthaeum* remains a vexing problem central to a problematic text" and then goes on to make a case for Annianus, a deacon from Celeda who lived and wrote during the fifth century, as the author of the text. Frederic W. Schlatter, *The Author of the* Opus Imperfectum in Matthaeum, 42 VIGILIAE CHRISTIANAE 364-75 (1988). This paper will follow the convention of referring to the author of the *Opus imperfectum* as Pseudo-Chrysostom or simply as the author.

of the patristics. Further, the theologians of the middle ages were heavily influenced by Greek and Roman thought themselves, particularly the thought of Plato, which tended to be anti-commercial in nature.[59]

While, as demonstrated in the preceding, it is somewhat of an overstatement to say that the anti-commercial teachings against which the Scholastics of the Papal Revolution reacted were characteristic of all of church history prior to the eleventh and twelfth centuries, Professor Berman is certainly correct that this teaching characterized much of the medieval period immediately prior to the Papal Revolution.[60] No single source better demonstrates this hostile attitude toward merchants and commercial activity than the *Opus imperfectum in Matthaeum* ("The Incomplete Work on Matthew"). The *Opus imperfectum* is an incomplete and anonymous text[61] believed by many scholars to have been originally written in Greek sometime in the fifth or sixth century.[62] The only extant copies of the text are in Latin.[63] The text is best described as heterodox in that it has been shown to have both Arian and Pelagian leanings.[64] Despite its heterodoxy, it was "very influential in western Europe" throughout much of the medieval period.[65] It was viewed as authoritative by the Scholastics of the Papal Revolution, and it is discussed in more detail in the next section.[66]

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59. GONZALEZ, *supra* note 52, at 3-17 (discussing the various views that Greek and Roman philosophers had towards work and accumulating wealth); *see also id.* at 7 (discussing Plato's view of various commercial activities, how he "shared the negative view of trade and commerce," and how he would have forbidden buying and selling on credit).

60. BERMAN, *supra* note 1, at 336-39.

61. *See supra* note 58.

62. ANGELIKI E. LAIOU, *Trade, Profit, and Salvation in the Late Patristic and the Byzantine Period*, *in* WEALTH AND POVERTY IN EARLY CHURCH AND SOCIETY, 247 (Susan R. Holman ed., 2008). However, at least one scholar has argued for Latin authorship. Schlatter, *The Author of the* Opus imperfectum in Matthaeum, 364-75.

63. LAIOU, *supra* note 62, at 247.

64. Frederic W. Schlatter, *The Pelagianism of the* Opus imperfectum in Matthaeum, 41 VIGILIAE CHRISTIANAE 267-85 (1987). "It has been the fate of the *Opus imperfectum in Matthaeum* since Erasmus reassessed it for his edition of 1530 to be classified as an Arian work." *Id.* at 267. Schlatter comes to the conclusion "that the *Opus imperfectum* is predominantly and basically a Pelagian work." *Id.* at 283.

65. LAIOU, *supra* note 62, at 248.

66. The Scholastics of the Middle Ages took Justinian's Code, the Bible, and the church fathers to be authoritative. For example, "As in the case of theology, the written text as a whole, the Corpus Juris Civilis, like the Bible and the writings of the church fathers, was accepted as sacred, the embodiment of reason." BERMAN, *supra* note 1, at 132. "Even apart from the universities, the church had long taught that all human law was to be tested and judged by divine law and moral law; but the university jurists added the concept of an ideal human law, the Roman law of Justinian's books, which—together with the Bible, the writings

After discussing the *Opus imperfectum*, this article turns to how the Scholastics dealt with this strident text. The great expansion of commercial activity during and after the Papal Revolution placed significant stress on the integrity of this teaching. Therefore, the Scholastics began to reinterpret the church's teachings on this subject, which were based in large part upon the *Opus imperfectum*, in a manner more favorable to merchants and commercial activity.[67] This demonstrates that, by the fifteenth century, the Scholastics had effectively reinterpreted the anti-commercial teachings of the *Opus imperfectum* and some were instead teaching the goodness of just commercial activity. The following section begins by discussing the anti-commercial teachings of the *Opus imperfectum* as representative of the teachings of much of the medieval church prior to the Papal Revolution. Then, it discusses the work of two Scholastics, the influential Thomas Aquinas and the lesser-known Johannes Nider. These works demonstrate how over a period of centuries the Scholastics moved the doctrine of the church from a position that commercial activity can almost never please God to a position that just commercial activity is pleasing to God.

III. THE *OPUS IMPERFECTUM IN MATTHAEUM*: THE CHURCH CONCLUDES COMMERCIAL ACTIVITY CAN NEVER PLEASE GOD

The *Opus imperfectum* answers the question "can a merchant please God?" with a rather emphatic "no." In commenting on the cleansing of the

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of the church fathers, the decrees of church councils and popes, and other sacred texts—provided basic legal principles and standards for criticizing and evaluating existing legal rules and institutions. These inspired writings of the past, and not what any lawgiver might say or do, provided the ultimate criteria of legality." *Id.* at 163. The use of the term "reinterpret" is therefore appropriate, although it may seem a bit odd, because this is what the Scholastics did. They did not, generally speaking, challenge the validity of the church fathers, such as the *Opus imperfectum.* Rather, they took the church fathers, along with the Bible and Justinian's Code, as authoritative sources and attempted to reconcile them where they perceived them to be in conflict.

67. "[T]he Scholastics wrote 'to reconcile the new contractual relations, which sprang from economic expansion, with the traditional morality expounded by the Church.'" Daniel A. Wren, *Medieval or Modern? A Scholastic's View of Business Ethics, circa 1430*, 28 JOURNAL OF BUSINESS ETHICS 110 (2000) (quoting R. H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM 30-31 (1952)). This traditional morality, as it relates to the condemnation of commercial activity, is illustrated in this Article primarily by the *Opus imperfectum.* The Scholastics' attempts at "reconciliation" of this traditional teaching are illustrated in this Article by the work of Thomas Aquinas and Johannes Nider.

Temple by Jesus in Matthew 21:12,[68] the author of the *Opus imperfectum* makes the following oft-quoted[69] statement: "*Homo mercator vix aut numquam potest Deo placere*,"[70] or, "a merchant can never or almost never please God."[71] The full context of the quote reads as follows:

> *This means that a merchant can never or almost never please God. Therefore, no Christian should be a merchant. Or, if he wishes to be a merchant, let him be thrown out of the church* according to the saying of the prophet, "Because I have not known bargaining I will enter into the Kingdom of Heaven." . . . *He who buys and sells cannot be free of lies and perjury*: for it is necessary that one of the merchants swear that the thing he is buying is not worth its price, while the other swear [sic] that the thing he is selling is worth more than the sale price. Nor is the property of the merchants stable. It is either destroyed while the merchant is still alive, or it is dissipated by bad heirs or it is inherited by outsiders and enemies. Nothing that is collected evilly can come to any good.[72]

Here is a sweeping statement appearing to condemn all commercial activity by arguing that anyone who buys and sells cannot be free of the sin of lying. Such a statement does indeed envisage an attitude "towards commerce not merely passive but actively hostile."[73]

Of course, the logical question then becomes "who is a merchant?" and therefore subject to such awesome judgment. Pseudo-Chrysostom raises, and then answers, this question. In relevant part, he states:

> He who buys a thing not so as to sell it in the same unchanged and complete form but rather in order to work with it, he is not a merchant, for he is selling not the thing itself but rather his own

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68. "And Jesus entered the temple and drove out all those who were buying and selling in the temple, and overturned the tables of the money changers and the seats of those who were selling doves." *Matthew* 21:12.

69. *Id.* at 336, 618 n.5. The Scholastics frequently quoted and discussed this statement. *See, e.g.*, Thomas Aquinas Summa Theologica, ST II-II, Qu. 77, Art. 4, Obj. 1. However, as noted earlier, they wrongly attributed it to St. John Chrysostom.

