REGENT UNIVERSITY
LAW REVIEW

VOLUME 18

2005-2006

REGENT UNIVERSITY LAW REVIEW

VOLUME 18 2005-2006 NUMBER 1

CONTENTS

ARTICLES

COMMENTS

REGENT UNIVERSITY LAW REVIEW

Volume 18 **2005-2006** **Number 1**

CONSIDERATION IN THE COMMON LAW OF CONTRACTS: A BIBLICAL–THEOLOGICAL CRITIQUE

C. Scott Pryor[*]

INTRODUCTION

An approach to the study of the law of contracts must start somewhere. Some casebooks on contracts start with a very brief historical review and proceed directly to cases.[1] A number start with the formation of contracts;[2] others begin with remedies for breach of contract.[3] One even begins with consideration.[4] Sprinkled throughout most casebooks are some discussions of why contracts should be enforced, usually in the form of notes following cases or short excerpts from law review articles. Even these discussions, however, rarely deal with questions of the worldview that legitimates coercive state enforcement of contracts. And to my knowledge, none discuss questions of theology in relation to the law of contracts.

---

[*] Professor, Regent University School of Law. J.D. 1980, University of Wisconsin Law School. M.A. 1997, Reformed Theological Seminary. I have used earlier versions of this article for classroom teaching purposes. Even in published form it thus retains a certain informality. Notwithstanding its didactic tone, I am publishing this work with the hope of spurring an open discussion of both the place of theological insights in the analysis of contemporary substantive private law as well as my particular conclusions.

[1] *See, e.g.*, CHARLES L. KNAPP, ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 2-15 (5th ed. 2003); STEWART MACAULAY, ET AL., CONTRACTS: LAW IN ACTION 1-40 (2nd ed. 2003); JOHN EDWARD MURRAY, JR., CONTRACTS: CASES AND MATERIALS 1-15 (5th ed. 2001); EDWARD J. MURPHY, ET AL., STUDIES IN CONTRACT LAW 1-13 (6th ed. 2003); ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE 2-21 (4th ed. 2001).

[2] *See, e.g.*, STEVEN J. BURTON, PRINCIPLES OF CONTRACT LAW (2nd ed. 2001); JOHN D. CALAMARI, ET AL., CASES AND PROBLEMS ON CONTRACTS (4th ed. 2004).

[3] *See, e.g.*, JOHN P. DAWSON, ET AL., CONTRACTS: CASES AND COMMENT (8th ed. 2003); E. ALLAN FARNSWORTH, CONTRACTS: CASES AND MATERIALS (6th ed. 2001).

[4] *See* LON L. FULLER & MELVIN A. EISENBERG, BASIC CONTRACT LAW (7th ed. 2001).

This article will discuss one aspect of contracts law—consideration—in light of biblical criteria. Such a move requires some preliminary groundwork. Application of biblical teachings requires more than citing a series of proof-texts. And application of biblical doctrine includes more than the Bible.[5] I will thus begin by describing three Christian doctrines that are particularly relevant to legal analysis. I will then follow with three perspectives that demonstrate how to apply the doctrines as tools for legal criticism. With these foundations, I will then move on to address consideration in two parts: What purpose does it serve? And how should courts draw its boundaries? I will cite very few cases. This is primarily a work of critique; I am certainly not trying to plot a curve on the scattershot of judicial decisions. But there is also some theory here; I believe Christianity has something to say about what the law should be.[6]

---

[5] *See generally* C. Scott Pryor, *Mission Possible: A Paradigm for Analysis of Contractual Impossibility at Regent University*, 74 ST. JOHN'S L. REV. 691 (2000) (discussing how the Bible can be used responsibly in legal scholarship). As a confessional Christian (i.e., one who has subscribed to certain sixteenth and seventeenth century confessions of the Protestant churches), I have assented to certain ecclesiastical doctrines about the nature of God as Trinity and the Bible as God's revelation. For purposes of this article these and other doctrines I will assume rather than argue for the truth of these teachings.

[6] William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1727 (2003) ("[I]nstead of looking for the Christian theory of contracts or criminal law or anything else, we ought to be looking for the Christian lines of critique, the sin-induced tendencies that run through all legal fields and all legal forms.").

I. BIBLICAL–THEOLOGICAL FOUNDATIONS

A. The Three Doctrines

1. The Creator–Creature Distinction

"God is God, and we're not," is an oft-quoted refrain. But what does it mean? Like many slogans, this one leaves out a great deal of important information: What is "God?" How do we know if God "is"? Even if God is, what difference does it make? What does it mean to say, "we're not" God? And so on. Biblically elaborated, this catch phrase suggests that it is God (through His Word) who sets the standards for what is true and just, not our experience or rationality. In theological parlance, God possesses aseity.[7] "Aseity" describes God's self-existence: "He has the ground of His existence in Himself."[8] Or, in plain English, God is *independent*: "[He] does not need us or the rest of creation for anything . . . ."[9] As the Apostle Paul proclaimed to the skeptical Greek philosophers on Mars Hill:

> The God who made the world and all things in it, since He is Lord of heaven and earth, does not dwell in temples made with hands; neither is He served by human hands, as though He needed anything, since He Himself gives to all life and breath and all things . . . .[10]

If God the creator is *in*dependent, it follows that all creation, including human beings, are *dependent*. We are dependent regardless of whether we like it or acknowledge it.[11] Our dependence is not only physical, it is cognitive. Human beings ultimately rely on God for their ability to know as well as for the contents of their knowledge. Human perception, cognition, and reason are equally as dependent on God as

---

[7] From the Latin preposition *a[b]* (meaning "from") and *se* (the third person reflexive pronoun meaning "himself"). CASSELL'S NEW COMPACT LATIN DICTIONARY 1, 200 (1963).

[8] LOUIS BERKHOF, SYSTEMATIC THEOLOGY 58 (4th ed. 1941).

[9] WAYNE GRUDEM, SYSTEMATIC THEOLOGY: AN INTRODUCTION TO BIBLICAL DOCTRINE 160 (1994) (emphasis omitted).

[10] *Acts* 17:24-25 (citing scriptural quotes from THE NEW AMERICAN STANDARD BIBLE, unless otherwise noted).

[11] Of course, if the scriptural record is correct, then all human beings at some level *know* that there is a God to whom they are accountable: "For the wrath of God is revealed from heaven against all ungodliness and unrighteousness of men, who suppress the truth in unrighteousness, because that which is known about God is evident within them; for God made it evident to them." *Romans* 1:18-19.

are the number of the hairs on our heads.[12] In other words, what we believe we know about justice in general and the law of contracts in particular is dependent on what God thinks about justice and contracts. Anything we say about these topics is subject to what God says about them.

The dependent character of knowing is entailed by the biblical account of creation *ex nihilo* (creation "from nothing").[13] If God originally created and now maintains[14] all that exists, then creation and providence include human object qualities such as perception, cognition, and reasoning as well as the subjects of human investigation like the law (of contracts). Divine aseity and human dependence account for Scripture's reference to "knowledge" in a lengthy list of ethical categories.[15] Neither reason nor experience has ever ultimately

---

[12] *Matthew* 10:29-31. "Are not two sparrows sold for a cent? And yet not one of them will fall to the ground apart from your Father. But the very hairs of your head are all numbered. Therefore do not fear; you are of more value than many sparrows." *Id.* As John Frame elaborates:

> Knowing is a process that itself is *subject* to God's lordship. Like all other processes, human knowledge is under God's control, subject to His authority, and exposed to His presence. Thus God is involved in our knowing, just as He is involved in the things we know about. The process of knowing itself, apart from any information gained by it, is a revelation of God.

JOHN M. FRAME, THE DOCTRINE OF THE KNOWLEDGE OF GOD 41-42 (1987). For a book-length analysis of the necessity of divine revelation for human knowledge, *see* ROBERT L. REYMOND, THE JUSTIFICATION OF KNOWLEDGE (1976).

[13] *Hebrews* 11:3 ("By faith we understand that the worlds were prepared by the word of God, so that what is seen was not made out of things which are visible.").

[14] Theologians refer to God's continued maintenance of all that he created as *providence*: "And He [Christ] is the radiance of His [God's] glory and the exact representation of His nature, *and upholds all things by the word of His power.*" *Hebrews* 1:3 (emphasis added.). *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA I, Q. 22, art. 1 (Fathers of the English Dominican Province trans., 1947) (1270) ("This good of order existing in things created, is itself created by God. Since, however, God is the cause of all things by His intellect, and thus it behooves that the type of every effect should pre-exist in him . . . ."); *see also* BERKHOF, *supra* note 8, at 166 ("Providence may be defined as that continued exercise of the divine energy whereby the Creator preserves all His creatures, is operative in all that comes to pass in the world, and directs all things to their appointed end."); GRUDEM, *supra* note 9, at 316 ("Both verses [*Hebrews* 1:3 and *Colossians* 1:17] indicate that if Christ were to cease his continuing activity of sustaining all things in the universe, then all except the triune God would instantly cease to exist.").

[15] As the Apostle Peter wrote:

> Now for this very reason also, applying all diligence, in your faith supply moral excellence, and in your moral excellence, knowledge; and in your *knowledge*, self-control, and in your self-control, perseverance, and in your perseverance, godliness; and in your godliness, brotherly kindness, and in your brotherly kindness, love. For if these qualities are yours and are increasing, they render you neither useless nor unfruitful in the true knowledge of our Lord Jesus Christ.

2 *Peter* 1:5-8 (emphasis added).

justified human ethical knowledge (although both are means by which ethical knowledge is acquired). Dependence on divine revelation characterized the prelapsarian ethical injunction not to eat of the fruit of a particular tree.[16] God through His Word provides the rule for all aspects of human life, not merely worship, evangelism, and personal ethics: "Whether, then, you eat or drink or whatever you do, do all to the glory of God."[17]

Atheism in Scripture is not described as an abstract concept; it is the practical matter of ignoring God in connection with daily life (including academic studies).[18] To think and act as if the law of contracts were unrelated to God denies His aseity, asserts our independence, and amounts to a practical atheism.[19] Our insights into the structures of created reality are not neutral; they are obedient or disobedient, righteous or unrighteous. As the Apostle Paul notes, "[W]e are taking every thought captive to the obedience of Christ . . . ."[20]

We must seek knowledge in an obedient way. In the quest to know the law—including the law of contracts—we must acknowledge our dependence and recognize that all knowledge is under authority. Our search for the correct rules and their accurate applications is not

---

[16] *Compare Genesis* 1:29 ("Then God said, 'Behold, I have given you every plant yielding seed that is on the surface of all the earth, and every tree which has fruit yielding seed, it shall be food for you . . . .'") *with Genesis* 2:16-17 ("And the LORD God commanded the man, saying, 'From any tree of the garden you may eat freely; but from the tree of the knowledge of good and evil you shall not eat . . . .'"). As Greg Bahnsen notes:

> Even when man's life was untainted by sin, his moral consciousness was not ultimate, but derivative; Adam was receptively reconstructive of God's word, that is, he thought God's thoughts after Him on a creaturely level. Adam did not look to himself for moral steering; rather, he lived by supernatural, positive revelation.

GREG L. BAHNSEN, THEONOMY IN CHRISTIAN ETHICS 280 (2d ed. 1984).

[17] 1 *Corinthians* 10:31.

[18] *Psalm* 10:4 ("The wicked, in the haughtiness of his countenance, does not seek *Him*. All his thoughts are, 'There is no God.'") (emphasis in original). *See also Psalm* 17. *See generally* Thomas C. Folsom, *The Restatement of the Obvious: Or What's Right Got to Do with It? Reflections on a Business Ethic for Our Times*, 16 REGENT U. L. REV. 301, 315 (2003-2004) ("Moral realism [the opposite of practical atheism] has three foundational principles: (1) there is an objective reality, (2) human beings can know something about it, and (3) there are some things that everyone can, and some things that everyone ought to do in response to what they know.").

[19] An atheist (or, speaking of those who do not wish to assume this title expressly, a secularist) is one who views the world as containing its meaning within itself. The principles of knowledge (epistemology) and action (ethics) are wholly immanent and have no transcendent referent to a self-contained God. Any connections between law and morality are the arbitrary products of human activity and can be deconstructed and reconstructed as we wish. Outside the realm of personal piety and a few hot-button social issues, most evangelical Christians fall into this category.

[20] 2 *Corinthians* 10:5.

autonomous but rather is subject to the God whose will is revealed in Scripture (*heteronomous*).

The Scriptures not only reveal God as the creator and sustainer of all that exists, they also disclose God as the absolute personality. God is not some impersonal force pervading the universe or a set of abstract rules of logic suspended above the world. God exists in an absolutely personal relationship as Trinity.[21] As creatures made in God's image,[22] human beings cannot help but be personal and relational as well.[23] Our relationships to God and to each other are volitional and emotional as well as intellectual; in other words, persons relate to each other through a variety of perspectives. The form of that personal relationship will be discussed in the next section.

2. The Covenantal Structure of Understanding

If we are dependent on a personal God, what form does our relationship to Him take? In other words, what is the structure of the bond between God and humanity? The answer in brief is *covenant*. The biblical use of the word covenant is not easy to sum up. At the most basic, a covenant means an agreement between two parties.[24] As used in Scripture, a covenant may refer to a negotiated pact between two equals or a unilaterally imposed relationship between a conqueror and his vassals. Divine–human covenants are, of course, of the later type. By way of specific examples, God has explicitly entered into covenant with Noah,[25] Abraham,[26] the nation of Israel,[27] and David.[28] Jeremiah

---

[21] The doctrine of the Triune nature of God and the doctrine of *perichoresis* (divine interpersonal interpenetration) of the members of the Godhead cannot be set forth through the citation of a couple of verses. A helpful discussion can be found in HERMAN BAVINCK, THE DOCTRINE OF GOD 304-17 (William Hendriksen ed. & trans., The Banner of Truth Trust 1977) (1951).

[22] *Genesis* 1:26 ("Then God said, 'Let Us make man in Our image, according to Our likeness . . . .'").

[23] For example, marriage, family, and social organizations.

[24] *See, e.g.*, O. PALMER ROBERTSON, THE CHRIST OF THE COVENANTS 15 (1980) ("A covenant is a bond in blood sovereignly administered."); *see also* 1 NEW INTERNATIONAL DICTIONARY OF OLD TESTAMENT THEOLOGY AND EXEGESIS 747-55 (Willem A. VanGemeren ed., 1997) [hereinafter, NIDOTTE].

[25] *Genesis* 6:18 ("But I will establish My covenant with you; and you shall enter the ark—you and your sons and your wife, and your sons' wives with you.").

[26] *Genesis* 15:18-21

> On that day the LORD made a covenant with Abram, saying, "To your descendants I have given this land, From the river of Egypt as far as the great river, the river Euphrates: the Kenite and the Kenizzite and the Kadmonite and the Hittite and the Perizzite and the Rephaim and the Amorite and the Canaanite and the Girgashite and the Jebusite."

[27] *Exodus* 24:8 ("So Moses took the blood and sprinkled it on the people, and said, 'Behold the blood of the covenant, which the LORD has made with you in accordance with all these words.'").

prophesied the coming of a new covenant,[29] Jesus spoke of the last supper in covenantal language,[30] and the author of the *Epistle to the Hebrews* identified the completed work of Christ as the fulfillment of the new covenant promised by God in *Jeremiah*.[31]

The concept of covenant is even more all encompassing in Scripture than the particular examples noted above. It is one of the most pervasive, large-scale descriptions of humanity's relationship to God.[32] The very structure of creation is covenantal,[33] including the original commands to Adam and Eve to populate the earth, to rule over the world, and to subdue the creation.[34] If the cosmic scope of the obligations assigned to our original parents was embedded in a covenantal relationship, then our work as their descendents is also embedded in covenant.

The conclusion that all of humanity's relationship to God is covenantal is not simply an exercise in biblical exegesis or historical analysis. The covenantal connection answers at least one question and entails at least three significant conclusions. If all humankind is not covenantally related to God, then what are its responsibilities in the world? Or, to put it another way, if only the Church stands in covenant with God, then there would be neither a basis on which to hold those outside the covenant community responsible for failing to observe the stipulations of creation nor justification for imposing sanctions on them for their failure to do so.[35]

---

[28] *Psalm* 89:3-4 ("I have made a covenant with My chosen; I have sworn to David My servant, I will establish your seed forever, And build up your throne to all generations.").

[29] *Jeremiah* 31:31 ("'Behold, days are coming,' declares the LORD, 'when I will make a new covenant with the house of Israel and with the house of Judah . . . .'").

[30] *Luke* 22:20 ("And in the same way He took the cup after they had eaten, saying, 'This cup which is poured out for you is the new covenant in My blood.'").

[31] *Hebrews* 8:1-13.

[32] Other scriptural divine-human relational analogies include father–child, shepherd–sheep, king–subject, mother–child, and warrior–vanquished.

[33] *See, e.g.*, *Jeremiah* 33:20-21 ("Thus says the LORD, 'If you can break My covenant for the day, and My covenant for the night, so that day and night will not be at their appointed time, then My covenant may also be broken with David . . . ."); *Jeremiah* 33:25-26 ("Thus says the LORD, 'If My covenant for day and night stand not, and the fixed patterns of heaven and earth I have not established, then I would reject the descendants of Jacob and David My servant . . . ."); *Hosea* 6:7 ("But like Adam they have transgressed the covenant; there they have dealt treacherously against Me.").

[34] *Genesis* 1:28 ("And God blessed them; and God said to them, 'Be fruitful and multiply, and fill the earth, and subdue it; and rule over the fish of the sea and over the birds of the sky, and over every living thing that moves on the earth.'").

[35] See, for example, the Apostle Paul's prosecution of a "covenant of creation" lawsuit against the philosophers at Mars Hill recorded at *Acts* 17:22-31 and charges of various prophets against the gentile nations at *Amos* 1:3-2:3.

Our universal human relationship to God through the covenant of creation also entails the conclusion that there is no division between sacred and secular; all of the life of every human being is embedded in covenantal relationship (including the law of contracts).[36] The covenant of creation also relates the extended Scriptural analogies of covenant and kingdom: if the suzerain king rules his vassal people by a covenant, then Christians should see *all* their activities as taking place in God's kingdom. God's kingdom (the sphere over which he rules covenantally) is not limited to His redemptive work (i.e., the Church). The practice of law *is* kingdom service, not merely a platform *for* kingdom service.[37]

Finally, creation understood in terms of covenant entails that the cosmos is subject to God's kingship. If the whole creation is God's covenant kingdom and if God is the king of creation, then God is king over that sphere of life called "law." Neither the law nor lawyering is a neutral, secular activity. A Christian analysis, critique, and theory of the law should not take place without reference to God and His covenantal administration.

A practical atheist finds the meaning of the world and principles of action solely within the world order. A secular approach to the law cannot acknowledge the existence of an independent God who rules a dependent humanity through a covenant of His determination. Ultimately, a secular approach to the law concludes that there is no real connection between law and morality. Morality is reduced to emotivism,[38] and the law is diminished to the exercise of power. Rather than seeking to frame the law in terms of an objective criterion of justice, most people see the law as a means by which his or her

---

[36] That most people do not consciously recognize their covenantal relationship to God is immaterial; it is built into our very humanity. As the Apostle Paul wrote:

> For all who have sinned without the Law will also perish without the Law; and all who have sinned under the Law will be judged by the Law; for not the hearers of the Law are just before God, but the doers of the Law will be justified. For when Gentiles who do not have the Law do instinctively the things of the Law, these, not having the Law, are a law to themselves, in that they show the work of the Law written in their hearts . . . .

Romans 2:12-15a.

[37] In contrast to the world-flight mentality of mid-twentieth century fundamentalism, God intended human history to be developmental. In contrast to much of contemporary evangelicalism, the kingdom of God cannot be reduced to saving souls.

[38] According to Alasdair MacIntyre:

> [An emotivist] [s]ee[s] in the social world nothing but a meeting place for individual wills, each with its own set of attitudes and preferences and who understand that world solely as an arena for the achievement of their own satisfaction, who interpret reality as a series of opportunities for their enjoyment . . . .

ALASDAIR MACINTYRE, AFTER VIRTUE 24 (1981).

personal or group interests may be advantaged at the expense of someone else.[39] For many today any connections between law and morality are little more than arbitrary products of human activity. If effective lawyering becomes simply a tool to enhance the client's interests, the notion of *justice* as morality may become a foreign concept.[40]

Human law is ultimately grounded in the divine character; the law of contracts is dependent. Human law is administered on earth; the law of contracts flourishes in God's Kingdom. Human beings dispense human law; the law of contracts is subject to God's kingship. In short, all human knowledge, including knowledge of the law of contracts, is servant knowledge, and the Christian's concern should be to discover what the LORD thinks about this law, to agree with that judgment, and to carry it out in loving obedience.

3. The Law of God

In view of the preceding discussion, one might conclude that the first place to begin a Christian analysis of the law of contracts would be the inscripturated Word of God. Such a conclusion would not necessarily be incorrect. Nevertheless, it might reveal an insufficiently broad understanding of the law of God. The law of God is more than the Ten Commandments, their adumbration in the Pentateuch, or even their elaboration throughout the rest of Scripture. Law is every word by which God subjects His creation to His will. Law may therefore be discovered from the full range of God's revelation including the world around us,[41] our consciences,[42] and human experience[43] as well as the Bible.[44]

---

[39] *See generally* MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES (1982) (demonstrating evidence of the vast number of government programs whose function is to redistribute income to politically powerful interest groups).

[40] As Professor Michael Schutt puts it, "the law [has become] a tool for social engineering, and the bench and bar [constitute] the primary social engineers." Michael P. Schutt, *Oliver Wendell Holmes and the Decline of the American Lawyer: Social Engineering, Religion, and the Search for Professional Identity*, 30 RUTGERS L.J. 143, 158-59 (1998).

[41] *See, e.g., Psalm* 19.

[42] *See Romans* 2:12-15, *supra* note 36.

[43] *See, e.g., Deuteronomy* 17:6, 19:15. The New Testament scriptures also justify the use of non-scriptural data in the process of applying canonical truth to particular states of affairs. *See, e.g., Matthew* 18:16 (quoting *Deuteronomy* 19:15); 1 *Timothy* 5:19.

[44] *See, e.g., Deuteronomy* 8:3.

> And He humbled you and let you be hungry, and fed you with manna which you did not know, nor did your fathers know, that He might make you understand

The Scriptures relate generally to the study of law in three ways. As God's inspired, infallible, and inerrant Word, the Bible is the "best evidence" of God's will on any topic it addresses.[45] The Scriptures also provide the standard against which all other truth claims must be evaluated because God's Word is His Word of truth.[46] Last, the Bible justifies other means by which the truth about the law of contracts can be discovered. Notwithstanding the primary authority of the Scripture, we may also have confidence that we can discover God's norms for the law of contracts from sources other than the Bible.[47] Non-biblical sources of divine norms are frequently labeled as general revelation.[48] God did not abandon the world after the Fall. God the King continues His covenantal rule over His creation. Correctly interpreted, general revelation in the forms of the testimony of the human conscience, the results of trial and error throughout history, and the empirical sciences, such as economics, can also reveal the mind of God on the law of contracts.

---

that man does not live by bread alone, but man lives by everything that proceeds out of the mouth of the LORD.

Id.

[45] The Chicago Statement on Biblical Inerrancy (1978), reprinted in GRUDEM, *supra* note 9, at 1204.

Holy Scripture, being God's own Word, written by men prepared and superintended by His Spirit, is of infallible divine authority in all matters upon which it touches: it is to be believed, as God's instruction, in all that it affirms; obeyed, as God's command, in all that it requires; embraced, as God's pledge, in all that it promises.

Id.

[46] *John* 17:17 ("Sanctify them in the truth; Thy word is truth.").

[47] As Gordon Spykman put it, "[S]cripture does not close the doors to other forms of revelation. Rather, it serves as our open window on the full cosmic dimensions of our Father's world." GORDON J. SPYKMAN, REFORMATIONAL THEOLOGY: A NEW PARADIGM FOR DOING DOGMATICS 78 (1992); *see also* JOHN M. FRAME, PERSPECTIVES ON THE WORD OF GOD: AN INTRODUCTION TO CHRISTIAN ETHICS 6 (1990) (footnote omitted).

God himself is the ultimate criterion of truth, and therefore his word to us, his revelation, is the standard by which all truth claims must be judged. It is true, however, that we *apprehend* God's revelation by means of human reason, human sense-experience, and the whole range of hard-to-define intuitions, feelings, and consciousnesses we call "subjectivity." None of these, in itself, gives absolute knowledge. If it did, we would not need God's word. But these human faculties work together, in mutual dependence, to lead us toward that truth which is absolute and final, God's word to us.

Id.

[48] *See, e.g.*, BERKHOF, *supra* note 8, at 36 ("The Bible testifies to a twofold revelation of God: a revelation in nature round us, in human consciousness, and in the providential government of the world; and a revelation embodied in the Bible . . . ."); FRAME, *supra* note 12, at 144-49; GRUDEM, *supra* note 9, at 122-23 ("General revelation comes through observing nature, through seeing God's directing influence in history, and through an inner sense of God's existence and his laws that he has placed inside every person."); SPYKMAN, *supra* note 47, at 80-81.

B. The Three Perspectives

I have described three doctrines that I believe are relevant to a Christian understanding of the law of contracts. In order to understand anything accurately we must acknowledge our utter dependence on God; apprehend the personal, covenantal relationship between humanity and God; and submit to the authority of God's law disclosed in special and general revelation. I am now prepared to apply these limiting concepts to the justification of law as a human enterprise.

We must ultimately relate the many "parts" of the law of contracts to the underlying whole described in the three doctrines. This is a big job, to say the least. For example, just how does the creator–creature distinction relate to the "mailbox rule," or what does the covenantal structure of understanding have to do with the Statute of Frauds? Multiperspectivalism describes the way of relating the various aspects of a system to each other and ultimately relating them to the whole (described in the three doctrines). Each element of the system of the law of contracts is perspectivally related to another *and* to the whole. These three perspectives can be summarized in several ways. We could call them the starting point; the method and the conclusion; or law, object, and subject. Alternatively, we could identify them (as I do) as the normative, the situational, and the existential.[49] First, all human activity is "normed" by the law of God, but the law is not simply "out there"; it is part of the covenantal constitution between the personal independent God and personal dependent human beings. Second, every human application of the law of God must take place in a particular setting; situations differ and provide differing *fora* or spheres in which to apply the correct norm. Last, the law is applied in a particular situation by and to human beings. All human beings exist equally as image-bearers of God. Yet, not all humans are identical. Our relative abilities to reason, form intentions, exercise our wills, feel passionate emotions, achieve ends, and the like do not provide reasons to apply the law relatively. Yet, these common capabilities suggest something about the nature of the law common to each person, not the least of which is that all are equal before the law.

---

[49] The Trinity is the root of perspectivalism:

> Father, Son, and Spirit are "mutually involved," without losing their distinctness. Each embodies the complete divine essence, so each is God from a particular perspective. Lest we embrace modalism, of course, it is also important for us to say that the perspectives represent genuine eternal distinctions within the one Godhead, not just the subjective viewpoints of those who come to know God. Since the Trinity is perspectival, the world is also.

JOHN M. FRAME, CORNELIUS VAN TIL: AN ANALYSIS OF HIS THOUGHT 170 (1995).

1. Perspective #1—The Normative (Dominion)[50]

God's original mandate to human beings was to rule the earth.[51] The obligation to rule entails two fundamental corollaries. First, obedient dominion requires covenantal acknowledgment of God's *independent* regal authority and humanity's *dependent* duty to rule as His vicegerents.[52] Second, the divine directive to subdue the earth justifies the exercise of human authority (and hence its legitimacy) *prior to* the Fall.[53] The exercise of human authority by some people is a legitimate means by which others should make a decision or undertake an action apart from reasons of their own.[54] Authority, therefore,

---

[50] Even the normative perspective on human activity can be summarized from another perspective. We could start with the Apostle Paul's injunction that "love therefore is the fulfillment of the law." *Romans* 13:10. Or we could move down one level of abstraction to Jesus' two-pronged summary:

> [A]nd He said to him [the lawyer who had asked which is the greatest commandment], "You shall love the Lord your God with all your heart, and with all your soul, and with all your mind." This is the great and foremost commandment. The second is like it, "You shall love your neighbor as yourself."

Matthew 22:37-39. Ultimately, however, we should see that the exercise of dominion is one of the fundamental means by which we carry out the love command. *See generally* Jeanne L. Schroeder, *Pandora's Amphora: The Ambiguity of Gifts*, 46 UCLA L. REV. 815 (1999).

[51] *Genesis* 1:26-30.

> Then God said, "Let Us make man in Our image, according to Our likeness; and let them rule over the fish of the sea and over the birds of the sky and over the cattle and over all the earth, and over every creeping thing that creeps on the earth." And God created man in His own image, in the image of God He created him; male and female He created them. And God blessed them; and God said to them, "Be fruitful and multiply, and fill the earth, and subdue it; and rule over the fish of the sea and over the birds of the sky, and over every living thing that moves on the earth." Then God said, "Behold, I have given you every plant yielding seed that is on the surface of all the earth, and every tree which has fruit yielding seed; it shall be food for you; and to every beast of the earth and to every bird of the sky and to every thing that moves on the earth which has life, I have given every green plant for food;" and it was so.

Id.

[52] *Romans* 9:20-21.

> On the contrary, who are you, O man, who answers back to God? The thing molded will not say to the molder, "Why did you make me like this," will it? Or does not the potter have a right over the clay, to make from the same lump one vessel for honorable use, and another for common use?

Id.

[53] The Apostle Paul confirms that authority as such is legitimate in *Romans* 13:1 ("Let every person be in subjection to the governing authorities. For there is no authority except from God, and those which exist are established by God.").

[54] *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 234 (1980) ("[A] person treats something as authoritative when he treats it as . . . a reason for judging or acting in the absence of understood reasons, or for disregarding at least *some* reasons which are understood and relevant . . . .").

(unlike persuasion) provides its own ground for action for one over whom the authority is exercised. Perhaps a familial example will help make this distinction clear. Parents have the authority to tell their young child to go to bed at nine o'clock. They may issue such a directive without providing reasons sufficient to persuade the child that it is in her interests to go to bed at nine o'clock. Conversely, persuasion works by offering reasons for action by which the child (or anyone else) may make a personal judgment whether to undertake a particular action without fear of punishment. The creation account admits the exercise of human authority.

Some might question the legitimacy of the exercise of authority after the Fall. Did the rebellion of our first parents work a forfeiture of their authority? No, for two reasons. First, God confirmed to Noah for the postdiluvian age the authority that he had originally delegated to Adam and Eve.[55] Second, the early patriarchs of Israel clearly exercised authority, as did the nation of Israel itself. The ability to misuse authority, however, represents a significant change from the prelapsarian age. On the one hand, the legitimacy of the continuing exercise of authority—including civil authority—is confirmed by the Apostle Paul in his epistle to the Romans where he comments that

> for it [the Roman state] is a *minister* of God to you for good. But if you do what is evil, be afraid; for it does not bear the sword for nothing; for it is a minister of God, an avenger who brings wrath upon the one who practices evil.[56]

On the other hand, the legitimate authority wielded by the State can be perverted as described in the vision of the Apostle John recorded in the thirteenth chapter of *Revelation*.[57] We can account for all

---

[55] *Genesis* 9:1 ("And God blessed Noah and his sons and said to them, 'Be fruitful and multiply, and fill the earth.'").

[56] *Romans* 13:4 (emphasis added). The Greek word here translated as "minister" (diavkonos, diakonos) is the root of the English word "deacon." *See generally* NEW INTERNATIONAL DICTIONARY OF NEW TESTAMENT THEOLOGY 544-549 (Colin Brown ed., 1986) [hereinafter, NIDNTT].

[57] *Revelation* 13:1-7.

> And he stood on the sand of the seashore. And I saw a beast coming up out of the sea, having ten horns and seven heads, and on his horns were ten diadems, and on his heads were blasphemous names. And the beast which I saw was like a leopard, and his feet were like those of a bear, and his mouth like the mouth of a lion. And the dragon gave him his power and his throne and great authority. And I saw one of his heads as if it had been slain, and his fatal wound was healed. And the whole earth was amazed and followed after the beast; and they worshiped the dragon, because he gave his authority to the beast; and they worshiped the beast, saying, "Who is like the beast, and who is able to wage war with him?" And there was given to him a mouth speaking arrogant words and blasphemies; and authority to act for forty-two months was given to him. And he opened his mouth in blasphemies against God, to blaspheme His name and His tabernacle, that is, those who dwell in heaven.

perversions of authority in terms of failing to observe the creator–creature distinction, indifference to the covenantal structure of reality, and/or disregard of the law of God. Notwithstanding the potential for deformation, we must continue to acknowledge that the dominion mandate continues as part of our human covenantal responsibility.

God granted human beings authority as a means by which we are to exercise dominion or, to put it another way, to be His co-creators:

> The first recorded Word of God addressed to mankind (Genesis 1:28-30) has come to be known as the cultural mandate. Within the unfolding drama of the Genesis narratives it assumes the form of a creatio tertia. Creatio prima refers to God's primordial act of creating the universe out of nothing. This is followed by God's ordering process, called creatio secunda. Then, as a tertiary, ongoing phase in the life of creation, God mandates mankind, as his "junior partners," to join him as coworkers in carrying on the work of the world.[58]

This "work of the world" was and is to move the creation (including us) to the rest into which God entered on the seventh day of creation. Human beings were created for "rest." How was the original goal for creation to have been accomplished? Had Adam and Eve not eaten from the tree of the knowledge of good and evil, they ultimately would have been allowed to eat from the tree of life. The tree of life was the preredemptive sacramental sign and seal of *life*,[59] which is the permanent rest of God into which Adam could have entered but did not.[60]

With the Fall, humanity lost its power to reach the goal of rest but not its mandate to do so. God graciously took upon Himself not only the

---

> And it was given to him to make war with the saints and to overcome them; and authority over every tribe and people and tongue and nation was given to him.

Id. Understanding the beast from the sea as State oppression of the Church is commonplace. *See, e.g.*, G. K. BEALE, THE BOOK OF REVELATION: A COMMENTARY ON THE GREEK TEXT 680-700 (1999).

[58] SPYKMAN, *supra* note 47, at 256.

[59] GEERHARDUS VOS, BIBLICAL THEOLOGY: OLD AND NEW TESTAMENTS 38 (1948). Consider that the Apostle John's description of the blessing of a right relationship with God as "eternal life." *See, e.g.*, *John* 3:16; 1 *John* 5:11.

> From the significance of the tree in general its specific use may be distinguished. It appears from Gen. 3:22, that man previous to his probation had not eaten of it, while yet nothing is recorded concerning any prohibition which seems to point to the understanding that the use of the tree was reserved for the future, quite in agreement with the eschatological significance attributed to it later. The tree was associated with the higher, the unchangeable, the eternal life to be secured through the probation.

1 *John* 5:11.

[60] The second Adam, Jesus Christ, has entered this rest. *See Hebrews* 4:10 ("For the one who has entered His rest has himself also rested from his works, as God did from His.").

provision of the tools by which we could have reached our goal but also provided the very way by which humanity could make it to its end in the person and work of Jesus Christ. Moreover, we will see on the return of Christ the perfect exercise of the norm of dominion granted to humanity.[61] Thus there should be no dichotomy between the sacred and the secular: the norm for human activity is the dependent exercise of dominion, in the context of covenant, and in terms of the law.

The relationship between the normative perspective of the dominion mandate and contracts is straightforward: contracts are a means by which human beings exercise dominion. Dominion can be distorted and become oppressive. Contractual oppression occurs when contracts become not a means for modeling God's independent work of creation, but a tool for self-aggrandizement. Failure to locate a contract in its larger covenantal context leads to oppression. Oppression typically ignores one or both of the following perspectives.

2. Perspective #2—The Situational (Office and Rights)

The next two perspectives can be described more briefly. I have already observed that the grant of dominion to human beings entails the legitimacy of the general exercise of authority. The concept of office expresses the means by which this authority is implemented and makes it clear that human beings can exercise authority over other human beings, not only over the non-human creation. Office necessitates service in a particular task and, thus, the right to perform it. The biblical expression "servant of the LORD" implies the concept of office[62] and suggests the limits on the various offices any person occupies. God's authority is universal and total; human authority is circumscribed and limited. God limits the exercise of human authority and hence suggests spheres of dominion through various offices such as parents, civil rulers, ecclesiastical leaders, and employers.[63]

---

[61] *Philippians* 2:9-11.

> Therefore also God highly exalted Him, and bestowed on Him the name which is above every name, that at the name of Jesus every knee should bow, of those who are in heaven, and on earth, and under the earth, and that every tongue should confess that Jesus Christ is Lord, to the glory of God the Father.

Id.

[62] The Hebrew word עבד (*'ebed*, slave/servant/subordinate) has a wide semantic range but nearly one-fourth of its occurrences in the Old Testament describe the relationship between kings and subordinates. In fact, it was an honor to be a servant of the king. *See* 4 NIDOTTE, *supra* note 24, at 1183-98.

[63] The first three offices correspond to the jurisdictions of the family, the state and the church. The last office is characteristic of all those jurisdictions within the rubric of voluntary associations. *See generally Ephesians* 6:1-9 (parents and employers); 1 *Peter* 2:13 (rulers and parents); and *Titus* 1:5 (elders).