70. Opus imperfectum in Matthaeum (Patrologia Gaeca, J.P. Milgne (Paris: 1857-1886), 56:839).

71. LAIOU, *supra* note 62, at 247 (quoting *Opus imperfectum* (PG 56:839).

72. LAIOU, *supra* note 62, at 247-48 (quoting *Opus imperfectum* (PG 56:839-840)) (emphasis added).

73. BERMAN, *supra* note 1, at 336 (quoting HENRI PIRENNE, ECONOMIC AND SOCIAL HISTORY OF MEDIEVAL EUROPE 48-49 (Harcourt Brace 1937)).

> work: that is to say, *if one sells a thing whose value lies not in the thing itself but rather in the work he has put in it, that is not commerce. But he who buys a thing so as to resell it complete and unchanged and thus realize a profit, he is a merchant who was thrown out of the Temple of the Lord.* Of all merchants the most accursed is the usurer. For, if he who buys in order to resell is a merchant, and accursed, how much more accursed is he who gives at interest money that he has not bought but that has been given him by God?[74]

Thus, the author of *Opus imperfectum* argues that someone who adds value to a thing by adding his own labor is not a merchant. The cobbler, for example, is not a merchant for having bought the raw materials that he will fashion into shoes and then sell. By contrast, the middleman, retailer, or "pure" or "true" merchant who travels to one town to buy shoes from a cobbler there for sale in another town "is a merchant who [should be] thrown out of the Temple of the Lord" and is accursed.[75] Consequently, the true merchant, defined by Pseudo-Chrysostom as one who "buy[s] cheap in order to sell dear,"[76] cannot please God.

However, the author's statements appear to be somewhat inconsistent. He first states that one engaging in buying and selling cannot do so without the sin of lying. Then, in defining who qualifies as a merchant, he asserts that a craftsman, such as the cobbler in the previous paragraph, who adds value by his labor to goods, is not a merchant. Certainly, the cobbler and similar craftsman engage in buying and selling, but they are not by this fact alone condemned as merchants because they add value to the goods with their labor. Accordingly, the cobbler's buying and selling is permissible because he is a craftsman and not a merchant. Pseudo-Chrysostom's definition of "merchant" serves, to some extent, as a limit on the rigorous teaching of this section of the *Opus imperfectum* by restricting it essentially to the pure merchant. The commercial activity seen as sinful by Pseudo-Chrysostom is retailing, serving as a middleman, importing, and like activities that involve of necessity buying with the intention of reselling and at a dearer price.

Still, this limitation of the *Opus imperfectum's* teachings on the subject may have served as little solace to a person in Medieval Europe who most

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74. LAIOU, *supra* note 62, at 248 (quoting *Opus imperfectum* (PG 56:840)) (emphasis added).

75. *Id.*

76. *See* LANGHOLM *supra* note 58, at 131.

likely understands salvation as coming only through the institutional church. Such a teaching, even given the limit supposed in the preceding, was likely downright terrifying as it suggests the possibility that buying and selling could result in being "thrown out of the church." Being "thrown out of the church" would mean being separated from the means of God's grace in this life and condemned to hell in the life to come. As noted previously, the *Opus imperfectum* was "very influential in western Europe,"[77] and, therefore, this undoubtedly worked to discourage commercial activity in general and mercantile activity in particular.[78]

IV. THE SCHOLASTICS' REINTERPRETATION OF THE *OPUS IMPERFECTUM IN MATTHAEUM*: JUST COMMERCIAL ACTIVITY IS PLEASING TO GOD

During the time of the Papal Revolution and thereafter, commercial activity experienced explosive growth.[79] Not surprisingly, many of the Scholastics, who were the church's theologians of the time, began to reinterpret the teachings of the *Opus imperfectum* as it relates to commercial activity.[80] Thomas Aquinas's handling of the teachings of the

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77. LAIOU, *supra* note 62, at 248.

78. A sample of related and similarly terrifying teaching is found in James Q. Whitman, *The Moral Menace of the Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 YALE L.J. 1841 (1996). Professor Whitman discusses a book, entitled *Spiritual Rudder of the Merchant's Ship*, written for merchants by a Dutch preacher named Godfried Udemans. *Id.* at 1855. This book quotes from *Opus imperfectum in Matthaeum* and notes that Aquinas said similar things. Then, it goes on to state the following:

> This, and the like hard and rough manner of speaking, will easily leave the *pious merchant* disturbed in his conscience and make him restless, especially when these passages are printed alongside the words of Sirach, chap. 26, verse 27: *A merchant can scarcely guard himself against doing evil, and a shopkeeper against sinning.*

Id. at 1856 (1996) (quoting GODFRIED UDEMANS, SPIRITUAL RUDDER OF THE MERCHANT'S SHIP 3 (Dordrecht: Fransoys Boels, 1638)).

79. For example, Professor. Berman states that:

> [I]n the eleventh and twelfth centuries there occurred a rapid expansion of agricultural production and a dramatic increase in the size and number of cities. At the same time, there emerged a new class of professional merchants, who carried on large-scale commercial transactions both in the countryside and in the cities.

BERMAN, *supra* note 1, at 333-34. Further, Professor Berman notes that this period "has been called 'the commercial revolution.'" *Id.* at 335 (quoting from the title and chapter 3 of ROBERT S. LOPEZ, THE COMMERCIAL REVOLUTION OF THE MIDDLE AGES 950-1350 (1972)).

80. For the response of several Scholastics to these teachings from the *Opus imperfectum*, see generally, LANGHOLM, *supra* note 58, at 102-03, 128-33, 354-55, and 394-95.

Opus imperfectum in the thirteenth century is illustrative of the beginnings of this reinterpretation of the rather rigorous teachings of the *Opus imperfectum* and is discussed in the following section. That section then discusses the work of Johannes Nider in the fifteenth century, which builds upon the work of Aquinas and other Scholastics and concludes that the just commercial activities of an honorable merchant are not only lawful, but beneficial to society, and therefore, pleasing to God.

Turning first to Aquinas, he discusses in his work, *Summa Theologica*, the relevant passage from the *Opus imperfectum* in answer to the question "is it, in trading, lawful to sell a thing at a higher price than that what was paid for it?" In *Summa Theologica*, Aquinas states:

> *Obj. 1.* It would seem that it is not lawful, in trading, to sell a thing for a higher price than we paid for it. For Chrysostom[81] says on Mt. 21:12, "He that buys a thing in order that he may sell it, entire and unchanged, at a profit, is the trader who is cast out of God's temple." Cassiodorus speaks in the same sense in his commentary on Ps. 70:15, "Because I have not known learning" (or "trading" according to another version).[82] "What is trade," says he, "but buying at a cheap price with the purpose of retailing at a higher price?" and he adds: "Such were the tradesmen whom Our Lord cast out of the temple." Now no man is cast out of the temple except for a sin. Therefore, such like trading is sinful.
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> *Obj. 2.* Further, it is contrary to justice to sell goods at a higher price than their worth or to buy them for less than their value, as shown above.[83] Now if you sell a thing for a higher price than you paid for it, you must either have bought it for less than its value, or sell it for more than its value. Therefore, this cannot be done without sin.[84]

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81. This is a reference to the *Opus imperfectum*, which as noted herein, the Scholastics attributed falsely to John Chrysostom. *Id.* at 102.

82. This passage is quoted by the author of *Opus imperfectum* but according to the Septuagint's rendering, which Aquinas describes here as "another version." *Id.* at 128-29.

83. This is a reference to *Summa Theologica*, ST II-II, Qu. 77, Art. 1. The idea discussed there is often referred to as the theory or doctrine of "just price." For a brief discussion of the theory of just price by the Scholastics, *see* R. H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM 40-41 (1952).

84. St. Thomas Aquinas, *Summa Theologica*, ST II-II, Qu. 77, Art. 4, Obj. 1 and 2, *in* SAINT THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS 195-96 (William P. Baumgarth & Richard J. Regan eds., 1988) (internal footnotes omitted and replaced with footnotes by the author).

Thus, Aquinas, in discussing the *Opus imperfectum*, recognizes that it teaches that the activities of the trader or pure merchant are sinful. Stating what appears to have been the reasoning of the *Opus imperfectum* more clearly than Pseudo-Chrysostom, he reasons that one is only cast out of the Temple for sin, and Christ cast the merchants of the Temple. Therefore, commercial activity such as that carried on by true merchants must be sinful.[85]

This idea seems to be based in the idea that it is a sin to do the very thing that a true merchant does—buy cheap to sell dear. This conclusion appears to rest upon the rather naïve idea that an item's value is constant, as between persons and locales, and therefore, in order to buy cheap and sell dear, the merchant must either buy for less than the just price, sell for more than the just price, or both. Thus, prior teaching, as understood by Aquinas, would forbid as much commercial activity as sin. Given the explosive growth of trade and commercial activity during and following the era of the Papal Revolution,[86] one might expect Aquinas to attempt to limit or mitigate the full reach of such teaching, which is exactly what he does.

Aquinas begins by turning to Augustine for a more balanced view of commercial activity.[87] He writes:

> *On the contrary,* Augustine commenting on Ps. 70:15, "Because I have not known learning," says, "The greedy tradesman

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85. *See* NIDER, *supra* note 36, at 10 n.10 (quoted text in the footnote belongs to the editor). Obviously, there are other valid interpretations of this passage that would not involve the condemnation of commercial activity. Nevertheless, typical of scholastic reasoning, Aquinas is more concerned with harmonizing all of the sources from tradition than a careful exegesis of the scriptures. This is illustrated by an editor's footnote to Johannes Nider's *On the Contracts of Merchants*, which points out the purpose of the Scholastics, from which is manifestly lacking the careful exegesis of the scriptures:

> Medieval theologians [i.e., Scholastics] such as Albertus Magnus, Thomas Aquinas, and Duns Scotus were much concerned with the problem of redefining the proper attitude of the church toward economic affairs. Broadly speaking, the Scholastics of the Middle Ages sought to reconcile the views of the early Church Fathers with those held by Aristotle (whose *Nicomachean Ethics* summarized his ideas of "just price," etc.) and with the practical needs of the growing business community.

Id.

86. BERMAN, *supra* note 1, at 336-37, 618 n.5.

87. Gerber asserts that Augustine was "[t]he only patristic writer of importance during the medieval period who placed any significant emphasis on justifying commercial activity." Gerber, *supra* note 45, at 697 n.113 (citing John W. Baldwin, *The Medieval Merchant before the Bar of Canon Law*, 44 PAPERS OF THE MICHIGAN ACADEMY OF SCIENCE, ARTS AND LETTERS 287, 287, 290 (1959)).

> blasphemes over his losses; he lies and perjures himself over the price of his wares. But these are vices of the man, not of the craft, which can be exercised without these vices." Therefore trading is not in itself unlawful.[88]

Augustine's view, as represented here by Aquinas, is that it is not commercial activity itself that is the problem. Instead, it is the sin that often accompanies commercial activity. Thus, Aquinas concludes that "the craft . . . [of] trading is not in itself unlawful."[89]

Aquinas continues by comparing the legitimate commercial activity of the "housekeepers or civil servants," which is entered into "in order to satisfy the needs of life," and the commercial activity of the "tradesman,"

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88. Thomas Aquinas, Summa Theologica, ST II-II, Qu. 77, Art. 4, *in* SAINT THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS 196 (2d ed. 2002) (quoting Augustine, Enarratio in Psalmum 70).

It is disappointing that neither Aquinas, Augustine, nor Nider noted the obvious weakness of Pseudo-Chrysostom's argument based upon Psalm 70:15 (which, in most English Bibles, is Psalm 71:15.) Pseudo-Chrysostom's reliance upon Psalm 70:15 rests upon a scribal error that added the questionable language frequently translated "because I have not known bargaining [or business, or sometimes buying and selling] I will enter the Kingdom of Heaven." The error apparently originates from a scribal error in the Greek Septuagint that carried into some versions of the Latin Vulgate. One error added the line entirely, while some manuscripts show an alternate reading of the line which changed the word from learning or literature to bargaining or business. "St. Augustine knew of both versions and was puzzled by the divergence, but failed to establish a sensible reconciliation." LANGHOLM, *supra* note 58, at 128-29.

Augustine's confusion, however, may perhaps be excused by the fact that, despite his obvious and incredible genius, he knew very little Greek. "Augustine's failure to learn Greek was a momentous casualty of the Late Roman educational system: he will become the only Latin philosopher in antiquity to be virtually ignorant of Greek." PETER BROWN, AUGUSTINE OF HIPPO 24 (Univ. of Cal. Press 2000). The author is not aware of the knowledge that either Aquinas or Nider had of Greek. Accordingly, the author is tempted to be very forgiving toward these great men given that the research for and writing of this article has rather painfully reminded him of his own ignorance of *both* Latin and Greek, which has served as a great hindrance to the work of researching and writing this article.

Finally, Aquinas's failure to focus on the Scriptural issue is probably also due to the fact that the Scholastics tended to be more concerned with the synthesizing of ancient sources in general than with determining the clear teaching of the Scripture in particular. Carson and Moo, for example, in discussing Aquinas note the tendency to focus on the philosophical over Scripture exegesis. "Despite the enormous influence his work has wielded, especially but by no means exclusively within Catholicism, his categories belong rather more to the domains of philosophy and systematic then to rigorous exegesis." D. A. CARSON AND DOUGLAS MOO, AN INTRODUCTION TO THE NEW TESTAMENT 44 (Zondervan, 2d ed. 2005).

89. Aquinas, Summa Theologica, *in* SAINT THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS 196 (2d ed. 2002).

which is "not on account of the necessities of life but for profit" and satisfaction of "the greed for gain."[90] Reasoning from this, Aquinas concludes that all commercial activity in and of itself is not sinful, but, rather, he appears instead to argue that it is neutral—neither inherently good nor inherently sinful.

> Nevertheless, gain, which is the end of trading, though not implying, by its nature, anything virtuous or necessary, does not, in itself, connote anything sinful or contrary to virtue; wherefore nothing prevents gain from being directed to some necessary or even virtuous end, and thus trading becomes lawful. Thus, for instance, a man may intend the moderate gain which he seeks to acquire by trading for the upkeep of his household or for the assistance of the needy; or, again, a man may take to trade for some public advantage, for instance, lest his country lack the necessaries of life, and seek gain, not as an end, but as payment for his labor.[91]

Sin, or virtue, then comes from the motivation behind entering commercial activity and the end to which any resultant gain is put. Providing for oneself through commercial activity on the basis of one's labor is "lawful," while commercial activity engaged in due to greed and avarice is not lawful.[92]

Further, relying on the author of *Opus imperfectum*, Aquinas noted a distinction between selling goods at a higher price unaltered and without their "undergoing any change" and selling goods "that [have been] changed for the better" by the labor of the seller.[93] The latter is a reward for the labor of the seller and is lawful, while the former, according to Aquinas, is more suspect in that it is more open to avarice.[94]

In addition to merely resting on the distinction already made in the *Opus imperfectum*, Aquinas goes further and attempts to justify, in certain situations, buying at a low price and selling at a higher price.