God has created the various offices and will hold their bearers responsible according to the terms of the covenant for effecting the norm of dominion appropriate to the exercise of that office.[64] God has delegated to each office-holder the authority to carry out that office; hence, the holder of an office has the *duty* to do so. The law's recognition of such a duty corresponds to what is commonly described as a *right*. In other words, a promisee does not have an independent right to require a promisor to perform; rather, the promisor has a duty to perform, a duty that may be enforced in a judicial forum. By way of contrast, the prevalent Enlightenment version of rights understands them as subjective properties attaching to personhood. Classical liberals assert that human beings have such subjective rights simply by virtue of their humanity.[65] Similarly, some contemporary thinkers associate rights exclusively with the political order and continue to ignore the covenantal basis for rights and place the genesis of rights with political society. The State thus creates or eliminates rights among its citizens to achieve some overarching vision of the good.[66] Neither the classical nor modern liberal view of the nature of rights grounds them in an office created by God, embedded in His covenant,

---

[64] See, for example, God's warning to Ezekiel about the duties and dangers of the prophetic office:

> [1]And the word of the LORD came to me saying, [2]"Son of man, speak to the sons of your people, and say to them, 'If I bring a sword upon a land, and the people of the land take one man from among them and make him their watchman; [3]and he sees the sword coming upon the land, and he blows on the trumpet and warns the people, [4]then he who hears the sound of the trumpet and does not take warning, and a sword comes and takes him away, his blood will be on his own head. [5]He heard the sound of the trumpet, but did not take warning; his blood will be on himself. But had he taken warning, he would have delivered his life. [6]But if the watchman sees the sword coming and does not blow the trumpet, and the people are not warned, and a sword comes and takes a person from them, he is taken away in his iniquity; but his blood I will require from the watchman's hand.' [7]"Now as for you, son of man, I have appointed you a watchman for the house of Israel; so you will hear a message from My mouth, and give them warning from Me. [8]"When I say to the wicked, 'O wicked man, you shall surely die,' and you do not speak to warn the wicked from his way, that wicked man shall die in his iniquity, but his blood I will require from your hand. [9]"But if you on your part warn a wicked man to turn from his way, and he does not turn from his way, he will die in his iniquity; but you have delivered your life."

Ezekiel 33:1-9; *see also* Jesus' parable of the talents (*Matthew* 25:14).

[65] *See, e.g.*, HADLEY ARKES, FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE ix-x (1986) (where the author notes that he presupposes the Enlightenment common sense realism of Thomas Reid in his discussion of the purpose of human society).

[66] The circularity of such a formula for the origin of rights is apparent. If political society is the source of rights, what is the source of the right to create a political society?

and under His law. The kingdom of the world is substituted for the Kingdom of God, and the spheres of the family, the Church, and even voluntary associations are ever reduced.

A biblical notion of rights is not limited to desert.[67] God frequently requires of an office-holder a duty with respect to another person. The duty-based system of justice is exemplified in the negative form in which God revealed most of the Ten Commandments and the restitutionary form in which the largest part of the judgments of the Book of the Covenant (*Exodus* 21:1–23:19) are given. Our duties are ultimately owed to the LORD,[68] although God may penultimately delegate enforcement of that duty to another office-bearer.[69] As Christopher J.H. Wright puts it:

> To say that B has certain rights is simply the entailment of saying that God holds A responsible to do certain things in respect of B. B has rights under God, because God is as concerned with how B is treated as with how A acts. The two are correlatives of the single will of God regarding the well-being of God's human creatures.[70]

The correlation between rights on the one hand and covenant and law on the other should be apparent. God has independently structured all of life under His covenantal regime. The stipulations of the covenant can be known from the Scriptures and general revelation. The primary stipulation—dominion—applies to everyone. Specific application of the dominion mandate requires understanding of the particular situation. Only those with the appropriate office, however, have the authority to enforce that stipulation as it comes to expression in various spheres of life. For example, only those entrusted by God

---

[67] Rights may, of course, also arise as a matter of desert. *See, e.g.*, *Leviticus* 19:13 ("You shall not oppress your neighbor, nor rob him. The wages of a hired man are not to remain with you all night until morning."); 1 *Timothy* 5:18 ("For the Scripture says, 'You shall not muzzle the ox while he is threshing,' and 'The laborer is worthy of his wages.'").

[68] *Genesis* 4:9 ("Then the LORD said to Cain, 'Where is Abel your brother?' And he said, 'I do not know. Am I my brother's keeper?'"). The setting of Cain's rhetorical question and God's punishment suggests that we are to understand that Cain was indeed his brother's keeper.

[69] *Genesis* 9:6 ("Whoever sheds man's blood, by man his blood shall be shed, for in the image of God He made man."); *Romans* 13:1-7.

[70] CHRISTOPHER WRIGHT, WALKING IN THE WAYS OF THE LORD: THE ETHICAL AUTHORITY OF THE OLD TESTAMENT 253 (1995).

> Talmudic law is aware of the concept of rights, as an element on the periphery of its base of information. The tradition itself did not enunciate a doctrine of individual entitlement but rather a doctrine of individual obligation, or mitzvah. Yet, the argument goes, if you look at obligation from the perspective of the person to whom it is owed, you have rights . . . .

H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 112 (2000); *see generally* DAVID NOVAK, COVENANTAL RIGHTS: A STUDY IN JEWISH POLITICAL THEORY (2000).

with ownership of an object may contract to sell it. The purchaser's right to the object arises out of desert.

The situational perspective of office suggests two useful insights on the law of contracts. First, the universal dominion mandate legitimates a universal opportunity to contract. Dominion is a stipulation of God's covenant with humanity; thus, all human beings are authorized to enter into contracts to the extent they are existentially capable and situationally justified. Second, office, more narrowly understood, defines who may provide a remedy for breach of contract. Simply because someone has the covenantal duty to perform a contract does not mean that God has delegated to every human being the office of enforcing that contract upon its breach. Generally, only those occupying the office of a civil judge have the authority to mete out State-sponsored sanctions for breach of contract. A plaintiff's right to justice is not a matter of desert but is nonetheless real and is grounded in the office-bearers duty to reflect the divine judge and to ensure that the purchaser gets what is deserved.

3. Perspective #3—The Existential (The Image of God)

A discussion of the significance of the image of God on the law of contracts brings us full circle. Only those who are made in the image of God *can* exercise dominion because dominion is an attribute of God.[71] Only those who are made in the image of God *may* fill an office because each human office (parent, judge, ecclesiastical officer, or employer) reflects an aspect of God's sovereignty.[72] Human beings may contract because they, like God, may make promises. Moreover, human beings should perform their contractual obligations because they are in God's image, and God keeps His Word.[73] The dominion mandate is part of the created status of human beings. Authority to participate in ruling creation is not derived from a person's redemptive status; therefore, every human being may exercise dominion by contracting and may occupy an office in which breaches of contracts are adjudicated.

C. Conclusion

God's nature is orderly, and the various human offices reflect God's orderly nature and are to be used to extend this order over all

---

[71] Theologians typically speak of God's attribute of dominion under the topic of his sovereignty. Scripture attests to God's right to exercise power over his creation. *See, e.g.*, 2 *Corinthians* 6:18 (referring to God as "Lord Almighty").

[72] *See, e.g.*, *Ephesians* 5:22 (discussing the parallel between the office of husband to the relationship between God the Father and the Son).

[73] *Deuteronomy* 7:9 ("Know therefore that the LORD your God, He is God, the faithful God, who keeps His covenant and His lovingkindness to a thousandth generation with those who love Him and keep His commandments . . . .").

creation. Human beings created in the image of God are uniquely equipped to develop this order. The relationship among the perspectives can be diagrammed as follows:

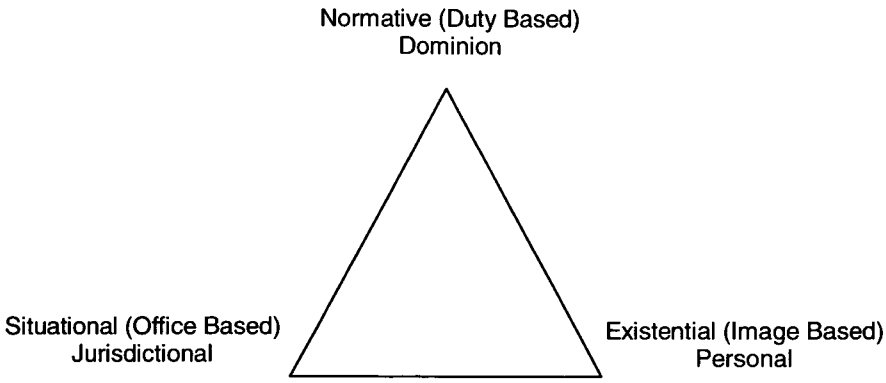

FIGURE 1. THE PERSPECTIVAL TRIANGLE

II. THE LIBERTY PRINCIPLE

God created human beings in His image and with liberty to exercise dominion by making certain promises enforceable at law when they communicate decisions to act or refrain from acting in some definite way in the future, subject to other stipulations of His covenant(s).

The Liberty Principle is the first principle under which we will analyze the law of contracts. Generally speaking, the implications of each principle will be considered in light of each of the three perspectives described above. Then any relevant scriptural resources will be examined. Finally, I will conclude each section with a summary of what the law is and what it should be in terms of the principle.

A. Introduction

One of the first questions that might occur to someone about to study the law of contracts concerns the nature of a contract: just what is a "contract"? *Restatement (Second) of Contracts*[74] defines (or rather

[74] The American Law Institute ("ALI") promulgates various "restatements" of the common law. The ALI was founded in 1923 to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work. *Restatement (Second) of Contracts* was published in 1981 and has had an enormous impact on judicial application of the law of contracts.

describes) the subject as follows: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[75] However, this definition largely begs the question of what a contract *is*. While the authors of the *Restatement* affirm that promising is the presupposition of any contract, they frame the range of promises that rise to the level of contract in terms of what the law will enforce. Yet how does the law *know* which promises to enforce? Moreover, what justifies legal enforcement of *any* promises? At these points, the *Restatement* is agnostic.

Although the *Restatement* refrains from providing a noncircular definition of a contract or a normative basis for contract enforcement, many legal scholars have attempted to fill these gaps. While contemporary writers about the law of contracts ignore the three doctrines, their answers to these questions can be categorized in terms of one of the three perspectives. In other words, the current discussions of the foundations of contracts emphasize the normative, the situational, or the existential. Some of the proponents of contemporary analyses of contract law fail to appreciate that their answers are only perspectives on contract law that need to be unified. Others, while acknowledging the perspectival nature of legal theories, fail to ground them in a transcendent order of reality.[76] The neglect of present-day studies of the law of contracts to come to grips with necessary truths does not render them useless. Each of them reveals valuable insights (as well as omissions) that can be related to the truths of the three doctrines. The format of the balance of this piece will examine what a legal scholar or scholars have said about the common law doctrine of consideration within the framework of the three perspectives. Following each of their expositions, I will address some critical biblical comments. Then, after having viewed the topic from each perspective, I will summarize what I believe is the biblical perspective.

B. The Normative Perspective—Pacta Sunt Servanda[77]

The principle that promises should be kept strikes most people as intuitively true. Many Christian thinkers have advocated something

---

[75] RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

[76] *See, e.g.*, MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT (1997).

[77] The Latin phrase *pacta sunt servanda* is usually translated as "promises must be kept." It is currently a principle of civil law (the form of law that is employed in most of Western Europe (except England)) that derives from the canon law and natural law traditions. *See generally* RUBEN ALVARADO, A COMMON LAW: THE LAW OF NATIONS AND WESTERN CIVILIZATION (1999); Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT'L L. 405 (1994).

like the maxim of *pacta sunt servanda*.[78] Samuel Pufendorf, a seventeenth century Lutheran natural law scholar (1632–1694),[79] first used the maxim in this particular form in 1688.[80] And the principle of *pacta sunt servanda* underlies the civil law today.[81] By way of contrast, the common law of contracts has never taken the position that all promises (or even all agreements) should be legally enforced. Prior to the middle of the sixteenth century, the common law courts enforced only those agreements that took a particular form. Written agreements executed with the formality of a seal received judicial sanction through the writ of *covenant*. By means of the writ of *debt,* the common law courts enforced agreements where services had been performed or goods sold if the only remaining obligation was payment of money. If a secured party did not return goods pledged to her as collateral after the loan had been repaid, the owner could seek their recovery through the writ of *replevin*. Finally, a party who sought the return of goods stored with another could sue under the writ of *detinue*.[82]

Most parties found the formalities of the writ of covenant too cumbersome for everyday transactions. While the writs of debt and detinue did not require the formalities of covenant, they did not provide relief in two important situations. First, neither debt nor detinue could

---

[78] *See, e.g.*, Hyland, *supra* note 77, at 416 (quoting Henricus de Segusia (Cardinal Hostiensis), *Lectura in quinque libros decretalium gregorianarum,* I, *de arbitris* 9.6 Venice 1581) ("Therefore care must be taken by whoever consents, because pacts, however naked, according to the Scriptures, must be kept.").

[79] *See generally* Samuel Pufendorf, *De jure naturae et gentium libri octo* (James Brown Scott ed., C. & W. Oldfather trans., photo. Reprint 1934) (1688)).

[80] Hyland, *supra* note 77, at 424-25.

[81] *Id.* at 428.

[82] See Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 451 (1996) for an extended discussion of the English common law of contracts from 1200 to 1600.

> In establishing, in 1178, the Court of Common Pleas as the first permanent professional English royal court, Henry II had limited its civil jurisdiction to the types of complaints for which the chancellor would issue a writ. At first, these were chiefly complaints that alleged certain types of "trespasses" (as they came to be called) against the rights of possession of land and chattels, as well as against the bodily security of the person. Later, the chancellor also granted writs of "debt" for the payment of money that the plaintiff claimed belonged to him, writs of "detinue" to recover damages for the wrongful detention of the plaintiff's chattels, writs of "replevin" for the return of chattels pledged for an obligation that had been fulfilled, writs of "covenant" for a breach of a sealed instrument containing a promise, and various others. By the year 1300 there were dozens of different types of such "forms of action" commenced by a royal writ issued to local royal officials (sheriffs), ordering them to have the defendant before the judges of Common Pleas or King's Bench to answer the charges stated in the writ.

Id. See generally A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT (1975).

be employed where both parties had remaining obligations to perform: these writs could be used only where one of the parties had completely performed her obligations. Second, neither debt nor detinue (nor even covenant) provided a form of relief for misfeasance: the common law court could only impose an all or nothing remedy. Thus, for example, an owner had no clear form of action against a contractor who performed a shoddy job of carrying out a contract to build a house.[83] Most importantly from the normative perspective, however, was the fact that a broken promise in itself was not actionable. The common law provided relief for only a few, very specific types of broken promises.

Beginning in the early 1500s and culminating in *Slade's Case* in 1602,[84] the common law courts began to use the writ of *assumpsit*, a form of action initially reserved for tort-like wrongs, to enforce executory contracts. The following section will discuss sixteenth century developments in more detail. Although plaintiffs could seek legal redress for a broader class of broken promises after both King's Bench and Common Pleas courts acquiesced in the expansion of assumpsit, in no sense were promises treated as sacred by the common law. With only some hyperbole, Oliver Wendell Holmes described the common law of contracts as follows: "The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves [the promisor] free . . . to break [the] contract if [he] chooses."[85]

---

[83] This is not to say that a dissatisfied owner had no recourse. Throughout the early history of the common law, there were systems of justice in addition to the common law. These alternate judicial systems would have included the ecclesiastical courts, local manorial courts, royal prerogative courts, and the Court of Chancery. The jurisdictions of these courts ultimately gave way to the common law courts throughout the history of the English struggles to centralize political authority, first in the King, then in Parliament, and ultimately in the Commons (where it resides today).

[84] 4 Coke's Rep. 92b (Eng. 1602). Every executory agreement imported an *assumpsit*; in other words, *assumpsit* meant that an agreement to act in a certain way created an obligation to act. Mere gratuitous promises, however, would still not be enforced; there must still be a "consideration." *See* Manwood and Burston's Case, 74 Eng. Rep. 479 (1587); *see generally* C. Scott Pryor & Glenn M. Hoshauer, *Puritan Revolution and the Law of Contracts*, 11 TEX. WESLEYAN L. REV. 291, 341-45 (2005) (discussing the rise of the writ of assumpsit to vindicate informal contract claims).

[85] OLIVER WENDELL HOLMES, THE COMMON LAW 236 (M. Howe ed., 1963) (1881). Holmes would have been more accurate if he had limited his aphorism to *legal* consequences. A party who breaches a contract also suffers significant non-legal repercussions when attempting to enter into contracts in the future. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 64 (1963) (quoting a businessman: "[C]ustomers had better not rely on legal rights or threaten to bring a breach of contract law suit against [him] since he 'would be not treated like a criminal' and would fight back with every means available.").

If the common law traditionally had an amoral approach to promise-keeping, where did the idea of *pacta sunt servanda* come from? Samuel Pufendorf first coined the expression drawing on the long tradition of broadly catholic natural law writers.[86] As Calamari and Perillo note, the roots of *pacta sunt servanda* derive historically from Christian thought:

> Although the Enlightenment concept of natural law was the natural law concept that had the most direct impact upon Anglo-American courts, it was preceded by canon law and rabbinical thinking about the sanctity of a promise. According to the canon lawyers and rabbinical scholars of the late middle ages and the Renaissance, promises were binding in natural law as well as in morality because failure to perform a promise made by a free act of the will was an offense against the Deity.[87]

There is much about the divine normativity underlying *pacta sunt servanda* that is useful to a Christian analysis of the law of contracts. Unlike either of the representatives of the two perspectives that follow, *pacta sunt servanda* at least historically lays claim to a foundation in the biblical record. Neither of the other perspectives that will be considered leaves an express opening for biblical truth. The Scriptures have much to say about promise-keeping, and their revelation will be treated as normative.

The change in worldviews from late medieval writers to Samuel Pufendorf is, however, significant. In the canon law tradition, the normativity of promise-keeping was founded upon a transcendent referent—God. By the time of Pufendorf, following the Thirty Years War,[88] the value of a religious ground for a legal principal had waned. Thus, Pufendorf's principal basis for the maxim lay not in the transcendent but in immanent human nature.[89] An immanentistic

---

[86] *See supra* note 80.

[87] JOSEPH PERILLO, CALAMARI & PERILLO ON CONTRACTS 8 (5th ed. 2003).

[88] The Thirty Years War (1618-1648), largely between Roman Catholic countries on one side and Protestant countries on the other, exhausted much of Continental Europe's post-Reformation religious fervor. The English Civil War (1649-1652) had much the same effect in Great Britain. Subsequent efforts to rebuild civil society were deliberately constructed on non-religious bases in the hope that this would avoid future sectarian violence.

[89] Pufendorf believed that human beings were by nature sociable and that law—including the private law of contracts—enabled humans to realize that nature.

"Pufendorf ultimately managed to unseat theological conception of natural law, such as those viewing it as a remnant of our prelapsarian knowledge of God, and replace them with his secular derivation of natural law from the *socialitas* that is innate in human nature." Hyland, *supra* note 77, at 424.

This is not to suggest that God was not the ultimate ground of obligation for Pufendorf but rather that he developed his theory of contracts on the mediate concept of human *socialitas* rather than the ultimate ground of God and his nature:

approach to contracts runs afoul of the three doctrines, especially the creator–creature distinction and the covenantal structure of understanding. A perspective on the law, even one that emphasizes the normative, will inevitably distort the law unless it retains its moorings in the full range of biblical principles.

C. The Situational Perspective—The Efficiency Principle Or The Dominion Mandate?

Richard Posner

Richard Posner has written numerous articles as well as several books, the most significant of which is *Economic Analysis of Law*, first published in 1973.[90] His express goal was to explain and evaluate legal rules in economic terms. Beginning with the axiom that "man [is] a rational maximizer of his self interest,"[91] Posner goes on to analyze the choices humans make in allocating scarce resources among more plentiful human wants.[92] For Posner, efficiency is "the main thing that students of public policy do or should worry about."[93] Contracts are especially well-suited to economic analysis because people frequently consciously use contracts for the purpose of satisfying their wants among a plethora of available competing resources by the efficient transfer of value.

To the extent Posner's goal is simply descriptive it is certainly unobjectionable. To examine how the law of contracts effects resource allocation and contributes to efficiency as economically understood is a warranted human activity. However, an *Economic Analysis of Law*

> [S]ince the foundation of natural law is a social life, and the nature of man's mind shows clearly enough that among a great number of men, who are undertaking to advance life by various arts, a quiet and decorous society cannot exist without distinct dominions of things, therefore, such were introduced in accordance with the proper requirements of human affairs, and with the aim of natural law.

PUFENDORF, *supra* note 80, at 555. The gradual weakening of natural law's Christian-theistic roots is certainly a factor in its marginalization today. *See generally* PAULINE WESTERMAN, THE DISINTEGRATION OF NATURAL LAW THEORY: AQUINAS TO FINNIS (1998).

[90] A sixth edition of *Economic Analysis of Law* was published in 2003. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3-4 (6th ed., Aspen 2003)(1973).

[91] *Id.* at 4. One should observe that self-interest is not equivalent to selfishness. One's self interest could just as easily be in feeding the poor as finding a starting job that pays $125,000. In economic terms, self-interest simply means that ultimately people do what they want to do. *Why* we want to do one thing rather than another is outside the scope of economics.

[92] *Id.* at 3-4. To be fair, I should note that Posner also states that "[e]fficiency or wealth maximization is an important thread in the ethical tapestry, but it is not the only one." *Id.* at 286. Posner is not very clear, however, on what the other threads are.

[93] *Id.* at 13.

implicitly suggests a normative vision for the law as well: because human beings are by nature maximizers of self-interest, then the law of contracts *should* advance the goal of efficient allocation of resources. Human societies are obliged, in Posner's view, to create legal systems by which individuals can make judicially enforceable promises simply because doing so will lead to the most efficient satisfaction of human wants. Posner's purported duty to enhance efficiency runs aground for two reasons. First, he commits the naturalistic fallacy: one cannot simply reason from the *is* to the *ought*.[94] Second, assuming there is a social duty to maximize efficiency, then why should society not seek out and enforce the efficient result regardless of what particular individuals have consented to do? In other words, why should efficiency be limited to voluntary transactions (like contracts) and involuntary transactions (like torts)? If efficiency is the *summum bonum* of social life, why should society not affirmatively enforce an efficient reallocation of resources whenever possible without regard to the consent of the parties involved?[95]

Posner's analysis has positive implications considered in light of the three doctrines and the three perspectives. An explanation of the law of contracts justified by reference to efficient allocation of resources fits most comfortably within the Normative and Situational Perspectives. As God's vicegerents, human beings are subject to the dominion mandate that entails the use, development, and allocation of resources. Moreover, all people occupy some office, which means they have authority over certain resources, even if those resources are only their own time and effort. Posner fails, however, to provide a warrant for even his accurate observation of the human desire to maximize self-interest, and economic analysis certainly provides no guidance on what human interests *should* be. A reduction of social goals to increasing efficiency ignores the broader covenantal context in which human beings are created, which includes duties for which no immediately self-interested rationale can be adduced.[96] Finally, Posner's refusal to ground his conclusions about efficiency in the law of God leaves him without a *transcendent* foundation for his proposals.

An economic analysis provides many insights into how legal rules operate and many of the rules of the law of contracts are efficient.

---

[94] FRAME, *supra* note 12, at 118 ("Statements about sensible facts do not imply anything about ethical goodness or badness, right or wrong, or obligation or prohibition.").

[95] Posner's answer to this challenge is that society cannot be nearly as certain of the efficient allocation of resources in a nonconsensual transaction. While this is undoubtedly true, it is not the case that society *never* knows of efficient transactions that particular parties do not recognize or undertake themselves.

[96] *See, e.g.*, *Leviticus* 19:9-10 (the gleaning laws).

Given the commercial setting of most contractual transactions, these findings should not be surprising. In light of the three doctrines, however, I hope to establish an ontological and moral underpinning for the offices associated with the dominion mandate. In addition, with the three perspectives (rather than Posner's one perspective), I will try to orient the office of vicegerent in the broader covenantal context.

D. The Existential Perspective—The Autonomy Principle Or The Imago Dei?

Charles Fried

Charles Fried authored *Contracts as Promise: A Theory of Contractual Obligations* in 1981. Fried's book advanced two goals. First, he sought to overcome the claim that there was no such concept as "contract law" as it has been commonly understood. Fried took this apparently unusual position because in the 1970s Grant Gilmore had concluded that there was no such thing as the law of "contract."[97] Gilmore began with the commonplace observation that the imposition of judicial liability is a community act enforcing community sanctions.[98] From this uncontroversial premise he supposed that a judgment by a court in favor of one party to a broken contract actually represents the imposition of community values of fairness or justice, in other words, a tort.[99] Then he reached the conclusion that *contract law* had little to do with the vindication of a particular obligation undertaken by the breaching party. If a society's goals are fairness and justice, Gilmore reasoned, then State-imposed rules actually governed most of what had been covered by "contract law."[100] Courts and commentators had for centuries, however, discussed contract law under the rubric of consent or promise, notwithstanding what these scholars took to be the correct understanding of the law.[101] Fried therefore felt compelled to take issue

---

[97] GRANT GILMORE, THE DEATH OF CONTRACT 3 (1974) ("We are told that Contract, like God, is dead. And so it is." (footnote omitted)).

[98] *Id.* at 73-74 ("More adventurous courts have turned to the idea of a 'contract implied in law,' a 'quasi-contract'—not really a contract, a legal fiction necessary to promote the ends of justice and, in particular, to prevent 'unjust enrichment.'").

[99] *Id.* at 88 ("We may take the fact that damages in contract have become indistinguishable from damages in tort as obscurely reflecting an instinctive, almost unconscious realization that the two fields, which had been artificially set apart, are gradually merging and becoming one.").

[100] *Id.* at 92 (discussing developments in California which Gilmore believed meant that "ex delicto seems to be well on the way toward swallowing up ex contractu.").

[101] Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806 (1941) (footnote omitted).

> Among the basic conceptions of contract law the most pervasive and indispensable is the principle of private autonomy. This principle simply

with those like Gilmore who reduced promise to an appendage and inserted communitarian rules in the place of the parties' autonomy.[102] Contract, under such approach, would have been subsumed into tort.[103]

Second, Fried set forth a positive theory of contract based on the morality of promising:

> The obligation to keep a promise is grounded . . . in respect for individual autonomy and in trust . . . . An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance. To renege is to abuse a confidence he was free to invite or not, and which he intentionally did invite. To abuse that confidence now is like (but only like) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust.
>
> . . .
>
> The moralist of duty . . . sees *promising* as a device that free, moral individuals have fashioned on the premise of mutual trust, and which gathers its moral force from that premise. The moralist of duty thus posits a general obligation to keep promises, of which the obligation of contract will be only a special case . . . But since a contract is first of all a promise, the contract must be kept because a promise must be kept.
>
> To summarize: There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it.[104]

At the outset, Fried's perspective may seem to exemplify the normative rather than existential perspective. This observation is correct to a certain extent. However, at the level of justification for promise-keeping, Fried's arguments rest on a particular view of human freedom rather than divine warrant. Autonomy in the Enlightenment tradition of Immanuel Kant, not the three doctrines, forms the foundation for Fried's account of the morality of promise-keeping. Kant argued that the essence of being human is the power to make free moral choices. The unconstrained will is the only "good" will. In

---

> means that the law views private individuals as possessing a power to effect, within certain limits, changes in their legal relations. . . . When a court enforces a promise it is merely arming with legal sanction a rule or *lex* previously established by the party himself.

Id.

[102] *See, e.g.*, Jay M. Feinman, *Relational Contract and Default Rules*, 3 S. CAL. INTERDISC. L.J. 43 (1993).

[103] *See, e.g.*, GILMORE, *supra* note 97, at 92.

[104] CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 16-17 (1981) (footnotes omitted).

addition, the free will is determined by reason that can direct the will independently of any empirical considerations. The only appropriate limit on the freedom of one human being is the recognition that all other human beings are likewise free. Respect for the freedom of others is, therefore, also a "good" (what Kant called practical reason).

Fried took Kant's insights in human freedom and applied them to the law of contracts. Fried noted that human beings are embedded in time; they cannot presently act freely in the future. In order to maximize one's temporally limited freedom; one may make a promise to do something for someone else in the future in return for either their action in the present or a comparable promise to do something for the initial promisor in the future.[105] Enforcing promises to limit one's actions in the future, thus, has the somewhat paradoxical effect of increasing one's freedom in the present.

Fried's analysis has much to offer. Yet I conclude that it fails at two crucial points: standing alone it cannot justify human freedom, and it is ultimately contradictory. From psychological behaviorists to economic determinists, many would deny that human beings are free in Fried's sense of the word. If humans do not have libertarian freedom, then a theory of contract premised on freedom is a waste of time at best and self-deceptive at worst. Similarly, Fried's Kantian notion of morality based on pure freedom (for myself and others) undercuts itself in due course. Pure freedom, unconstrained by any outside sources (except the obligation to recognize the freedom of others), means that there are ultimately no good or bad purposes from which to chose: only the unconstrained will to choose among various ends freely can be considered "good." But to exercise the will, even in a free fashion, represents the actor's choice among *some* purposes. If, however, the choice among those purposes is without any moral significance, then even the idea of respecting one's own or another's freedom seems meaningless. As Franklin Gamwell puts it:

> Independently of an affirmation of or some positive relation to some state of affairs . . . there simply is no freedom and, therefore, no self to be understood. Thus, if the truth about practical reason were that there is no moral distinction among possible purposes, the moral worth of understanding oneself in this way would not imply that *no* state of affairs identifies the moral law but rather that *all* states of affairs do so. Since a constitutive choice in accord with this truth [that all freely chosen ends are equally moral] would be morally

---

[105] For example, in an exercise of my free will, I determine that I want your car. For anyone to tell me that I may not have your car is a limit on my freedom. Yet, for me simply to take your car is an infringement on your freedom (to keep your car). To enhance my immediate freedom (to possess your car), I may make a promise to pay you $1,000 for it next week. If promises were not enforced, you would be unwilling to deliver your car to me and, hence, my freedom to have your car in the present would be limited.

> prescribed [required], it would follow that all possible purposes are equally good, so that any possible purpose is morally permissible. Independently of all purposes, however, there simply is no will at all that could be called good without qualification. . . . [I]f the unqualified goodness of a good will is independent of any state of affairs to be pursued, one cannot affirm another's pursuit of ends as morally good and, therefore, respect for her or his freedom is meaningless.[106]

Kant's (and hence Fried's) account of the morality of promise-keeping ultimately fails. If personal freedom is the *only* good, then any purpose one chooses is equally valid. Such a conclusion entails the utter randomness of human decision making: no purpose is good in and of itself (or, stated another way, every purpose is equally good). And, if no particular purpose is good, then how can it be asserted that even respect for another's free will is good? After all, the other's free choice among various ends is equally random. Thus, to the extent that promise-keeping is anchored only on a purported duty to respect the autonomy of the other, its foundation is made of sand.

Fried's analysis, however, has merit if it is reconsidered in terms of the three doctrines and three perspectives. On the one hand, a law of contracts founded upon human autonomy fits comfortably in the doctrine of the law of God. As we shall discover, God's law places a great premium on keeping promises and performing agreements. This should not be surprising because the LORD is a promise-keeping God, and human beings are created in His image. On the other hand, Fried's weaknesses are most apparent when we observe how he collapses humanity's moral freedom into the only source for the norm of promise-keeping. His failure to acknowledge humanity's existence as images of God deprives him of the ontological basis for our freedom. His apparent reluctance to recognize the transcendent norm of God's law leaves him without a basis for asserting that recognition of another's freedom is a moral good. At this point, a diagram of the competing vision of the justification for the social practice of contracting may be helpful:

---

[106] FRANKLIN GAMWELL, THE DIVINE GOOD: MODERN MORAL THEORY AND THE NECESSITY OF GOD 49-50 (1990).

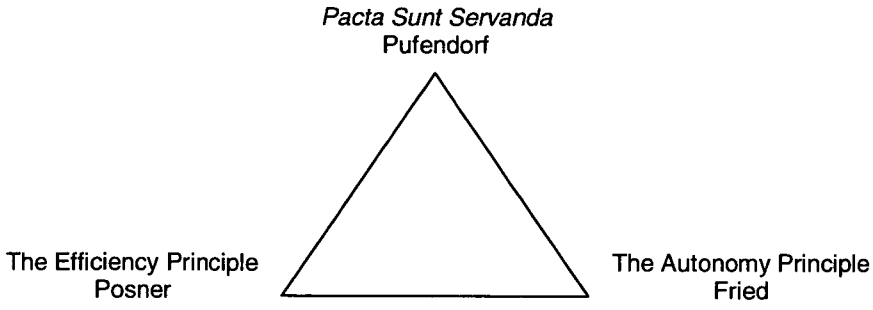

FIGURE 2. THE SECULAR JUSTIFICATION TRIANGLE

E. Scriptural Resources

The three doctrines supply us with the basis for believing the Christian Scriptures will be relevant to the task of justifying the social practice of contracting. The doctrines of covenant and law, in particular, are pertinent to the law of contracts. Even divine–human covenants have contractual aspects: there are two parties who are bound to undertake actions in the future and sanctions for default. Each of these elements is also found in an ordinary contract. A word of caution is in order, however. The Bible contains virtually no substantive references to executory contracts. While the Scriptures describe and regulate transactions corresponding to agreements enforceable by the writs of covenant,[107] debt,[108] replevin,[109] and detinue,[110] the early biblical economy had apparently not progressed to the point of significant use of executory agreements (agreements where both parties have remaining unperformed obligations). Care must thus be taken when drawing inferences from both the prescriptive and descriptive revelatory data in order to critique the law of contracts as it exists today.

1. The Normative Perspective

The normative perspective can be examined from three scriptural directions: God as our model, specific biblical teachings, and relevant biblical examples. Each of these "perspectives" on the normative will justify the social practice of contracting and, ultimately, its legal enforcement.

---

[107] *See, e.g., Genesis* 31:44 and *infra* text accompanying notes 116-17 regarding vows.

[108] *See generally Leviticus* 25:25ff.; *Deuteronomy* 15:1-6.

[109] *See, e.g., Deuteronomy* 24:10-13; *Ezekiel* 18:12, 16.

[110] *See generally Exodus* 22:7-8, 10-13.

i. God as the Model

We can start with the scriptural revelation about the character of God. From the Apostle Paul's *Epistle to Titus*, we observe that promising is something that takes place within the Godhead: "God, who cannot lie, *promised before time began* . . . ."[111] If God is the promisor, to whom did he make this promise "before time began"? The answer can only be Himself: the Father made the promise to the Son.[112]

If making promises is part of the nature of God, does the Bible reveal any information about whether God keeps His promises? The answer is an unqualified "yes." One of the most well known examples is from chapter twenty-three of the book of *Numbers* where Balaam, in his second oracle about the future of the people of Israel, says:

> 16 The LORD met Balaam, put a word into his mouth, and said, "Return to Balak, and this is what you shall say." 17 When he came to him, he was standing beside his burnt offerings with the officials of Moab. Balak said to him, "What has the LORD said?" 18 Then Balaam uttered his oracle, saying:
>
> "Rise, Balak, and hear;
> listen to me, O son of Zippor:
> 19 God is not a human being, that he should lie [fail],
> or a mortal, that he should change his mind.
> Has he promised, and will he not do it?
> Has he spoken, and will he not fulfill it?[113]

Other references to the nature of God to keep His promises are too numerous to quote.[114] The performing of promises by the independent Creator–God serves as a model for created and dependent humanity.

ii. Scriptural Precepts

Promise-keeping by human beings is specifically prescribed in Scripture. Although the Scriptures have little to say directly regarding the social practice of contracting, there are many references to a particular class of promises called *vows*. Vows are promises in the name of God *to* God. Vows are distinguished from ordinary contracts in

---

111 *Titus* 1:1-2 (New King James) (emphasis added).

112 *See also 2 Timothy* 1:9 (stating that God "called us with a holy calling, not according to our works, but according to His own purpose and grace which was *granted us in Christ Jesus from all eternity*." (emphasis added)).

113 *Numbers* 23:16-19 (New Revised Standard). The Hebrew word וִיכַזֵּב (*wiḵazzēḇ*) is a jussive (a verb form that is used to express the speaker's desire, wish or command) and is better translated "fail." God's purposes are reliable and his nature does not disappoint or fail, as is often the case with human beings. *See* TIMOTHY R. ASHLEY, THE BOOK OF NUMBERS 477 (1993); *see also Hebrews* 6:13-18 ("[I]t is impossible for God to lie . . . .").

114 *See, e.g., Isaiah* 40:8, 55:11; *James* 1:17; *Malachi* 3:6.

two respects: they have the significance of an oath ("promises in the name of God")[115] and the promisee is God ("promises . . . to God").[116] Individuals typically made vows in the biblical record, although they were sometimes offered on behalf of the nation as a whole.[117] Vows in the Hebrew Scriptures were typically offerings or gifts promised to the LORD for His assistance; when God's aid had been secured, what had been promised was to be promptly offered to Him in thanksgiving. Several biblical texts contain stern reminders that vows were binding and were not to be made rashly or in an ill-considered way. For example, in *Deuteronomy* 23 Moses tells the people of Israel that:

> When you make a vow to the LORD your God, you shall not delay to pay it, for it would be sin in you, and the LORD your God will surely require it of you. However, if you refrain from vowing, it would not be sin in you. You shall be careful to perform what goes out from your lips, just as you have voluntarily vowed to the LORD your God, what you have promised.[118]

Although one cannot simply apply the rules concerning vows to ordinary contracts, the normative significance of keeping one's promises cannot be ignored. Promise-keeping, a fundamental aspect of the law of contracts, is clearly the biblical rule.

iii. Scriptural Examples

Not only does God model promise-keeping, promising represents a practice into which God entered with human beings such as Adam, Noah, Abraham, and numerous others.[119] Moreover, the Bible contains references to the practice of contracting with apparent approval, such as the agreement between Abraham and Abimelech over water rights,[120] and Esau's sale of his birthright to Jacob.[121] Finally, the Apostle Paul acknowledged the significance of contracting (at least obliquely) when he compared the absolute certainly of God's promise with a human covenant: "Brethren, I speak in terms of human

---

[115] 4 NIDOTTE, *supra* note 24 at 32 ("OT oaths consist of a *promise* that is strengthened by the addition of a *curse*, with an appeal to a deity (or even a human king) who could stand as the power behind the curse.").

[116] With only one exception (*Jeremiah* 44:25), vows by Israelites in the Old Testament were made to the LORD. *See, e.g.*, *Genesis* 28:20-22; *Psalms* 132:2-5; 2 *Samuel* 15:7-12; *see generally* 3 NIDOTTE, *supra* note 24 at 38.

[117] *See, e.g.*, *Psalms* 65:1 (calling the people to perform vows in thanksgiving for a good harvest).

[118] *Deuteronomy* 23:21-23; *see also Ecclesiastes* 5:4-5; *Proverbs* 20:25.

[119] *See supra* notes 25-31 and accompanying text.

[120] *Genesis* 21:25-27.

[121] *Genesis* 25:31-33.

relations: even though it is *only* a man's covenant, yet when it has been ratified, no one sets it aside or adds conditions to it."[122]

The normative basis for promising and, by extension, contracting is established by Scripture. The Scriptures reveal that promising is a characteristic of God within Himself; that God made promises to people; that God's law mandates performance of vows; and that people made binding contracts with each other. Therefore, while the maxim *pacta sunt servanda* will turn out to be insufficient to explain the common law of contracts, it is a biblically justifiable presumption from which to start.

2. The Situational Perspective

What does the perspective of office disclose regarding the justification of the social practice of contracting? As we have noted, God endowed humanity with a creational mandate of dominion.[123] The Scriptures do not explicitly identify the practice of contracting as a means by which to exercise dominion. Yet, examples of contracting in connection with the production of wealth justify the conclusion that human beings can legitimately occupy the office of a contracting party.[124] Furthermore, the biblical promise to Israel of economic prosperity tied to commercial lending, a practice based upon contracting, demonstrates that God intended the use of contracts as a means by which to produce wealth and exercise dominion.[125]

The biblical description of division of labor following the creation account also implies that some contractual arrangements were necessary to obtain property or services. Adam is presented as the general handyman of creation, but the biblical record indicates that many of his descendants developed a particular trade or occupation.[126] As persons with particular talents and interests exercised dominion over different aspects of creation, they would have to engage in barter to obtain other items necessary for survival. By the time of the Exodus,

---

[122] *Galatians* 3:15.

[123] *See supra* notes 50-58, 62-63 and accompanying text.

[124] *See, e.g.*, 2 *Chronicles* 1:16-17 (describing Solomon's successful commercial trading practices); *Deuteronomy* 15:3 (exception to the generally applicable debt release law for transactions with foreigners, presumably for commercial purposes); *Genesis* 21:25 (narrating Abraham's agreement with Abimelech regarding access to water for livestock grazing); *Genesis* 30:28-34 (the account of the bargain between Laban and Jacob for the raising of sheep); *see also Ephesians* 4:28 (blessing wealth acquisition through employment, which is primarily a contractual relationship).

[125] *Deuteronomy* 15:6 ("For the LORD your God shall bless you as He has promised you, and you will lend to many nations, but you will not borrow; and you will rule over many nations, but they will not rule over you.").

[126] *See, e.g., Genesis* 4:2 (Cain as agriculturist); *Genesis* 4:2 (Abel as livestock keeper); *Genesis* 4:21 (Jubal as musician); *Genesis* 4:22 (Tubal–Cain as metal-worker).

the use of money in lieu of barter had become so widespread that it could be used to redeem that which was promised to God as part of a vow.[127] It is only a few steps to proceed from the use of money to the extension of credit for purchasing goods and then to the exchange of promises, which constitutes the core of modern contracts.

The value of the insights of an economic analysis of law should be apparent. Human beings are not merely rational maximizers of self-interest. They are God's image-bearers who are charged with the covenantal duty to exercise dominion by developing the latent potential of creation. To the extent an economic analysis enhances evaluation of the efficiency of the rules of contract law, it enhances the exercise of dominion. Dominion, however, is not a stand-alone concept; it is part of the covenantal relationship between God and humanity. Efficiency is therefore not the *sole* arbiter of appropriate dominion; all of God's law must be consulted. With the establishment of contracting as a means of exercising dominion, it follows that human beings have a right to insist on the performance of the unexecuted portions of contracts. The biblical precepts and examples cited above further justify this conclusion.

3. The Existential Perspective

Even if human beings were truly autonomous, human freedom alone would be an insufficient foundation on which to build ethics or law.[128] Persons are able to make promises as image-bearers of the God who makes promises. They are to keep promises because the God in whose image they were created keeps His promises. These fundamental truths have an ontological basis in the narrative of the biblical creation account and carry epistemological weight as the prescriptions of God's law. The Kantian ethic based on the sole good of the free will is rescued from its own contradiction. There are also several legitimate implications for the law of contracts drawn from humanity's creation in the image of God.

Positively, imaging God justifies human cooperation in the exercise of the dominion mandate. The inter-Trinitarian covenant of redemption[129] involved the cooperation of the Father and Son in the accomplishment of salvation. Reasoning from the greater to the lesser, it follows that human beings can also cooperate through contracts to carry out their goals.

Creation in the image of God suggests three additional implications. First, although human freedom in carrying out the dominion mandate is quite extensive, it is not unlimited. The

---

[127] *See Leviticus* 27.

[128] *See supra* notes 104-06 and accompanying text.

[129] *See supra* notes 111-12111 and accompanying text.

covenantal relationship with God and His laws both exemplify and put limits on human freedom. While human beings are made in the image of the absolutely sovereign God, no humans individually (nor even groups of human beings collectively) are totally sovereign. The very power to contract—authorized and prescribed by the Bible—greatly limits the legitimate office of the State to bind its citizens to a particular form of dominion.

Second, the biblical concept of freedom of contract is not self-centered; it is covenant enmeshed and circumscribed by the law of God. The fact that the other party to the contract is also a member of the human covenant community constrains the ends to which contracts can be used. Not even Samuel Pufendorf was willing to extend the maxim of *pact sunt servanda* to the enforcement of a contract to commit a crime.[130]

Finally, the fact that others are created in the image of God has a third implication for the law of contracts: the other party to an agreement must be freely acting as an image bearer in order to contract. Thus, those who are incompetent due to age or disability, or who have been the victims of fraud or coercion, have remedies that may involve the cancellation of the contract into which they entered.

F. Conclusion

Taking the three perspectives in reverse order, we see that the ability to freely make promises is part of created human nature. We also observe that promising is a means by which human beings carry out the covenantal dominion mandate. Finally, we observe that keeping promises accords with God's normative standards. This analysis is consistent with human dependence: this understanding of the liberty of contract is based upon the foundation of the independent Creator–God. These conclusions are embedded in humanity's covenantal relationship with God. With this foundation, we can examine a specific doctrine under which the law of contracts is formulated in the common law tradition, the doctrine of consideration.

III. THE JURISDICTION PRINCIPLE

God has delegated to the State the authority to provide remedies for agreements that concern a person's interests in life, liberty or property, subject to other stipulations of his covenant(s).

A. Introduction

No legal system has ever sought to enforce all agreements. The law refuses to provide a remedy for some promises even where there

---

[130] PUFENDORF *Supra* note 79, at 436.

has been mutual consent.[131] The question of which agreements to enforce particularly concerned the common law over the course of the sixteenth century. Then and now, the common law courts have named the fact necessary to turn an agreement into a legally enforceable contract "consideration."[132] Unfortunately, courts have not been as consistent in defining what constitutes consideration.

Consideration: An Historical Excursus

From shortly after the Norman Conquest until early in the nineteenth century, all suits at common law in England had to fit one of the prescribed forms of action. As noted above, for many years the only writs available for contract-like actions were covenant and debt.[133] Assumpsit was one of the last forms of action created by the common law judges, probably in the mid-1300s.[134] Assumpsit was a "residual form of action in which wrongs could be alleged and remedied that were not covered by other forms":[135]

> In the fourteenth and fifteenth centuries . . . very few new types of writs were issued, although one of them, "trespass-on-the-case," was of great importance, because it gave a legal remedy for certain types of harm to persons or property caused "indirectly" and also for certain types of harm caused by failure to perform an act that the defendant had specially undertaken to perform "special assumpsit". In the 1530s and 1540s, a new form of trespass-on-the-case called *indebitatus assumpsit* gave a remedy for breach of certain types of obligations for which there was no express undertaking but one could be implied because the defendant was "indebted," as when the defendant had received something of value from the plaintiff and, in the absence of an agreement on the price, would not pay for the benefit he obtained.[136]

Assumpsit was not a freestanding writ by which courts could right every wrong brought before them. The plaintiff had to plead the existence of an obligation (*indebitatus*), a subsequent promise (*assumpsit*), a breach of the promise, and that the promise was

---

[131] *See, e.g.*, ARTHUR LINTON CORBIN, CORBIN ON Contracts 2 (1952) ("The law does not attempt the realization of every expectation that has been induced by a promise . . . ."); E. ALLAN FARNSWORTH, CONTRACTS 11 (3d ed. 1999) ("No legal system has ever been foolish enough to make all promises enforceable."); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 172 (5th ed. 2003) ("Apparently no legal system has ever enforced all promises.").

[132] *See generally* Pryor and Hoshauer *supra* note 84.

[133] *See supra* text accompanying note 822.

[134] *See* Val D. Ricks, *The Sophisticated Doctrine of Consideration*, 9 GEO. MASON L. REV. 99, 101 n9 (2000) ("Promise enforcement actually began in assumpsit in the mid-fourteenth century.").

[135] *Id.*

[136] Berman & Reid, *supra* note 82, at 451-52 (footnotes omitted).

actionable. It was the last element of the action of assumpsit that judges in the 1500s called consideration. Even 500 years ago, consideration included what today would be called a bargain.[137] However, the early uses of consideration included far more than bargains, too. In fact, judges of the sixteenth century "[b]ent or disregarded the consideration/exchange requirement to enforce promises that we now enforce as promissory estoppel (gratuitous promises unfairly inducing detriment), moral obligation, and quasi-contract/unjust enrichment. . . . Finally, in some cases, courts granted relief on the basis of mutual assent *without* any consideration . . . ."[138]

By the early part of the twentieth century, however, through the influence of Oliver Wendell Holmes, Jr., most courts had limited consideration to cases of the bargained-for exchange.[139] Today, consideration is still required as an element of a contract.[140] And it is the narrow Holmesian view of consideration that holds sway in section 71 of the *Restatement (Second) of Contracts*:

> (1) To constitute consideration, a performance or a return promise must be bargained for.
>
> (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

The promise to make a gift is the paradigmatic case of the common law court's refusal to enforce a promise.[141] A gift promise by definition is not the result of a bargain; thus, it cannot fit the bargained-for exchange model of a contract according to the *Restatement (Second) of Contracts*.[142] It is not the case, however, that unbargained-for promises are always the result of the promisor's altruism. Many promisors make promises to influence a promisee's attitude and, the promisor hopes, the promisee's actions in the future. Reciprocal gift-giving is a conventional social practice in many cultures.[143] Thus, "gift" promises

---

[137] *See* David J. Ibbetson, *Consideration and the Theory of Contract in Sixteenth Century Common Law*, in TOWARDS A GENERAL LAW OF CONTRACT 67, 69 (John Barton ed., 1990). The court in *Manwood and Burston's Case*, 74 Eng. Rep. 479, 480 (1587) laid down the three types of consideration: "1. A debt precedent, 2. where he to whom such a promise is made, is damnified by doing any thing, or spends his labor at the instance of the promiser [sic] . . . 3. Or there is a present consideration . . . ." *Nichols v. Raynbred*, 80 Eng. Rep. 238, 238 (1615) expressly held that a mere promise would constitute a present consideration.

[138] Ricks, *supra* note 134, at 104.

[139] *See generally* GILMORE, *supra* note 977, at 35-53.

[140] *See* RESTATEMENT § 71.

[141] *See, e.g.*, LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 9-13 (7th ed. 2001).

[142] Restatement § 17.

[143] *See, e.g.*, Tim Alan Garrison, *Review Essay: Recent Works on the History of U.S. Indian Policy*, 36 TULSA L.J. 415, 421 (2000) (discussing significance of reciprocal gift-

should be understood to include all promises that are not the product of a conventional bargain. Had the common law adopted a purely promissory basis for contracting, virtually every promise to make a gift would be enforceable. Before turning to the Scriptures to see if they provide any insight about civil enforcement of unbargained-for agreements, the views of several writers will be considered to better understand the insights afforded by the three perspectives on this issue.

B. The Normative Perspective—Civil Jurisdiction Over All Promises

Samuel Pufendorf would agree that promises to make gifts are as enforceable as any other promise:

> For if a man . . . has ordered me to expect some free gift from him, that I may thereafter have some reason to love and cultivate him, why should I not trust him? . . . [W]hy did he command me to base my plans upon his word, if he was not ready to be fully obligated thereby?[144]

Notwithstanding the second sentence quoted above, Pufendorf does not limit the enforceability of gift promises to cases where the promisee has relied to his detriment on the promise.[145] Rather than grounding legal enforceability of promises on a promisee's reliance, Pufendorf asserts that human nature and the need to preserve the structure of society provide the necessary foundation for legal enforcement of all promises:

> [S]urely there is enough opportunity for liberality in offering [promising] a man the right to demand of you what you could perfectly well deny him. And since so many promises pass between men from their standing in need of each other's assistance, it is more to the interest of human affairs that men keep their word . . . .
>
> But it is a dangerous thing to admit the following conclusion: When you are no worse off from my non-fulfilment [sic] of my promise than you would have been had I made no promise at all, therefore I shall have the right to recall it . . . . [I]f you have bound yourself in a special way to such an act, to repent of it for the sole reason that the other person will receive no harm therefrom, would

---

giving in Native American culture); Timothy L. Fort & James J. Noone, *Gifts, Bribes, and Exchange: Relationships in Non-Market Economies and Lessons for Pax E-Commercia*, 33 Cornell Int'l L.J. 515, 554 (2000) (noting that reciprocal gift-giving is a more sophistical social practice than monetary transactions).

144 Pufendorf, *supra* note 80, at 398.

145 Pufendorf later cites the expectation interest and reiterates the importance of the reliance interest: "those promises which bid a person to expect some certain and definite thing from us must necessarily be fulfilled, because the man has put faith in us, and made his plans according to our word . . . ." *Id.* at 399.

> make it seem that the bettering of our neighbour's condition is beneath our notice.[146]

Pufendorf was quite aware, however, that the law did not measure up to his high standards, and no legal system in his day provided a remedy for all broken promises. Nonetheless, the jurisdiction of a legal system emphasizing only the Normative Perspective would be as broad as promising itself. The promise itself, and neither the presence of a bargain nor the reliance of the promisee, would give rise to civil liability. Courts in Pufendorf's view would certainly have jurisdiction to enforce a promise to make a gift.

A Christian view of contracting acknowledges the importance of the norm of promise-keeping. The obligation to keep one's promises, however, does not equate to availability of civil sanctions for the failure to do so. First, the Existential Perspective discloses that a promisor should not keep certain promises. Promises to act inconsistently with the promisor's very existence (e.g., to sell one's heart) should never receive legal sanction. This set of promises pertains to what are called inalienable rights.[147] Second, the Existential Perspective also teaches that a promisor need not keep certain promises. Promises induced by actions inconsistent with the image of God of the promisor (e.g., "your money or your life") should not receive legal sanction over the promisor's objection. Finally, the Situational Perspective reminds us that the authority of the office of judge is circumscribed. No human judge has jurisdiction to mete out sanctions for breaches of every promise.

C. The Existential Perspective—Civil Jurisdiction Over (Almost) All Promises

Charles Fried, the proponent of the Existential Perspective, finds the common law's requirement of consideration as useless as Pufendorf would have had he written 300 years later.[148] If the basis of contract law is the power of the individual to bind herself autonomously, then there are few reasons not to provide legal resources for enforcement of the promise. It is primarily grounds that interfere with the autonomy

---

[146] *Id.* at 400-01.

[147] *See generally* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998) (classifying inalienable rights under the rubrics of several property, freedom of contract, self-defense, first possession, and restitution).

[148] FRIED, *supra* note 104, at 37-38.

> I conclude that the life of contract is indeed promise, but this conclusion is not exactly a statement of positive law. There are too many gaps in the common law enforcement of promises to permit so bold a statement. My conclusion is rather that the doctrine of consideration offers no coherent alternative basis for the force of contracts, while still treating promise as necessary to it.

Id.

of the decision-making process that should limit judicial enforcement of promises, although he admits there are other reasons for nonenforcement as well.[149] Like Pufendorf, Fried believes:

> [T]here simply are no grounds for not extending that conclusion [that making gifts serves individual liberty] to *promises* to make gifts. I make a gift because it pleases me to do so. I promise to make a gift because I cannot or will not make a present transfer, but still wish to give you a (morally and legally) secure expectation.[150]

Fried's focus on the promisor's autonomy highlights those defenses to judicial enforcement that are centered in the promisor's existence as the image of God. His theory does not explain other reasons for nonenforcement of promises equally well. As Fried works his way out from the center of autonomy, he begins to import explanations based on arguments other than autonomy. We see again why examining legal principles from all three perspectives balances the analysis of a legal rule.

D. The Situational Perspective—Civil Jurisdiction Over the Bargained-for Exchange, Plus . . .

It is peculiar that the epitome of the Situational Perspective on jurisdiction—the doctrine of consideration set forth in sections 17 and 71 of the *Restatement (Second) of Contracts*—has few scholarly advocates today. Richard Posner comments:

> The doctrine that a promise, to be legally enforceable, must be supported by consideration may seem at first glance a logical corollary of the idea that the role of contract law is to facilitate the movement of resources, by voluntary exchange, into their most valuable uses. If the promise is entirely one-sided [e.g., a promise of a gift], it cannot be part of the exchange process. But *it is not true that the only promises worth enforcing are those incidental to an exchange.*[151]

Grant Gilmore was even more dismissive of the theory of consideration.[152] Yet, consideration—understood as the bargained-for

---

[149] *Id.* at 38 (footnote omitted).

> The promise must be freely made and not unfair. . . . The promisor must have been serious enough that subsequent legal enforcement was an aspect of what he should have contemplated at the time he promised. Finally, certain promises, particularly those affecting the situation and expectations of various family members, may require substantive regulation because of the legitimate interests of third parties.

Id.

[150] *Id.* at 37 (emphasis in original).

[151] POSNER, *supra* note 90, at 99 (emphasis added).

[152] GILMORE, *supra* note 97, at 76 (footnote omitted).

> Classical theory used consideration as the touchstone for such curious deductions as that offers expressed to be irrevocable were nevertheless

exchange—remains firmly ensconced as a fundamental plank of the law of contracts.

Several arguments have been advanced for why something like consideration is appropriate to mark the boundary between those agreements that are legally enforceable contracts and those that must look to another forum for redress. Professor Lon Fuller's 1941 article, *Consideration and Form*,[153] remains the standard account of the purpose for consideration. Fuller's analysis breaks the doctrine of consideration into two components: substance and form. With respect to the element of form, Fuller observes that consideration serves three valuable functions. The first is evidentiary: "The most obvious function of a legal formality is . . . that of providing 'evidence of the existence and purport of the contract . . . .'"[154] Second, consideration serves a cautionary role "by acting as a check against inconsiderate action."[155] Finally, the doctrine of consideration serves to channel agreements by which parties desire to be bound into easily recognizable forms:

> The thing which characterizes the law of contracts and conveyances is that in this field forms are deliberately used, and are intended to be so used, by the parties whose acts are to be judged by the law. . . . [F]orm offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention.[156]

Fuller's observations about the purpose for the doctrine of consideration ring true.[157] The law should certainly be concerned about the reliability of the evidence of an agreement's existence. The law also has an interest in enhancing the purposefulness of the parties' deliberations. Lastly, a judicial system has an interest in encouraging contracting parties to use a form that demonstrates their consent (or lack thereof) to the use of the civil authority to vindicate their agreement. Yet, it is hardly the case that only bargained-for exchanges

---

> revocable until accepted, that certain modifications of ongoing contracts are ineffective and that discharge of debtors on payment of less than full amount of the debt are not binding on creditors. Each of these propositions, it should be noted, almost immediately generated an almost infinite number of exceptions . . .

Id.

153 *See supra* note 101.

154 Fuller, *supra* note 101, at 800 (quoting 2 JOHN AUSTIN, *Fragments—On Contracts*, *in* LECTURES ON JURISPRUDENCE (4th ed. 1879)).

155 *Id.*

156 *Id.* at 801.

157 Even Samuel Pufendorf acknowledges that Roman law limited enforcement of promises to those made in certain forms to encourage deliberation (cautionary function) and enhance clarity (evidentiary and channeling functions). PUFENDORF, *supra* note 80, at 401.

meet Fuller's criteria for legally enforceable promises, a point which Fuller acknowledges.[158]

The law would be better off if it were to address directly issues of detrimental reliance, illusory promises, mutuality of obligation, the rule that past and/or moral "consideration" is not consideration, the need for separate consideration for an option, and the pre-existing duty rule. Instead of resolving all these questions with the blunt tool of consideration, the law would be healthier if it developed appropriate rules for each set of issues.[159] Nonetheless, the doctrine of consideration could be considered as a rough surrogate for the fundamental question of jurisdiction: For what sorts of agreements *should* the civil government provide a remedy? Perhaps consideration will one day be reformulated on a principled basis to provide a scalpel by which courts can determine which promises fall within the sphere of civil enforcement. The following analysis may point to the direction of that reformulation.

E. Scriptural Resources

1. The Normative Perspective

The Normative Perspective on *civil enforcement* of agreements is not founded simply on the promise. With few exceptions promises should be kept. God will ultimately judge all breaches of promises; as Jesus said: "[E]very careless word that men shall speak, they shall render account for it in the day of judgment."[160] Nonetheless, just as the norm of promise-keeping has biblical justification, so too the Normative Perspective on civil enforcement of agreements must be grounded in the Word of God.

No passage in Scripture answers directly the question of which agreements are subject to enforcement by the civil government. The Bible does, however, clearly identify the State as an authorized agent of the vindication of the presently existing rights to life (and liberty) and property.[161] The Sixth and Eighth Commandments[162] provide that

---

[158] Fuller freely grants that promises inducing injury (detrimental reliance) and promises in response to a moral obligation (unjust enrichment) should also be enforced. Fuller, *supra* note 101, at 810-13.

[159] *See generally* Mark B. Wessman, *Retaining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713 (1996); Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45 (1993).

[160] *Matthew* 12:36.

[161] The Mosaic covenantal administration also sanctioned violations of several other commandments including worshipping false gods, the use of idols, misusing God's name, and desecrating the Sabbath. For reasons beyond the scope of this work, these obligations are not subject to State sanction today. *See generally* Craig A. Stern, *Things*

"[Y]ou shall not murder"[163] and "[Y]ou shall not steal."[164] Immediately after the revelation of the Ten Commandments on Mount Sinai, God went on to provide for judicial remedies for killing (and associated deprivations of liberty) and theft in the Book of the Covenant.[165] Forty years later, Moses spelled out more details regarding the sanctions for interfering with these standing rights in his second address to the people of Israel on the Plains of Moab.[166]

The presence of State-enforced remedies for violations of the rights of life and property opens the door to judicial vindication of *agreements* founded on these rights. On the one hand, if civil government has no jurisdiction over the subject of an agreement, couching the subject in promissory form should not change the legitimate reach of the State. For example, since modern states cannot compel the worship of any god, they should not be able to enforce an agreement to worship a particular god.[167] On the other hand, even if civil government has jurisdiction over an agreement's subject matter, it does not necessarily follow that it has jurisdiction over a promise relating to that subject matter. However, if no promises received judicial protection then the insights of the three perspectives would be diluted. The Normative Perspective on promise-keeping at least suggests some civil sanction for breach; the usefulness of promises as a tool of dominion (the Situational Perspective) would be seriously undermined if no promise received judicial enforcement; and the failure to provide state protection for all promises would undercut the Existential Perspective on human beings as images of God. It is thus reasonable to start with the proposition that all agreements relating to the subject matter of

---

Not Nice: An Essay on Civil Government, 8 REGENT U. L. REV. 1 (1997). The Ten Commandments additionally provide that "[Y]ou shall not commit adultery." *Deuteronomy* 5:18; *Exodus* 20:14. Enforcement of this commandment also received civil sanction in the Book of the Covenant. While I believe the protection of marriage is also within the jurisdiction of the state, I will not separately develop the implications of this jurisdictional grant at this time.

[162] Given my confessional tradition, I use the numbering of the Ten Commandments common to most Protestant and Orthodox Churches. The difference in numbering of the Ten Commandments from the Roman Catholic and Lutheran Churches is immaterial to my analysis.

[163] *Deuteronomy* 5:17; *Exodus* 20:13.

[164] *Deuteronomy* 5:19; *Exodus* 20:15.

[165] *Exodus* 21:12, 14 (giving remedies for murder); *Exodus* 21:16 (giving remedies for deprivation of liberty/kidnapping); *Exodus* 22:1, 4 (giving remedies for theft).

[166] *See generally Deuteronomy* 4:44-28:68.

[167] Other entities, however, may have jurisdiction over such a promise. The church, for example, has ecclesiastical jurisdiction over all sins. The civil magistrate does not have jurisdiction over love and affection: "The same rule holds true today: love and affection are not consideration." Ricks, *supra* note 134, at 111.

civil jurisdiction are *prima facie* also within the scope of civil jurisdiction.

i. Agreements About Property

Contracts concerning sales of goods, conveyances of real estate, and licenses of intellectual property make up a large portion of all contracts. The question of whether promises relating to property should receive judicial sanction depends in the first place on whether private property itself deserves civil protection. If all property were the common possession (or available for common use) of humanity, then the civil government should not enforce contracts treating property as something over which the parties have dominion. Yet the fundamental right to own property is biblical:

> The Ten Commandments sanction private property implicitly and explicitly. God forbids stealing, indeed even coveting, the house, land or animals of one's neighbors (Exod. 20:15, 17; Deut. 5:19, 21; *see also* Deut. 27:17; Prov. 22:28). Apparently Jesus likewise assumed the legitimacy of private property. His disciple Simon Peter owned a house that Jesus frequented (Mark 1:29). Jesus commanded his followers to give to the poor (Matt. 6:2-4) and loan money even when there was no reasonable hope of repayment (Matt. 6:24; 5:42; Luke 6:34-35). Such advice would have made little sense if Jesus had not also assumed that the possession of property and money was legitimate so that one could make loans. . . . [N]ot even the dramatic economic sharing in the first Jerusalem church led to a rejection of private ownership. Throughout biblical revelation the legitimacy of private property is constantly affirmed.[168]

Not only is private property a fundamental biblical right, the passages cited above demonstrate that civil governments should protect it.[169] Thus, given the presumption of judicial enforcement where the subject of an agreement is within the civil jurisdiction, parties to agreements for sale, conveyance or license are entitled to seek the power of the State to vindicate the expectations to property arising under an agreement.

---

[168] RONALD J. SIDER, RICH CHRISTIANS IN AN AGE OF HUNGER 86 (1990) (footnotes omitted).

> The earth is indeed the Lord's, as is all dominion, but God has chosen to give dominion over the earth to man, subject to His law-word, and property is a central aspect of that dominion. The absolute and transcendental title to property is the Lord's; the present and historical title to property is man's.

ROUSAS J. RUSHDOONY, THE INSTITUTES OF BIBLICAL LAW 451 (1973).

[169] *See supra* text accompanying note 164.

ii. Agreements About Services

Agreements for services ranging from painting a house to teaching at a law school make up another large portion of modern contracts. Rooting civil jurisdiction over service contracts in the commandment "you shall not murder," however, may not be self-evident. Consider, however, that a positive restatement of the prohibition of murder is the vindication of life.[170] According to John Calvin, we vindicate life when we:

> Study faithfully to defend the life of [my] neighbor, and practically to declare that it is dear to [me]; for in that summary [*Leviticus* 19:18] no mere negative phrase is used, but the words expressly set forth that [my] neighbors are to be loved.[171]

Life is a prerequisite to the exercise of dominion.[172] In turn, the goal of dominion is to enhance life. Consistent with the foregoing paragraph, the life enhanced through the exercise of dominion should include not only our own but also that of our neighbor. Given the division of labor inherent in the unfolding of the exercise of dominion,[173] the provision of services between persons becomes necessary for the preservation of life. Thus, there is a fundamental and legally enforceable biblical duty to perform agreements to supply and receive services.

There is also a biblical basis for civil jurisdiction over exchanges of services. The texts cited above, granting civil government the authority to punish wrongful deprivations of life and liberty, provide a general

---

[170] *Matthew* 22:34-40.

> [34]But when the Pharisees heard that He [Jesus] had put the Sadducees to silence, they gathered themselves together. [35]And one of them, a lawyer, asked Him *a* question, testing Him, [36]"Teacher, which is the great commandment in the Law?" [37]And He said to him, 'YOU SHALL LOVE THE LORD YOUR GOD WITH ALL YOUR HEART, AND WITH ALL YOUR SOUL, AND WITH ALL YOUR MIND.' [38]"This is the great and foremost commandment. [39]"The second is like it, 'YOU SHALL LOVE YOUR NEIGHBOR AS YOURSELF.' [40]"On these two commandments depend the whole Law and the Prophets."

Id.

[171] JOHN CALVIN, COMMENTARIES ON THE FOUR LAST BOOKS OF MOSES 3:21 (Charles William Bingham trans., (1852), (reprinted 1950) (1563). *See also* THE HEIDELBERG CATECHISM (1563), *reprinted in* THE HEIDELBERG CATECHISM WESTMINSTER SHORTER 50 (CRC Publ'ng 1990) (stating that, "God requires us to love our neighbor as ourselves, to show patience, peace, meekness, mercy, and kindness towards him, and, so far as we have power, to prevent his hurt; also, to do good even unto our enemies."); THE WESTMINSTER SHORTER CATECHISM (1647), *reprinted in* THE HEIDELBERG CATECHISM WESTMINSTER SHORTER (CRC Publ'ng 1990) (stating that "[T]he sixth commandment requireth all lawful endeavors to preserve our own life, and the life of others.").

[172] *See supra* note 59 and accompanying text.

[173] *See supra* note 126 and accompanying text.

basis for judicial enforcement of agreements relating to services.[174] The previous discussion dealing with judicial protection of promises relating to property is also relevant because services are most often promised in exchange for property (e.g., money). Nonetheless, there are also specific Scriptural prescriptions relevant to this topic. *Deuteronomy* 24:14-15 provides:

> You shall not oppress a hired servant who is poor and needy, whether he is one of your countrymen or one of your aliens who is in your land in your towns. [15]You shall give him his wages on his day before the sun sets, for he is poor and sets his heart on it; so that he may not cry against you to the LORD and it become sin in you.

Moses expressly authorizes the exchange of services for pay, and provision is made for performance of the promised payment.[175] Similarly, Jesus remarks, "[T]he laborer is worthy of his wages."[176] And Paul expressly provides that "to the one who works, his wage is not reckoned as a favor, but as what is due."[177] Not only are the fundamental rights to life and the liberty of the use of one's services in exchange for payment biblically based, civil government should protect those rights as part of its mandate under the Sixth Commandment.[178] The general presumption is that judicial enforcement is appropriate where the subject of an agreement is within the civil jurisdiction. In the case of service contracts, there is also a clear scriptural implication that a party providing services pursuant to an agreement is entitled to seek the power of the State to vindicate her expectation to payment. Together, these biblical norms lead to the conclusion that agreements for services are civilly enforceable contracts.

2. The Situational Perspective

The Bible is replete with examples of the use of agreements for the transfer of property. Beginning with Abraham, there are accounts of purchases and conveyances as tools of dominion.[179] For example, Abraham purchased real estate in which to bury Sarah in *Genesis* 23, and Esau sold his birthright in *Genesis* 25. Service contracts receive their first mention in the lengthy account of Jacob and Laban in

---

[174] *See supra* note 165 and accompanying text.

[175] *See also Leviticus* 19:13; *Malachi* 3:5.

[176] *Luke* 10:7.

[177] *Romans* 4:4.

[178] The Hebrew root of the verb translated "oppress" (עָשַׁק, *ṣ'q* cry out, raise a cry of wailing, summon, call together), is used in other contexts where the presence of civil jurisdiction is even more obvious. *See, e.g., Hosea* 12:7; *Leviticus* 19:13.

[179] Abraham is the first person whom the Bible mentions as having "possessions." *See Genesis* 12:5.

Genesis 29-30.[180] In the New Testament, the legitimacy of the power to convey property is assumed,[181] and Paul gives very high status indeed to the inviolability of contracts in *Galatians* 3:15.[182] The Bible thus provides examples of valid transfers of property and services. It also ratifies the importance of promising. These two points combined with the mandate of dominion provide ample support for the conclusion that agreements relating to property and services are judicially enforceable contracts.

God has ordained the State, *inter alia*, to protect the lives and property of its residents. In turn, the State commissions particular individuals to an office to carry out its mandate. Among those offices is the judge. While judges in Hebrew society had a broader range of activity than modern judges,[183] among the tasks that Moses assigned the Israelite judge was to preside over trials.[184] Thus the biblical concepts of office and service[185] are consistent with and fortify the conclusion that God's structure for society includes persons with the specific charge of deciding cases and that the coercive power of the civil authority extends to the results of those decisions.

3. The Existential Perspective

The biblical perspective on humans as images of God is consistent with promising. The scriptural examples of promise and assent confirm the validity of inter-human agreements. And the biblical norms related

---

[180] Some interesting service contracts mentioned in the Bible include service as a family priest, *see Judges* 17:10, and consultation with a prophet, *see 1 Samuel* 9:7-8.

[181] *Acts* 4:32-5:11.

[182] *See supra* text accompanying note 122.

[183] 4 NIDOTTE, *supra* note 24, at 214.

> [The Hebrew verb for judge] [d]escribes a range of actions that restore or preserve order in society, so that justice, especially social justice, is guaranteed. Whether achieved by God (ca. 40 percent of the occurrences) or by a human agent (ca. the other 60 percent), as a continuous activity it can be translated as rule, govern; as a specific activity it can be translated as deliver, rescue, or judge.

Id.

[184] *Deuteronomy* 16:18-20

> You shall appoint for yourself judges and officers in all your towns which the LORD your God is giving you, according to your tribes, and they shall judge the people with righteous judgment. You shall not distort justice; you shall not be partial, and you shall not take a bribe, for a bribe blinds the eyes of the wise and perverts the words of the righteous. Justice, and only justice, you shall pursue, that you may live and possess the land which the LORD your God is giving you.

Id. See also Deuteronomy 17:2-13.

[185] *See supra* text accompanying notes 62-64.

to human liberty and the right to property demonstrate that freedom to contract is in harmony with our creation in God's image.

F. Conclusion

So far, the discussion has emphasized biblical insights on the substantive/jurisdictional aspect of the common law doctrine of consideration. Yet, the formal/prudential concerns of Lon Fuller should not be ignored.[186] It is a relatively straightforward matter for the State to protect present interests in liberty and property. It is more difficult to evaluate claims to *promises* relating to them. A claim arising out of deprivation of a person's possession of property involves judicial evaluation of an existing state of affairs. Such a claim easily falls within the jurisdiction of civil authority as a violation of the prohibition of theft. A claim, however, which arises out of deprivation of a person's *expectation* of possession of property is more difficult to establish. The defendant will still have possession of the property, and the aggrieved party will need to convince the court that the defendant promised possession to her. Promises are generally more ephemeral than possession, and a promise can more easily be made without the thoughtfulness that typically accompanies surrender of possession. Finally, it may also be the case that a promisor does not appreciate that a breach of her promise will subject her to legal liability. Thus, Fuller's analysis of the form of consideration in terms of its evidentiary, cautionary, and channeling functions is properly part of the law of contracts.[187] The common law has conflated the jurisdictional and formal aspects of consideration. While these features should be analyzed separately, the law must, nonetheless, account for both. The relationship between the substantive and formal aspects of contracts can be diagrammed as a truth table as follows:

---

[186] *See supra* text accompanying notes 153-56.

[187] Even Pufendorf agreed that positive law may properly limit enforcement of agreements only to those that meet cautionary, evidentiary, and channeling criteria:

> [T]he reason why the Romans allowed an action only on those promises which were made by stipulation or agreement was not because the law of nature did not hold serious promises binding, but with the object that, by the use of set formulae, men would be made carefully to consider whether it was to their advantage to promise what could not later be recalled. And also that what was promised might be expressed more clearly, for fear some obscurity in their terms might open the way to disagreements.

PUFENDORF, *supra* note 80, at 401; *see also id.* at 700.