> Not everyone that sells at a higher price than he bought is a tradesman, but only he who buys that he may sell at a profit. If, on the contrary, he buys not for sale but for possession and afterwards, for some reason, wishes to sell, it is not a trade transaction even if he sell at a profit. For he may lawfully do this,

90. *Id.*
91. *Id.* at 196-97.
92. *Id.*
93. *Id.* at 197.
94. *Id.*

> either because he has bettered the thing, or because the value of the thing has changed with the change of place or time, or on account of the danger he incurs in transferring the thing from one place to another, or again in having it carried by another. In this sense, neither buying nor selling is unjust.[95]

Thus, Aquinas asserts that a person has not sinned merely by buying at a low price and selling at a high price. Rather, he appears to require that the person have not bought originally with such purpose, but he must have "afterwards, for some reason" changed his mind and decided to sell.[96]

Therefore, if not originally intending to buy low and sell high, he is justified in selling at a higher price than he originally paid. Aquinas asserts that this higher price may be justified for a number of reasons, including changes in price due to change in location or the passage of time, labor invested to alter the thing, or the costs and risks incurred in moving the thing from one place to another.[97] Consequently, according to Aquinas, such a person is not a merchant or "tradesman" by virtue of his original intent to buy the goods for "possession" as opposed to "for sale."[98] However, the same reasons used to justify the higher price for the "and afterwards, for some reason"[99] seller just as readily serve to justify the higher price for the merchant buying with the express intention of resale. Unfortunately, Aquinas does not address this rather logical extension of his argument.

Aquinas thus softened the teaching of the *Opus imperfectum* in two ways. First, he asserts that trading, i.e., commercial activity, is not evil in and of itself. Whether it be vice or not is instead determined by the motive behind entering into the transaction and the end to which any gain is put. Second, he asserts that buying at a lower price and selling at a higher price is not always unlawful. This is the case, for instance, in the situation of the "afterwards, and for some reason" buyer-turned-seller, who buys the good for possession, but, "afterwards, and for some reason," decides to sell it and at a higher price than was paid. While the reasons that Aquinas gives to justify the higher price in this situation would apply equally to true merchants, he does not extend his logic that far. Rather, he appears to support the idea that a merchant buying goods for the purpose of resale at a higher price is behaving sinfully.

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95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*

Aquinas reinterpreted the teachings of the *Opus imperfectum* to make them more favorable to commercial activity, but he stopped short of recognizing commercial activity as good or permitting buying with the express purpose of reselling at a higher price. Although not taking these next logical steps himself, Aquinas's arguments appear to have provided some support for the work of Johannes Nider, a later scholastic who did take these steps. Nider's work, *De Contractibus Mercatorum*[100] or "On the Contracts of Merchants," written in the fifteenth century, is a "guide for conduct that would enable merchants to engage in trade while still being assured that their practices were ethical, or 'just' in the language of the times."[101] Nider does not specifically address the *Opus imperfectum*, but he does specifically address the issue raised by the *Opus imperfectum* and not reinterpreted by Aquinas—whether a merchant may, without danger to his soul, buy a good at a lower price with the express purpose of selling it at a higher price.[102] The *Opus imperfectum* answered this question in the negative, and Aquinas seemed to have agreed, but Nider, assuming certain conditions such as voluntariness and a just price, reached the opposite conclusion.[103]

In Chapter III, entitled "Concerning the Rules According to Which It Can Be Seen in What Way and When Merchants May Be More or Less Secure," Nider states that he is discussing a merchant who "buys not in order to use, that is, but to sell, and this for more."[104] Nider is therefore clearly discussing the shoe merchant from the earlier example herein who buys shoes in one town to sell them in another at a higher price, as opposed to the cobbler who buys raw materials with which to make shoes and then sells those shoes. Of this merchant, he says that:

> Insofar as such a merchant is useful to the commonwealth, Scotus approves of his existence . . . because it is useful to the commonwealth to have keepers of things for sale in order that they can be promptly found by those who need them and want to purchase them. In particular, it is useful to the commonwealth to have importers of necessary things in which a country does not abound, although their availability and employment is useful and

100. NIDER, *supra* note 36. This is a translation of Nider's original work in Latin, *De Contractibus Mercatorum*, written in approximately 1430 and published in approximately 1468; *see also* Wren, *supra* note 67, at 109.

101. Wren, *supra* note 67, at 117.

102. Id. at 38-54.

103. *Id.*

104. *Id.* at 38.

> necessary. From this it follows that the merchant who imports a product from a country where it abounds, into a country where it is lacking, or who takes care of this product after it has been imported, in order that it may readily be found by the one desiring to buy it, performs an act useful to the commonwealth.[105]

It follows then, according to Nider, that such a useful act is not sinful and that a merchant performing such a useful act would be right to expect some gain thereon.

After qualifying that the thing imported is "nothing of itself shameful but rather only lawful, honorable, and useful,"[106] Nider concludes:

> When, under these circumstances, someone seeks a limited [reasonable] gain by the practice of commerce, with the intention of sustaining his own house or contributing toward the subvention of the indigent, or when he engages in commerce because of its public utility lest things necessary to the life of his country be wanting—when, that is, he seeks gain not as an end but as a stipend for his efforts, as it were—this is morally legitimate in the opinion of Saint Thomas.[107]

As noted previously herein, Aquinas stopped short of reaching this conclusion. He did conclude that in limited circumstances one may buy cheap and sell dear. Further, he concluded that motives do indeed matter, as Nider points out. However, contrary to Nider's conclusion, Aquinas concludes that only those persons who buy with the intent to possess and not to sell, but then change their minds and sell, are engaged in morally legitimate activity.[108] By contrast, Nider concludes that even those who "buy[] not in order to use . . . but to sell, and this for more" are engaged in morally legitimate activity just the same.[109] While this is a logical extension of Aquinas's arguments noted in this Article, it is not one made by Aquinas himself.

In support of this extension of Aquinas's arguments, Nider relies on grounds very similar to the ones used by Aquinas to justify his "and afterwards, for some reason" buyer-turned-seller. Nider states "that a

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105. *Id.*

106. *Id.* at 39.

107. *Id.*

108. *See supra* notes 90-91 and accompanying text.

109. NIDER, *supra* note 36, at 38-39.

merchant of the type just described [i.e., the merchant buying in order to sell at a higher price] can, in proportion to his diligence, prudence, and risks, lawfully receive in exchange" a profit.[110] Nider continues by noting that "it is right for everyone serving the commonwealth by honest work to live honorably by his toil."[111] Therefore, Nider concludes "whoever imports or [maintains an inventory of] goods honorably and usefully serves the commonwealth and, therefore, stands justified in profiting thereby."[112] Nider, with reasons similar to those of Aquinas, justifies this profit as a reward for the merchant's "diligence, prudence, and risks" and his costs of importing and housing such goods.[113]

Thus, by the fifteenth century, Nider reached a conclusion nearly diametrically opposed to the one reached by the author of the *Opus imperfectum*. Pseudo-Chrysostom's position is that no true merchant can honor God, and he defines a merchant as one who buys cheap and sells dear.[114] Nider, on the other hand, concluded that a true merchant dealing justly in "lawful, honorable, and useful goods," far from being "thrown out of the Temple of the Lord," is instead useful to society and justified in earning a reasonable profit from his commercial activities.[115]

Further, with only minor extrapolation, Nider's position is that the merchant engaged in just commercial activity is pleasing to God and that the commercial activity itself is useful to society; therefore, the merchant and the commercial activity are good. Rather than viewing the work of the just merchant as merely neutral as Aquinas did, Nider describes it as "honest work," "honorabl[e]," and a useful service to society.[116] *On the Contracts of Merchants* does not contemplate that commercial activity itself is a danger to the merchant's soul—the danger lies in unjust commercial

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110. *Id.* at 39. Nider develops this more fully in his discussion of the value of goods. For example, he states that:

> Such businessmen may properly charge more than their actual costs because of the expenses, exertions, cares, qualities of industry, risks, and other reasonable engagements or burdens which they undergo in bringing together things useful to men or in preserving or setting out necessary things in the common market place, and because they remain [there] in order that anyone in need may promptly have such goods.

Id. at 30-31.

111. *Id.* at 39.

112. *Id.*

113. *Id.* at 30-31, 39.

114. *See supra* notes 68-76 and accompanying text.

115. *See supra* notes 107-09 and accompanying text.

116. NIDER, *supra* note 36, at 39.

activity, characterized by the sins of avarice and deceit.[117] Rather, *On the Contracts of Merchants* is written to presumably pious merchants who desire to ply their trade honorably and in a way pleasing to God and written with the express purpose of providing them with guidelines whereby they may do just that.[118] Thus, a fair conclusion is that Nider viewed just commercial activity as a good thing and the pious merchant engaged therein as pleasing to God.