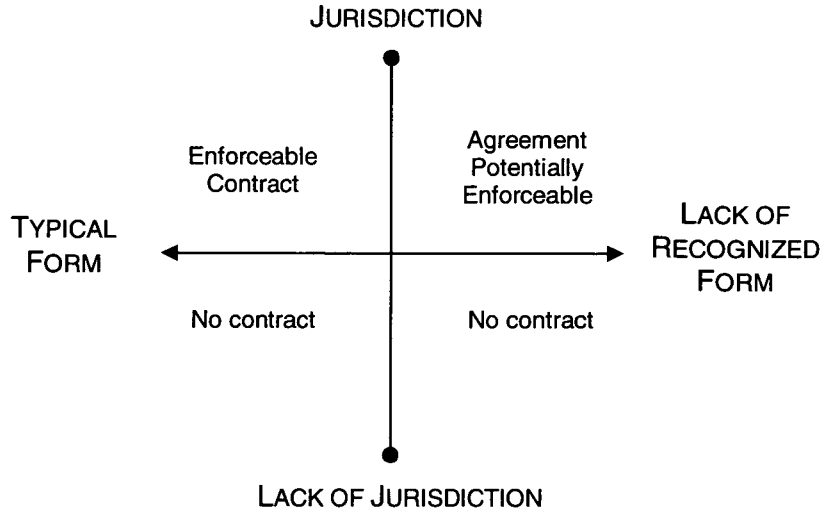

FIGURE 3. THE CONSIDERATION TABLE

Note that the axis representing civil jurisdiction is closed-ended. The norm of civil jurisdiction should not expand or contract. Contractual formalities, however, are grounded in historical situations and, to a lesser extent, tacit individual understandings. Thus, the axis representing the formal aspect of consideration is open-ended.

The question that must next be considered is what form or forms *should* the law require in order to insure that an agreement within the civil jurisdiction receives judicial sanction. The bargained-for exchange currently provides the only manner certain to obtain the protection of the State. Yet, there is no clear reason why this particular form of agreement should be the only one that is privileged *prima facie* as a contract. Agreements for which there are other means by which to meet the evidentiary, cautionary, and channeling functions should receive judicial enforcement equally with bargained-for agreements.

Oliver Wendell Holmes did not develop the modern definition of consideration as only the bargained-for exchange until the late nineteenth century.[188] Limiting consideration to a conventional exchange was not the case in the early days of the common law. In the sixteenth and seventeenth centuries English courts of Common Pleas and the King's Bench enforced many agreements where the consideration was *not* the bargained-for exchange.[189] A broader

[188] *See* Frederick Pollock, Book Review, 30 L.Q. Rev. 128, 129 (1914).

[189] These early English decisions enforced agreements based on promissory estoppel, moral obligations, executors' promises to pay the debts of the decedent, and

definition of "consideration" in terms of jurisdiction and form has historical antecedents as well as theological legs on which to stand. Such a broader understanding would permit modern courts to enforce agreements without subterfuge[190] and make the doctrine of consideration more coherent. At the very least, perhaps as many as a dozen sections of the current *Restatement (Second) of Contracts*[191] relating to enforceability could be replaced by as few as two under a clearer regime of jurisdiction and form:[192]

[HYPOTHETICAL] RESTATEMENT (THIRD) OF CONTRACTS

§ 71. Enforceability of Agreements

Agreements relating to a transfer of an interest in property or provision of services are legally enforceable

(1) if the agreement is the result of a bargained-for exchange; or

(2) if the agreement is accompanied by a formality that manifests an intention to be legally bound, such as:

(a) a seal; or

(b) the recital of a nominal consideration; or

(c) an expression of intention to be legally bound; or

(d) copies of a writing sent to both the promisor and the promisee bearing the signatures of both parties;

(3) unless the agreement was made under such circumstances that the promisee knew or had reason to know that the promisor did not intend the agreement to be legally enforceable.[193]

---

other cases where assent was clear but an exchange was not. *See* Ricks, *supra* note 135, at 113-33.

[190] *See* Wessman, *supra* note 159.

[191] *See, e.g.,* RESTATEMENT §§ 73 (Performance of Legal Duty); 74 (Settlement of Claims); 77 (Illusory and Alternative Promises); 79 (Adequacy of Consideration; Mutuality of Obligation); 82 (Promise to Pay Indebtedness; Effect on the Statute of Limitations); 83 (Promise to Pay Indebtedness Discharged in Bankruptcy); 84 (Promise to Perform a Duty in Spite of Non-occurrence of a Condition); 85 (Promise to Perform a Voidable Duty); 86 (Promise for Benefit Received); 87 (Option Contract); 88 (Guaranty); 89 (Modification of Executory Contract); 90 (Promise Reasonably Inducing Action or Forbearance); 95 (Requirements for Sealed Contract or Written Contract or Instrument).

[192] The following suggested principles are taken with modifications from RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 904-15 (1995) and RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 871-72 (2d ed. 1999).

[193] Samuel Pufendorf would agree with this exclusion from enforceability. *See* PUFENDORF, *supra* note 80, at 393.

§ 90. Enforceability of Promises

A promise is binding if, with the knowledge of the promisor, a promise has induced reliance on the part of the promisee

(1) that is so substantial that it would be unlikely in the absence of the grounds set forth in Section 71; and

(2) the promisee expects the promise to be enforceable and is aware that the promisor has knowledge of the promisee's reliance; and

(3) the promisor remains silent concerning the promisee's reliance.

Should an agreement to make a gift[194] be enforceable under this scenario? The answer depends on two factors. First, is the promise of a gift for property or services? A promise of "love and affection" lies entirely outside the civil jurisdiction but a donative promise of a Honda Accord does not. Second, the questions raised by Lon Fuller's analysis of the the formal aspects of the doctrine of consideration must also be considered. The presence of a seal, the recitation of nominal consideration, an expression of intent to be legally bound, or the creation of a writing signed by both promisor and promisee should be sufficient to verify the evidentiary, cautionary and channeling functions of consideration. In the absence of such forms, however, the State should be unwilling to lend its coercive powers to enforcement of a promise to make a gift, unless there has been such reliance to confirm the consideration functions indirectly.[195] Until the law recharacterizes this doctrine, to be judicially enforceable a contract will continue to require consideration (understood as the bargained-for exchange) or one of the numerous consideration substitutes. Understanding the doctrine of consideration in terms of jurisdiction and form can nonetheless orient further critique and inform legal theory about the question of the reach of the civil authority over promises.

---

[194] An agreement to make a gift may seem peculiar. Yet the common law of property holds that a gift is not completed until it has been accepted. RESTATEMENT (THIRD) OF PROPERTY § 6.1(b) (2003).

[195] *See generally* Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979) (arguing that while there are substantive reasons for enforcing simple donative promises, the general principle of non-enforcement is justified because the process-based problems of enforcement (problems of proof and deliberateness) outweigh the substantive advantages).

THE THREE ANTINOMIES OF MODERN LEGAL POSITIVISM AND THEIR RESOLUTION IN CHRISTIAN LEGAL THOUGHT

Dr. Charles J. Reid, Jr.[1]

I. INTRODUCTION

Christian legal thinkers have shaped and formed Western law from the latter days of the Roman Empire until nearly our own age. Historically, Christianity is of immense importance to the shape and substance of Western law. This great and imposing legal heritage has been the subject of many important historical accounts.[2] Remarkably, the effort to draft a constitution for the new European Union has entailed what can only be called a denial of this deep and powerful historical record.[3] Indeed, what is occurring in Europe is nothing less than a sustained and systematic attempt to erase from official memory the important role played historically by Christianity in the development of Western law.[4]

---

[1] Associate Professor of Law, University of St. Thomas (MN) I would like to acknowledge the thoughtful comments of my colleague and friend Professor Robert J. Delahunty.

[2] To identify some leading works: HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983) (tracing the origin of western law to the papal revolution of the late eleventh and twelfth centuries); HAROLD J. BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION (2003) (considering the importance of the German Lutheran Revolution and the English Calvinist Revolution to the shape of Western law); JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE (1987) (exploring the relationship of Christianity to the formation of Western laws governing marriage and sexuality); JOHN T. NOONAN, JR., BRIBES (1984) (reviewing the contribution of the Judeo-Christian tradition to the shaping of the Western anti-bribery ethic); BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW, 1150-1625 (1997) (examining the Christian origins of Western conceptions of natural and human rights); BRIAN TIERNEY, RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150-1650 (1982) (considering the Christian foundations of Western constitutionalism); and JOHN WITTE, JR., LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION (2002) (examining the importance of the Lutheran reformation to the formation of Western law).

[3] *See* Peggy Polk, *New Constitution Ignores Europe's Christian History*, THE SEATTLE TIMES, Oct. 29, 2004, at A20; *cf.* Kenneth L. Woodward, *An Oxymoron: Europe Without Christianity*, N.Y. TIMES, June 14, 2003, at A15 ("[T]he eliding of the Christian foundations of Western culture is morally and intellectually dishonest.").

[4] The Holy See has begun to warn against the rise of "Christianophobia" in Europe and elsewhere in the world. *See* Anthony Browne, *We are Committing Cultural Suicide*, THE TIMES (London), Dec. 21, 2004, at 16; Jane Lampman, *Matters of Faith*, THE

In the United States, Christian legal scholars who seek to apply self-consciously Christian norms to the resolution of legal problems are accustomed to thinking that their work is marginalized, but their situation is not nearly so dire as that of European scholars confronted with what can best be described as a kind of militant secularism.[5] Even so, American Christians who take their faith seriously, who see it as relevant to questions of law, should take up the task of explaining exactly how it is relevant, how it can help to resolve pressing legal problems. Harold Berman recently observed that "[w]ith rare exceptions, American legal scholars of Christian faith have not, during the past century, attempted to explain law in terms of that faith."[6] As Berman also notes, this situation has begun to change for the better in recent decades, as professional associations and legal academics have come to explain how faith and legal thought can, and must, be integrated.[7]

I view my assignment in these proceedings as building on these recent developments. I would like to use this occasion to discuss some ways in which Christian legal thought might assist in resolving some of the great tensions of contemporary legal philosophy—what members of the legal academy call "jurisprudence."

CHRISTIAN SCI. MONITOR, Dec. 20, 2004, at 12; Jonathan Petre, *Vatican Warns of Christianophobia*, THE DAILY TELEGRAPH, Dec. 7, 2004, at 12.

The election in April 2005 of Pope Benedict XVI has been seen by many as motivated in part by a desire to combat the new European relativism. *See* Anthony J. Figueiredo, *Pope Benedict XVI: The Right Man at the Right Time for the Right Job*, RELIGION NEWS SERVICE, Apr. 25, 2005; Richard Owen, *Pope Sets Stage for Tussle Over Christian and Secular Europe*, THE TIMES (London), Apr. 28, 2005, at 43; and George Weigel, *The Spiritual Malaise that Haunts Europe: Continent Faces a Grim Future If It Turns Its Back on Its Religious Roots*, LOS ANGELES TIMES, May 1, at M5. Weigel writes: "Europe, and especially Western Europe, is suffering from a crisis of civilizational morale." *Id.* European leaders, Weigel notes, "have convinced themselves that, to be modern and free, Europe must jettison its Judeo-Christian heritage . . . ." *Id.* Weigel closes with a somber prediction: "If Europe rejects what Pope Benedict XVI . . . called its 'unrenounceable Christian roots,' the results are likely to be grim for those committed to decency, human rights, and democracy." *Id.*

[5] *See* Robert Louis Wilken, *The Church as Culture*, FIRST THINGS, Apr. 1, 2004, at 31 (describing his encounter with a woman who unabashedly identified herself as a "heathen"). Wilken wrote:

> It is hardly surprising to discover pagans in the heart of Western Europe where Christianity once flourished: a steep decline in the number of Christians has been underway for generations . . . . What surprised me was the absence of embarrassment in her use of the term "heathen." . . . It would seem that if Christianity is ever to flourish again in the land between the Rhine and the Elbe, a new Boniface will have to appear to fell the sacred oaks of European secularism.

Id.

[6] Harold J. Berman, *Foreward* to CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, at xi (Michael W. McConnell et al. eds., 2001).

[7] *Id.* at xii-xiii.

I propose to examine the three great antinomies of modern jurisprudence and how Christian jurisprudence might help to resolve them. Before explaining what these antimonies are, I should offer some explanation into that foreign-sounding word "antinomy." It is not all that strange a word. Most lawyers know that the Greek word for "law" is *nomos*. We have also often encountered the word "antinomian" in our work. To be antinomian is to be opposed to the law.

The word "antinomy" is derived from the same roots but it does not mean opposition to the law; rather, it signifies laws that are opposed to one another. The *Oxford English Dictionary* defines the word as meaning "a contradiction in a law, or between two equally binding laws."[8] The word "antinomy" signifies ""a contradictory law, statute, or principle; an authoritative contradiction."[9] It is my contention that contemporary jurisprudence, by which I mean the legal positivism that has come to prevail especially in the Anglo-American academy, embodies within itself serious contradictions—"antinomies"—which can best be resolved by paying studious attention to some of the teachings of modern Christian jurisprudes.

II. THE ROOTS OF CONTEMPORARY SECULAR JURISPRUDENCE

A. Three Antinomies: The Problem Set Out

Three antinomies have come to shape much modern thinking about the nature and function of law. These might be reduced to a few propositions:

(1) Law consists of commands backed by power, force, and external compulsion. Questions concerning the rightness or justice of those commands are not to be considered when determining whether a particular act of sovereign will should be considered to be law.

(2) Law and morality should and must be viewed as existing as separate and apart from one another. Thus the relative moral content of a given legal provision ought to have nothing to do with the question whether the provision should count as law. This is not to say that moral considerations should be excluded from law-making, only that the moral content of a particular sovereign decree should never be used in determining whether to count a particular sovereign decree as law.

(3) Finally, in determining whether a particular command, rule, or principle should count as law, one is allowed only to consider its formal source. If it emanates from an officially-sanctioned source, such as the legislature or judiciary, and is supported by the Rule of Recognition in a given society or by that society's Grundnorm, then it counts as law. And

---

[8] OXFORD ENGLISH DICTIONARY 371 (1933).

[9] *Id.*

it counts as law, irrespective, once again, of its content. Whether it is wise or foolish, moral or immoral, it nevertheless remains the duly adopted law of the particular jurisdiction.

These are three antinomies in legal analysis that the average lawyer works with every day and that the average student of jurisprudence takes for granted as part of the foundation of her or his view of the legal world. They are antinomies because they seem to be at war with our instincts as to what should or should not count as law. Indeed, they are at war with other deeply-cherished elements of the legal order. Law should be about justice. Power should be in the service of justice. Law and morality should not occupy separate spheres. Law should not only regulate conduct, but should seem to be inherently good. Thus the acts of civil disobedience that challenged the Jim Crow legal regime in the American South laid bare the immorality inherent in that system and revealed Jim Crow to be nothing but state-sanctioned force devoid of justice. The formal source of law, furthermore, should not be all that counts in determining whether a particular sovereign decree counts as law. Should Stalin's law of counter-revolutionary crimes or Hitler's Nuremberg race laws really qualify as law simply because Stalin and Hitler held monopolies of force within their territories? Instinctively, we recoil against these suggestions.

These antinomies did not always exist in Western law. There was a time when these tensions were unknown to legal thinkers. Western jurists once approached jurisprudence with a single integrated vision of justice, morality, and legal order. That these modern oppositions between justice and force, morality and law, had a beginning goes unrecognized and unappreciated by contemporary scholars. That there might exist means by which these antinomies could be brought together and integrated into a single unified whole also goes largely unacknowledged.

These antinomies can be said to form the foundation-stone of modern legal positivism. The term "positive law," of course, is quite ancient. It goes back at least to the medieval scholastic writers. Thomas Aquinas wrote of the positive law, but he did not view it as existing in opposition to a transcendent natural law, but rather in harmony with it. As one scholar of Thomas wrote, "Laws and rights are necessary to particularize the natural law, to apply it, and to determine the manifold relations between private individuals (positive private law) and the relations between the state and its members (positive public law)."[10] In a writer like Thomas Aquinas, indeed, in most Catholic writers, positive and natural law form a single integrated whole.

---

[10] HANS MEYER, THE PHILOSOPHY OF ST. THOMAS AQUINAS 500-01 (Frederic Eckhoff trans., 1944).

I do not propose in this Article to attempt a comprehensive reintegration of modern positivistic jurisprudence within a naturalistic or Christian horizon. That is a large and imposing undertaking best left for another day.

My purpose is much more limited: it is, first, to explore, in a brief and impressionistic fashion, the origin of these three antimonies as a valid means of explaining the nature and function of law. A review of the sources makes its clear that it they have their origin in fairly recent history, if one thinks about Western law as a living tradition that has its origin in the twelfth century.[11] Viewed in this context, modern positivism is a recent phenomenon that can really be traced no farther back than the opening years of the nineteenth century.

Second, I propose to look at Christian thought as an alternative to the regnant jurisprudential assumptions, focusing particularly on the writings of some leading Catholic thinkers. In particular, I will focus on the popes of the last century and a quarter. It should become clear that Christian ways of thinking about the law still retain both vitality and relevance.

B. The Foundations of Classic Positivism

1. John Austin

John Austin (1790-1859) is generally considered, together with Jeremy Bentham, to be the founder of modern legal positivism.[12] Austin, however, at least thought and wrote within a framework still conditioned by Christianity, though the same cannot be said for Bentham. In lecture two of his *Province of Jurisprudence Determined,* Austin thus took up consideration of "[t]he Divine laws, or the laws of God."[13] Divine law, Austin asserted, following classical sources, might be revealed in the Scripture, or it might be "unrevealed."[14] By "unrevealed" law, Austin meant the natural law that is inscribed on the hearts of persons and made known through various "signs" that Austin termed collectively "the light of nature."[15] An important modern commentator on Austin has observed that "Divine law is the stated foundation of [Austin's] ethical

---

[11] The idea that the western legal tradition has a continuous existence stretching back in time to the first flowering of legal culture in the twelfth century is a major theme of BERMAN, *supra* note 2.

[12] *See, e.g.,* ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 3 (1998) ("Classical legal positivism was developed in England by Austin and Bentham . . . .")

[13] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 38 (Wilfrid E. Rumble ed., 1995).

[14] *Id.*

[15] *Id.* at 39.

system."[16] Thus, in many respects, if one read only Austin's treatment of the divine and natural law, one would find oneself moving in terrain that would have been recognizable to a medieval schoolman.[17]

It is not, however, his religious thinking, but his thinking about the secular law that set Austin apart from his predecessors and his contemporaries. To Austin belongs the honor of having been the first to argue, from a self-consciously juridic standpoint, in favor of the antinomies set forth above. Austin, above all, wished to create a "scientific" jurisprudence, modeled on the sort of empirical work being done by early economic writers like David Ricardo and James Mill.[18] He sought to identify those characteristics that made law distinct from other branches of scientific inquiry.[19] He relied, furthermore, on David Hume's sharp distinction between "is" and "ought" to maintain that the question, "what is law?" should be kept separate from the question "what ought the law to be?"[20] Jurisprudence, Austin claimed, was a descriptive, not a prescriptive science, and concerned itself exclusively with the law as it is.[21]

Understood scientifically, Austin stressed, jurisprudence was about the study of commands issued by sovereigns.[22] Law was variously described by Austin as an expression of the will or desire of those with sovereign authority. Austin's choice of language was significant. To scholastic writers, reason played an important part in determining the validity of law—law was valid only to the extent that it conformed with principles of right reason.[23] To Austin, on the other hand, what counted was will, divorced from consideration of reason.[24] Such a bifurcation made sense in Austin's analysis. To introduce considerations of reason

---

[16] Wilfrid E. Rumble, *Divine Law, Utilitarian Ethics, and Positivist Jurisprudence: A Study of the Legal Philosophy of John Austin*, 24 AM. J. OF JURIS. 139, 148 (1979).

[17] Prominent among the Christian thinkers Austin names as an influence is William Paley (1743-1805), who is described as "hav[ing] anticipated Bentham" and whose philosophy "is the best statement of the utilitarianism of the eighteenth century." William Paley, The Internet Encyclopedia of Philosophy, http://utm.edu/research/iep/p/paley.htm. (last visited Sept. 9, 2005).

[18] W. L. MORISON, JOHN AUSTIN 1 (1982).

[19] *Id.*

[20] Richard F. Devlin, *Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education*, 27 QUEEN'S L.J. 161, 174 (2001).

[21] *See* AUSTIN, *supra* note 13, at 59-60 (distinguishing between is and ought in analysis of law and morality).

[22] *Id.* at 21 ("Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*. Or, rather, laws or rules, properly so called, are a *species* of commands.").

[23] Thomas Aquinas thus defined law as "an ordinance of reason for the common good." JOHN FINNIS, AQUINAS 255 (1998).

[24] Thus Austin defined a command variously as an expression of a "wish"" and a "desire." AUSTIN, *supra* note 13, at 21. Austin never considered whether these commands should be measured by some external standard of justice or rightness.

would, on Austin's account, necessarily obscure the sharp lines separating the "is" and the "ought" that should characterize scientifically-grounded jurisprudential inquiry. To ask whether a particular act of sovereign will was reasonable permitted the questioner to read into that law his or her particular values ("oughts"), thereby challenging the sovereign's monopoly over the making of law and also disrupting the central distinction that lay at the heart of the Austinian project.

The sovereign, thus, made its will known through the issuance of commands.[25] Commands, in Austin's mind, were the proper subject-matter of jurisprudence and might qualify as law only if backed by the possibility of real coercive force being employed in the face of disobedience. Commands, Austin asserted, represented one side of a correlative relation, the other side being the real threat of enforcement.[26] Austin labeled this threat a "sanction" and described it as an "evil," which the superior was free to impose on those who defied the superior's will.[27] "Duty," finally, was the obligation to obey the sovereign's will.[28] Stripped of its moral sense, Austin insisted that duty was nothing more or less than "the chance of incurring the evil [of punishment], or . . . the liability or obnoxiousness to the evil."[29] Duty, in short, was the fearful obedience of the law.

"Superiority," which was the source of law so understood, might be understood as the equivalent of the concept of "sovereignty." But this was superiority or sovereignty understood only in terms of the power to issue commands and to inflict evil if its will were disregarded. As Austin put it, "the term *superiority* signifies *might*: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes."[30] Notably absent from this definition was any notion of justice. St. Augustine had declared famously that a state lacking in justice was no different from a gang of highway robbers.[31] This sort of comparison was not possible in Austin's model, in light of his preoccupation with commands, sovereign will, and the use of coercive force as the determinates of what counted as law.

After making the commands of a superior power the focus of his jurisprudential analysis and after premising his theory of law not on

---

[25] *Id.* ("Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*.").

[26] *Id.* at 24.

[27] *Id.* at 24-25.

[28] *Id.* at 25.

[29] *Id.*

[30] *Id.* at 30.

[31] HERBERT A. DEANE, THE POLITICAL AND SOCIAL IDEAS OF ST. AUGUSTINE 126-27 (1963).

considerations of justice but on an appreciation of the importance of force in the enforcement of the law, it was an easy and logical step for Austin to separate law and morality. Indeed, it was improper, Austin asserted, to speak in general terms of the "laws of morality."[32] Austin conceded that some moral rules had their foundation in the law of God and so might thus be considered a type of law.[33] This was not so, however, with a set of principles Austin termed "positive morality."[34] "The positive moral rules, which are laws improperly so called, are *laws set* or *imposed by general opinion* . . . ."[35] General agreement or acceptance by a given community of a set of moral aspirations, on this analysis, could result in nothing greater than a kind of customary morality. Imposed by no superior,[36] lacking the threat of governmental force and the obligatoriness of duty,[37] moral principles stood outside the legal order.[38]

This did not mean that Austin thought morality unimportant. It has been noted that "Austin regarded his discussion of ethical theories as essential for achieving the principal purpose of his book."[39] He entertained the ambition of writing a companion work that would relate jurisprudence to ethical theory, although he never succeeded in producing such a volume.[40] What would prove significant for later generations, however, was the separation that Austin proposed must prevail between law and moral principles.

Austin was similarly moved to distinguish between the source of law and its content. A particular norm's content had nothing to do with whether it qualified as a law. A law's validity depended solely on its enactment by the duly-authorized law-giver. Only commands backed by force counted as law.[41] And these commands, in turn, had to issue from a discernible superior or sovereign, whether that superior stood in the relation of the government to its subjects or citizens; a slave-holder to his

---

32 AUSTIN, *supra* note 13, at 20.

33 *Id.*

34 *Id.*

35 *Id.* at 123.

36 *Id.* at 124-25.

37 *Id.*

38 *Id.* at 125.

> It follows from the foregoing reasons, that a so called law set by general opinion is not a law in the proper signification of the term. It also follows from the same reasons, that it is not armed with a sanction, and does not impose a duty, in the proper acceptation of the expressions. For a sanction properly so called is an evil annexed to a command. And duty properly so called is an obnoxiousness to evils of the kind.

Id.

39 Wilfrid E. Rumble, *Nineteenth-century Perceptions of John Austin*, 3 No. 2 UTILITAS 199, 204 (1991).

40 *Id.*

41 AUSTIN, *supra* note 13, and accompanying text.

slaves; or a father to his children.[42] The rightness or wrongness of the commands was never considered; similarly excluded from analysis was the justice or injustice of particular legal structures, such as slavery. What mattered was the form and source of the law—it had to originate in the command of a superior power capable of backing its commands with the real threat of punishment should the commands not be complied with.

Austin's earliest readers recognized the holistic quality of his work; recognizing, as later readers did not, that Austin strove to produce a work that was simultaneously concerned with legal order and with moral principle.[43] This should not be surprising in light of the emphasis that Austin himself had placed on divine law. A later generation of commentators, however, did not take this aspect of Austin's thought seriously.[44] In the 1870s, Henry Sumner Maine famously observed that Austin's theory of legal positivism was "consistent with *any* ethical theory."[45] Henceforward the "usable" John Austin—the Austin who would be quoted and relied upon by later generations of jurists—would be entirely secular in outlook. It thus came to pass that Maine's interpretation of Austin's applicability came to prevail in the twentieth century, as legal scholarship itself grew into a rigidly secular enterprise.[46]

2. Jeremy Bentham (1748-1832)

If John Austin still operated in a thought-world that could look to the law of God as a valid source of law, this was not the case with

---

[42] *Id.* at 30.

[43] It has been observed that to turn from the first generation of Austin's readers "to modern scholarship is indeed to encounter a very different Austin . . . ." Rumble, *supra* note 39, at 201.

[44] In his 1906 summary of Austin prepared for use in the schools, W. Jethro Brown omitted Austin's lectures on divine law. *See* John V. Orth, *Casting the Priests Out of the Temple: John Austin and the Relation Between Law and Religion*, *in* THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION (A TRIBUTE TO HAROLD J. BERMAN) 229, 236-37 (John Witte, Jr. & Frank S. Alexander eds., 1988). Orth has written that Austin's lectures about "God and divine law—[thus] remained to all intents and purposes interred even after the posthumous editions of his work achieved success." *Id.* at 236.

[45] Rumble, *Divine Law*, *supra* note 16, at 141 (quoting HENRY SUMNER MAINE, LECTURES ON THE EARLY HISTORY OF INSTITUTIONS 368 (7th ed. 1966)).

[46] It has thus been written:

> The modern legal mind with its reluctance to relate any analysis of the law to topics such as theology, finds it difficult to conceive of Austin as a man whose primary concern was not with the minute analysis of legal terms, but rather with their relationship to other elements in a universe dominated by a particular vision of God and the state.

Rumble, *supra* note 39, at 202 (quoting RAYMOND COCKS, FOUNDATIONS OF THE MODERN BAR 49 (1983)).

Jeremy Bentham,[47] who took a far more dubious view of religion. Indeed, concerning Bentham's view of religion, it has been recorded: "Between 1809 and 1823 Jeremy Bentham carried out an exhaustive examination of religion with the declared aim of extirpating religious beliefs, even the idea of religion itself, from the minds of men."[48] Bentham was not a theologian. His thoughts on religious belief were impassioned and hostile, but not especially profound.[49] He viewed the physical world of the here and now as the only reality.[50] He was, in other words, an unremitting materialist who was willing to trust only those things capable of being apprehended by sensory perception. Intangibles that could not be quantified, measured, felt, or seen were excluded as unworthy of serious consideration. They did not constitute a part of external, observable reality, so far as Bentham was concerned.

Bentham's deep animosity toward religion and its supposedly baneful influence on the law is apparent in his treatment of William Blackstone's understanding of the law of nature and the divine law.[51] Bentham described Blackstone's effort to connect the law of nature with divine will as a "smooth string of unmeaning periods."[52] The "mixing [of] theology . . . with jurisprudence" was improper, in Bentham's mind.[53] Bentham sought to establish "how absolutely unserviceable and indeed disserviceable the idea of God is for the purpose of solving any political problem . . . ."[54] Instead of following the "Law of Revelation," Bentham argued that civil polities would be much better served by adhering to "[t]he principle of utility."[55]

Bentham defined utility entirely in materialistic terms. Pain and pleasure, as experienced by the physical senses, were the sole guides to right and wrong.[56] "The *principle of utility*," Bentham asserted,

---

[47] WILFRID E. RUMBLE, THE THOUGHT OF JOHN AUSTIN: JURISPRUDENCE, COLONIAL REFORM, AND THE BRITISH CONSTITUTION 65 (1985).

[48] J.E. Crimmins, *Bentham on Religion: Atheism and the Secular Society*, *in* 2 JEREMY BENTHAM: CRITICAL ASSESSMENTS 113 (Bhikhu Parekh ed., 1993).

[49] Bentham's works, it has been said, "cannot . . . provide anything other than a superficial treatment of the subject of religion." *Id.*

[50] *Id.* at 114. "Bentham could not countenance any common ground between the spiritual world of religion and the perceptible world of physical experience; they are, he believed, mutually exclusive worlds. Indeed, in taking his stand on the apparently solid ground of the latter, he confidently declared the nonexistence of the former." *Id.*

[51] *See* JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES 35-44, 45-52 (Charles Warren Everett ed., 1928) (referring to natural law and divine law respectively).

[52] *Id.* at 42.

[53] *Id.* at 46.

[54] *Id.*

[55] *Id.* at 51.

[56] He stated,

> Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the

"recognizes this subjection [of the mind to the senses]" and makes use of it as a foundation for law and political order.[57] Bentham ridiculed legal orders and systems that looked to alternative principles for guidance: "Systems which attempt to question it [the principle of utility], deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light."[58] Indeed, although Bentham would have eschewed any association with the natural law, he praised the principle of utility in terms that would have been familiar to natural lawyers: "By the natural constitution of the human frame, on most occasions of their lives men in general embrace this principle,[] without thinking of it."[59]

Having rejected the possibility of divine or natural law and having grounded his call for a new jurisprudence on materialist and utilitarian premises, Bentham's definition of law closely mirrored the positivist account that Austin had set forth. Like Austin, Bentham exalted as the chief consideration of jurisprudence the will of the sovereign as expressed through clearly perceived forms and symbols:

> A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the *sovereign* in a state, concerning the conduct to be observed in a certain *case* by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question.[60]

One can identify a substantial similarity between this definition of law and John Austin's understanding. Law, in each understanding, was the imposition of sovereign will. There was no room for the use of reason as a means of challenging the sovereign's "volition."[61] Compliance with the law is the reaction that the sovereign properly expects on the part of those subject to the law. The sovereign's will, furthermore, is given effect precisely because it is backed by a sanction—the "means of bringing to pass" the expected obedience.

> standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne.

JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1 (1948).

[57] *Id.* at 1-2 (footnote omitted).

[58] *Id.* at 2.

[59] *Id.* at 4.

[60] JEREMY BENTHAM, OF LAWS IN GENERAL 1 (H.L.A. Hart ed., 1970).

[61] The word "volition," with its root in the Latin verb "volo," "I will it, or wish it so," conveys Bentham's point that it is the act of willing, not reasoning, that is implicated in the law-making process. On the verb "volo,", consult the OXFORD LATIN DICTIONARY 2098-99 (1982).

One must note what is not present in this definition: there is no mention of any purposes served by the law. Justice, thus, does not figure into his definition. Law is separated from conventional moral considerations. Like Austin, Bentham rigorously separated the "is" from the "ought." Although Bentham devoutly wished law to serve utilitarian principles, law, as a definitional matter, was nothing more or less than sovereign will effectively conveyed to a subject population and backed by force.

This is not to say that Bentham was entirely lacking in a theory of justice, although he subsumed it under his principle of utility. Ideally, a law should have in view "the greatest good of the community";[62] although, Bentham simultaneously conceded that "[i]n many instances it may happen, and that properly enough, that the end which [the legislator] has in view is no other than his own particular benefit or satisfaction."[63] There was, in Bentham's judgment, no necessary connection between law and utility, even though, in the abstract, such a connection was desirable.

The validity of law, furthermore, could be judged only in relation to its formal source. Thus Bentham asserted that law considered "with respect to its source" must be the expression of "the will of the sovereign in a state."[64] Bentham acknowledged that the analysis of where sovereignty lay in a particular state might be quite complex: magistrates, assemblies, and monarchs might all exercise sovereign will in particular political contexts. What made a particular decree law, however, was its issuance by the duly-constituted sovereign of the state.

Here, as in other contexts, Bentham condemned considerations of a transcendent natural law.[65] As with Austin, so also with Bentham: the validity of law was linked with sovereign will and the force that gave that will its effect; justice, understood as the implementation of the utility principle, was desirable but not necessary to a law's validity; law, finally, was separated from traditional notions of morality, which were connected with a discredited notion of natural law.

On the whole, Bentham's work was more sophisticated than Austin's. As H.L.A. Hart remarked, had Bentham published his treatise on law during his lifetime, "it, rather than John Austin's later and obviously derivative work, would have dominated English

---

[62] BENTHAM, *supra* note 60, at 31. Bentham added: "The common end of all laws as prescribed by the principle of utility is the promotion of the public good." *Id.* at 32.

[63] *Id.* at 31.

[64] *Id.* at 18.

[65] Thus in one place Bentham attacked Blackstone for permitting his readers to "wander[] in a labyrinth of rights and wrongs, and duties, and obligations and laws of nature, and other fictitious entities." *Id.* at 3.

jurisprudence."[66] Bentham's discussions of command, of sanctions, and of the other elements of analytical jurisprudence were generally more refined and sometimes significantly more advanced than Austin's account. But with respect to the three antinomies that are the subject of this Article, his work bore a substantial similarity to Austin's. Like Austin, Bentham understood law in terms of state-sanctioned force or compulsion; he similarly severed law "as it is" from considerations of justice. Bentham also rigorously separated law from morality; indeed, he rejected conventional morality, proposing that it be replaced by the utility principle. Finally, Bentham determined the validity of law only in terms of the formal source of law, not its content.

3. H.L.A. Hart (1907-1992)

Herbert Lionel Adolphus Hart, typically known by the abbreviation H.L.A. Hart, was born into a Jewish home in England in 1907.[67] He trained as a scholar of classics and ancient philosophy and showed every promise of becoming a great philosopher even though, in 1932, he opted instead for the life of a chancery lawyer.[68] World War II, however, both interrupted and inalterably changed the course of Hart's life. He went to work for the British intelligence service and, at the completion of the war, chose to pursue a career as an academic philosopher rather than return to his old chancery practice.[69] In 1952, he was invited to assume the chair of jurisprudence at the University of Oxford despite a paucity of published writings to that point in time.[70] In the course of an academic career that would span over thirty years, Hart produced a corpus of work that would have the effect of revising and refining the legal positivism of Austin and Bentham, and of recasting the field of contemporary jurisprudence.

Hart began his great work of jurisprudence, *The Concept of Law*, with a discussion of Austin's command theory of law.[71] Sensitive to the criticism that on Austin's theory one could not distinguish between

---

[66] H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 108 (1982). Bentham's major treatise on law, *Of Laws in General*, "was substantially completed in 1782 but was never published by Bentham and remained unknown until it was discovered by Professor Charles Warren Everett among the Bentham [manuscripts] at University College London in 1939." *See* H.L.A. Hart, *Introduction* to JEREMY BENTHAM, OF LAWS IN GENERAL, at xxxi (1970) (footnote omitted).

[67] NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM 11 (2004). "Both of Herbert Hart's parents came from families which had moved to England from central Europe during the course of the late eighteenth and nineteenth centuries." *Id.* at 12. Lacey notes that because of this background, Hart was never entirely comfortable as a member of the English establishment. *Id.* at 39.

[68] NEIL MACCORMICK, H.L.A. HART 2 (1981).

[69] *Id.*

[70] *Id.* at 2-3.

[71] H.L.A. HART, THE CONCEPT OF LAW 18-25 (2d ed. 1994).

legitimate and illegitimate uses of force, Hart considered the case of a robber who demands that a bank clerk hand over the cash in the till.[72]

Such an order should not be considered a "command" in a legal sense of the word because it lacked the sense of authority and rightfulness that most people associate with the word and concept of "command."[73] Relying on ordinary language theory, which he borrowed from the work of Ludwig Wittgenstein,[74] Hart asserted that the law was distinguishable from the robber's demands because of the acceptance the law received on the part of those governed by it.[75] It was generally agreed that what the bank robber did was wrong, while the state acts rightfully in commanding certain acts be done and others forbidden.[76] It is this general consensus among the ordinary users of language that the word "command" signifies a sense of rightfulness that separates the robber's order from the law of the state. Most citizens, after all, would concede that a particular government behaves rightfully in issuing and enforcing the law. The commands of the law are thus legitimate in a way the demands of a robber cannot be, because the former are accepted as legitimate while the latter are universally condemned.[77]

Hart was thus willing to acknowledge, not that law for its validity must embody and reflect some fundamental principles of justice, but that, for its effectiveness, it must be believed and accepted as just by those subject to it. There was a place in jurisprudential analysis, Hart declared, for the "normative terminology of 'ought', 'must', and 'should',

---

[72] *Id.* at 19.

[73] *Id.* at 20 ("To command is characteristically to exercise authority over men, not power to inflict harm, and though it may be combined with threats of harm a command is primarily an appeal not to fear but to respect for authority.").

[74] *See* MACCORMICK, *supra* note 68, at 15 ("A chief task for philosophy is . . . that of working towards an interpretive understanding of normal human discourse in its normal social settings.").

[75] *Id.* at 34-35.

[76] HART, *supra* note 71, at 57. Hart calls this the "internal aspect of rules."

> There is no contradiction in saying that people accept certain rules but experience no such feelings of compulsion. What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism . . . demands for conformity, and in acknowledgements that such criticism and demands are justified . . . .

Id.

[77] Hart's line of argument smuggles morality into the equation through the backdoor, so to speak. States do not proclaim their law as something indifferent to questions of justice or fairness. Indeed, states assert that their laws are intended to achieve justice or to resolve disputes in a fair and equitable manner. It is in this way that states acquire the legitimacy that allows the populace to grant them the legitimacy needed for survival. This fact establishes a conceptual linkage between the public's belief in the justice of a given legal regime and the legal regime's understanding of its law.

'right' and 'wrong.'"[78] The prevalence of this sort of normative language signaled, for Hart, a "general standard to be followed by the group as a whole."[79]

Despite his acknowledgement that for law to be effective it must at least be perceived to be just and reflect widely-shared conceptions of right and wrong, Hart nevertheless retained the old positivist conception of law. Law was the product of sovereign will, mediated through such conceptions as the Rule of Recognition by which existing laws are shaped into a system and the "rules of change" by which the system of law can be altered in response to changing conditions.[80] Even though he found the question uninteresting, Hart ultimately conceded that "[e]ven in a complex large society, like that of a modern state, there are occasions when an official, face to face with an individual, orders him to do something."[81] In this way, Hart found the old Austinian emphasis on sovereign will, expressed through the use or threat of coercive force, to be an unavoidable feature of the law.

In exploring the relationship of justice and law, Hart conceded wide latitude to cultural relativism. Hart proposed that fairness, the idea that like cases should be decided alike, that laws should be of general applicability, that there should be no discrimination among persons, are what most people think of when they turn their attention to the specialized meaning of justice.[82] In modern Western societies, these principles have been properly understood as condemning racial and religious discrimination,[83] but Hart also acknowledged that "it is certainly possible to conceive of a morality which . . . openly rejected the principle that prima facie human beings were to be treated alike."[84] Thus, while Hart introduced the notion of fairness into his jurisprudence, it was a sense of procedural fairness not bound to any particular notion of substantive justice.[85] Substantive norms of right and wrong, in contrast, were for the particular culture to determine. In short, even though Hart certainly made greater room than Austin and Bentham for a notion of justice as part of his conception of law, this was a conception of procedural justice that might vary widely in its

---

78 *Id.*

79 *Id.* at 56.

80 *Id.* at 94-95.

81 *Id.* at 20.

82 *Id.* at 158-59.

83 *Id.* at 161-62.

84 *Id.* at 162.

85 Hart wrote: "It is therefore clear that the criteria of relevant resemblances and differences may often vary with the fundamental moral outlook of a given person or society. Where this is so, assessments of the justice or injustice of the law may be met with counter-assertions inspired by a different morality." *Id.* at 163.

substantive provisions from one political community or culture to another.

Hart also argued on behalf of the separation of law from morals. In this respect, he viewed his work as being continuous with the great positivists of the nineteenth century, "Bentham and Austin, [who] constantly insisted on the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be."[86] Writing in the shadow of World War II, Hart sought to defend the separation of law and morality from critics, including even those, like the German positivist-turned-natural-lawyer Gustav Radbruch, who had concluded that the Nazis were able to come to power for a time in part because of the acquiescence of a German legal academy whose capacity for outrage had been tamed by too much exposure to legal positivism.[87] He criticized Radbruch specifically for attempting to make the category of law bear more than was possible.[88] Hart feared that merging law and morality would confuse and weaken both categories of thought. Even though an immoral law was still law, Hart concluded, it should not on that account be obeyed.[89] Hart thus recognized the importance of civil disobedience, but unlike those possessed of naturalist inclinations who pledged allegiance to a higher law, he believed that civil disobedience always entailed violations of the law.

Hart specifically took issue with natural law in its various forms and in its various attempts to fuse morality and law. Classically, natural law reflected a theistic view of nature and of the human person that is, "in many ways, antithetic to the general conception of nature which constitutes the framework of modern secular thought."[90] The word "law," when used within this old and debunked framework, carried a fatal ambiguity: it might be "descriptive," in that it purported to set out "the course or regularities of nature;"[91] but it might also be prescriptive, in the "demands" that it made that "men shall behave in certain ways."[92] It

---

[86] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594 (1958).

[87] *Id.* at 617.

[88] *Id.* at 618.

> For everything that [Radbruch] says is really dependent upon an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: "Ought this rule of law to be obeyed?" Surely the truly liberal answer to any sinister use of the slogan "law is law" or of the distinction between law and morals is, "Very well, but that does not conclude the question. Law is not morality; do not let it supplant morality."

Id.

[89] *Id.* at 620.

[90] HART, *supra* note 71, at 186.

[91] *Id.* at 187.

[92] *Id.*

is this confusion of thought, which was a legacy of an older theistic view of the universe, that Austin and Bentham, with their rigorous distinction between law and morals, proposed to clarify.[93] An earlier generation of scholars, influenced variously by Aristotle or by the medieval schoolmen, proposed a natural law grounded on a teleology that understood "the end or good for man . . . as a specific way of life about which, in fact, men may profoundly disagree."[94]

Hart, however, rejected the Aristotelian/scholastic synthesis in favor of the Austinian/Benthamite approach; although, he was willing to entertain minimal natural law grounded on the impulse of most persons to seek their own survival.[95] He was also willing to concede that certain legal systems, in essence, enshrined moral analysis into their fundamental law, as the American legal system had through the invention of substantive due process.[96] Ultimately, however, his jurisprudence relied on a thin conception of the human person that denied the possibility of human transcendence. His frame of reference, in contrast, was wholly modern, secular, and materialistic.[97]

Despite these concessions and qualifications, Hart defended the separation of law and morality as not only a proper intellectual stance, but as a socially beneficial one:

> Hart affirms that natural lawyers' moralization of the concept of law tends either towards a form of extreme conservatism (whatever is law must be moral, therefore all law is morally binding) or towards revolutionary anarchism (since whatever is law must be moral, governments must be disobeyed or even overthrown if what they propound as 'law' is not morally justified). The proper attitude to law is, as against that, one which acknowledges that the existence of law depends on complex social facts, and which therefore holds all laws as always open to moral criticism since there is no *conceptual* ground for supposing that the law which *is* and the law which *ought to be* coincide.
>
> Indeed, as Hart frankly acknowledges at the end of his book the ultimate basis for adhering to the positivist thesis of the conceptual differentiation of law and morals is itself a moral reason. The point is to make sure that it is always open to the theorist and the ordinary person to retain a critical moral stance in face of the law which is.[98]

---

[93] *Id.*

[94] *Id.* at 192.

[95] *Id.* at 192-93. "[O]ur concern is with social arrangements for continued existence, not with those of a suicide club." *Id.*, at 192.

[96] H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 970-71 (1977).

[97] *See, e.g.*, LACEY, *supra* note 67, at 194 (noting that religion did not play a role in Hart's jurisprudence).

[98] MACCORMICK, *supra* note 68, at 24-25 (citation omitted).

In a logical corollary to the emphasis he placed on the need to apprehend the "law as it is," Hart concluded that the validity of legal norms could only be determined by reference to their source. The ultimate "criterion of legal validity or source of law," in Hart's jurisprudence, was the rule of recognition, which gave definition and shape to the law-making authority of a given regime.[99] Different systems might have different rules of recognition—the doctrine of legislative supremacy as practiced in Great Britain, for instance, or the constraints of written constitutions in the American federal system.[100] It is always possible to question the soundness and efficacy of the rule of recognition, Hart conceded.[101] But, Hart emphasized, the rule of recognition remained the only source of valid law within a given jurisdiction.[102] One might object on moral or utilitarian grounds to a law made in accord with a state's rule of recognition, but such objections could not affect the validity of the law.

III. CHRISTIAN LEGAL THOUGHT AND THE RESOLUTION OF THE THREE GREAT ANTIMONIES

Christian legal thought, as an intellectual category, is a broad subject with many dimensions. One might quite properly speak of the Bible and its contributions to the shape of Western law. The Bible, of course, was a fundamental reference point for lawyers, whether they be the common lawyers of the Anglo-American tradition or the canonists whose influence was felt for many centuries across the entirety of western Europe. And the Bible continues to exert great influence today in ways large and small even where lawyers may not notice the influence. To give just one small example: Good Samaritan laws are meant to give legal protection to people following the example Jesus set for His followers with His parable of the Good Samaritan who looked

---

[99] HART, *supra* note 71, at 106.

[100] *Id.*

[101] *Id.* at 107 ("We can ask whether it is a satisfactory form of legal system which has such a rule at its root. Does it produce more good than evil? Are there prudential reasons for supporting it? Is there a moral obligation to do so?").

[102]

> No such question can arise as to the validity of the very rule of recognition which provides the criteria [of validity for other rules in the system]; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way. To express this simple fact by saying darkly that its validity is "assumed but cannot be demonstrated", is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of the correctness of all measurement in metres, is itself correct.

Id. at 109.

after an injured wayfarer he encountered on the highway.[103] It is regrettably fair to say that the modern secular courts that use the terminology and concept of the Good Samaritan probably only rarely think of the New Testament.[104] In the remainder of this article, I will not pursue the sorts of direct biblical influence that we see in the development and adoption of the Good Samaritan laws, even though such a project would be important and interesting in its own right. Rather, I will be concerned with another facet of Christian legal philosophy, namely, the light that modern papal teaching might shed on the three antinomies that I have identified and discussed. Over the course of the last century and a quarter, the papacy has developed a clear and consistent message about the demands of justice and morality in the modern world. The implications of this body of teaching for jurisprudence will be considered.

A. Catholic Theories of the State and Justice

There are, of course, many responses to the three great antinomies outlined above. I shall make particular use of Catholic social thought as a means of developing one line of response. One might start by concentrating on Catholic theories of the relationship of the state to justice. The writers of the high middle ages, scholastics like Peter Lombard and Thomas Aquinas, came to view the state not only in terms of the defense that it might offer against those who would threaten its existence, but as a means of promoting the welfare of its citizens. Medieval writers were conscious of living in a Christian world—the *mundus Christianus*.[105] In such a context it was easy to think of a Christian state, functionally different from the Church but sharing the same broad commitment to justice and virtue. It was similarly easy for medieval thinkers to conceive of themselves as having a dual citizenship—belonging to the Church and to the state.[106] In this context, Christian writers proposed:

---

[103] "The term 'Good Samaritan' derives from a New Testament parable in which a Samaritan was the only passer-by to aid a man who had been left half dead by a group of thieves. *Luke* 10:30-37 (King James)." Velazquez v. Jiminez, 798 A.2d 51, 55 (N.J. 2002).

[104] A Lexis search using the search terms "Jesus" and "Good Samaritan" was able to locate only four cases, in addition to *Velazquez*, 798 A.2d at 55, that drew the connection between modern Good Samaritan statutes and the parable Jesus told. *See* Maynard v. Ferno-Washington, Inc., 22 F. Supp. 2d 1171 (E.D. Wash. 1998); Gibson v. Lee County Sch. Bd., 1 F. Supp. 2d 1426 (M.D. Fla. 1998); Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983); and State v. Hillman, 832 P.2d 1369 (Wash. Ct. App. 1992). In contrast, a Lexis search using only the search term "Good Samaritan," stripped of religious reference points, revealed over 3,000 results.

[105] HEINRICH ROMMEN, THE STATE IN CATHOLIC THOUGHT: A TREATISE IN POLITICAL PHILOSOPHY 532 (1945).

[106] *Id.*

> [A] new concept of the state . . . based upon the theory of natural law independent of ecclesiastical ways of thinking. . . . The state is conceived as a natural intrinsically good form of political, self-sufficient life. It is a perfect society with a proper specific end, the secular common good, and in its proper field it is independent of the spiritual power.[107]

The circumstances that allowed for such a conceptualization—an essential unity of belief and action on the part of believers and the state—was shattered over the course of the early modern and modern periods. And while the shattering of the medieval order was tragic in many respects for Christendom, it has also allowed the Church to see the injustices that had been perpetrated in its name—in inquisitions, pogroms, and the repression of dissenting forms of Christianity.[108]

The pontificate of Leo XIII (1878-1903) stands as a landmark in the recent history of the Church. His pontificate can, with justification, be called the first modern pontificate.[109] It witnessed the first sustained attempt to apply the medieval synthesis to the problems of the modern world—a world characterized by rapid industrialization; massive population shifts caused by immigration and the increasing urbanization of the West; and new concentrations of wealth and power that were able to exploit urban populations as inexpensive and expendable pools of labor.[110] In the face of these developments, Pope Leo reminded his readers in his encyclical *Diuturnum*, issued in 1881, that:

> [I]t is of the highest importance that those who rule states should understand that political power was not created for the advantage of any private individual; and that the administration of the State must be carried on to the profit of those who have been committed to their care, not to the profit of those to whom it has been committed.[111]

---

[107] *Id.* at 536.

[108] *See* POPE JOHN PAUL II, *TERTIO MILLENIO ADVENIENTE* para. 35 (1994). In reflecting on the excesses of the high middle ages, the Holy Father has written:

> Many factors frequently converged to create assumptions which justified intolerance and fostered an emotional climate from which only great spirits, truly free and filled with God, were in some way able to break free. Yet the consideration of mitigating factors does not exonerate the Church from the obligation to express profound regret for the weaknesses of so many of her sons and daughters who sullied her face, preventing her from fully mirroring the image of her crucified Lord . . . .

Id. Cf. INT'L THEOLOGICAL COMM'N, MEMORY AND RECONCILIATION: THE CHURCH AND THE FAULTS OF THE PAST para. 5.3 (1999) (criticizing the Church's medieval reliance on the use of "all arms of force . . . in the repression and correction of errors").

[109] See the important summary of Leo XIII's character and accomplishments in OWEN CHADWICK, A HISTORY OF THE POPES 1830-1914, at 278-331 (1998).

[110] A comprehensive and classic study of these phenomena in the context of nineteenth-century England is E.P. THOMSON, THE MAKING OF THE ENGLISH WORKING CLASS (1963).

[111] POPE LEO XIII, *DIUTURNUM* para. 16 (Paulist Press trans. 1942) (1881). Leo expressed concern about the "unbridled license" that might follow should states and

Ten years later, in his encyclical *Rerum Novarum*, Pope Leo added substantive detail to his teaching on the responsibility of the modern state to see to the demands of justice.[112] In this encyclical, Leo confronted head-on the crisis of late-nineteenth-century industrialization—the emergence of large pools of capital controlled by magnates with little in the way of social conscience, on the one hand, and large masses of urban poor, whose services could easily be exploited, on the other.[113] It was an era of laissez-faire economics, characterized by long hours, low pay, and child labor.[114] It was also an age of revolutionary ferment, as Marxists and socialists of various stripes pressed for revolution, agitated against the institution of private property, and promised the working classes a future utopia without distinction of class or caste.[115]

Responding to this economic, political, and spiritual crisis, Leo admonished that alleviation of this sort of suffering required that church and state recognize their proper roles and spheres of authority.[116] The Church, for instance, must not be "so preoccupied with the spiritual concerns of her children as to neglect their temporal and earthly interests."[117] The Church was obliged to intervene directly where it could so as to relieve the suffering of the poor.[118] In taking action, in seeing to the material requirements of those in need, the Church did nothing more than follow the example of the earliest Christian community as depicted

---

societies deny the centrality of God in the governance of the polity. *Id.* at para. 23. He feared in particular "Communism, Socialism, Nihilism, hideous deformities of the civil society of men . . . ." *Id.*

[112] On the background to this encyclical, see JOE HOLLAND, MODERN CATHOLIC SOCIAL TEACHING 107-96 (2003).

[113] The encyclical has often been called "the Magna Charta of Social Catholicism." *Id.* at 176. The Latin term *De Rerum Novarum* is translated literally as "of new things." The "new things" referred to by the encyclical were the changed conditions brought about by the Industrial Revolution. *Id.*

[114] Child labor in industrial occupations in France, one of the countries with which Leo was most concerned, was common in industrial occupations in the latter half of the nineteenth century and was met by a series of legislative acts in the 1870s. A law of 1874 limited the number of hours children between sixteen and twenty-one years of age might work. *See* COLIN HEYWOOD, CHILDHOOD IN NINETEENTH-CENTRURY FRANCE: WORK, HEALTH, AND EDUCATION AMONG THE 'CLASSES POPULAIRES' 264 (1988). The 1874 law was superseded by more comprehensive legislation in 1892. *Id.* at 318. Leo's encyclical, clearly, was both shaped by and responsive to the climate of opinion in Europe in the late nineteenth century. The United States, of course, had its own problems with child labor at this time. *See generally*, HUGH D. HINDMAN, CHILD LABOR: AN AMERICAN HISTORY (2002).

[115] ARTHUR ROSENBERG, A HISTORY OF BOLSHEVISM: FROM MARX TO THE FIRST FIVE YEARS' PLAN 1-18 (1965).

[116] Altogether, Pope Leo XIII issued ten encyclicals that collectively reflected his "grand design" for the family, for politics, and for just economic relations. *See* HOLLAND, *supra* note 112, at 146-147.

[117] POPE LEO VIII, *RERUM NOVARUM* para. 28 (1891).

[118] *Id.* at para. 29.

in the *Acts of the Apostles*.[119] The Church, furthermore, as the principal expositor of Christian morality, should elucidate the principles by which responsible officials might take further action to relieve the crisis.[120]

But the state also had responsibilities. Indeed, the crisis has been brought about in part because of failures on the part of the state: "[T]he ancient workingmen's guilds were abolished in the last century, and no other protective organization took their place. Public institutions and the laws set aside the ancient religion."[121] The state now had the responsibility to restore the imbalance and to return to the basic principles of the common good. And Leo had more than mere slogans in mind when he considered the content of the common good. Indeed, he set forth a deep and rich notion of substantive justice to which he expected the state to conform:

> The foremost duty . . . of the rulers of the State should be to make sure that the laws and institutions, the general character and administration of the commonwealth, shall be such as of themselves to realize public well-being and private prosperity. . . . Now a State chiefly prospers and thrives through moral rule, well-regulated family life, respect for religion and justice, the moderation and fair imposing of public taxes, the progress of the arts and of trade, the abundant yield of the land—through everything, in fact, which makes the citizens better and happier. Hereby, then, it lies in the power of a ruler to benefit every class in the State, and amongst the rest to promote to the utmost the interests of the poor; and this in virtue of his office, and without being open to suspicion of undue interference—since it is the province of the commonwealth to serve the common good. And the more that is done for the benefit of the working classes by the general laws of the country, the less need will there be to seek for special means to relieve them.[122]

In that paragraph, one sees the connections that twentieth-century Catholic thinkers would come to draw between law and justice. Yes, the strict positivist might rejoin: it is possible to separate law and justice. But in reply the believer might note that the separation of law and justice will ultimately result in failure: the state will fail in its responsibilities to its citizens, and the public might turn to revolutionary utopianism out of desperation. Law and justice are not only connected at the level of abstract principle, but, Leo made clear, at the level of concrete proposals. The State that treats its populace fairly, that builds up public institutions, that promotes an equitable legal order will command the respect of its people and thrive in the long run. A state that fails in these responsibilities is, on the other hand, ripe for ruin. In

---

[119] *Id.*

[120] *Id.* at paras. 19-21, 23-25.

[121] *Id.* at para. 3.

[122] *Id.* at para. 32.

the revolutionary context of 1891, Leo's promise that respect for the common good had practical benefits for state and civil society carried real resonance with his audience.

Catholic thinkers would come to understand *Rerum Novarum* as the starting point of a set of ideas that would be grouped together under the rubric of the "social teaching of the Church." Popes came to mark various anniversaries of *Rerum Novarum* by issuing their own encyclicals, expanding upon and deepening Leo's original insights, exploring the integral connections between law, the state, and justice in the modern world.

Thus, Pope Pius XI, addressing a world gripped by economic depression on the fortieth anniversary of *Rerum Novarum*, reaffirmed that "the very structure and administration of the State" must promote well-being and the common good.[123] Pius applauded the emergence of a complex body of employment law that sought "the protection of life, health, strength, family, homes, workshops, wages, and labor hazards . . . ."[124]

Writing in 1961, seventy years after *Rerum Novarum*, in the face of the competition between capitalist and communist economic orders, Pope John XXIII elucidated a complicated set of requirements that individual states and the international order were to satisfy in order to ensure the promotion of the common good.[125] John XXIII, like his predecessors,

---

[123] POPE PIUS XI, *QUADRAGESIMO ANNO* para. 25 (1931) (quoting POPE LEO VIII, *supra* note 117 at para. 19). The title of the encyclical, "*Quadragesimo Anno*"—"On the Fortieth Year"—was meant to call to mind Leo's earlier encyclical.

[124] *Id.* at para. 28.

[125] Pope John wrote:

> Any adjustment between wages and profits must take into account the demand of the common good of the particular country and of the whole human family.
>
> What are these demands? On the national level they include: employment of the greatest possible number of workers; care lest privileged classes arise, even among the workers; maintenance of equilibrium between wages and prices; the need to make goods and services accessible to the greatest number; elimination, or at least the restriction, of inequalities in the various branches of the economy—that is, between agriculture, industry and services; creation of a proper balance between economic expansion and the development of social services, especially through the activity of public authorities; the best possible adjustment of the means of production to the progress of science and technology; seeing to it that the benefits which make possible a more human way of life will be available not merely to the present generation but to the coming generations as well.
>
> The demands of the common good on the international level include: the avoidance of all forms of unfair competition between the economies of different countries; the fostering of mutual collaboration and good will; and effective co-operation in the development of economically less advanced communities.

POPE JOHN XXIII, *MATER ET MAGISTRA* paras. 78-80 (1961).

envisioned a social order governed by law and backed by a powerful conception of justice. To John, Pius, and Leo, the kind of separation of justice from law contemplated by positivist jurists was fraught with practical and theoretical danger.

The twentieth-century popes did not only call for the creation of substantively just legal institutions, but were also quick to condemn wars and regimes that denied fundamental principles of justice. Pope Benedict XV, elected pope in the fall of 1914,[126] a few weeks after the outbreak of World War I, dedicated his pontificate to the cause of a peace that respected Christian conceptions of justice and right order.[127] Writing in November, 1914, Pope Benedict condemned the disappearance of Christian virtue among the combatants of Europe. The loss of the Christian love that transcended borders and boundaries and allowed for the recognition of the humanity of the other permitted the fratricide that was the Great War.[128] Writing three weeks after the Armistice that closed the War's hostilities, on December 1, 1918, Pope Benedict expressed his hope for "true peace founded on the Christian principles of justice."[129] In an encyclical issued in May, 1920, Benedict warned that peace among nations required both respect for justice and for principles of Christian charity. He urged the "pardon of offences and the fraternal reconciliation of . . . peoples."[130]

By the early 1930s, the one-sided "victor's peace" that ended World War I had broken down. Fascism rose to dominate the government in Italy, while Adolph Hitler and his Nazi Party seized full power in Berlin in 1933. In response to these grave threats to world order, Pope Pius XI issued a series of encyclicals. In *Nova Impendet*, published in November, 1931, Pius feared the "insensate competition in armaments" then emerging in Europe.[131] Six months later, in his enclycical *Caritate Christi Compulsi*, Pius returned to the theme of social justice: economic injustice, hatred of religion, the rise of totalitarianism all threatened to destroy "the Divine Laws, which are the standard of all civic life and

---

[126] On the election of Pope Benedict XV, *see* FRANCIS A. BURKLE-YOUNG, PASSING THE KEYS: MODERN CARDINALS, CONCLAVES, AND THE ELECTION OF THE NEXT POPE 11-16 (1999).

[127] Pope Benedict proposed a peace plan in 1917 that was ultimately rejected by the great powers fighting World War I. *Id.* at 16. Under Pope Benedict's direction, Catholic organizations sought to provide assistance to victims of the conflict and also saw to the just treatment of prisoners of war on all sides. *See* JOHN F. POLLARD, THE UNKNOWN POPE: BENEDICT XV (1914-1922) AND THE PURSUIT OF PEACE 112-16 (1999).

[128] BENEDICT XV, *AD BEATISSIMI APOSTOLORUM* para. 3 (1914).

[129] BENEDICT XV, *QUOD IAM DIU* para. 2 (1918).

[130] BENEDICT XV, *PACEM, DEI MUNUS PULCHERRIMUM* para. 15 (1920).

[131] POPE PIUS XI, *NOVA IMPENDET* para. 8 (1931). Pius feared that in the context of the Great Depression this was a misdirected squandering of public resources "diverting large sums of money from the public welfare . . . . " *Id.*

culture."[132] And in March, 1937, with war in Europe imminent, Pius XI wrote to the bishops of Germany:

> Whoever exalts race, or the people, or the State, or a particular form of State, or the depositories of power, or any other fundamental value of the human community—however necessary and honorable be their function in worldly things—whoever raises these notions above their standard value and divinizes them to an idolatrous level, distorts and perverts an order of the world planned and created by God . . . .[133]

The state, the "depositories of power" on this analysis, could not be separated from the human community or the cause of justice without grave social consequences. And Pius XI needed to look no farther than events north of the Alps as an example of how such a separation might play out.

The Second Vatican Council's teaching on the responsibility of the state to see to justice and the common good is a natural development and outgrowth of this formidable body of papal teaching. The political community exists, the Council taught:

> [F]or the common good; this is its full justification and meaning and the source of its specific and basic right to exist. The common good embraces the sum total of all those conditions of social life which enable individuals, families, and organizations to achieve complete and efficacious fulfillment.[134]

Do these documents teach that law and justice must, as a matter of logical necessity, be connected? Not in so many words. They do teach, however, in clear tones that echo with the history of the twentieth century, that the practical separation of law from justice can lead to devastating social consequences. Perhaps as a matter of neat syllogistic reasoning, one might succeed in separating justice from law and in compelling obedience through force; as a matter of human reality, however, the implementation of such a program will result in the ruination of human communities. And this, in turn, raises the question whether a jurisprudence that views such a separation as analytically desirable truly reflects the human condition or assists in its development.

B. The Fusion of Law and Morality in Natural Law

Natural law is a wide and capacious concept. As with the relationship of law and justice, so also with the natural law, it is best to be brief and impressionistic. Natural law has been associated with

---

[132] POPE PIUS XI, *CARITATE CHRISTI COMPULSI* para. 4 (1932).

[133] POPE PIUS XI, *MIT BRENNENDER SORGE* para. 8 (1937).

[134] SECOND VATICAN COUNCIL, *GAUDIUM ET SPES* para. 74 (1965). All quotations from Second Vatican Council documents used here and elsewhere in this Article are from the standard English translation found in VATICAN COUNCIL II: THE CONCILIAR AND POST-CONCILIAR DOCUMENTS (Austin Flannery, O.P., ed. and trans., 1975).

Christianity, especially western Catholicism, but the idea that the natural order embodied and reflected norms for the right living of human life is at least as old as the Greek *polis*. "Plato took the widest possible view of law. He held that it was a product of reason and he identified it with Nature itself."[135] Aristotle grounded his vision of natural law on a powerful teleology—the world and all within it was essentially purposive.[136] All things aimed at the achievement of their naturally-endowed purposes.[137] Human life was no different—the purpose of the human person was the achievement of life lived well and virtuously in the context of the Greek city-state.[138] Natural law, which Aristotle analogized to such natural forces as fire, was an objective guide to the accomplishment of this good life, which Aristotle taught might "be revealed by a process of reason and observation."[139]

Christian writers divinized the Greco-Roman conception of the natural law. This divinization occurred as early as the New Testament, when St. Paul wrote of non-Christians who do not have the Gospel to follow but yet follow a law "inscribed on their hearts."[140] By the high middle ages, a specifically Christian content came to be introduced into the natural law.[141] The twelfth-century canonist Gratian, who was responsible for the creation of the systematic discipline of canon law, equated the natural law to the Golden Rule expressed by Jesus in the New Testament: Gratian's opening dicta in his *Decretum* declares: "Humankind is governed by two, namely, natural law and custom; the law of nature is that which is contained in the law and Gospel, by which one is commanded to do unto others that which one wishes done to oneself, and is prohibited from inflicting on others that which one does not wish done to oneself."[142]

Not only at the level of general principle, but even at the level of specific content, natural law came to be associated with specifically Christian teachings and commands. One might consult the thirteenth-century canonist Hostiensis (c. 1200-1271). His distinction between positive law and natural law was one that might resonate with jurisprudes today: In the realm of positive law, Hostiensis noted, it is often true that "will stands for reason," by which he meant that earthly rulers grounded their law on exertions of raw power, not on the reason

---

135 HUNTINGTON CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 29 (1949).

136 WAYNE MORRISON, JURISPRUDENCE: FROM THE GREEKS TO POST-MODERNISM 41-42 (1997).

137 *Id.* at 42.

138 *Id.* at 44-45.

139 *Id.* at 49.

140 *Romans* 2:14-15.

141 MICHAEL BERTRAM CROWE, THE CHANGING PROFILE OF THE NATURAL LAW 72-110 (1977).

142 GRATIAN, *DECRETUM* D.a.c, d. 1.

that belonged to natural law.[143] Natural law, however, operated on different premises. Hostiensis distinguished between two types of natural law—"the first was that common to man and beast alike, the second that which was unique to rational creatures."[144] This second category, the rational natural law, was specific to human persons who could grasp its essential demands through their use of reason. Hostiensis used this latter category to argue for specifically Christian moral insights, such as the natural-law requirement that marriage be lifelong and monogamous.[145]

In this way, natural law came to be closely associated with Christian revelation. Legal positivists, such as Bentham and Hart, as noted above, relied on the distinction between is and ought to reject theistic conceptions of natural law.[146] Equating morality with Judeo-Christian principles, H.L.A. Hart argued that it was much healthier, for both the cause of law and the cause of morality, to keep the two categories of thought separate and distinct.[147]

But is the "is/ought" distinction really as efficacious as the positivists believe? Can the "is" and the "ought" be kept in separate compartments, where each can be analyzed free of the contamination, so to speak, of the other? Lon Fuller answered these questions famously when he argued that in all human artifice, even of a purely mechanical nature, the "is" and the "ought" are necessarily fused.[148] Consider, for instance, a steam engine:

> [A]ssume that we have before us an assemblage of wheels, gears, and pistons, and that the question is whether this assemblage *is* a steam engine. This question cannot be answered without regard to another question: whether the assemblage can make steam and make moving parts move by steam pressure, a notion of what ought to be. The assemblage will count as a steam engine if the assemblage (the "is") at least minimally serves the creator's purpose of making steam (the "ought").[149]

---

[143] HOSTIENSIS, *LECTURA* X.4.17.13, v. testamento. On the history of the phrase *pro ratione voluntas* ("will standing for reason"), *see* KENNETH PENNINGTON, POPE AND BISHOPS: THE PAPAL MONARCHY IN THE TWELFTH AND THRITEENTH CENTURIES 17-20, 34-38 (1984).

[144] CHARLES J. REID, JR., POWER OVER THE BODY, EQUALITY IN THE FAMILY: RIGHTS AND DOMESTIC RELATIONS IN MEDIEVAL CANON LAW 77 (2004).

[145] *Id.*

[146] *See supra* notes 47-89 and accompanying text.

[147] *See supra* notes 86-102 and accompanying text.

[148] Fuller distinguished between things occurring naturally and things brought into being through human invention. "Pebbles along a stream and pieces of soil are mere things. They are not human inventions informed by anyone's conceptions about what ought to be." ROBERT S. SUMMERS, LON L. FULLER 24-25 (1984).

[149] *Id.* at 25. An objection might be raised: Is a malfunctioning steam engine still a steam engine? The analogy seems clear: a bad law might nevertheless be a valid law. An answer might take the following form: a malfunctioning steam engine can still be

"Is" and "ought," Fuller asserted, formed an "integral reality," whether the work of artifice under consideration was a feat of engineering, such as a steam engine, or a statute, or a judicial opinion.[150] On this analysis, a central tenet of positivism—the separation of law as it is from the value it reflects—breaks apart. All law is essentially purposive in the sense that it aims to promote certain goals or types of conduct as normative, or good; and to prohibit other types of conduct as dysfunctional, or bad.

This point becomes even clearer when it is realized that all law necessarily teaches certain values. In a searching analysis of the ante-bellum Virginia slave statutes, John Noonan identified any number of values that that law protected and conserved. These were not, of course, the sorts of values that any legal system should aspire to: the inhumanity of the African-Americans held in involuntary servitude was one aspect, of course, but so also were other values, such as the sanctity of private property as opposed to basic respect for persons.[151] Such an analysis of the "oughts" served by a particular legal framework need not be confined to statutory schemes that are odious in nature. A careful analysis can lay bare the essential values of nearly every area of law one can think of. The criminal law clearly serves to conserve such values as

---

considered a steam engine, *up to a point*, in the same way that a bad law can still be considered a law, up to a point. But at a certain point, a line is crossed where the artifact in question—be it steam engine or statute—simply ceases to be recognizable as a steam engine or law.

Thus consider the following: Suppose an old boiler is converted into a decorative planter and was intended to serve as the centerpiece of a thematically-designed restaurant. While the boiler/planter might once have been a steam engine, it would cease to serve any of the functions typically associated with being a steam engine. It has become something else—a decoration, a centerpiece at a restaurant, not a steam engine. It has come to serve other purposes. The same is true of other human artifacts, such as laws: thus a law might achieve such unimaginably wicked results, that one ceases to call it a law and begins to call it by other names—instruments of terror perhaps, or the fiats of a dictator.

The comparison might be extended: So also, at a certain point, a steam engine might simply have fallen into such an extreme state of disrepair or desuetude, that we might conclude that it could not possibly function as a steam engine. The same again, is true of other human artifacts, such as laws: a law might have fallen into such neglect or desuetude that we are compelled to conclude that it cannot function as a law. No one, for instance, believes that Hammurabi's Code remains valid law. It might stand as a wonderful monument to the legal history of the world, but we are not governed by its provisions.

150

> For example, not just anything that falls from the collective lips of legislators, however solemnly pronounced and however procedurally correct, can qualify as statutory law. To begin with, it must have a substantive purpose or purposes. A putative statute not informed by some such authoritative conception of what ought to be, would not be a rule of law.

Id.

151 JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 35-43 (2002).

respect for the life and limb of others. The law of torts teaches care in conduct affecting others' interests. Even the great social welfare statutes teach many important lessons about public responsibility toward those least able to see to their own needs.[152] It is not surprising, therefore, that Thomas Aquinas taught that "[t]he proper effect of law is to lead its subjects to their proper virtue: and since virtue is *that which makes its subject good*, it follows that the proper effect of law is to make those to whom it is given, good, either simply or in some particular respect."[153]

C. Personhood and the Law

John Noonan has called attention to a remarkable oversight in modern analytical jurisprudence: the relative neglect of persons when speaking about the nature and function of law. Noonan makes his point by imagining "a Conference on the Study and Improvement of Railroads."[154] One expert after another testifies to different aspects of the proper way to run a railroad: one should focus on the process, one expert intones; another speaks about the master plan by which the railroad is run; yet another speaks about the lay-out of the track.[155] And on it goes until an on-looker asks about the failure of any of the experts to talk about the importance of passengers to the system.[156]

Arguments on behalf of the separation of the validity of law as distinguished from its content have the feel about them of Judge Noonan's imagined Conference on the Improvement of Railroads. Must the only determinant of law's validity to be the law-making organs of the state? Must the Nuremberg race laws of pre-World War II Nazi Germany count as law because of their source in the law-making power of the Nazi state? Is the state the final arbiter of right and wrong? Is the state the sole source of human rights? Should not law conform in some respect to the basic attributes of human nature? If the law really is about doing justice, if it inevitably embodies and teaches certain values while rejecting others, then perhaps we cannot neatly separate the source of law's validity from the soundness of its content.

Again, one might point to the Church's social teaching as a means of exploring this issue. There is the steady development of a body of principles that challenges states to satisfy the basic requirements of natural law under penalty of losing their very legitimacy. The Church has taken these steps over the course of the last century by integrating

---

[152] MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 101-08 (1991).

[153] CHARLES RICE, 50 QUESTIONS ON THE NATURAL LAW 80 (1995) (quoting THOMAS AQUINAS, *SUMMA THEOLOGICA* I, II, Q. 92, art. 1).

[154] NOONAN, *supra* note 151, at 9.