By contrast, the *Opus imperfectum* stood for the propositions that a merchant can almost never please God and commercial activity is almost always evil.[119] This represented the church's position for much of the medieval period. However, by the fifteenth century, the Scholastics, as demonstrated by the work of Nider, had entirely reinterpreted this teaching. Nider, representing his understanding of the church's teachings,[120] agrees that an unjust merchant can never please God, but a merchant engaged in just commercial activity is understood by Nider as pleasing to God. Additionally, the just commercial activity of that merchant is seen as useful to society and therefore basically good.

Thus, at least by the conclusion of the Scholastic period (and to a large degree much earlier in the period), the Church's teachings on commercial activity can be summarized as just commercial activity is pleasing to God. This idea, that "the economic activities of merchants, like other secular activities, were no longer to be considered as necessarily 'a danger to salvation'; on the contrary, they were considered to be a path to salvation, if carried on according to the principles laid down by the church."[121] These principles—foundational among which is the idea that just commercial activity is pleasing to God—formed the basis for the mercantile law, "a system of law based on the will of God as manifested in reason and conscience."[122] Departing from this understanding of commercial law has

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117. *Id.* at 38-54.

118. *See supra* notes 101-02 and accompanying text.

119. *See supra* notes 68-72 and accompanying text.

120. In the introduction to *On the Contracts of Merchants*, the editor writes "that Friar Nider's primary purpose for writing *De Contractibus Mercatorum* was to provide a moral guide to those" engaged in commercial activity. The guide was written "in terms of the author's understanding of the accepted views of the Roman Catholic Church of Western Europe." Thus, "[t]he innumerable references to that which is 'just,' or 'right,' or 'lawful,' . . . should be read as intended primarily to remind the reader that worldly action should be judged by churchly standards of morality." NIDER, *supra* note 36, at viii.

121. BERMAN, *supra* note 1, at 339.

122. *Id.*

necessarily led to a lack of coherence and consistency in commercial law jurisprudence. Perhaps a return to it can restore these essential characteristics.

V. TOWARD A LAW-OF-NATURE COMMERCIAL LAW JURISPRUDENCE BASED UPON THE FOUNDATIONAL PRINCIPLE THAT JUST COMMERCIAL ACTIVITY IS PLEASING TO GOD

In another time, when people thought much differently, Justice Story of the United States Supreme Court could write of such a thing as "the general principles and doctrines of commercial jurisprudence" and general "principles of commercial law."[123] These general principles of commercial law where thought to be the same for all people for all time in all places:

> The law respecting [commercial activity] may be truly declared in the languages of Cicero, adopted by Lord Mansfield in *Luke* v. *Lyde*, 2 Burr. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit.*[124]

For centuries, courts in the West would reason from these general principles of commercial law to the particular facts of a given case. The departure from this way of thinking has greatly contributed to the current incomprehensibility of law and the related cynicism toward and contempt of law in the West. Given the disastrous results of this change in jurisprudential thinking, perhaps a return to early models and ways of thinking is in order.[125]

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123. Swift v. Tyson, 41 U.S. 1, 18-19 (1842), *overruled by* Erie R. Co. v. Tompkins, 304 U.S. 64, 79-80 (1938).

124. *Id.* at 19. The quoted phrase from Cicero can be translated "nor will there be one law in Rome, another in Athens, another now, another in the future, but one law eternal and immutable will bind together all nations of all times." III MARCUS TULLIUS CICERO, DE RE PUBLICA 22 (James E.G. Zetzel) (1995).

125. Livy makes just such a suggestion in THE EARLY HISTORY OF ROME. He writes:

> I invite the reader's attention to much more serious consideration of the kind of lives our ancestors lived, of who were the men, and what the means both in politics and war by which Rome's power was first acquired and subsequently expanded; I would then have him trace the process of our moral decline, to watch, first, the sinking of the foundations of our morality as the old teaching was allowed to lapse, then the rapidly increasing disintegration, then the final collapse of the whole edifice, and the dark dawning of our modern day when we can neither endure our vices nor face the remedies needed to cure them.

Such a return should begin with the recognition that there are general principles of commercial law that are knowable and can serve as the basis for a jurisprudence of commercial law. Further, as the Scholastics eventually concluded, a foundational general principle of commercial law is that just commercial activity is a good thing.

On the first topic, i.e., that there are general principles of law that are knowable and can serve as a basis for legal analysis, there is perhaps no greater work than Dean Jeffrey Tuomala's magnificent article *Marbury v. Madison and the Foundation of Law*.[126] Of particular help for the topic at hand is Section IV of that article, which is captioned "*Marbury*—The General Principles of Law."[127] In that section of his article, Dean Tuomala asserts that "God's law not only provides the right to establish a framework of government, but it . . . . [A]lso provides other general principles of

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> The study of history is the best medicine for a sick mind; for in history you have a record of the infinite variety of human experience plainly set out for all to see; and in that record you can find for yourself and your country both examples and warning; fine things to take as models, base things, rotten through and through, to avoid.

LIVY, THE EARLY HISTORY OF ROME 30 (Aubrey de Selincourt trans., Penguin Classics 2002). The prophet Jeremiah suggests a similar remedy for the people of Judah when he writes, "Thus says the Lord, 'Stand by the ways and see and ask for the ancients paths, Where the good way is, and walk in it; And you will find rest for your souls." *Jeremiah* 6:16. This is not a romantic imagining that the "the good old days" were much better. *Ecclesiastes* 7:10. Rather, it is an understanding that, when one's way has been lost, it is often helpful to return to the place in the road where the wrong turn was made.

126. Jeffrey Tuomala, Marbury v. Madison *and the Foundation of Law*, 4 LIBERTY U. L. REV. 297 (2010). Dean Tuomala does an outstanding job of describing (1) "law of nature" jurisprudence; (2) the historic character of law of nature jurisprudence, including its foundations in Christianity and God's law; (3) the departure from this way of thinking about the law; and (4) the related decent into a purely positivistic understanding of law, which has lead to the type of confusions throughout the law as are discussed particularly in this Article as they relate to commercial law. For the most part, this Article does not attempt to set out again all of Dean Tuomala's arguments, but rather the author commends the reader to Dean Tuomala's excellent article for a fuller explication of these important issues. That said, this Article generally accepts the premises and conclusions of Dean Tuomala's excellent work without additional examination, and it attempts to move on from there by attempting to understand and apply the "general principles of commercial law" in order to begin laying the foundation for a law of nature jurisprudence of commercial law. Further, throughout this Article, when a reference is made to a law-of-nature jurisprudential approach, it is intended to refer to the approach described and set out by Dean Tuomala in this article. *See, e.g.*, *id.* at 315-16 & nn.95-98 (describing a law-of-nature jurisprudence and noting that it was "set out in the Declaration of Independence" and "is not simply a human convention").

127. *Id.* at 314-25.

law."[128] It was with these other principles of law that the Scholastics were grappling when they reinterpreted the *Opus imperfectum*. These general principles formed the foundation for law for nearly a millennia in the West.

In discussing these general principles and Chief Justice John Marshall's view of them, Dean Tuomala writes:

> He presupposed a preexisting law, whose source is identified in the Declaration of Independence, that grounds the right to establish a government, provides the general principles of law, and defines the nature of judicial power.
>
> Marshall's "general principles of law" may be identified in part with the "general principles of commercial law" to which Justice Story appealed in *Swift v. Tyson*. It is generally recognized that Story's opinion in *Swift* was grounded in law-of-nature jurisprudence. . . . *Swift* was based on the law-of-nature jurisprudence set out in the Declaration of Independence, that law is not simply a human convention. This jurisprudence provided the basic rule of law upon which thousands of decisions . . . were premised . . . .[129]

As noted earlier, however, the legal systems in the West have abandoned this way of understanding the law, and consequently "most contemporary lawyers, judges, and law professors do not recognize any law superior to the Constitution" which "means they will not recognize the existence of general principles of law as articulated in *Marbury* and *Swift*."[130]

Like Justices Holmes, Brandeis, and Frankfurter, among many others, they do not even believe that these principles exist. In the landmark case of *Eerie Railroad Co. v. Tompkins*, for example, Justice Brandeis, in overruling *Swift v. Tyson*, wrote that "[t]he fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it. . . . .'"[131] Further, in *Guaranty Trust Co. v. York*, "Justice Frankfurter . . . proclaimed that *Erie* had . . . actually established an entirely different way of looking at the law"[132] that did not include any higher general principles of law. Frankfurter too quoted

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128. *Id.* at 314-15.

129. *Id.* at 315-16 (footnotes omitted).

130. *Id.* at 316.

131. Erie R. R. Co. v. Tompkins, 304 U.S. 64, 79 (1938); *see also* Tuomala, *supra* note 126, at 323.

132. Tuomala, *supra* note 126, at 324.

Holmes, proclaiming that law should not be "conceived as a 'brooding omnipresence' of Reason" capable of providing general principles upon which law can be based.[133]

Without these general principles of law, most all areas of law, commercial law included, lack any foundation other than the will of the sovereign.[134] Being Realists and positivists, Justices Brandeis and Holmes would certainly agree, as is evidenced by Justice Brandeis's quote of Justice Holmes in *Erie*, which concludes that "'[t]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.'"[135] As Dean Tuomala demonstrates, this led to a rejection of the centuries-old "foundational principle of Christian common law jurisprudence . . . that human will must be exercised in accord with right or reason to be law."[136] Not surprisingly, law based purely upon the will of the sovereign, or even law believed to be so based, appears to be arbitrary, meaningless, and without any substantial foundation. Also not surprisingly, it has not taken long for a strong cynicism to develop toward law and for law to be held in contempt by much of the people of the West.[137] Or, to put it another way as Professor Smith does in *Law's Quandary*, this shift in understanding the law has resulted in the reduction of the modern legal profession's "talk" about the law to little more than nonsense.[138] Accordingly, as stated at the beginning of this Article, commercial law lacks any coherent jurisprudence and there appears to be little hope of developing one any time soon, at least under the prevailing models of thought about the law.

Therefore, a return to the other model of thought about the law is warranted. Pursuant to that model of legal thought, such general principles of law really do exist, as evidenced by Justice Story's statements in *Swift v. Tyson* quoted earlier. Further, Christianity forms the basis for these general

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133. Guaranty Trust Co. v. York, 326 U.S. 99, 102 (1945) (alluding to and quoting Justice Holmes's dissent in Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917), which stated that "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified"); *see also* Tuomala, *supra* note 126, at 324.

134. Tuomala, *supra* note 126, at 323-25.

135. *Id.* at 323 (quoting *Erie*, 304 U.S. at 79 (alteration in original) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 535 (1928) (Holmes, J., dissenting)).

136. *Id.* at 324.

137. BERMAN, *supra* note 1, 40.

138. *See, e.g.*, SMITH, *supra* note 4, 176-77.

principles of commercial law. As Justice Story wrote elsewhere, "[t]here never has been a period, in which the common law did not recognize recognise Christianity as lying at its foundations."[139] In a similar vein, Dean Tuomala, writing of Justice Story's opinion in *Swift*, states that in *Swift* Justice Story

> cited opinions from multiple jurisdictions and different periods in history, not as evidence of some broader social custom, but as evidence of what the law of God is on a particular matter of commercial law. The *Swift* opinion embodies the view that law is "permanent, uniform and universal." It does not change; it applies to everyone equally; and it applies in every part of the world. This was Blackstone's view of the common law, and it was also Lord Coke's view of the common law.[140]

In an important footnote, Dean Tuomala further elucidates this "permanent, uniform, and universal nature of the law to which Story alluded in *Swift*" by setting forth the entire context, from Cicero, of the Latin phrase quoted by Justice Story in *Swift*. It reads:

> [L]aw in the proper sense is right reason in harmony with nature. It is spread through the whole human community, unchanging and eternal, calling people to their duty by its commands and deterring them from wrong-doing by its prohibitions. When it addresses a good man, its commands and prohibitions are never in vain; but those same commands and prohibitions have no effect on the wicked. This law cannot be countermanded, nor can it be in any way amended, nor can it be totally rescinded. We cannot be exempted from this law by any decree of the Senate or the people; nor do we need anyone else to expound or explain it. *There will not be one such law in Rome and another in Athens,*

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139. Joseph Story, Address Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law in Harvard University, August 25th, 1829, in THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 178 (Perry Miller ed., Cornell Univ. Press 1969) (1962) ("One of the beautiful boasts of our [United States] municipal jurisprudence is, that Christianity is part of the Common Law, from which it seeks the sanction of its rights, and by which it endeavours to regulate its doctrines . . . . There never has been a period in which the common law did not recognise Christianity as lying at its foundations.").

140. Tuomala, *supra* note 126, at 318 (footnotes omitted); *see also* SMITH, *supra* note 4, 45-48 ("Blackstone and Story were, after all, heirs of a worldview that assumed that God was real—*more* real than anything else, in fact, or *necessarily* rather than just *contingently* real—and had created the universe according to a providential plan. This view had important implications for the nature of law.").

> *one now and another in the future, but all peoples at all time will be embraced by a single and eternal and unchangeable law*; and there will be, as it were, one lord and master of us all—the [G]od who is the author, proposer, and interpreter of that law.[141]

The Law of God provides the general principles of commercial law. It is only from these general principles of commercial law that one can hope to develop a consistent and coherent commercial law jurisprudence.

It is here, then, that the church's view of commercial activity becomes so very important. The church's historic view of commercial activity assists in determining the Law of God with regard to commercial activity and therefore the general principles of commercial law. Certainly, the church can be in error with regard to a particular teaching, as it was for some time when it concluded that commercial activity, and therefore merchants, could not please God.[142] As this Article demonstrated herein, however, the Scholastics moved the church away from this teaching, eventually concluding that just commercial activity is pleasing to God.[143] This teaching is consistent with the Bible.

The Bible assumes private property rights and a market economy.[144] Further, the Bible never condemns commercial activity in and of itself nor

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141. *Id.* at 318 n.106 (quoting Cicero, *The Republic, in* THE REPUBLIC AND THE LAWS 68-69 (Niall Rudd trans., 1998) (emphasis added)).

142. Obviously, the author is a Protestant. Therefore, he adheres to *Sola Scriptura*—a Latin phrase from the Reformation that literally means "scripture alone" and summarizes the Reformation teaching "that Scripture alone is absolutely authoritative for doctrine and practice, and following Scripture alone is sufficient to please God in all things." THE ESV STUDY BIBLE 2614 (Wheaton, IL: Crossway Bibles, 2008). Popes, councils, the church fathers, and all other mortal men may err, but the Bible is infallible and is therefore the standard by which all things are to be judged. *See, e.g., Westminster Confession of Faith*, Chapter 1. For more on the differences between the Roman Catholic and Protestant approaches to law, *see* Jeffrey C. Tuomala, *Book Review: Robert George's* The Class of Orthoxies: Law, Religion, and Morality in Crisis, 3 LIBERTY U. L. REV. 77 (2009).

143. *See supra* Part IV.

144. The command found in the Ten Commandments and elsewhere in the Bible not to steal makes sense only in light of private ownership rights in property. *See, e.g.*, *Exodus* 20:15 and 22:1-4, *Leviticus* 19:11, *Deuteronomy* 5:19, *Proverbs* 30:9, *Matthew* 19:18, *Romans* 13:9, and *Ephesians* 4:28. Further, the commands against coveting the property of another imply the same thing. *See, e.g.*, *Exodus* 20:17, *Deuteronomy* 5:21, *Matthew* 5:28, *Romans* 7:7 and 13:9, *Ephesians* 5:3-5, and *Colossians* 3:5; *see also* WAYNE GRUDEM, BUSINESS FOR THE GLORY OF GOD: THE BIBLE'S TEACHING ON THE MORAL GOODNESS OF BUSINESS 19-24 (2003) (discussing the goodness of ownership.)