[155] *Id.*

[156] *Id.* at 10.

respect for persons within its teaching on natural law. This process is detectible as early as encyclicals like Leo XIII's *Rerum Novarum*. In justifying the natural right of property, Leo looked to the basic attributes of human personhood: the human person is confronted with certain economic needs and must be allowed to hold property "in stable and permanent possession."[157] Through reason, the human person may make sound and good use of the things he owns.[158] The person's right to possess, use, and enjoy the goods of the earth, Leo continued, preceded the state itself and was grounded in the nature of the person as a creature of God.[159]

Pius XI continued this line of reasoning in *Quadragesimo Anno*. "[T]win rocks of shipwreck must be carefully avoided," Pius wrote, by which he meant an extreme individualism that tended to "deny[] or minimiz[e] the social and public character of the right to property," on the one hand, and the complete denial of the right of private property, on the other.[160] While it belonged to the state to regulate this fundamental natural right, Pius stressed that "[t]he natural right . . . both of owning goods privately and of passing them on by inheritance ought always to remain intact and inviolate, since this indeed is a right that the State cannot take away."[161] Pius further proposed, as a principle of governance, a set of ideas that would come to be labeled "subsidiarity."[162] As he had with private property, Pius grounded subsidiarity on human nature itself: "[I]t is gravely wrong," he wrote, "to take from individuals what they can accomplish by their own initiative and industry and give it to the community."[163] Allowing room for a wide variety of political organizations, Pius stressed that all political orders must recognize and accommodate the basic freedom of the human person to associate with others.[164]

In this way, Leo and Pius articulated basic natural law principles conformable to the character of the human person and against which the ultimate validity of the human law might be judged. Pius XI allowed wide latitude for the prudential judgments of governmental leaders in satisfying these basic principles, but their total denial resulted in nothing less than invalid acts on the part of state leaders. Subsequent

---

157 POPE LEO XIII, *supra* note 117, at para. 6.

158 *Id.*

159 *Id.* at para. 7 ("Man precedes the State, and possesses, prior to the formation of any State, the right of providing for the substance of his body").

160 POPE PIUS XI, *supra* note 123, at para. 46.

161 *Id.* at para. 49.

162 *Id.* at paras. 79-80.

163 *Id.* at para. 79. Pius completed the thought: "[S]o also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do." *Id.*

164 *Id.* at para. 87.

church teaching developed these insights into a set of natural-law principles that were responsive to the essential character of the human person and that judged the actions of states accordingly.

In a period of about twenty years, from the late 1930s to the late 1950s, one sees a series of encyclicals that did not shy away from condemning entire states for their denial of the fundamental attributes of personhood. Pius XI was unsparing in his condemnations of Nazism.[165] Natural law, Pius wrote, was the ultimate standard by which the positive law of contemporary regimes must be judged, and Hitler's regime fell grievously short of the mark:

> Such is the rush of present-day life that it severs from the divine foundation of Revelation, not only morality, but also the theoretical and practical rights. We are especially referring to what is called the natural law, written by the Creator's hand on the tablet of the heart (*Rom.* 2:14) and which reason, not blinded by sin or passion, can easily read. It is in the light of the commands of this natural law, that all positive law, whoever be the lawgiver, can be gauged in its moral content, and hence, in the authority it wields over conscience. Human laws in flagrant contradiction with the natural law are vitiated with a taint which no force, no power can mend.[166]

Because of its grounding in nationalism, racism, and religious hatred, Pius XI concluded that the Nazi government of Germany fell far short of the mark in its denial of basic human rights and of human nature itself.

Pius XII, whose conduct in World War II has come in for fundamentally unjust criticism,[167] was steadfast in his condemnations of communism as falling short of minimal standards of justice.[168] Writing in 1950, Pius XII condemned attacks on the Church in communist lands, seeing in them an assault on the foundations of the natural law and the believer's quest for God.[169] In 1956, the Soviet Union brutally repressed Hungary's attempt to break free of the Soviet axis. Defending the "rightful freedom" of the Hungarian people to be free of such domination, he condemned the Soviet regime and its rulers as liable to divine justice

---

[165] *See generally* POPE PIUS XI, *supra* note 133. *Cf.* ROBIN ANDERSON, BETWEEN TWO WARS: THE STORY OF POPE PIUS XI (ACHILLE RATTI) 1922-1939, at 84-88 (1977) (providing historical background to this encyclical).

[166] POPE PIUS XI, *supra* note 133, at para. 30.

[167] Ralph McInerny has written a scathing critique of the campaign against Pius XII. *See generally* RALPH MCINERNY, THE DEFAMATION OF PIUS XII (2001).

[168] On Pius's conduct in the Cold War, *see generally* PETER C. KENT, THE LONELY COLD WAR OF POPE PIUS XII: THE ROMAN CATHOLIC CHURCH AND THE DIVISION OF EUROPE 1943-1950 (2002).

[169] POPE PIUS XII, *ANNI SACRI* para. 5 (1950) ("We must above all deplore with overwhelming sadness that in not a few nations the rights of God, Church and human nature itself are outraged and trampled upon.").

in this world as well as the next.[170] Addressing circumstances in China in the late 1950s, Pius criticized "atheistic materialism" as contrary to principles of human nature and religious belief.[171]

The Second Vatican Council did not represent a break with this tradition but, rather, an important synthesis of it. *Gaudium et spes* and other conciliar documents present to the world a profound defense of natural law in the context of the fundamental nature and needs of the human person. This conciliar decree began with a powerful endorsement of a theology of creation that viewed the human person as sacred: "For Sacred Scripture teaches that man was created 'to the image of God,' as able to know and love his creator, and as set by him over all earthly creatures . . . ."[172] Called to use our reason within the world God made and granted, endowed with the capacity to ponder the transcendent, the human person is directed by conscience toward observance of the natural law.[173]

Our God-given reason, our status as uniquely-blessed and endowed creatures, and the dignity that attached to having been made in God's own image conferred certain natural rights on the human person. Foremost among them, the Council taught, was the solemn right and obligation to seek the truth.[174] Religious freedom, "based on the very dignity of the human person as known through the revealed word of God and by reason itself," was a right and obligation which no human power should abridge.[175] From this principle, certain corollaries followed: at a bare minimum, the state must refrain from coercion on matters of conscience.[176] Affirmatively, the state should act to ensure "those

---

[170] POPE PIUS XII, *DATIS NUPERRIME* paras. 2-3 (1956). Pius wrote, prophetically:

> The words which "the Lord said to Cain . . . the voice of thy brother's blood crieth to me from the earth." (*Gen.* 4: 10), are relevant today. For so the blood of the Hungarian people cries out to God. And even though God often punishes private individuals for their sins only after death, nonetheless, as history teaches, He occasionally punishes in this mortal life rulers of people and their nations when they have dealt unjustly with others. For He is a just judge.

Id. at para. 5.

[171] POPE PIUS XII, *AD APOSTOLORUM PRINCIPIS* paras. 11 and 19 (1958) (condemning "atheistic materialism" which denies both God and "religious principles" and condemning Chinese violations of "the principal rights of the human person").

[172] SECOND VATICAN COUNCIL, *supra* note 134, at para. 12.

[173] *Id.* at para. 16.

> Deep within his conscience man discovers a law which he has not laid upon himself but which he must obey. Its voice, ever calling him to love and to do what is good and to avoid evil, tells him inwardly at the right moment: do this, shun that. For man has in his heart a law inscribed by God. His dignity lies in observing this law, and by it he will be judged.

[174] SECOND VATICAN COUNCIL., *DIGNITATIS HUMANAE* para. 1 (1965).

[175] *Id.* at para. 2.

[176] *Id.* at para. 3.

conditions of social life which enable men to achieve a fuller measure of perfection with greater ease."[177] As a general principle, the Council affirmed that "[t]he protection and promotion of the inviolable rights of man is an essential duty of every civil authority."[178]

Gaudium et Spes stressed the importance of human freedom as evidence of the human person's creation in God's image and likeness: "The people of our time prize freedom very highly and strive eagerly for it. In this they are right. . . . [T]hat which is truly free[] is an exceptional sign of the image of God in man."[179] Freedom, the Council stressed, was not radically individualistic; indeed, it could only be exercised in community with others since the human person was, by nature, social.[180] Social groups, which included both free associations of individuals as well as large-scale political communities and even nations and governments, were called to conserve the common good, which included "the sublime dignity of the human person, who stands above all things and whose rights and duties are universal and inviolable."[181]

Having established these first principles, the Council also spoke to the content of the common good that individuals, associations, and states were all alike expected to safeguard. Crimes against the person were condemned—"murder, genocide, abortion, euthanasia, and willful suicide."[182] Fundamental equality among persons should be respected.[183] The State, furthermore, was affirmatively charged with the task of promoting "the formation of a human person who is cultured, peace-

---

> It is through his conscience that man sees and recognizes the demands of the divine law. He is bound to follow this conscience faithfully in all his activity so that he may come to God, who is his last end. Therefore he must not be forced to act contrary to his conscience.

Id.

[177] *Id.* at para. 6. *Dignitatis Humanae* continued:

> It consists especially in safeguarding the rights and duties of the human person. For this reason the protection of the right to religious freedom is the common responsibility of individual citizens, social groups, civil authorities, the Church, and other religious communities.

Id.

[178] *Id.*

[179] SECOND VATICAN COUNCIL , *supra* note 134, at para 17.

[180] *Id.* at para. 24 ("In his fatherly care for all of us, God desired that all men should form one family and deal with each other in a spirit of brotherhood").

[181] *Id.* at para. 26.

[182] Id. at para. 27. The Council continued:

> [A]ll offenses against human dignity, such as subhuman living conditions, arbitrary imprisonment, deportation, slavery, prostitution, the selling of women and children, degrading working conditions where men are treated as mere tools for profit rather than as free and responsible persons.

Id. The Council also condemned "mutilation, physical and mental torture, [and] undue psychological pressures." *Id.*

[183] *Id.* at para. 32.

loving, and well disposed towards his fellow-men . . . ."[184] But this did not mean that the state was entitled to swallow the person. Echoing Pius XI's teaching on subsidiarity,[185] the Council stressed: "Citizens, . . . either individually or in association, should take care not to vest too much power in the hands of public authority nor to make untimely and exaggerated demands for favors and subsidies, lessening in this way the responsible role of individuals, families, and social groups."[186]

Pope John Paul II's teaching on the human person is rich and complex but fits comfortably within the path of trajectory that has been thus far reviewed. In *Sollicitudo Rei Socialis*, the Pope emphasized the universality of the teaching that all persons are created in God's likeness.[187] In *Veritatis Splendor*, the Holy Father stressed not only the nature of the human person as created in the image and likeness of God, but also the essential unity that prevails in the individual person between the physical body and the immortal soul.[188] The dignity of every person is grounded on this principle of creation.[189] Essential rights and duties,[190] indeed, the entirety of the moral law,[191] flow from this reality. And in *Centesimus Annus*, John Paul condemned the totalitarian state, "which sets itself above all values, [and] cannot tolerate the affirmation of *an objective criterion of good and evil* beyond the will of those in power."[192] He juxtaposed to totalitarianism the principles of "authentic democracy," grounded on the rule of law and "a correct conception of the human person."[193]

It should be evident from this line of development how difficult it is to ground the validity of law on its formal source, that is, on the exercise of state authority alone, without regard to the content of the law or its impact on persons. Law should be concerned with the promotion of the common good. It should use as its touchstone the nature of the human person as worthy of fundamental dignity and respect and as possessed of

---

[184] *Id.* at para. 74.

[185] *See supra* 162-64 and accompanying text.

[186] SECOND VATICAN COUNCIL, *supra* note 134, at para. 72.

[187] POPE JOHN PAUL II, *SOLLICITUDO REI SOCIALIS* para. 47.5 (1987) (The human person is "the indestructible image of God the Creator, which is *identical* in each one of us.")

[188] POPE JOHN PAUL II, *VERITATIS SPLENDOR* para. 48.3 (1993).

[189] *Id.*

[190] *Id.* at para. 50.1. "At this point the true meaning of the natural law can be understood: it refers to man's proper and primordial nature, the 'nature of the human person,' which is the person *himself in the unity of soul and body*." *Id.* (quoting SECOND VATICAN COUNCIL, *supra* note 134, at para. 51).

[191] *Id.* ("The natural moral law expresses and lays down the purposes, rights, and duties which are based upon the bodily and spiritual nature of the human person." (quoting CONGREGATION FOR THE DOCTRINE OF THE FAITH, *DONUM VITAE*, *Introduction* 3)).

[192] POPE JOHN PAUL II, CENTESIMUS ANNUS para. 45.1.

[193] *Id.* at para. 46.1.

certain fundamental rights. The history of the twentieth century has been the story of the systematic denial of these human realities and their ultimate vindication through nothing less than titanic struggle. The Church's teaching offers to law-makers a powerful substantive vision of right and justice that provides an alternative to the great antinomies of positivist jurisprudence.

A focus on personhood as the ultimate source of law's validity also makes clear that what is at stake in the struggle between rigorous forms of positivist jurisprudence and natural law is nothing less than conflicting anthropologies. Over the last two centuries, positivist jurisprudence has relied on the shifting anthropologies of a variety of secular sciences. Social Darwinism and its diminishment of the sanctity of the person dominated late nineteenth-century philosophy[194] and continued to exert a large influence on the jurisprudence of the first half of the twentieth century.[195] Other competing anthropologies have, of course, also played a large role in the shaping of modern jurisprudence and law. One thinks, for instance of Rousseau's conception of the noble savage, corrupted by the restraints of civilization—an image that would

---

[194] Social Darwinism has its origin with Charles Darwin himself, who in the concluding chapter of his *Descent of Man* stressed the importance of sex selection in the "improvement" of various species. "Man scans with scrupulous care the character and pedigree of his horses, cattle and dogs before he matches them." CHARLES DARWIN, THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX 612 (rev. ed. 1874). Individuals should exercise the same degree of care:

> Both sexes ought to refrain from marriage if they are in any marked degree inferior in body or mind; . . . . The advancement of the welfare of mankind is a most intricate problem: all ought to refrain from marriage who cannot avoid abject poverty for their children; for poverty is not only a great evil, but tends to its own increase by leading to recklessness in marriage.

Id.

[195] One area of American life and law in which social Darwinism had profound influence was in the area of eugenics—which was nothing less than the use of selective breeding to improve the race. It was this idea that stood behind the Supreme Court's infamous decision in Buck v. Bell, 274 U.S. 200 (1927). Upholding a statute that put into effect Darwin's teaching on sex selection by requiring the sterilization of certain mentally "unfit" persons, Oliver Wendell Holmes wrote, on behalf of eight members of the United States Supreme Court:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccinations is broad enough to cover cutting the Fallopian tubes. [Citation omitted]. Three generations of imbeciles are enough.

Id. at 207.

profoundly influence Karl Marx and generations of revolutionaries. More recently, philosophical liberals like John Rawls[196] and exponents of law and economics have explained human behavior in terms of rational self-interest devoid of any consideration for man's social dimension.[197]

The Christian anthropology that undergirds the natural-law postulates examined in this Article differs significantly from the competing anthropologies of secular legal scholarship. The dignity of the human person, *qua* person, is exalted in Catholic natural-law writing. Secular anthropologies tend, on the other hand, to exalt one or another *aspect* of the human person as *the* primary identifying characteristic of what it means to be human—whether that be membership in a neo-Darwinian species; or the naturally free and good individual of Rousseau and Marx; or the unremittingly rationally self-interested actor of liberal and economic-libertarian thought. It may be that our anthropology must be taken on faith. But in light of the extreme inhumanity that has resulted from the social experiments of the twentieth century that chose to discard Christian anthropology, we may be well-served indeed to choose the Christian model.

---

[196] The basic postulate of Rawlsian liberalism, the "veil of ignorance," makes critical assumptions about the rationally self-interested nature of the human person. *See* JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971).

[197] Thus, it has been argued that penalty clauses should be permitted in commercial contracts on the basis of the rational self-interest of the parties:

> When the promisee demands a 'penalty clause', the promisor will agree only if the price is increased sufficiently to cover any increase in the cost of performance. . . . [S]ince it seems plausible that commercial contractors act largely in their 'rational' self-interest, it is likely that both parties initially saw a benefit even in a clause which a court later terms a penalty.

Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L. J. 633, 687-88 (2001) (quoting Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683, 720 (1986)).

In its pure form, law and economics depends on persons behaving rationally at all times, especially where their economic interests are concerned. It is believed by the follower of law and economics that this rationality is revealed through the choices that the economic actor makes. Arthur Leff considers the circularity involved in this mode of reasoning:

> [S]ince people are rationally self-interested, what they *do* shows what they value, and their willingness to pay for what they value is proof of their rational self-interest. Nothing merely empirical could get in the way of such a structure because it is definitional. That is why the assumptions can predict how people behave: in *these* terms there is no other way they can behave.

John E. Noyes, *Book Review: An Introduction to Law and Economics*, 59 N.Y.U. L. REV. 410, 423 n.93 (1984) (book review) (quoting Arthur A. Leff, Comment, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 457 (1974)).

IV. CONCLUSION

Writing in the summer of 1986, the Protestant legal theorist Frank Alexander proposed that "contemporary American legal thought—nonpositivist as well as positivist—would benefit greatly from theology."[198] This Article, which began with a review of the tensions and defects of the modern positivist project, has ended with just such a theological exploration of the created nature of the human person and the implications of this theological reality for jurisprudence. Ultimately, when the analysis is pressed back, it becomes evident that jurisprudential debates are really, at bottom, debates about human nature and the relationship of human nature to the law-making enterprise.

Is it possible to sever justice from law and to analyze law in terms of structures of command and monopolies of force devoid from any larger purpose? Is it possible to analyze law as something separate and apart from its moral contents or the values it seeks to conserve? Is it possible to speak of the validity of law in terms of its formal source in state authority, as opposed to its origins in human nature and the requirements of human life? It is hoped that this Article has revealed some of the difficulties inherent in the positivist project.

An alternative to this project is available in the social teaching of the Catholic Church. This social teaching did not develop in isolation, but rather in response to the great upheavals of the twentieth century. In contrast to the great antinomies of positivism, Catholic social thought emphasizes the integral connections between justice and law; the inseparability of law from morals and values; and the need to ground the validity of law not in a formal analysis of state authority but in human nature itself.

---

[198] Frank S. Alexander, *Beyond Positivism: A Theological Perspective*, 20 GA. L. REV. 1089, 1090 (1986).

THE JURY IS OUT: THE URGENT NEED FOR A NEW APPROACH IN DECIDING WHEN RELIGION-BASED PEREMPTORY STRIKES VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS

*Robert W. Gurry**

I. INTRODUCTION

> One more thing, gentlemen, before I quit. Thomas Jefferson once said that all men are created equal . . . . We know all men are not created equal in the sense some people would have us believe . . . . But there is one way in this country in which all men are created equal—there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution, gentlemen, is a court. . . . Our courts have their faults, as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal. I'm no idealist to believe firmly in the integrity of our courts and in the jury system—that is no ideal to me, it is a living, working reality. Gentlemen, a court is no better than each man of you sitting before me on this jury. A court is only as sound as its jury, and a jury is only as sound as the men who make it up. I am confident that you gentlemen will review without passion the evidence you have heard [and] come to a decision . . . . In the name of God, do your duty.[1]

The jury system is one of two[2] fundamental institutions of American democracy that give legitimacy to the notion that the powers of our government truly are derived "from the consent of the governed"[3] and that ours is indeed a government "of the people, by the people, for the

---

* Robert W. Gurry is an associate at Faruki, Ireland & Cox P.L.L., a commercial litigation firm in Dayton, Ohio. J.D. 2005, University of Dayton School of Law. B.S. Business Administration, *summa cum laude*, 1999, Lee University. Mr. Gurry was a staff writer and associate editor on the University of Dayton Law Review and is a Blackstone Fellow with the Alliance Defense Fund. The author would like to thank Dean Lori Shaw and Assistant Professor and Head Librarian Susan Elliott, for their dedication to legal writing instruction and for selecting this comment the best overall article, Spring 2004, and awarding it the Cohen Excellence in Writing Award. Professor Elliott, in particular, spoils law students at Dayton with her patience, willingness to help, and immense knowledge of all things related to libraries, legal research, and scholarly writing.

1 HARPER LEE, TO KILL A MOCKINGBIRD 205 (Warner Books 1982) (1960). In this passage, Atticus Finch delivered his famous closing argument at the jury trial of a black man accused of raping a young white girl in the 1930's Deep South.

2 The other is voting to elect the officials who govern us.

3 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

5 Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), *in* GARY WILLS, LINCOLN AT GETTYSBURG 263 (1992).

people."[5] From the beginning of the republic, the concept of trial by a jury of one's peers has been firmly engrained in our jurisprudence and even in our collective sense of what justice is and ought to be.[6] These documents that define our form of government—the Declaration of Independence, the Gettysburg Address, and the United States Constitution—also acknowledge the significance of a deity in our nation's genesis.[7] George Mason, one of the Framers instrumental in drafting the Bill of Rights, stated that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience."[8] Yet today, the sincere acknowledgment and involvement in one's faith, a supposedly protected right, can render a citizen unfit to participate in the vital civic role and government institution of the jury. This is not only inconsistent with the spirit of the Constitution, but is a perversion

---

[6] U.S. CONST. art. III, § 2, cl. 3 provides: "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," and U.S. CONST. amend. VI guarantees the right to "a speedy and public trial, by an impartial jury *of the State and district wherein the crime shall have been committed.*" (emphasis added). Although the phrase "jury of one's peers" does not appear in the Constitution itself, it is the phrase that has come to describe part of the fundamental fairness which the jury system was designed to ensure. *Frame of Government of Pennsylvania* provided "[t]hat all trials shall be by twelve men, and as near as may be, *peers or equals*, and of the neighborhood." William Penn, Laws Agreed Upon in England, *in* FRAME OF GOVERNMENT OF THE PROVIDENCE OF PENNSYLVANIA art. VIII (May 5, 1682) (emphasis added). *See also* WILLIAM BLACKSTONE, 4 COMMENTARIES *349-50 (stating that the jury was part of "strong and two-fold barrier . . . between the liberties of the people, and the prerogative of the crown" because the jury required that "the truth of every accusation . . . be confirmed by the unanimous suffrage of twelve of *his equals and neighbors, indifferently chosen,* and superior to all suspicion") (emphasis added). The other part of the barrier to which Blackstone referred was indictment by a grand jury. *Id.* at *302-03.

[7] "We hold these truths to be *self evident*, that all men are *created* equal, that they are endowed by their *Creator* with certain *unalienable* Rights . . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added). The nation's charter thus acknowledges that the rights of life, liberty, and happiness are derived from the natural law endowed by their "Creator." The Constitution itself harkens back to the divinely endowed rights when it sets forth as one of its own purposes, "*secur[ing]* the *Blessings* of Liberty," not creating them by authority of a humanist state. U.S. CONST. pmbl. (emphasis added). Immediately preceding Lincoln's immortal expression of democracy, "of the people, by the people, for the people," he mentions that "this [is a] nation under God." Lincoln, *supra* note 4.

[8] VIRGINIA BILL OF RIGHTS art. XVI (1776). George Mason is known as the "Father of the Bill of Rights" because he famously refused to sign the United States Constitution and then actually led the opposition to its ratification on the grounds that it did not sufficiently limit government's power to infringe on the rights of citizens. Mason was a delegate from Virginia to the Constitutional Convention and a member of the Virginia House of Burgesses; he authored the Virginia Constitution and the Virginia Bill of Rights, which has striking similarity to the Bill of Rights to the United States Constitution which he was also heavily involved in drafting. DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, AND RELIGION, 205-06, 525 (1st ed. 1996).

of its core protections of religious liberty, free speech, and equal protection of the laws.

Mason's statement above, exemplifying an ideal once strongly held, but no longer actually ensured, seems strangely out of place in contemporary America. Recently, a wave of government actions have been methodically eroding the free exercise of religion[9] and the equal protection of the laws,[10] which the Constitution theoretically guarantees. In the last year alone, dozens of Ten Commandments monuments have been challenged as unconstitutional, and many removed from public buildings, including the most well known in Alabama;[11] a college student had his state scholarship taken away because he chose to double major in pastoral studies along with business administration;[12] and it was held that Catholic charities *must* offer contraceptives in their employee health plans, even though this violates a fundamental tenet of the Catholic faith.[13] Thus, it seems that "*all* men" does not mean what it used to mean.[14]

The jury is unique in its function and special in its importance to our system of justice. For centuries, it has been recognized in Anglo-American jurisprudence[15] as *the* vital unit of justice to protect weak individuals from the awesome power of the state.[16] Its uniqueness stems

---

[9] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, . . . or the right of the people to peaceably assemble . . . .").

[10] U.S. CONST. amend. XIV, § 1 ("No State . . . shall deny to any person within its jurisdiction the equal protection of the laws.").

[11] Glasroth v. Moore, 335 F.3d 1282 (11th Cir. 2003). For a thorough critique of the court's decision in *Glasroth*, see Curtis A. New, Note, *Moore Establishment or Mere Acknowledgment: A Critique of the* Marsh *Exception as Applied in* Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003), 29 U. DAYTON L. REV. 423 (2004).

[12] Locke v. Davey, 540 U.S. 712, 713-25 (2004).

[13] Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County, 85 P.3d 67 (Cal. 2004).

[14] *See supra* note 7 (emphasis added). Even if Mason's statement and the Free Exercise Clause are not taken literally—so as to actually protect the religious freedom of all men—there is no Establishment Clause issue here of supposed "separation of church and state." It has simply not been asserted or even acknowledged in the case law that the religious beliefs of individual jurors sitting on the temporary state institution of a particular jury implicate the Establishment Clause of the First Amendment.

[15] Coburn R. Beck, *The Current State of Peremptory Challenge*, 39 WM. & MARY L. REV. 961, 965 (1998). The peremptory challenge is believed to have originated over 700 years ago in England. *Id.*

[16] ROBERT D. STACEY, PH.D., SIR WILLIAM BLACKSTONE AND THE COMMON LAW: BLACKSTONE'S LEGACY TO AMERICA (ACW Press 2003) (citing WILLIAM BLACKSTONE, 4 COMMENTARIES *342-43). "The trial by jury . . . is also that trial by the *peers of every Englishman*, which, as the grand bulwark of his liberties, is secured to him by the great charter. . . . Our law has therefore wisely placed this *strong . . . barrier . . . between the liberties of the people, and the prerogatives of the crown*" *Id.* (emphasis added).

from its use of disinterested "peers" to render judgment. Special importance emanates from the jury's role as a check to unfettered state power, the remarkably broad discretion it is granted, and the fact that ordinary citizens, without respect to power, wealth, prestige, or ancestry, engage in direct governance of each other. The American jury is a tradition both maligned as a crude instrument of amateurish law and extolled as the great equalizer of Mother Justice. Regardless of one's appraisal of the jury concept generally, it is a truism that the quality of a particular jury is limited by the quality of those individuals who comprise it. As Harper Lee put it, speaking through that mythical lawyer Atticus Finch: "[a] court is only as sound as its jury, and a jury is only as sound as the men who make it up."[17]

If a jury is "only as sound as the [people] who make it up,"[18] then it follows that the procedure for selecting those men and women must also be sound. In our adversarial system of justice, the primary tool used to select the most fair and impartial jury, is the *voir dire*[19] challenge.[20] There are two types of challenges: for cause, and peremptory.[21] The peremptory challenge, in particular, is a nimble and effective way for the parties' attorneys to eliminate jurors whom they suspect harbor some bias against their client or case, but which either cannot be proven or does not rise to the level of a cognizable basis for partiality. In this way, the peremptory challenge is the proverbial oil in the machinery of the trial court system. It allows the inarticulable human instinct of counsel to come into play, which, in theory, increases the litigants' confidence

---

17 LEE, *supra* note 1, at 205.

18 *Id.*

19 WAYNE R. LAFAVE & JERALD H. ISRAEL, CRIMINAL PROCEDURE § 22.3(a) (2d ed. 1992). *Voir dire* is Latin for, 'to speak the truth,' and in common legal parlance is the name given to the jury selection process. *Id.*

20 A challenge (in this article, challenge and strike are used interchangeably) is an action by one of the parties' attorneys to remove a prospective juror from the venire, or the pool of eligible jurors. The challenge itself may in turn be "challenged" by opposing counsel, which means it is contested and submitted for the trial judge's or appellate court's determination. Beck, *supra* note 14, at 963.

21 Challenges for cause require that parties give a "narrowly specified, provable and legally cognizable basis of partiality" for the strike. Swain v. Alabama, 380 U.S. 202, 220 (1965). The right to challenges for cause is rooted in the Sixth Amendment's guarantee of an impartial jury. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury* of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI (emphasis added). *See also* Georgia v. McCollum, 505 U.S. 42, 57 (1992). There is no limit on the number of challenges for cause which a party may make. Peremptory challenges are the alter-ego of challenges for cause. Peremptory strikes are not based on the Constitution. Until recently, they have required no explanation as to the reasons for the challenge. The number of peremptory strikes allowed is limited by the statute or court rules according to jurisdiction. Beck, *supra* note 14, at 964.

that the jury will be objective. This, in turn, strengthens overall confidence in the integrity of the system and helps those found guilty to accept the outcome more easily. The Supreme Court has carved out certain exceptions to the complete freedom to exercise even peremptory strikes. Exercising a peremptory strike based on a prospective juror's race[22] or gender[23] is now unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment.

Likewise, religion-based peremptory strikes should be strictly scrutinized[24] under the Equal Protection Clause of the Fifth and Fourteenth Amendments, the First Amendment's Free Exercise and Free Speech Clauses, and the prohibition of religious tests for public service under Article VI of the United States Constitution.[25] Ideally, the Supreme Court should abandon the current *Batson v. Kentucky* approach[26] and extend its general First and Fourteenth Amendment strict scrutiny framework to challenges which implicate the suspect class and fundamental right of religious affiliation. Procedurally, the Court should require litigants' counsel to question allegedly biased jurors further in order to uncover some evidence that a specific belief held by that juror would be likely to prevent or substantially impair the performance of the prospective juror's duties to uphold the law in the case at bar.[27] *In the alternative*, the Court should extend the *Batson* three-step burden shifting approach to religion-based peremptory strikes.[28] Whichever option the Court may choose, religious exercise must receive its due constitutional protection.

Courts must stop attempting to determine which religious attributes constitute "affiliation," "involvement," "beliefs," and "practices"; and those which are "unusual," "strong," or "heightened" religious practices.[29] These distinctions are not meaningful, create absurd legal and logical inconsistencies, and allow for irrational discriminatory classifications which harm litigants, prospective jurors, and the community. The Free Exercise Clause is broad enough to

---

[22] Batson v. Kentucky, 476 U.S. 79, 87 (1986).

[23] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 144-45 (1994).

[24] *See infra* note 144 (defining constitutional strict scrutiny).

[25] U.S. CONST. amends. XIV, V, I, and art. VI.

[26] *See discussion infra* Part II(A)(2) (discussing the three-part burden shifting test in Batson v. Kentucky, 476 U.S. 79, 94-99 (1986)).

[27] Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)) (discussing standard for excluding prospective jurors who have conscientious scruples about capital punishment under the Sixth Amendment); Haile v. State, 672 So. 2d 555, 556 (Fla. Dist. Ct. App. 1996).

[28] *Batson*, 476 U.S. at 94-99.

[29] *See discussion infra* Part II(B) (delineating some of the ways in which modern courts have created and distinguished between various levels and typologies of religious free exercise).

encompass all of these distinctions within its protection. Peremptory strikes based on *any religious attributes* of a prospective juror must be subject to the same standard of strict scrutiny as ordinary equal protection and First Amendment claims which implicate either a suspect classification or a fundamental right. The burden of proof should rest on the party claiming that a religious view will lead to a bias in the prospective juror. This high standard is warranted by the protection which the Constitution affords to free exercise of religion generally, protection from public officials being subjected to religious tests, free speech, and equal protection of the laws.[30] This standard provides the appropriate level of protection and creates flexibility while, at the same time, limiting overly broad judicial discretion. Regardless of the utility or desirability of the peremptory challenge in the trial court system, it is the Constitution which must determine the parameters of the peremptory challenge, and not the reverse.

This article discusses the problem of navigating the apparent conflict between protecting freedom of religion and preserving the guarantee of an impartial jury. Section II provides context by examining the history and modern development of the peremptory challenge, including the conflicting case law on religion-based challenges. Section III shows why the Supreme Court must review this issue and clarify what standard is to be used to scrutinize religion-based peremptory strikes in *voir dire*. It sets forth the reasons why the current *Batson* test for race-based and gender-based peremptory strikes is not adequate for religion-based challenges (nor is it adequate even for gender-based and race-based strikes). It proposes a new approach and procedural method for applying the traditional strict scrutiny framework to religion-based challenges in *voir dire*, and suggests in the alternative that the *Batson* test be extended to these challenges. Finally, Section IV briefly concludes.

II. BACKGROUND

A. History and Transformation of the Peremptory Challenge

The history of the peremptory challenge in jury trials can be traced at least as far back as fourteenth century England.[31] It has been used in the United States for some 200 years and is used today in virtually every

---

[30] *See supra* note 24.

[31] *See* Christopher M. Ferdico, *The Death of the Peremptory Challenge:* J.E.B. v. Alabama, 28 CREIGHTON L. REV. 1177 (1995). The peremptory challenge developed sometime between 1256 and 1470, the time frame in which Henry Bracton and Sir John Fortescue were writing their treatises on English common law. *Id.* at 1177 n.2. The peremptory challenge has existed in the United States since its colonization. Swain v. Alabama, 380 U.S. 202, 213-14 (1965).

trial court in every jurisdiction nationwide.[32] Prior to 1986, a peremptory challenge could be defined as "one exercised without a reason stated, without inquiry and without being subject to the court's control."[33] This is in contrast to a challenge for cause, which requires that the party making the challenge provide a "narrowly specified, provable and legally cognizable basis of partiality" to sustain the strike.[34] Essentially, the challenge for cause must satisfy a higher threshold of proof to actually demonstrate to the court that there is some real degree of probability that a particular juror will be biased in the present case, while a peremptory challenge historically did not require any showing at all.[35] Such unregulated freedom with the peremptory challenge was the state of things in 1965 when the first significant peremptory challenge case was decided.

1. The Traditional Test for Discrimination in the Law of Peremptory Strikes

In 1965, the Supreme Court decided *Swain v. Alabama*, the first significant Constitutional challenge to the system of peremptory strikes which had become ubiquitous in the trial court system.[36] In *Swain*, the prosecution exercised peremptory challenges to strike all six black members from the jury panel; the black defendant was convicted of rape by an all-white jury and sentenced to death.[37] Although the Court did not

---

[32] The peremptory challenge is utilized in all fifty states and the District of Columbia either by statute or court rule. *Swain*, 380 U.S. at 217 (citing twenty-four state statutes providing for peremptory strikes as examples). *See e.g.*, Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 (codifying peremptory challenges at the federal level). *See generally* ARNE WERCHICK, CIVIL JURY SELECTION app. A (2d ed. 1993); Pamela R. Garfield, Comment, J.E.B. v. Alabama *ex rel.* T.B.: *Discrimination by any Other Name . . .*, 72 DENV. U. L. REV. 169, 172 (1994) (explaining that the Framers considered including peremptory challenges in the Constitution, but ultimately rejected it).

[33] *Swain*, 380 U.S. at 220.

[34] *Id.*

[35] Litigants receive an unlimited number of challenges for cause because the Constitutional guarantee of an impartial jury would be a farce if biased jurors were permitted to compromise the integrity of the jury system. *See In re* Murchison, 349 U.S. 133, 136 (1955) (citing the Due Process clause of the Fourteenth Amendment as grounds for ensuring a "fair trial in a fair tribunal").

[36] *See supra* note 31 (describing the universality of peremptory challenges in the American court system).

[37] *Swain*, 380 U.S. at 205. In the *Swain* case, the petitioner was also able to prove that no black individuals had actually served on a petit jury in Talladega County, Alabama, for fourteen years (although they had been called to jury service as part of the venire). Also, black citizens had served on grand juries, including the one that indicted the petitioner. *Id.*

sanction the selection of jury members on the basis of race,[38] it set an unrealistically high evidentiary standard for proving that racial discrimination had occurred.[39] For an equal protection challenge to a peremptory strike to succeed, the petitioner would have to establish that the government had engaged in a pattern of systematic elimination of black venirepersons from petit juries over a period of time.[40] The Court concluded that the petitioner had failed to meet this burden largely due to the peremptory challenge's function of eliminating any prospective juror without the obligation to state any reason.[41] Thus, although the Supreme Court did recognize a theoretical exception to the total carte blanche of parties exercising peremptory challenges, it meant little in terms of actually limiting the practice of striking prospective jurors on account of their race. The Court explained that:

> To subject the prosecutor's challenge *in any particular case* to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards.[42]

A radical change is exactly what was in store for the peremptory challenge in the Court's next significant decision some twenty years later. In fact, many scholars have argued that the challenge today should not rightfully be called peremptory.[43]

2. The Current Test for Peremptory Strikes

In 1986, the Supreme Court overruled its earlier decision in *Swain* to the extent that *Swain* had required a challenging party to establish a systematic pattern of discrimination in jury selection.[44] Instead, the *Batson* Court held that it was the proper role of the trial court to decide if the facts of each particular case established a prima facie showing of purposeful discrimination.[45] If a prima facie showing of discrimination was found, then the prosecution had the burden to proffer a race-neutral

---

[38] *Id.* at 204 ("Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race.") (quoting Cassell v. Texas, 339 U.S. 289 (1950))).

[39] *Id.* at 227.

[40] *Id.*

[41] *Id.* at 221-22.