Further, there are a number of passages in the Bible that condemn financial unfairness in the market, which of course assumes that there is such a thing as a market. *See,*

does it forbid Christians from becoming merchants.[145] The Bible does, however, have much to say about unjust commercial activity.[146] For example, it condemns unjust weights and measures,[147] forbids certain types of security interests that would be particularly harmful to the poor,[148] and demands respect for debtors in the repossession of collateral that is located in a dwelling,[149] just to name a few. Taken together, these passages establish a foundational general principle of commercial law—that just commercial activity is pleasing to God and is a good thing.

This foundational principle would do much to begin unifying and organizing thought regarding commercial law. As an initial matter, it provides a deeper meaning to the oft-stated comment that "commercial law is merely the rules by which business people do their work."[150] Commercial law is such a set of rules because it serves the interests of those engaged in commerce, but that is not all that it is. Instead, it provides the necessary legal framework to encourage just commercial activity and to discourage and punish unjust commercial activity. As noted here, this just commercial activity is pleasing to God and beneficial to society. Therefore, a legal framework that encouraged such activity, while taking adequate precautions against unjust practices, is a good thing and much more than just a collection of rules for the benefit of merchants.

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e.g., *Leviticus* 19:35-36, *Deuteronomy* 25:13-15, *Proverbs* 11:1, 16:11, 20:10 and 23, *Micah* 6:11, and *Hosea* 12:7. Accordingly, the Bible implicitly affirms the free market by condemning those who act deceitfully in that market without condemning the market itself. *See also* GRUDEM, *supra* note 144, 61-66 (discussing the goodness of competition.)

145. In addition to the passages listed in the previous footnote, there are a number of craftsman and merchants in the New Testament who are never condemned for being merchants and are never commanded to seek out a different way of life. *See, e.g.*, *Acts* 16:14-15, 40 (Lydia, who was a purple cloth merchant) and 18:2-3 (Aquila, Priscilla, and even the Apostle Paul, who were tentmakers.); *see also* GRUDEM, *supra* note 144, 35-45 (discussing the goodness of commercial transactions and profit).

146. *See, e.g.*, *Leviticus* 19:35-36; *Deuteronomy* 25:13-15; *Proverbs* 11:1, 16:11, 20:10, 20:23; *Micah* 6:11; *Hosea* 12:7.

147. *Leviticus* 19:35-36; *Deuteronomy* 25:13-15; *Proverbs* 11:1, 16:11, 20:10, 20:23; *Micah* 6:11; *Hosea* 12:7.

148. *See Deuteronomy* 24:6 (forbidding the pledge of a handmill or upper millstone, which would leave the debtor without a way to grind grain for bread), 24:12-13 (requiring that a poor man's cloak, if taken in pledge, be returned to him at night so that he can sleep in it and be warmed), *Exodus* 22:25-27 (same), and *Deuteronomy* 24:17 (forbidding the pledge of a widow's garment).

149. *Deuteronomy* 24:10-11 (forbidding entrance into a debtor's house to take a pledge, requiring instead that the creditor remain outside and wait for the debtor to bring it out).

150. *See* Scott, *supra* notes 8-11 and accompanying text.

For example, the law of secured transactions, a subset of commercial law, still provides for pledges and security interests, just as the law in the time of the Bible did.[151] Further, and still in accordance with the Law of God, it provides special rules for the repossession of collateral.[152] Article 9 of the Uniform Commercial Code provides that a secured creditor may repossess the collateral, often called self-help repossession, on the condition that this self-help repossession can be carried out without a breach of the peace.[153] Article 9, however, does not supply a definition for what constitutes a breach of the peace.[154] Instead, it looks to the courts and the common law to provide such a definition.[155]

Courts have generally concluded that a central concern in evaluating whether a breach of the peace has occurred is the risk of violence.[156] Further,

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151. *Deuteronomy* 24:6 (forbidding the pledge of a handmill or upper millstone, which would leave the debtor without a way to grind grain for bread), 24:12-13 (requiring that a poor man's cloak, if taken in pledge, be returned to him at night so that he can sleep in it and be warmed), *Exodus* 22:25-27 (same), and *Deuteronomy* 24:17 (forbidding the pledge of a widow's garment); *see also* U.C.C. §§ 9-203(b)(3)(B), 9-207 & cmt. 2, 9-313 & cmt. 2 (2001); 4 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE: PRACTITIONER TREATISE SERIES 169 (6th ed. 2010) (identifying property that is properly "pledgeable").

152. *Deuteronomy* 24:6 (forbidding the pledge of a handmill or upper millstone, which would leave the debtor without a way to grind grain for bread), 24:12-13 (requiring that a poor man's cloak, if taken in pledge, be returned to him at night so that he can sleep in it and be warmed), *Exodus* 22:25-27 (same), and *Deuteronomy* 24:17 (forbidding the pledge of a widow's garment); *Deuteronomy* 24:10-11 (forbidding entrance into a debtor's house to take a pledge, requiring instead that the creditor remain outside and wait for the debtor to bring it out). It should be noted, however, that the acts referenced in these passages might be a reference solely to the initial taking of the collateral as a pledge. Nevertheless, the principles seem to carry forward such that if it applied to the initial taking, it appears that it would apply with equal force to all subsequent takings. For example, if you gave the poor man's cloak back to him at night after he failed to pay, and you come back the next day to take it and sell it, then it would in essence be a repossession and thus covered by these principles.

153. U.C.C. § 9-609 (2001).

154. *See generally* U.C.C. art. 9 (2001); *see also* Deavers v. Standridge, 242 S.E.2d 331, 333 (Ga. Ct. App. 1978) (noting that the Uniform Commercial Code does not provide a precise definition of breach of the peace); U.C.C. § 9-609 cmt. 3 (stating that this particular section "does not define or explain the conduct that will constitute a breach of the peace, leaving that matter for continuing development by the courts").

155. U.C.C. § 9-609 cmt. 3 (2001).

156. *Deavers*, 242 S.E.2d at 333 (stating that a breach of the peace is usually indicated if there is "an accompanying incitement to immediate violence"); Morris v. First Nat'l Bank & Trust Co. of Ravenna, 254 N.E.2d 683, 686 (Ohio 1970) (noting that a breach of the peace is generally found when there is an incitement to violence); Harris Truck & Trailer Sales v. Foote, 436 S.W.2d 460, 464 (Tenn. Ct. App. 1968) (noting that the "breach of the peace there referred to must involve some violence, or at least threat of violence"); Salisbury Livestock

courts have generally held that entering a dwelling without consent to retrieve collateral is per se a breach of the peace.[157] From a law-of-nature perspective, these two concerns within the context of breach of the peace can be easily explained and relate to issues much more important than just having a workable list of rules that clearly define how business people should conduct themselves. Both derive not merely from a set of rather arbitrary rules handed down by some particular sovereign but rather from the profound respect for human beings as being made in the image of God.[158]

Violence is a concern because people are made in the image of God, and therefore, violence against another human should only be carried out in situations where there is proper authority and justification for it. Self-help repossession, while furthering the laudable goal of encouraging just commercial activity, does not warrant physical violence. Rather, the secured party seeking repossession, when faced with the possibility of violence, must desist in its efforts to repossess, and instead it must petition the court in order to procure the assistance of the sheriff in repossessing the collateral.[159] While secured creditors do not have the authority to use physical violence

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Co. v. Colorado Cent. Credit Union, 793 P.2d 470, 474 (Wyo. 1990) (noting that one of the main factors for determining a breach of the peace is whether there is a "potential for immediate violence").

157. Laurel Coal Co. v. Walter E. Heller & Co., 539 F. Supp. 1006, 1007 (W.D. Pa. 1982) (noting that the "actual breaking of a lock or fastener securing property . . . constitutes a breach of the peace"); Riley State Bank of Riley v. Spillman, 750 P.2d 1024, 1030 (Kan. 1988) (stating that "forced entry into the debtor's premises would almost certainly be considered a breach of the peace . . . . [W]e view breaking and entering either the residence or business of a person a serious act detrimental to any concept of orderly conduct of human affairs and a breach of the peaceful solution to a dispute."); Berg. v. Wiley, 264 N.W.2d 145, 150 (Minn. 1978) (stating that even "non-violent, forcible entry to retake possession of a tenant's premises constitutes a breach of the peace"); *see also* WHITE & SUMMERS, *supra* note 151, at 442-50 (providing a detailed description of what courts have consistently found to constitute a breach of the peace).

158. *Genesis* 1:26-27, *Genesis* 9:5-6, *James* 3:9.

159. Marcus v. McCullom, 394 F.3d 813, 819 (10th Cir. 2004) (stating that repossession is only lawful if no breach of the peace occurs); Williams v. Ford Motor Credit Co., 674 F.2d 717, 719 (8th Cir. 19882) (affirming the principle that judicial process is required if a breach of the peace may result from the repossession); *Laurel Coal Co.*, 539 F. Supp. at 1006 (noting that a creditor cannot proceed without judicial intervention if it can be done without a breach of the peace); Wade v. Ford Motor Credit Co., 668 P.2d 183, 189 (Kan. Ct. App. 1983) (noting that a person "proceeds at his own peril if he commit the slightest assault or other breach of the public peace"); *see also* WHITE & SUMMERS, *supra* note 151, at 443-50 (providing numerous examples of when creditors were required to seek assistance to avoid breaching the peace in their repossession efforts).

to retrieve collateral because they do not "bear the sword," the civil magistrate does have such authority.[160] Accordingly, the concern that there not be a breech of the peace, i.e., violence, in self-help repossession is grounded in a profound respect for human beings as being made in the image of God and the authority that God has entrusted to various institutions within society.[161]

Further, the respect for the dwelling of a debtor is also easily explained by reference to the general principles of commercial law. First, it should be obvious that entering a dwelling without consent greatly increases the risk of violence.[162] This undoubtedly helps to explain the principle that runs throughout the common law that "a man's home is his castle."[163] Such a principle is also related to the idea of biblical institutions and the proper jurisdiction of those institutions. The institution of the family has the proper and primary jurisdiction in the home, and this jurisdiction should be respected by others.[164]

In addition, the Bible specifically provides that a secured creditor may not enter a dwelling house to retrieve collateral.[165] Rather, the secured party must wait outside for the collateral to be brought out.[166] This would have been rather radical for the time, as it was typical in ancient times for creditors to plunder the goods and homes of debtors taking those things to which they took a fancy.[167] Again, this very specific rule is based upon a

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160. *Romans* 13:4; *see also* Roger Bern, *A Biblical Model for Analysis of Issues of Law and Public Policy: With Illustrative Applications to Contracts, Antitrust, Remedies, and Public Policy Issues*, 6 REGENT U. L. REV. 103, 116-124 (1995).

161. *Genesis* 1:26-27, *Genesis* 9:5-6, *James* 3:9; *see also* Bern, *supra* note 158, at 116-124.

162. *Marcus*, 394 F.3d at 819; *Williams*, 674 F.2d at 719; *Laurel Coal Co.*, 539 F. Supp. at 1006.

163. SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES ON THE LAWS OF ENGLAND 162 (1644) ("For a man's house is his castle, *et domus sua cuique est tutissimum refugium* [and each man's home is his safest refuge]; for where shall a man be safe, if it be not in his house.").

164. *See* Burn, *supra* note 160, at 119-20 & nn.84-85, 87 (establishing the jurisdictional propositions of the family and noting that one of man's duties is to respect the jurisdiction of his fellow man as being made in the image of God").

165. *Deuteronomy* 24:10-11 (forbidding entrance into a debtor's house to take a pledge, requiring instead that the creditor remain outside and wait for the debtor to bring it out).

166. *Id.*

167. 5 R. J. RUSHDOONY, COMMENTARIES ON THE PENTATEUCH: DEUTERONOMY 390-91 (2008).

> To protect men's houses and properties is to uphold God's order, because God has established the legitimate boundaries of the family's jurisdiction and freedom.

profound respect for the individual debtor, who is also, despite his debts, made in the image of God. It is therefore inappropriate for the secured party to enter into the debtor's home, "his castle," to repossess the collateral. The secured party does not have the rightful jurisdiction to so do. Instead, the secured party must wait outside the house for the debtor to bring the collateral out.[168]

Using a law-of-nature approach, this brief example demonstrates that a coherent and consistent commercial law jurisprudence can be developed that is intellectually satisfying. It is so because it is grounded on more than merely the will of the sovereign, and it consists of more than merely just a set of rules governing what business people do. Instead, it looks for its force and validity to those general principles of law that govern all the earth and find their ultimate source in God.

> A little thinking tells us what this law prevents when obeyed. When a money-lender can enter a house to choose his collateral, he can, with a practiced eye, inventory the contents of the house. It is then possible for him to urge the borrower to ask for more than he can repay. By this means, he can in time seize various valuable assets.
>
> For its own purposes, in various countries now, inventories of a man's house are required by the tax collector, or by the census bureau. By this means, the state knows more than it has a legitimate right to know, and it can plan to use that knowledge lawlessly.

Id. at 390.

168. Presumably, if the debtor refuses, the civil magistrate would have the authority to enter the house and retrieve the collateral. The Bible is silent as to this point, but that is not surprising. The Bible, like much ancient law, is paradigmatic in nature. 2 DOUGLAS K. STUART, THE NEW AMERICAN COMMENTARY – EXODUS 442-45 (E. Ray Clendenen et al. eds., 2006) (noting that "modern societies have generally opted for exhaustive law codes" but that "[a]ncient laws did not work this way."). Dr. Stuart pointed out that

> were paradigmatic, giving models of behaviors and models of prohibitions/punishments relative to those behaviors, but they made no attempt to be exhaustive. Ancient laws gave guiding principles, or samples, rather than complete descriptions of all things regulated. Ancient people were expected to be able to extrapolate from what the sampling of laws did say to the *general* behavior the laws in their totality pointed toward.

Id. Additionally, Dr. Stuart pointed out that "God's revealed covenant law to Israel was paradigmatic." *Id.*; *see also* Rodney D. Chrisman, *The Paradigmatic Nature of Biblical Law*, RODNEYCHRISMAN.COM (Aug. 11, 2010), http://www.rodneychrisman.com/2010/08/11/the-paradigmatic-nature-of-biblical-law/ (providing a more thorough discussion of the paradigmatic nature of ancient and biblical law).

VI. CONCLUSION

In conclusion, commercial law in modern times has lacked any coherent and consistent jurisprudential understanding. Commercial law has often been understood as little more than a set of rules, promulgated by some sovereign, to govern the affairs of business people and provide them a clear framework within which to act. These rules have been, therefore, viewed as perhaps little more than arbitrary guidelines based on an implicit assumption that one set of rules would be just as good as any other.

This Article suggests, however, that perhaps a law-of-nature approach to commercial law jurisprudence could provide a coherent and consistent understanding of commercial law. To develop such an understanding, this Article looks to the church's historic view of commercial activity. Moving into the Medieval period, the church had developed a very negative view toward commercial activity. This view is exemplified by the *Opus imperfectum*, which declared that a merchant can never or almost never please God.

This negative view of commercial activity largely held sway in the church until the Papal Revolution. During this time, the Scholastics began to reinterpret the teachings of the *Opus imperfectum* to bring them more into line with the actual teachings of the Bible, finally reaching the conclusion, just before the period of the Reformation, that just commercial activity is pleasing to God. This conclusion can then serve as a foundational general principle of commercial law upon which a coherent and consistent jurisprudence of commercial law can be developed. That work is well beyond the scope of this Article, but perhaps this Article can serve as an initial step toward that laudable goal.