[42] *Id.* (first emphasis added).

[43] *See* Ferdico, *supra* note 30, at 1177; Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992); Steven M. Puiczis, Edmondson v. Leesville Concrete Co.: *Will the Peremptory Survive its Battle with the Equal Protection Clause?*, 25 J. MARSHALL L. REV. 37 (1991).

[44] Batson v. Kentucky, 476 U.S. 79, 96, 100 (1986).

[45] *Id.* at 98.

explanation.[46] The prosecution's failure to offer a race-neutral reason for the strike would result in the preclusion of the peremptory strike at trial or a reversal on appeal.[47]

In *Batson v. Kentucky*, the prosecutor eliminated all four black venirepersons, and the black defendant was convicted of burglary by an all-white jury.[48] The defense counsel moved to discharge the jury before it had been sworn in, claiming that the prosecutor's removal of the black veniremen violated petitioner's rights to a jury drawn from a cross section of the community under the Sixth and Fourteenth Amendments and his rights to equal protection of the laws guaranteed under the Fourteenth Amendment.[49] The trial judge denied petitioner's motion stating that peremptory challenges may be used to "strike anybody [the parties] want to."[50] The Kentucky Supreme Court affirmed the lower court decision, and the United States Supreme Court granted certiorari.[51]

The Supreme Court reversed the decision of the Kentucky Supreme Court and held that the Equal Protection Clause prohibits a prosecutor's discriminatory use of peremptory challenges based on an individual juror's race.[52] Before *Batson*, all the cases which had been successfully appealed on the basis of discrimination in jury selection had done so by showing that the jurisdiction had discriminated either by allowing faulty procedures for selecting the entire jury pool, or allowing a particular race to be disproportionately underrepresented over a period of time based on a statistical comparison of the jurisdiction's racial demographics to the composition of jury pools, grand juries, or petit juries.[53] Thus, it was a

---

[46] *Id.* At this time, *Batson* type challenges were only applicable to race and only applied against prosecutors in criminal cases.

[47] *See generally id.*

[48] *Id.*

[49] *Id.* at 83.

[50] *Id.*

[51] *Id.* at 84.

[52] *Id.* at 84-90.

[53] *Id.* at 95. The *Batson* Court cited several cases showing this. *Id.* In *Whitus v. Georgia*, for example, the prospective jurors were selected from a jury roll based on a racially segregated tax digest which had been condemned in an earlier appellate proceeding. 385 U.S. 545, 545 (1967). There was an opportunity for discrimination, and the prosecution failed to explain why the condemned jury selection roll was used in petitioners' retrial. *Id.* The prosecution failed to rebut petitioners' prima facie showing of discrimination. *Id.* "[T]he disparity between the percentage of Negroes on the tax digest (27.1%) and that of the grand jury venire (9.1%) and the petit jury venire (7.8%) strongly points to this conclusion [of purposeful discrimination]." *Id.* at 552. In *Castaneda v. Partida*, the respondent made out a prima facie case of purposeful discrimination by presenting census statistics that clearly identified Mexican-Americans as a disadvantaged class and revealed a percentage of the county's population far exceeding the percentage on

significant expansion in terms of evidentiary methods when the *Batson* Court announced that a single case with one race-based peremptory strike was sufficient for unconstitutional discrimination.[54] Unlike the test in *Swain,* it is not essential for the defendant to show that members of his race have been systematically excluded in the past. The institutional discrimination is only one potential source of evidence which may be used to establish a prima facie case of discrimination "in selecting the defendant's venire."[55]

The Court outlined a new test for determining cases involving equal protection challenges to peremptory strikes.[56] Where defense counsel presents to the trial judge evidence supporting a prima facie case of purposeful discrimination, then the burden shifts to the prosecution to proffer a race-neutral explanation for striking the juror(s) in question.[57] The explanation is not required to be "persuasive, or even plausible."[58] All that is required is that the explanation not reveal that "discriminatory intent is inherent in the prosecutor's explanation."[59] Ultimately, it is up to the trial judge to determine, based on the totality of the circumstances, whom and what to believe by weighing the credibility of the government's explanation against the defendant's case for purposeful discrimination.[60]

To make a prima facie showing of purposeful racial discrimination under *Batson,* the defendant must show (1) "that he is a member of a cognizable racial group";[61] (2) "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race"; and (3) "that these facts and any other relevant

---

respondent's grand jury list. 430 U.S. 482, 494 (1977). Additionally, the "key man" system of selecting the grand jury was found to be highly subjective. *Id.* at 491.

[54] *Batson,* 476 U.S. at 95-96.

[55] *Id.* at 95.

[56] *Id.* at 90-94.

[57] *Id.*

[58] Purkett v. Elem, 514 U.S. 765, 768 (1995).

[59] Hernandez v. New York, 500 U.S. 352, 360 (1991).

[60] *Batson,* 476 U.S. at 98 (quoting Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) (stating that "'a finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court," and noting that a "trial judge's findings [in the context of discrimination in jury selection] largely will turn on evaluation of credibility"). *See also* United States v. Mahan, 190 F.3d 416, 425 (6th Cir. 1999).

[61] *But see* Powers v. Ohio, 499 U.S. 400, 420 (1991) (modifying the requirement that the petitioner be of the same race as the challenged juror and allowing a defendant to make a successful showing of purposeful racial discrimination even if the challenged jurors are of a different race than defendant).

circumstances[62] *raise an inference* that the prosecutor used that practice to exclude the veniremen from the petit jury *on account of their race.*"[63]

The *Batson* Court suggested a non-exclusive list of the "circumstances," or pieces of evidence, that might establish a prima facie case of discrimination in the exercise of a peremptory strike.[64] These include (1) evidence of a pattern of strikes against those of a particular race, and (2) the nature of the prosecutor's questions and statements during *voir dire*.[65] Other factors have been added by lower courts, including (1) whether most or all of the members of an identified group have been struck from the venire, (2) whether a disproportionate number of peremptory challenges were used to exclude specific racial or ethnic groups, and (3) whether excluded jurors shared race as their only common characteristic.[66]

3. Extending the *Batson* Test to Gender-Discrimination and Beyond

Just eight years after its holding in *Batson,* finding a Constitutional exception for race-based peremptory challenges, the Court extended this protection to apply to gender-based challenges.[67] In a suit to establish paternity and obtain child support, the State of Alabama sued on behalf of a single mother, and an all-female jury found the defendant to be the father.[68] Of the twelve males on the thirty-six member initial jury panel, the state used nine of its ten peremptory strikes to remove male jurors, and the defense used all but one of its strikes to remove female jurors.[69] This resulted in an all-female jury.[70] The petitioner objected, arguing that the challenges were exercised solely on the basis of gender to exclude male jurors in violation of the Equal Protection Clause.[71] The trial court rejected petitioner's argument that "the logic and reasoning of *Batson v. Kentucky,* which prohibits peremptory strikes solely on the

---

[62] *See* Cheryl G. Bader, Batson *Meets the First Amendment: Prohibiting Peremptory Challenges that Violate a Prospective Juror's Speech and Association Rights,* 24 HOFSTRA L. REV. 567 (1996) (cataloging the various factors that courts have proposed for determining whether a defendant has established a prima facie case of purposeful racial discrimination).

[63] *Batson,* 476 U.S. at 96 (emphasis added).

[64] *Id.* at 97.

[65] *Id.*

[66] *See* People v. McDonald, 530 N.E.2d 1351, 1357 (Ill. 1988); State v. Gilmore, 511 A.2d 1150, 1164-65. (N.J. 1986).

[67] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 145 (1994).

[68] *Id.* at 128-30.

[69] *Id.* at 129.

[70] *Id.*

[71] *Id.*

basis of race, similarly forbids intentional discrimination on the basis of gender" under equal protection.[72]

The Supreme Court began its equal protection analysis with its normal multi-tiered scrutiny approach, applying intermediate scrutiny and requiring the government to show "an exceedingly persuasive justification" to justify its gender-based classifications.[73] The Court agreed with the State's argument that historical views of men and women *could* potentially lead to concomitant biases.[74] But the Court concluded that "gender simply may not be used as a proxy for [a juror's] bias" because there was not enough "support for the conclusion that gender alone is an accurate predictor of juror's attitudes" as to be *substantially related* to the *important government objective* of ensuring a fair and impartial jury.[75] The *Batson* three-part test was extended to apply to the State's gender-based challenge in the same way it applied to race in *Batson*.[76] The Court emphasized the rights of individual jurors to be free from invidious discrimination in jury selection, rather than the rights of the litigating parties themselves.[77]

4. Incremental Extensions and Clarification of the Equal Protection Doctrine

In the cases that followed *Batson*, a number of expansions were made to the doctrine, and the rationale on which the doctrine itself rested was clarified. The Court extended *Batson's* protection to apply even to defendants who are not of the same race as the juror being challenged.[78] That same year, the doctrine was extended to apply to civil litigants.[79] One year later, the Court extended the reach of *Batson* again to allow both parties—defense and now prosecution—to benefit from equal protection in jury selection.[80]

In addition to extending the classes and contexts to which *Batson* applied, the Court also clarified the primary rationale on which the doctrine now rests. It is not so much the effect that invidious discrimination might have on the outcome of a particular case which chiefly concerned the Court; rather, it was the right of the prospective jurors themselves to participate in one of the most fundamental civic

---

72 *Id.*

73 *Id.* at 136 (quoting Pers. Adm'r v. Feeny, 442 U.S. 256, 273 (1979)).

74 *Id.* at 137-43.

75 *Id.* at 139, 143.

76 *Id.* at 144-46.

77 *Id.* at 141.

78 Powers v. Ohio, 499 U.S. 400, 419 (1991).

79 Edmonson v. Leesville Concrete Co., 500 U.S. 614, 614 (1991).

80 Georgia v. McCollum, 505 U.S. 42, 49 (1992).

responsibilities.[81] In addition to the rights of the jurors, the Court also acknowledged the interest of upholding the integrity of the judicial system and thus, indirectly, the community or society itself.[82]

B. Religion-Based Peremptory Challenges

Although the United States Supreme Court has held that race and gender are constitutionally protected categories, it has not extended this same recognition to religious affiliation and exercise in the context of jury selection.[83] Moreover, the federal and state courts have created a panoply of holdings which have produced great inconsistency in both results and the various legal theories used to reach those results.[84]

In a recent case, the Third Circuit Court of Appeals upheld a conviction where three prospective jurors were excused due to peremptory challenges which the prosecutor admitted to making on the

---

[81] *Id. See also* Ramseur v. Beyer, 983 F.2d 1215, 1224 (3d Cir. 1992), *cert. denied*, 508 U.S. 947 (1993) (stating that *jurors* have the right to be unmarred by public discrimination in the justice system).

[82] *McCollum*, 505 U.S. at 49.

[83] United States. v. DeJesus, 347 F.3d 500, 510 (3d Cir. 2003), *cert. denied* by DeJesus v. United States, 541 U.S. 1086 (2004) (stating that the Supreme Court has not ruled on this issue). *See* Davis v. Minnesota, 511 U.S. 1115, 1115 (1994) (denying certiorari to appeal from Minnesota Supreme Court which declined to apply *Batson* to religion-based peremptory challenges); United States v. Clemmons, 892 F.2d 1153, 1158 n.6 (3d Cir. 1990) (declining to consider claim of religious discrimination in exercise of peremptory strike because issue was raised for the first time on appeal).

[84] The *DeJesus* court also noted that "[t]here is no clear consensus among the other Circuits on this issue." *DeJesus*, 347 F.3d at 510. *See e.g.*, United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir. 1998) (stating in dicta that "[i]t would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, a Muslim, etc.," but holding that because "status of peremptory challenges based on religion is unsettled," a strike based on religion was not plain error); United States v. Berger, 224 F.3d 107, 120 (2d Cir. 2000) (declining to decide whether *Batson* extends to strikes based on religious affiliation because prosecutor provided a reason for the strike based on something other than juror's membership in a protected class); United States v. Somerstein, 959 F. Supp. 592, 595 (E.D.N.Y. 1997) (extending *Batson* to religion-based challenges). The state courts are not uniform in their approach to this issue either. *Compare* State v. Fuller, 812 A.2d 389, 397 (N.J. Super. Ct. App. Div. 2002) (finding that exclusion of jurors based on religious affiliation would violate the state constitution's Equal Protection Clause), State v. Purcell, 18 P.3d 113, 120 (Ariz. Ct. App. 2001) (holding that *Batson* encompasses peremptory strikes based upon religious affiliation or membership), *and* Thorson v. State, 721 So. 2d 590, 594 (Miss. 1998) (holding that state constitutional and statutory law prohibit the exercise of peremptory challenges based solely on a person's religion), *with* Casarez v. State, 913 S.W.2d 468, 492 (Tex. Crim. App. 1995) (en banc), *as corrected in* 913 S.W.2d 468, 496 (1997) (holding that "interests served by the system of peremptory challenges in Texas are sufficiently great to justify State implementation of choices made by litigants to exclude persons from service on juries . . . on the basis of their religious affiliation"), *and* State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993) (declining to extend *Batson* to strikes on the basis of religious affiliation).

basis of religious beliefs of the prospective jurors.[85] The court stated that it was upholding the conviction because the Supreme Court has not ruled on the issue of whether *Batson* and its progeny apply to religious affiliation, and even if *Batson* did apply, the three jurors were properly challenged on account of "heightened religious involvement" and "strong religious beliefs" as opposed to presumably ordinary religious practices and beliefs.[86] Thus, courts have upheld admittedly religion-based peremptory strikes based on the distinction between "religious affiliation" and "religious involvement," and "heightened" or "strong" religious beliefs.[87] A similar approach is that of upholding religion-based peremptory strikes due to a prospective juror's strongly professed beliefs based on the premise that the challenging party was *not singling out any particular religious group*, and therefore, the challenge was not prohibited on equal protection grounds or otherwise.[88] At least one court has gone so far as to hold that *Batson* and equal protection simply do not apply to any religion-based strikes, even including religious *affiliation*.[89] The *Casarez* court explained this as follows: ascribing particular moral, political, or social beliefs to women and African Americans is overly broad because not all members of the group subscribe to the beliefs.[90] It is therefore invidious because individual members who do not share the belief suffer due to the attribution anyway.[91] But in the case of religion, the attribution was deemed by the court not to offend equal protection principles because,

> in the case of religion, the attribution is not overly broad, and therefore not invidious, when the belief is an article of faith. Because all members of the group share the same faith by definition, it is not unjust to attribute beliefs characteristic of the faith to all [of them].[92]

Still other courts have held that *Batson* and equal protection *do extend* to religion-based challenges.[93] Many states have statutes which bear on the question, and at least one court has held that religion-based

---

[85] *DeJesus*, 347 F.3d at 503-11.

[86] *Id.* at 500, 503.

[87] *Id.*

[88] *Fuller*, 812 A.2d at 397 (finding that exclusions of jurors based on religious affiliation would also violate the state constitution's Equal Protection Clause).

[89] *Casarez*, 913 S.W.2d at 496 (holding that *discrimination on the basis of personal belief was a proper consideration* in jury selection in determining suitability for jury service). The court held that the interest served by the system of peremptory challenges was sufficiently great to justify state implementation of choices made by litigants to exclude persons from service on juries in individual cases on the basis *of their religious affiliation*. *See id.* (emphasis added).

[90] *Id.*

[91] *Id.*

[92] *Id.* at 492.

[93] State v. Purcell, 18 P.3d 113, 120 (Ariz. Ct. App. 2001).

peremptory strikes are prohibited by both statute and state constitution.[94] Thus, there is a great variety of legal approaches and results on both the federal and state levels.

III. ANALYSIS

A. The Court Must Define Constitutional Protection for Religion-Based Peremptory Strikes Because Harmful Religious Discrimination is On-Going and Uncertainty is Causing Confusion for Litigants and Lower Courts

In the same way that courts and prosecutors resisted constitutional protection for racial discrimination before *Batson*, many now resist constitutional protection for religious discrimination. In 1993, the Minnesota Supreme Court held that the *Batson* line of cases does not extend to peremptory strikes based on religious affiliation.[95] The court explicitly recognized in its reasoning that "[t]he United States Supreme Court has not ruled on whether *Batson* should extend beyond race-based peremptory challenges."[96] The Minnesota court noted that the Supreme Court was, at the time, waiting to hear a case involving an equal protection challenge to a gender-based peremptory strike during *voir dire* (which subsequently led to the Supreme Court extending *Batson* and equal protection to gender-based peremptory strikes).[97]

In addition to the lack of Supreme Court precedent, three other reasons were cited by the *Davis* court as justification for its decision not to extend equal protection to peremptory strikes based on religion. First, the court assumed, without actually demonstrating, that "there is no indication that irrational religious bias so pervades the peremptory challenge as to undermine the integrity of the jury system."[98] But is there really "no indication"? In actuality, there is a long and growing litany of cases showing exactly the opposite—that there are frequent biases against religious jurors and many can, at least arguably, be called irrational.[99] It is no mystery why such religious discrimination goes on with steady consistency. The United States Supreme Court has yet to

---

94 Thorson v. State, 721 So. 2d 590, 594 (Miss. 1998).

95 State v. Davis, 504 N.W.2d 767, 768-72 (Minn. 1993), *cert. denied,* 511 U.S. 1115 (1994).

96 *Id.* at 768.

97 *Id.* (citing J.E.B. v. State *ex rel.* T.B., 606 So. 2d 156 (Ala. Civ. App. 1992), *cert. granted,* 508 U.S. 905 (1993), *rev'd,* 511 U.S. 127 (1994)).

98 *Id.* at 771.

99 *See* Caroline R. Krivacka, J.D. & Paul D, Krivacka, J.D., Annotation, *Use of Peremptory Challenges to Exclude Persons from Criminal Jury Based on Religious Affiliation—Post-Batson State Cases,* 63 A.L.R. 5th 375 (1998) (citing approximately 50 examples involving challenges to peremptory strikes based on religious discrimination from state criminal cases alone). *See also supra* note 83 (cataloging only a few of these cases). The irrationality of several of these religious discrimination cases is discussed *infra.*

recognize any protection for the religious beliefs of prospective jurors.[100] Many other jurisdictions as well afford little or no constitutional proscription of these religion-based strikes.[101] In these courts, there is no disincentive to the ongoing practice of tacit religious discrimination in the competitive efforts of litigants to win trials. The examples in these cases, exemplifying this lack of protection, severely undermine the bold assertion by the *Davis* court that "there is no indication that irrational religious bias so pervades the peremptory challenge."[102]

Second, the *Davis* court's assertion ignored the United States Supreme Court's standard for finding discrimination in violation of the Equal Protection Clause. As a predicate to extending constitutional protection to religion-based challenges, the *Davis* court was looking for evidence of "perva[sive]" religious bias.[103] It found that the use of the peremptory strike to discriminate purposefully on the basis of religion did not appear to be as "common and flagrant" as racial bigotry in jury selection.[104] Yet this search for discrimination in the aggregate directly contradicts the standard which the Supreme Court identified in *Batson* when overruling its decision in *Swain*. The *Baston* Court stated the principle that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury *solely on evidence* concerning the prosecutor's exercise of peremptory challenges *at the defendant's trial*."[105] The Court pointed out that "since [its] decision in *Swain*, this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying *solely* on the facts concerning its selection *in his case*."[106] "[A] consistent pattern of official racial discrimination" is *not* "a necessary predicate to a violation of the Equal Protection Clause. A

---

[100] The *Davis* case is the first of two instances where the U.S. Supreme Court has denied hearing an appeal seeking to apply *Batson* to classifications based on religious affiliation, and the Court has never directly spoken on the issue. State v. Davis, 504 N.W.2d 767 (Minn. 1993). *See also* Goff v. State, 931 S.W.2d 537 (Tex. Crim. App. 1996), *reh'g denied*, (Oct. 16, 1996), *and cert. denied*, 520 U.S. 1171 (1997).

[101] United States v. DeJesus, 347 F.3d 500. 500 (3d Cir. 2003) (holding that *Batson* did not apply to peremptory strikes based on religious "beliefs"); United States v. Berger, 224 F.3d 107, 120 (2d Cir. 2000) (declining to decide whether Batson extends to strikes based on religious affiliation because prosecutor offered valid class-neutral reason for the strike); Casarez v. State, 857 S.W.2d 779 (Tex. App. 1993), *aff'd*, 913 S.W.2d 468 (Tex. Crim. App. 1995) (holding that *Batson* does not extend to the exclusion of venirepersons based on religious beliefs).

[102] *Davis*, 504 N.W.2d at 771.

[103] *Id.* at 668-772.

[104] *Id.* at 771 ("This is not to say that religious intolerance does not exist in our society, but only to say that there is no indication that irrational religious bias so pervades the peremptory challenge as to undermine the integrity of the jury system.").

[105] *Batson*, 476 U.S. at 96 (emphasis added).

[106] *Id.* at 95 (first emphasis added).

single invidiously discriminatory governmental act" is *not* "immunized by the absence of such discrimination in the making of other comparable decisions."[107] Hence, Judge Simonett's reasoning in *Davis* is in direct contradiction to the Supreme Court's reasoning in *Batson*. The Supreme Court's subsequent extension of *Batson's* protection to gender-based peremptory strikes[108] further supports the individualized approach because gender-discrimination has been in many ways "less common and flagrant" than racial discrimination. The reasoning in *Batson* and in *J.E.B. v. Alabama ex rel T.B.* requires the current Court to extend the doctrine to protect religious beliefs and affiliation in *voir dire*.

Third, the *Davis* Court pointed out that "religious affiliation (or lack thereof) is not as self-evident as race or gender."[109] Again, the Court offers no support for this conclusory statement. While the claim that race and gender are more "self-evident" than religion may ultimately be true, its implication—that the deeply religious are not as easily discriminated against in jury selection—does not logically follow. Take, for example, a Catholic priest who wears the robe and white collar of his faith, the Orthodox Jew with his skull cap and curled forelocks, or the traditional Muslim in long white shirts and pants or burqahs in the case of women.[110] Even the mere act of carrying a Bible around in public today can cause one to stick out like a sore thumb. These are no less visible (nor less stigmatizing in many cases) than gender or race. There are, in actuality, far more religious indicators which identify those who practice their faith than the *Davis* Court was willing to acknowledge.

Even setting aside the practical evidence of religious visibility, the *Davis* Court's reasoning is flawed as it relates to the process of jury selection. The court's focus on the "self-evident" nature or identifiability of a particular class is based on the premise that the more easily identifiable the trait, the more likely it is that discrimination will occur.[111] But in the context of jury selection, religion is as easy to identify as race or gender. That is because the entire process of empanelling the venire is designed to elicit any potential traits that may, in the opinions of the parties, bias the prospective jurors. In a typical *voir dire*, there is a three-tiered method for filtering out those whom the parties believe will

---

[107] *Id.* (quoting its earlier decision in Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 n.14 (1977) (emphasis added)).

[108] *See generally* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).

[109] *Davis,* 504 N.W.2d at 771.

[110] *See, e.g.,* State v. Fuller, 812 A.2d 389, 397 (N.J. Super. Ct. App. Div. 2002) (finding permissible a peremptory strike based on prosecutor's inference from juror's traditional Muslim clothing that juror was religiously devout and therefore likely to be defense-oriented).

[111] *See generally Davis*, 504 N.W.2d at 767.

be unfavorable to their case.[112] First, each member of the jury pool fills out a questionnaire, which can be relatively extensive.[113] In these questionnaires, even in trials that have no direct relation to anything religious, questions about religious persuasions are common.[114] Second, the judge conducts individual *voir dire* questioning of the panelists.[115] Finally, the parties themselves often have the opportunity to question the jurors with little restriction[116] and exercise peremptory strikes and challenges for cause.[117] These procedures allow ample opportunity for religious beliefs and practices to be identified, and, of course, they frequently are. This, in turn, makes religious discrimination not only possible, but easy.

1. The Current Standard is Unclear

The United States Supreme Court has declined to hear a case on whether religion-based peremptory strikes are protected under Equal Protection, the First Amendment, or the *Batson* doctrine.[118] Moreover, there is a disagreement between the various state and federal jurisdictions on this issue.[119] This combination of the volume of cases litigated and the lack of any uniform constitutional standard creates inefficiency in the judicial process because the rules differ by jurisdiction and may not be clear if they have even been litigated at all. Litigants cannot be sure what the standard is, convictions are often appealed and overturned, and resources are consumed by more frequent appeals and longer trials due to extended *voir dire*. This confusion and inefficiency makes the issue ripe for constitutional review by the Supreme Court.

---

[112] It should be noted that the *voir dire* process does vary significantly depending on what jurisdiction and court system one is examining. Therefore, what follows is meant as a generic or composite version of the jury selection process, not as any predominant form.

[113] United States v. DeJesus, 347 F.3d 500, 502 (3d Cir. 2003). Although *voir dire* does differ by jurisdiction, there are a number of features that are common to many jury selection procedures. *See* Bader, *supra* note 61, at 573 n.25. For a general discussion of various jury selection procedures, see Jon M. Van Dyke, JURY SELECTION PROCEDURES (1977).

[114] *DeJesus*, 347 F.3d at 503. *See also supra* note 100 (describing the volume of cases that arise due to either oral or written questioning of prospective jurors' religious beliefs).

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] State v. Davis, 504 N.W.2d 767, 768-72 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994).

[119] *See supra* Part II.B. for a discussion of the widely varying rules by jurisdiction.

2. Defendants, Prospective Jurors, and Society All Suffer from the Supreme Court's Reticence to Speak to this Issue

The peremptory strike cases have recognized three groups that are harmed by the lack of constitutional protection for race and gender in *voir dire*: litigants, prospective jurors, and society through the injury to the judicial system's integrity.[120] *Batson* focused chiefly on the harm to the litigant whose interests in receiving a fair trial are compromised by unconstitutional challenges.[121] Thus, the *Batson* Court held that the first step in challenging a peremptory strike was showing that the defendant was himself a member of the same cognizable racial group as that of the excluded jurors.[122]

> Selection procedures that purposefully exclude African Americans from juries *undermine* that *public confidence*—as well they should. "The overt wrong, often apparent to the entire jury panel, *casts doubt* over the obligation of *the parties, the jury, and indeed the court* to adhere to the law throughout the trial of the cause."[123]

The Court has also recognized that prospective jurors and the community itself hold an interest in having confidence that the courts will faithfully apply the law and not allow invidious discrimination.[124] All of these reasons for prohibiting racial and gender discrimination apply equally to religion-based discrimination. The Court must resolve this situation which continues to be injurious to litigants, jurors, the court system, and society itself.

B. The Constitution Protects Even the "Unusual," "Strong," and "Heightened" Exercise of Religion and Extends to "Affiliation," "Beliefs," "Involvement," and "Practices"

The Free Exercise Clause is broad enough to encompass all of the various distinctions which courts have attempted to draw regarding religious observances and involvement.[125] Among the categories of race, gender, and religion, only religion is mentioned in the text of the Constitution itself. Article VI states that "no religious Test shall ever be required as a Qualification to *any* Office or public Trust under the

---

[120] Georgia v. McCollum, 505 U.S. 42, 49 (1992).

[121] *Batson*, 476 U.S. at 97.

[122] *Id.*

[123] *McCollum*, 505 U.S. at 49 (quoting Powers v. Ohio, 499 U.S. 400, 412-13 (1991) (emphasis added)).

[124] *Id.* at 49.

[125] Black's Law Dictionary defines the word, 'exercise' as "[t]o make use of; to *put into action*." BLACK'S LAW DICTIONARY 594 (7th ed. 1999) (emphasis added). The "'Free Exercise Clause'" is defined as "[t]he constitutional provision . . . prohibiting the government from interfering in people's religious *practices* or forms of worship" *Id.* at 675 (emphasis added).

United States."[126] The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[127] No direct or indirect reference to race or gender appears in either the Constitution or any of the amendments.[128] In the context of the Court's strict scrutiny framework, religion is the only class or affiliation which merits the highest level of protection, which can be called absolute protection.[129] This standard states that "a law targeting religious belief as such is never permissible."[130] This begs the question: Why is such special status and prominent placement given to religious considerations in the text of the United States Constitution itself? Fortunately, the Framers, in their extremely prolific writings, answered this question with unmistakable clarity.

According to the United States Supreme Court, it is a matter of historical fact that this nation and its government were founded by a religious people and on principles of religious faith.[131] The great majority of the Framers were self-proclaimed Christians with "strong," "heightened," and what would today be called by the courts, "unusual" religious beliefs.[132] A few examples of the religious views and practices of

---

[126] U.S. CONST. art. VI (emphasis added). This applies to petit juries since the Supreme Court has found the jury to be an institution of the government. *Powers*, 499 U.S. at 407 (stating that the jury is an important part of the democratic process and is a part of government).

[127] U.S. CONST. amend. I.

[128] The Thirteenth Amendment, which makes slavery illegal, and Fourteenth Amendment, which grants equal protection under the laws, have obvious and direct application to African Americans and were undeniably motivated by the ills of slavery. However, the actual status of race per se is not protected or explicitly stated in the same way as religion. U.S. CONST. amends. XIII, XIV.

[129] *See* Benjamin Hoorn Barton, *Religion-Based Peremptory Challenges After* Batson v. Kentucky *and* J.E.B. v. Alabama: *An Equal Protection and First Amendment Analysis,* 94 MICH. L. REV. 191, 199-200 (1995) (defining both absolute scrutiny and strict scrutiny for religious expression).

[130] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

[131] Church of The Holy Trinity v. United States, 143 U.S. 457, 457 (1892) (stating that "beyond all these matters, no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true."). *See also* THE CHRISTIAN AND AMERICAN LAW (H. Wayne House ed., 1998). Political Science Professors Donald Lutz and Charles Hyneman conducted a detailed study of the *political* writings of the Framers from the founding period of 1760–1805 in order to determine which sources most influenced the Framers in forming the American system of government. They reviewed an estimated 15,000 writings of the Framers to see what sources the Founders cited. They reduced the study to 916 items, and studied these closely to identify quotations. Lutz and Hyneman identified 3,154 references, of which the source cited far more than any other—34 percent—was the Bible (with Deuteronomy, the restatement of the law, being the most often cited book).

[132] *See* BARTON, *supra* note 7, at 123-27 (discussing historical documentation of the strong religious beliefs and actions throughout the lives of the vast majority of the early patriots who have been called Framers).

the Framers, the early Supreme Court, and the United States Congress confirm the central importance placed on religious liberty *even in the context of public expression and official government actions*.[133]

C. *The* Batson *Test Should be Abandoned in Favor of the Ordinary Equal Protection and First Amendment Framework: Strict, Intermediate, and Rational Review*

Constitutionally protected religious freedom may be based on the First Amendment, the Equal Protection Clause of the Fourteenth (or Fifth) Amendment, or the Religious Test Clause of Article VI.[134] In the context of religious discrimination, the particular clause or section of the Constitution does not appear to be altogether vital to an accurate analysis of the issue:

---

[133] The U.S. Supreme Court stated:

> [W]e find everywhere a clear recognition of the same truth. Among other matters and note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town and hamlet; the multitude of charitable organizations existing every where under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.

Holy Trinity, 143 U.S. at 471. "[R]eligion and virtue are the only foundations . . . of republicanism and of all free *governments*." BARTON, *supra* note 7, at 156 (quoting 9 JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES, Vol. IX, 636 (Charles Francis Adams ed., Little, Brown, & Co. 1854) (emphasis added)). James Madison stated that, "to the same Divine Author of every good and perfect gift we are indebted for all those privileges and advantages, religious *as well as civil*, which are so richly enjoyed in this favored land." *Id.* at 182 (quoting 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1797 561 (James D. Richardson ed., 1899) (emphasis added)). Many of the Framers of the Constitution had the very type of "heightened religious involvement" which the modern courts have found indicative of potential biases sufficient to ground peremptory strikes. This religious fervor of our predecessors presents a cruel irony. By the standards of many of the modern courts, the very patriots who "pledge[d] to each other [their] Lives . . . Fortunes, and . . . sacred Honor," could be found unfit to serve on one of the two primary vanguards designed to secure that liberty—the jury. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776). Since many of these early patriots ultimately sacrificed their lives for the cause, perhaps remembering more accurately what they fought for is in order as modern courts interpret their work.

[134] U.S. CONST. art VI (stating that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States").

> [E]mphasis on equal treatment is, I think, an eminently sound approach. In my view, the Religion Clauses – the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, . . . and the Equal Protection Clause . . . all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.[135]

Perhaps this explains why the Court has applied its strict scrutiny framework to all of these clauses in various areas of constitutional law, (naturally, with some minor permutations based on the narrow issues and sub-issues in play). While the strict scrutiny terminology is found nowhere in the text of the Constitution, it has been the judicially accepted tool for solving real world problems without literally applying the apparent meaning of the Constitutional text.[136]

1. The *Batson* Test Affords Too Much Discretion but Not Enough Flexibility

One of the weaknesses of the *Batson* test as a legal standard is that it offers judges very broad discretion in arriving at an essentially factual conclusion—whether an attorney's peremptory strike was or was not motivated by an impermissible classification—while simultaneously allowing very little flexibility in its overall approach. *Batson* and its progeny stand for the proposition that once a court accepts that an impermissible classification has motivated a peremptory strike, then the strike will be absolutely disallowed.[137] This approach does not embrace the dexterousness or degree of nuance which the strict scrutiny framework recognizes as a necessary part of interpreting and applying broad constitutional principles. Under strict scrutiny, even race-based discrimination is allowed where there is a compelling interest and the means used are narrowly tailored to effectuate that interest.[138] In dicta, the Court has left open possibilities that classifications based on race can survive strict scrutiny in cases where past discrimination against a particular race within a particular institution can be shown to have a lingering effect.[139] More recently, it was held that race-based classifications in admissions policies were justified when narrowly

---

[135] Bd. of Educ. v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

[136] For example, if the First Amendment's admonition that "Congress shall make no law . . . abridging the freedom of speech" was applied completely literally, then Congress could not prohibit people from yelling out "Fire" in a crowded theatre. U.S. CONST. amend. I.

[137] *Batson*, 476 U.S. at 94-99; J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 128-46 (1994) (both resulting in reversal of lower court decisions, including a criminal conviction being overturned in the former).

[138] Grutter v. Bollinger, 539 U.S. 306 (2003).

[139] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

tailored to the interest of "diversity" in higher education.[140] In the area of free speech, at least four distinct categories have been recognized as compelling governmental interests capable of passing constitutional muster when regulations are narrowly tailored to reduce or prohibit them: fighting words,[141] obscenity,[142] fraudulent misrepresentation,[143] and defamation.[144] While the merits of these respective results have been and will continue to be debated, surely one of the virtues of this approach is that it has allowed flexibility and nimble decision making. This recognizes the many different situations in which constitutional problems arise and makes allowance for a greater degree of nuance in decision making. At the same time, a general strict scrutiny approach takes some discretion away from judges because the burden of justifying the use of a suspect classification or burdening a fundamental right now rightfully rests on the party exercising the peremptory strike. The standard is clearer, and the presumption in favor of constitutional protection is restored.

2. The *Batson* Test is Unnecessary Because the Ordinary Strict Scrutiny Framework Will Better Serve Both First and Fourteenth Amendment Challenges to Peremptory Strikes

The majority in *Batson* never specifically states the conventional strict scrutiny test,[145] which is applied in every other equal protection (and First Amendment) context. Because this framework is more developed in the law and already affords the protection which the *Batson* Court sought to increase from the unrealistic *Swain* evidentiary threshold,[146] it should be used to adjudicate challenges to peremptory strikes. For some reason, which the *Batson* Court did not explain, it never applied strict scrutiny and never stated whether race-based

---

[140] Grutter v. Bollinger, 539 U.S. 306 (2003).

[141] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[142] Miller v. California, 413 U.S. 15 (1973).

[143] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

[144] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[145] The conventional strict scrutiny test requires that a state action which infringes upon a fundamental right or distinguishes based on a suspect class, must survive the Court's strict constitutional scrutiny. That is, the state action must serve some "compelling" governmental interest and the state action must be "narrowly tailored" to achieve that compelling objective. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995). If neither a fundamental right nor a suspect class is implicated, then ordinary rational basis review applies (meaning that there must only be a legitimate state objective and the state action must only be rationally related to that objective to survive Constitutional review). *Id.*

[146] The *Batson* Court overruled *Swain* to the extent that *Swain* required petitioner to establish a systematic pattern of discrimination in jury selection. *Batson*, U.S. 476 at 94.

peremptory challenges constituted facial discrimination.[147] The current *Batson* burden shifting test encourages litigants' counsel to lie to the court about the real reason for which they are striking a juror. This is because the test does not require that the party's explanation for striking the juror be "persuasive, or even plausible."[148] All that is required is that the explanation not reveal that "discriminatory intent is inherent in the prosecutor's explanation."[149] It is not surprising then that there have been a number of cases where a party peremptorily struck an African American juror, was accused of excluding the juror based on race, and *then* offered an argument based on religious beliefs as a race-neutral explanation.[150] It should be remembered that only after *Batson* did litigants cease to openly use race as a basis to strike jurors. In the current absence of protection, religion is similarly proffered in open court as a reason to strike jurors.[151]

D. Equal Protection and First Amendment Analysis of the Peremptory Strike Requires the Highest Protection for Religious Exercise and Affiliation

The Equal Protection Clause and the First Amendment share enough common ground in the context of peremptory challenges to analyze both essentially together.[152] The Court has recognized that the strict scrutiny standard is essentially the same for racial and religious classifications under the First and Fourteenth Amendments.[153] Though distinctions are made where necessary, most of the analysis in the sections below applies almost interchangeably within either Equal Protection or First Amendment strict scrutiny analysis.

1. The Peremptory Strike is Not a Compelling Interest

Although certain factions of the Supreme Court have hinted at finding that the peremptory strike represents a compelling interest for purposes of constitutional review, no majority of the Court has ever

---

[147] *See* Barton, *supra* note 128, at 194-96 (comparing *Batson* and *J.E.B.* to the Court's normal equal protection approach).

[148] Purkett v. Elem, 514 U.S. 765, 768 (1995).

[149] Hernandez v. New York, 500 U.S. 352, 360 (1991).

[150] *See* United States v. DeJesus, 347 F.3d 500, 500 (3d Cir. 2003); United States v. Clemmons, 892 F.2d 1153, 1153 (3d Cir. 1989).

[151] *See id.*

[152] *See* Bd. of Educ. v. Grumet, 512 U.S. 687, 687 (1994) (stating that the Religion Clauses, Free Exercise Clause and the Equal Protection Clause speak with one voice and that equal treatment is the *sine qua non* of Constitutional protection).

[153] Employment Div. v. Smith, 494 U.S. 872, 886 (1990); *See also* Barton, *supra* note 129, (noting the shared strict scrutiny approach for both First and Fourteenth Amendment challenges in the context of religion-based peremptory strikes).

explicitly stated as much.[154] This is fortunate because a closer look at the trial process shows that the peremptory strike is not essential to impartial juries and fair trials and, therefore, is not compelling in the constitutional sense. In *J.E.B.*, the Court is still referring to the "State's *legitimate* interest in achieving a fair and impartial trial" and explicitly states that it is not determining "the value of peremptory challenges."[155] Thus, there is considerable doubt as to whether the peremptory strike would be found a compelling interest if specifically reviewed by the Court today.

Peremptory strikes are one procedural tool in the trial process employed as a means of attempting to ensure an impartial jury; they are not essential to achieving that constitutionally required result.[156] The peremptory strike, unlike the challenge for cause, is *not* used to target unqualified jurors, but effectively results in parties strategically selecting jurors more sympathetic to their cause, and thus *more biased*.[157] The peremptory strike allows parties to exclude neutral potential jurors in favor of more partial jurors. Accordingly, it cannot be said that peremptory strikes are required in order to achieve an *impartial* jury. Since peremptory strikes are not required to further the constitutional interest of an impartial jury, they are not and should not be treated as a compelling interest.

Even if the peremptory strike was found to have such a connection to the mandate of impartial juries and fair trials as to be deemed a compelling interest, the challenge must still give way to the freedom to practice one's religious faith. That is because religious affiliation and expression constitute both a fundamental right and a suspect class—and unlike the peremptory strike, religious freedoms are expressly spelled out in the Constitution's text.

2. Religious Affiliation is a Fundamental Right

Fundamental rights are those which are "explicitly or implicitly guaranteed by the Constitution."[158] There is no question that free

---

[154] The *Batson* dissent pointed out that the peremptory strike has historically been treated as "substantial, if not compelling." *Batson*, 476 U.S. at 125 (Burger, J., dissenting). Even here, the Justices acknowledged that the opinion of the Court was "silent," and was "leaving this issue . . . to further litigation." *Id.*

[155] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136-37 (1994) (emphasis added).

[156] "Although peremptory challenges are valuable tools in jury trial, they 'are not constitutionally protected fundamental rights; rather they are but one state-created means to the constitutional end of an impartial jury and a fair trial.'" *Id.* at 137 n.7 (quoting Georgia v. McCollum, 505 U.S. 42, 57 (1992)).

[157] "No rule of law or practice requires that a litigant's exercise of a peremptory challenge relates in any way to the juror's ability to sit impartially on the case." Bader, *supra* note 61, at 584.

[158] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

exercise of religion is a constitutional, fundamental right.[159] Government actions or classifications which burden a fundamental right are subject to strict scrutiny.[160] Government denial of the opportunity to sit on a jury based on religious classification clearly burdens the free exercise of religion. It forces citizens to choose between the freedom to observe their religious beliefs and having the opportunity to administer justice by sitting on a jury. As such, it places a heavy burden on the would-be religious individual.[161] It also has a chilling effect on the freedom of expression that all of the First Amendment clauses are designed to protect because those wanting to be eligible to fulfill their civic and patriotic duty of jury service will be discouraged from overtly practicing their faith.

3. Religious Affiliation Constitutes a Suspect Class

The Supreme Court's equal protection framework has defined suspect classes as those groups "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of powerlessness as to command extraordinary protection from the majoritarian political process."[162] As the Court has recognized, religious classes have been subjected to discrimination and persecution throughout this country's history.[163] Heightened scrutiny was first acknowledged as being the appropriate standard for statutes directed at particular religious (and racial) minorities in the famous

---

[159] Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974) (stating that "[u]nquestionably, the free exercise of religion is a fundamental constitutional right").

[160] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 666-67 (1990) (holding that strict scrutiny is the standard of review for abridgment of First Amendment rights to free speech).

[161] The importance of religion is self-evident from the billions of people worldwide willing to make it a significant and often fundamental part of their lives and the sacrifices that many make to adhere to it. The importance of the jury is discussed in Section I and was recognized by the Supreme Court in Powers v. Ohio, 499 U.S. 400, 407 (1991) (quoting Alexis de Tocqueville over 150 years ago in 1 DEMOCRACY IN AMERICA 334-37 (Schocken 1st ed. 1961). Stating,

> [T]he institution of the jury raises the people itself . . . . The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society."

Id.

[162] *Rodriguez*, 411 U.S. at 28.

[163] *See* Everson v. Bd. of Educ., 330 U.S. 1, 8-12 (1947) (noting that Catholics, Protestants and Jews have often been the object of maltreatment, even if that has often been the product of inter-religious conflicts).

footnote four in *United States v. Carolene Products Co.*[164] Since then, the Court has several times stated that classifications based on religion are "inherently suspect" in the context of equal protection.[165] Religious persecution has been no milder or less insidious than other forms: "[M]en and women had been fined, *cast in jail, cruelly tortured, and killed*" for their religious beliefs.[166] In recognizing the historic pervasiveness of persecution of even orthodox religions, the Court in *Everson v. Board of Education* cited James Madison, who realized the need to Constitutionally protect the "liberty of conscience" to practice one's faith unhindered by the tyranny of the government.[167]

In contrast to other forms of invidious discrimination, such as racial, gender-based and so-called sexual orientation discrimination, religious discrimination is on the rise and en vogue.[168] A brief review of a few contemporary cases shows not only that sincere religious believers are a cognizable class, but that there is a rising tide of anti-religious sentiment which is easily discernible. American citizens have been peremptorily excluded from juries based on a variety of religion-oriented reasons. Religion-based peremptory strikes have been upheld based in whole or in part on prospective jurors' affiliation with the Catholic faith,[169] Jehovah's Witness church,[170] status as a preacher and wearing of a cross during *voir dire*,[171] Buddhist beliefs,[172] reading of the Bible and Christian books, choir practice, theological degrees, status as deacon and trustee, Sunday School teacher, ability to forgive others, and general hobbies or activities with a church.[173] Religion-based challenges have been made, but not upheld, based on the jurors' affiliation with the

---

[164] 304 U.S. 144, 152-53 n.4 (1938) (listing class traits which serve to qualify a group for suspect class status).

[165] City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 885 (1985).

[166] *Everson*, 330 U.S. at 9 (emphasis added).

[167] *Id.* at 11 n.9. "There are at this time in the adjacent country not less than five or six well-meaning men in close jail for publishing their religious sentiments, which in the main are *very orthodox*. . . . So I must beg you to pity me, and pray for *liberty of conscience to all*." (quoting James Madison, *in* 1 WRITINGS OF JAMES MADISON 18, 21 (1900)).

[168] *See generally* DAVID LIMBAUGH, PERSECUTION: HOW LIBERALS ARE WAGING WAR AGAINST CHRISTIANITY (Regnery Publ'g Inc. 2003) (describing how traditional Judeo-Christian adherents are, with increasing frequency and acceptance, subject to discrimination and persecution in government, public schools, private spheres, the media and even churches themselves, based on religious beliefs and lifestyle).

[169] Commonwealth v. Carleton, 629 N.E.2d 321 (Mass. App. Ct. 1994).

[170] Ramos v. State, 934 S.W.2d 358 (Tex. Crim. App. 1996).

[171] Bass v. State, 585 So. 2d 225 (Ala. Crim. App. 1991), *overruled on other grounds by* Trawick v. State, 698 So. 2d 151 (Ala. Crim. App. 1995).

[172] People v. Hope, 658 N.E.2d 391 (Ill. 1995).

[173] United States v. DeJesus, 347 F.3d 500, 502 (2003).

Jewish faith,[174] the Baptist denomination,[175] and the Islamic religion,[176] among others. Justice Scalia recently articulated this in his distinctive sardonic style in his dissent in *Locke v. Davey*:

> One need not delve too far into modern popular culture to perceive *a trendy disdain for deep religious conviction*. In an era when the Court is so quick to come to the aid of other disfavored groups, its indifference in this case, which involves a form of discrimination to *which the Constitution actually speaks*, is exceptional. . . . What next? Will we deny priests and nuns their prescription-drug benefits on the ground that taxpayers' freedom of conscience forbids medicating the clergy at public expense? . . . When the public's freedom of conscience is invoked to justify *denial of equal treatment*, benevolent motives shade into indifference and ultimately into *repression*.[177]

One of the factors which the *Batson* Court expressly stated as tending to show impermissible discrimination is the nature of "the prosecutor's questions and statements during *voir dire*."[178] The tone of the language used in several cases dealing with peremptory strikes for religious individuals is noteworthy. One prosecutor explained his religion-based peremptory challenge in a recent case this way: "The problem I have with [the three jurors] is . . . they read the Bible. . . . [A]ny of *these people* that read the Bible, *I want nothing to do with*."[179] Justice Rehnquist, writing for the Court in *Davey*, described religious instruction as being "of a different *ilk*."[180] In *United States v. DeJesus*, the government mused that the reason for its previous mistrial against the defendant "may very well have been . . . some type of religious belief that *infected or paraded* into the jury's province in the first trial."[181] Apparently this is the brave new world in which Americans with "unusual," "strong," or "heightened"[182] religious beliefs are indeed second-class citizens. This sampling of the current judicial and cultural milieu shows that not only is religious affiliation a suspect class, but unlike race and gender, it is a

---

[174] Joseph v. State, 636 So. 2d 777 (Fla. Dist. Ct. App. 1994).

[175] State v. Gilmore, 511 A.2d 1150 (N.J. 1986).

[176] People v. Langston, 641 N.Y.S.2d 513 (N.Y. Sup. Ct. 1996).

[177] Locke v. Davey, 124 S.Ct. 1307, 1320 (2004) (Scalia, J., dissenting) (emphasis added) (citation omitted). In this case, a student, Joshua Davey, was offered a "Promise" Scholarship from the state of Washington for low-income and high-achieving students. When Davey decided to double major in pastoral ministries and business administration, he was told that he could not use the scholarship for such a religious endeavor. *Id.* at 1309-16.

[178] Batson v. Kentucky, 476 U.S. 79, 97 (1986).

[179] Haile v. State, 672 So. 2d 555, 556 (Fla. Dist. Ct. App. 1996) (emphasis added).

[180] *Davey*, 124 S.Ct. at 1309.

[181] United States v. DeJesus, 347 F.3d 500, 503 (2003). Albeit, the government put fourth no evidence to support this speculation of what might have happened in the previous mistrial.

[182] *Id.* at 502, 509-10.

suspect class whose susceptibility to invidious discrimination is increasing.

Far from being limited to mere insults, modern religious discrimination is taking form in renewed acts of violence and actual government policy hostile to religious people. Examples of violence against Christians include recent shootings at Wedgewood Baptist Church in Fort Worth, Texas; specific targeting of Christian students at Columbine High School in Littleton, Colorado; and the shootings of praying students in Paducah, Kentucky.[183] Presidential candidate Gary Bauer cited the shootings as examples of a "disturbing pattern" of religious persecution.[184] Former House Majority Leader Dick Armey echoed Bauer's sentiment when, in a September 29, 1999 speech, Armey stated, "We are witnessing a rising level of bigotry against people of faith, especially Christians."[185] Armey also pointed out that the anti-religious sentiment has infected official state policy; the Justice Department's own "Healing the Hate" middle school curriculum suggests to school counselors that children may be *dangerous* if they grow up in a "very religious" home.[186] These examples and a multitude of others warrant the Court's prompt adjudication of religion-based peremptory strikes based on the increasing discrimination against religious people.

Even though religion is, generally speaking, a protected class, there is a legitimate question of whether it may still be necessary to demonstrate a particular history of religious discrimination *in jury selection* in order to justify strict scrutiny for jurors who are peremptorily excluded.[187] While this may have been necessary at one time to justify applying equal protection scrutiny to peremptory strikes, *Batson* expressly eliminated this requirement in overruling *Swain*.[188] The majority in *Batson* emphasized in its holding that even a "single invidiously discriminatory governmental act" violates equal protection. "'[A] consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause.'"[189] Thus, a specific history of religious discrimination in the context of jury

---

[183] Frank York, Is Christianity a 'Hate Crime'?, WorldNetDaily (Dec. 3, 1999), http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=17272.

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] Batson v. Kentucky, 476 U.S. 79, 84-87 (1986) (citing a history of racial discrimination in the jury system); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 134 (1994) (citing a similar history of gender discrimination in jury selection).

[188] *Batson*, 476 U.S. at 94-99.

[189] *Id.* at 95 (quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

selection is not necessary to afford strict scrutiny protection to jurors based on religious beliefs.[190]

4. Narrow Tailoring Requires the Most Searching Inquiry Even in *Voir Dire*

Whether based on equal protection or First Amendment analysis, the strict scrutiny standard is the same: the law or practice at issue must be narrowly tailored to serve a compelling government interest.[191] Narrow tailoring is commonly determined by asking whether the means employed by the government statute or policy are "necessary" to achieve the objective in the sense that "no less restrictive [or intrusive] alternative" could succeed in achieving the particular compelling objective.[192] The doctrine is designed to prohibit the use of invidious stereotypes and thus minimize potential discriminatory harm even where classifications *are* justified by some compelling interest.[193] The definition of stereotype—which is the primary evil to be shunned in Equal Protection Law[194]—is "a fixed or conventional notion or conception, as of a person, group, idea, etc., held by a number of people, and allowing for no individuality, critical judgment, etc."[195] This seems to be exactly what many of the courts have been allowing in the area of peremptory strikes. For example, prosecutors have commonly asserted

---

[190] Although it is not necessary in legal terms to show this history of religious discrimination in jury selection, it is probably not at all difficult to demonstrate that indeed, a significant amount of this type of religious discrimination has occurred. *See supra* note 101 for a representative sample of the sheer volume of cases that have actually been litigated based on claims of religion-based discrimination.

[191] *Compare* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279-80 (1986) (holding that under the Equal Protection Clause, "[T]o pass constitutional muster, [racial classifications] must be 'necessary . . . to the accomplishment' of their legitimate purpose" (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)), and "narrowly tailored to the achievement of that goal" (quoting Fullilove v. Klutznick, 448 U.S. 448, 480 (1980)), *with* Larson v. Valente, 456 U.S. 228, 247 (1982) (holding under the First Amendment that a "rule must be invalidated unless it is justified by a compelling governmental interest, and unless it is closely fitted to further that interest") (citation omitted).

[192] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978).

[193] The evil of steadying a suspect class such as race is that the stereotypes "'impermissibly value[d] individuals' based on a presumption that 'persons think in a manner associated with their race.'" Gratz v. Bollinger, 539 U.S. 244, 271 (2003) (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 618 (1990). In her now-vindicated dissent, Justice O'Connor joined by Justices Rehnquist, Scalia, and Kennedy, explained this position: Narrow tailoring is designed to ensure that the only instances where a suspect class such as race may be used by the state, even where a vital interest *is* at stake is where the discriminating law scrupulously adheres to the vital interest, thus minimizing the potential harm which the discrimination will cause. *Metro*, 497 U.S. at 603 (O'Connor, J., dissenting).

[194] *Bakke*, 438 U.S. at 298, 360.

[195] WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1405 (4th ed., IDG Books 2000).

that people who have forgiven[196] others because of spiritual beliefs are less inclined to sit in judgment of other human beings and uphold the law.[197] As mentioned earlier, one court has gone so far as to say that "in the case of religion, the attribution [of moral, political, or social beliefs] is not overly broad, and therefore not invidious . . . [b]ecause all members of the group share the same faith by definition, it is not unjust to attribute beliefs characteristic of the faith to all of them."[198] The absurdity of this statement is matched only by its audacity. Judge Stapleton discerned and nicely articulated the fatal analytical leap made by these courts in his dissenting opinion in *DeJesus*:

> [A] prosecutor may undoubtedly strike a juror for being unwilling to sit in judgment of another human being. However, a prosecutor may not, consistent with the Equal Protection Clause, *infer solely from* a prospective juror's race, gender, or *religion* that he will be *unwilling to sit in judgment* of another, and then offer that unwillingness as a permissible basis for a peremptory challenge.[199]

Common sense bolsters the judge's point that the assumptions based on religious practices, currently being allowed by many courts, are unfounded. As noted below, many of the same evangelicals who make up the most conservative ranks of the political spectrum tend to hold the *toughest* views on crime. Studies consistently show that Protestants and Catholics are 10–20% more likely to support capital punishment than non-religious persons.[200] This sharply higher support for capital punishment among religious individuals—precisely the ones who believe

---

[196] Incidentally, these cases grossly misunderstand the theological concept of (at least Biblical) forgiveness. Forgiveness is not inconsistent with holding criminals accountable to society and civil government for their crimes. Rather, it is entirely coherent to say to an individual who has committed a crime against you, "I forgive you because God has shown me His own infinite grace which I did not deserve. He asks me to attempt to extend that same grace to you personally, but you must still be accountable to the civil government which God instructs all to obey and pay your debt to the rest of society." Telecom Interview with Terry Cross, Ph.D., Professor of Theology and Dean of the School of Religion, Lee University, Cleveland, TN (Jan. 20, 2004).

[197] United States v. DeJesus, 347 F.3d 500, 505-11 (3d Cir. 2003) (holding that religion-based peremptory strikes were a permissible race-neutral reason primarily because the prosecutor was entitled to infer that the jurors would be less able to exert judgment on fellow humans); State v. Fuller, 812 A.2d 389, 397 (N.J. Super. Ct. App. Div. 2002) (finding permissible a peremptory strike based on prosecutor's inference from juror's traditional Muslim clothing that juror was religiously devout and therefore likely to be a defense-oriented).

[198] Casarez v. State, 913 S.W.2d 468, 496 (Tex. Crim. App. 1995).

[199] *DeJesus*, 347 F.3d at 514 (Stapleton, J., dissenting) (emphasis added).

[200] In 2003, 70% of mainline Protestants and 79% of Catholic Americans supported capital punishment compared to only 60% for non-religious individuals. THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, RELIGION AND POLITICS: CONTENTION AND CONSENSUS (2003), http://people-press.org/reports/display.php3?PageID=722.

in Biblical forgiveness—exposes a fatal flaw in prosecutors' and courts' assumptions that religious practice equates to inability to serve judgment on others for violating the law. Even in mainline Christendom, there is roughly a 70–30% split of opinion in favor of capital punishment—hardly a consensus of thinking![201] This is merely one example to show that all religious people do not think alike as a demographic group and that the current stereotypes pretending that people of faith are less inclined to uphold the law are specious. Therefore, excluding jurors based on religious beliefs or practices is not even rationally related, let alone narrowly tailored to some supposed interest in selecting jurors who can sit in judgment of fellow humans. The Supreme Court must step in and stem the tide of these increasingly frequent and erroneous stereotypes that pervade the lower courts today.

a. Attorneys Have a Duty to Question Further to Uncover an Actual Belief or Opinion that Raises a Presumption of Impartiality or Bias for that Prospective Juror

As a procedural extension of the Court's general strict scrutiny analysis, it should require litigants' counsel to (1) question allegedly biased prospective jurors beyond vague innuendo and stereotypical religious assumptions, and (2) to adduce some actual evidence showing that a specific belief held by the juror would likely prevent or substantially impair that juror's performance of the duties to determine the case at bar based on the evidence presented and the applicable law.[202] In *Haile v. State*, the court stated:

> The [lower] court erred by failing to *inquire more deeply* into the *reasons* advanced by the state for exercising a peremptory challenge aimed at Ms. King. The court should have conducted a *more penetrating inquiry* into what appears to be a pretextual reason; the defendant is entitled to a new trial.[203]

In *Batson*, the Supreme Court correctly reasoned that "[j]ust as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black."[204] The Court went on to explain that the "core

---

[201] *Id.*

[202] *See* People v. Hall, 672 P.2d 854, 854 (Cal. 1983) (holding that the trial court committed reversible error in accepting the prosecutor's explanations of his peremptory challenges at face value, and that the court had a duty not only to compel the prosecutor to explain his peremptory challenges, but also to conduct a serious evaluation of those explanations for purposes of determining whether they were bona fide).

[203] Haile v. State, 672 So. 2d 555, 556 (Fla. Dist. Ct. App. 1996) (emphasis added).

[204] *Batson*, 476 U.S. at 97 (citation omitted).

guarantee of equal protection . . . would be meaningless" if the Court on the one hand forbade the state to justify peremptory strikes by referring directly to the veniremen's race, but still allowed the party to justify a strike by couching it in terms of "assumptions" of bias "which arise solely from the jurors' race."[205] This boils down to a standard that prohibits striking a venireperson based *either directly or indirectly* on the individual's race. Applying the same principle to religion-based challenges exposes the hypocrisy which currently exists when judges say, apparently with straight faces, that discrimination based on "heightened religious involvement" or "unusual beliefs" is somehow substantively different from discrimination based on religious affiliation (evidently meaning religious sects with which persons associate). These distinctions hold no meaning for the individuals who are peremptorily struck from jury duty because they go to church, or sing in the choir, or read the Bible, or engage in other Christian or religious practices. Their constitutional rights are violated due to their lifestyle, their beliefs, and their actions—all of which are covered under the deliberately broad umbrella of "free exercise of religion."[206] Even the courts which have attempted to distinguish between *religious beliefs* in general, as opposed to *particular denominations,* fail to recognize that the sole purpose for different denominations is the set of sacred beliefs which constitute them. Thus, these distinctions do not inoculate otherwise impermissible discrimination merely by selecting a different word which technically distinguishes a fact pattern from some prior court precedent. The Constitution protects religious exercise, whatever its label.

The equal protection principle articulated in *Batson* is that discrimination against a suspect class is neither allowed directly nor indirectly through a proxy by another name. If this is carried forward to apply to the fundamental right of religious expression, then the absurdity of the *DeJesus* case and similar cases is exposed. In *DeJesus*, the court allowed the peremptory strikes to stand based on the venirepersons' "heightened religious involvement" and "fairly strong religious beliefs."[207] The prosecutor clearly based these assumptions of bias on the perception of how the venirepersons' religious beliefs would affect their ability to judge the facts impartially. In making his race-neutral explanation, the prosecutor admitted basing his assumptions of bias at least indirectly, and probably even *directly* on the religious persuasions of the venirepersons. Thus, under the *Batson* standard, the challenges should be struck down as violating the equal protection rights of the litigants, the prospective jurors, and the community.

---

[205] *Id.* at 97-98.

[206] U.S. CONST. amend. I.

[207] *DeJesus*, 347 F.3d at 502-03, 510.

b. *It Must be Determined Whether the Prospective Juror's Belief Would "Prevent or Substantially Impair the Performance of his Duties as a Juror in Accordance with his Instructions and his Oath"*[208]

The constitutional protection of religious liberty, like other constitutional protections, is not absolute. Accordingly, some analytical framework must be devised to reconcile the substantial protection it is afforded with the also-important interest of the right to trial by an impartial jury.[209] One standard strikes a sensible balance between the two weighty interests. It is the standard used for deciding whether for-cause challenges exercised to exclude prospective jurors based on their conscientious views regarding capital punishment deprive a defendant of an impartial jury.[210] It asks whether the juror's "views about capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath" to "consider and decide the facts impartially and conscientiously apply the law as charged by the court."[211] This standard is used to determine the propriety of for-cause challenges, not ordinary peremptory strikes. Therefore, the higher threshold requirement must be justified if it is to be applied to religion-based peremptory challenges.

First, the explicit constitutional protection given to religion necessitates a higher standard of protection than other ordinary rights. Strict scrutiny requires that the free exercise of religion must not be compromised absent a showing that the law or rule in question is narrowly tailored to achieve a compelling interest of the State.[212] The language and approach of the *Wainright v. Witt* standard recognizes the need to balance these interests.[213] On the one hand, it requires a party wanting to exclude a juror with some scruples about the death penalty to show some connection to, or questioning of, the juror's ability to decide the case based on the merits of the evidence presented and applying the law.[214] Thus, it does not permit the prosecutor to challenge the juror for cause if all that can be inferred from the juror's answers is that he or she

---

[208] Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)) (discussing standard for excluding prospective jurors who have conscientious scruples about capital punishment under the Sixth Amendment).

[209] U.S. CONST. amend. VI provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury of the State and district wherein the crime shall have been committed . . .*" (emphasis added); U.S. CONST. amend. XIV provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[210] *Wainright*, 469 U.S. at 420.

[211] *Id.*

[212] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 143 U.S. 457, 533 (1993).

[213] *Wainright*, 469 U.S. at 420-21.

[214] *Id.*

"would be more emotionally involved or would view their task 'with greater seriousness and gravity.'"[215] This standard does not allow use of the sloppy stereotype that all persons having any lack of comfort with the death penalty are subject to exclusion merely on that basis. On the other hand, in attempting to establish a connection between the juror's viewpoint and an inability to fairly administer his duties, the prosecution is not required to make such a biased attitude unmistakably clear to the trial judge. In fact, the trial judge may decide that a particular juror would be unable to faithfully and impartially apply the law from his own impression "[d]espite [a] lack of clarity in the printed record."[216]

This higher standard comports with the stronger protection that strict scrutiny is designed to ensure. The Supreme Court's rulings protecting litigants and prospective jurors from discrimination during *voir dire* have come about despite considerable resistance and criticism.[217] The *Batson* Court itself acknowledged, but discounted, the potential danger that its holding would "eviscerate" the function of the peremptory challenge to achieve the most fair and impartial jury possible as part of a fair trial.[218] While *Batson* and its offspring have spawned a substantial amount of scholarly criticism (and support), it does not seem to have eviscerated the important function that the challenge still plays in the trial process throughout the nation.[219] Nor, as the appellee–prosecutor in *Batson* predicted, has the test led to insurmountable administrative difficulties.[220] Some will argue that requiring the higher standard effectively converts the peremptory challenge into a for-cause challenge. This theory is misdirected because the name one gives to the protection required by the Constitution is not significant; the practical legal effect is what matters. To be sure, the approach argued for here does elevate the religion-based peremptory strike to a higher threshold, requiring litigants to meet a more rigorous standard when excluding a juror based on religious exercise. This is much the same as what the *Batson* and *J.E.B.* cases did for race and gender-based peremptory challenges. Moreover, as is demonstrated

---

[215] *Id.* (quoting Adams v. Texas, 448 U.S. 38, 49 (1980)).

[216] *Id.* at 425.

[217] *See supra* note 32 for examples of law review articles criticizing the *Batson* line of cases.

[218] Batson v. Kentucky, 476 U.S. 79, 98 (1986).

[219] *See supra* note 43 for several law review articles arguing that the peremptory challenge either will be, or already is, eviscerated as an effective tool in selecting fair juries.

[220] The California Supreme Court found that there was no evidence to show that procedures implementing its version of this standard, imposed five years before *Batson*, were burdensome for trial judges. *Batson*, 476 U.S. at 90-99.

below, the Constitution affords special protection to religion beyond even race and gender.[221] The Constitution is the supreme law of the land; the peremptory strike is a mere procedural tool. Like the mighty river which forms the contours of its surrounding canyon, so must the Constitution carve out the parameters of the peremptory strike, not the other way around.

E. Placing the Burden on the Party Claiming the Bias is Consistent with the High Degree of Protection Given to Religious Expression in the Constitution

Religion and religious practice are given special status and protection by the Constitution explicitly—unlike race or gender.[222] Even the provision in Article VI that "no religious test shall ever be required as a qualification to any office or public trust under the United States" supports the application of strict scrutiny when using religious factors in peremptorily striking a potential juror.[223] The protection of religious exercise in the Constitution is much broader than many of the current courts now acknowledge. Unlike gender or race, religious protections are explicitly in the text of the Constitution itself, and in more than one clause. When religion-based challenges are allowed, four different Constitutional clauses are violated: (1) Free Speech, (2) Free Exercise of religion, (3) Equal Protection, and (4) the prohibition of using religious litmus tests for public office found in Article VI.

When prospective jurors are suspected of biases associated with religious beliefs, the questioning attorney must develop the juror's testimony and establish that the juror actually does, or at least is likely to, harbor the alleged bias. Then the attorney must also demonstrate that the bias itself would cause prejudice in the case at bar; in other words, it must be shown that the bias would be likely to cause an unfair trial in light of the case's subject matter.[224] The reason for these additional requirements is that religious affiliation is both a

---

[221] *See infra* Part III.E. (explaining the constitutional justifications for recognizing the highest degree of protection for religious affiliation).

[222] U.S. CONST. amend. XIV. Neither race, gender, nor any equivalent of these actually appears in the text of the Fourteenth Amendment or elsewhere in the Constitution. In contrast, religious liberty appears explicitly in the original text of both Article VI and in the First Amendment. This comment does not argue that protection for race and gender should in any way be lessoned, but rather that religious liberty must once again be given at least a level of protection consistent with an honest interpretation of the Constitution.

[223] U.S. CONST. art. VI.

[224] For example, a juror who had a strong belief against capital punishment would be completely irrelevant in a misdemeanor case. In contrast, a juror who believed that all adulterers should still be stoned in accordance with Old Testament Jewish law is probably biased in regard to a divorce proceeding where infidelity is a central issue.

fundamental right and a suspect class. To abridge such a right or draw such a suspect classification, the party challenging must show that the challenge is narrowly tailored to meet a compelling state interest.[225] As has been discussed above, the peremptory strike itself is not a compelling or fundamental interest because it is not essential to a fair and impartial jury. The challenge is narrowly tailored only if the challenging party can establish that the bias is very likely to prejudice one of the parties in the case. If this test is met, then the challenge will be sustained on the basis of the improper bias notwithstanding the religious source of the bias. The questioning attorney must at least develop the prospective juror's testimony so that a nexus can be drawn between the religious belief or practice and the alleged bias that such a belief or practice would be likely to cause in the case at bar. Currently, none of these safeguards are required. Consequently, many citizens have had their constitutional rights trampled by litigants and by the courts who are entrusted to protect them.

Applying the standard previously set forth requires little imagination or ingenuity for attorneys and judges. Much of its strength lies in its simplicity. In the *DeJesus* case, for example, the prosecutor merely should have questioned the jurors further to ascertain whether, in fact, their religious beliefs and involvement would actually impair their ability to judge the case based on the evidence and applicable law. The prosecutor could have begun by asking the juror, who had forgiven the murderer of his cousin, whether that belief in forgiveness (or the particular experience itself) would affect his ability to judge another human being; this question was apparently never asked.[226] If it were asked, however, it could be followed by a series of questions probing further how the prospective juror could grant personal spiritual forgiveness on the one hand, while at the same time holding a criminal accountable to the civil government in the case at bar. These questions asked by a skillful attorney, together with the prospective juror's unrehearsed answers, provide a much greater opportunity for the trial judge to determine credibility and whether the religious beliefs would substantially and improperly influence the juror's performance of duties

---

[225] This is nothing more than the ordinary constitutional strict scrutiny test which is used whenever a fundamental right is implicated.

[226] Transcript of Jury Selection at 53–55, United States v. DeJesus, 347 F.3d 500, (3d Cir. 2003) (No. 99-728). *See also*, United States v. DeJesus, 347 F.3d 500, 514-515 (3d Cir. 2003) (Stapleton, J., dissenting). Stating that,

> [T]he voir dire transcript reveals no indication from either McBride or Bates that they would be reluctant to convict or pass judgment on another human being. If they had exhibited such a reluctance, the government clearly would have been able to use such a belief, regardless of whether it had a religious basis, as the reason behind a peremptory strike.

Id.

in a given case. If the juror answered that his belief in forgiveness would make it difficult to hold another person accountable or if the trial judge had reason to doubt the veracity of his answers, then the juror may still be properly excluded (if the potential bias is sufficient to compromise the compelling interest of the fair trial itself). This avoids the logical fallacy of jumping from the mere religious activities of an individual to concluding that the person cannot uphold the oath and decide a case on its merits. This satisfies constitutional strict scrutiny under the First and Fourteenth Amendments if the peremptory strike is someday found to be a compelling interest or if the individual juror's degree of bias must be excluded to ensure the compelling interest of an entire fair trial itself.

IV. CONCLUSION

If constitutional protection for religious discrimination in jury selection is not soon recognized and defined by the Supreme Court, religious discrimination will continue to occur and is very likely to increase. This harms the litigants themselves, the excluded members of the panel, the court system's integrity, and society as a whole. When individuals with strong religious beliefs or involvement are excluded from the fundamental civic role of serving on a jury, it violates the Equal Protection Clause of the Fourteenth Amendment, Article VI's prohibition of any religious test being used for a public office, and all the best principles of the First Amendment's guarantees of free speech and religious expression. When the Court began its experiment with the *Batson* doctrine in 1986, it did so in the name of equality. But the current message to religious individuals called for jury duty is clear: Thou Shalt Not Believe. The standard for religion-based strikes is unclear, and the harm this causes is troubling. The Supreme Court must act to remedy this injustice. Until this problem is remedied, the jury is still out on *Batson* and the law of peremptory challenges. A verdict is needed, and it is needed quickly.

THE IMPACT OF SCHOOL VOUCHERS ON EMPLOYMENT LAW: STATE REGULATORY INTERFERENCE WITH PRIVATE RELIGIOUS SCHOOLS

Brent Shelley[*]

I. INTRODUCTION

The current American educational system is divided into two fundamentally distinct parts: private education (mostly, though not exclusively, religious) and public education.[1] While public education is a State action, subject to strict constitutional controls, private education bypasses many of these checks in its educational procedures, especially if the private institution is associated with a religious doctrine or institution.[2] This system is generally cognizable in the classic instance where a private school is presented as an alternative source of education, wherein parents and students voluntarily opt out of the State-provided public education in favor of the private institution. In this situation, the State's constitutional obligation to grant a public education is nullified by the choice of the student not to accept the proffered education.[3]

With the creation and possible growth in the area of school vouchers, wherein the State grants payments or tax credits to parents placing their students in private institutions, the State's interest may change dramatically.[4] In providing vouchers, the State is arguably

---

[*] J.D. candidate, Vanderbilt University Law School, 2006; B.A., Indiana University Bloomington, 2003. Thanks are due to Professor Alex J. Hurder and Charles Langley for their assistance and insight in preparation of this article, as well as family and friends for their continued and welcomed support.

[1] Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1400 (2003).

> A fundamental tenet of constitutional law posits an "essential dichotomy" between public and private, with only public or government actors being subject to constitutional restraints. With rare exception, the Constitution "erects no shield against merely private conduct, however discriminatory or wrongful." The reigning constitutional paradigm thus strictly compartmentalizes society into public and private spheres, and does not acknowledge any substantial blurring between the two.

Id.

[2] *Id.*; Eric A. DeGroff, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 BYU EDUC. & L.J. 363 (2003).

[3] Joe Price, *Educational Reform: Making the Case for Choice*, 3 VA. J. SOC. POL'Y & L. 435, 488 (1996) ("The program neither dictates nor even encourages parents to select public or private schools, or vice-versa. It is parents, therefore, who make the decision as to which school their children will attend, based on the unique needs and interests of each child and on the reputation and record of each school.").

[4] Metzger, *supra* note 1, at 1389-90.

granting an alternative to its own public schools, while, to some unknown degree, keeping the student's education under the aegis of the State's constitutional duty to provide education.[5] This may serve to increase the State's interest in assuring the education of students and consequently allow greater State regulation of teacher certification, labor rights of educators, and the acceptance and dismissal of students in otherwise seemingly totally private institutions. Ultimately, school voucher programs may allow the State to impose additional direct statutory and agency regulations on private institutions.

Part II of this article will discuss the current distinctions between public and private religious schools from a constitutional and statutory standpoint, focusing on how State regulatory interests allow for imposition into religious schools, notwithstanding the effect of vouchers on lay teacher employment unions and collective bargaining (the discussion of which illustrates most effectively the general trajectory in this regard), teacher certification requirements, and discrimination in employment. Part III will discuss how these distinctions may be compromised by the introduction of school vouchers and the resulting increases in state regulatory interests. Part IV asks the question of whether this potential additional governmental regulation is in the best interests of the State, the private schools, or the student.[6]

II. THE CURRENT STATE OF EMPLOYMENT LAW CONCERNING STATE INTERFERENCE WITH PRIVATE RELIGIOUS SCHOOLS

In *Pierce v. Society of Sisters*,[7] the Supreme Court ruled that a state cannot act to bar students from attending private educational institutions in lieu of attending State-provided public schools.[8] Later cases added that while such private institutions may not be barred, they

---

> Under voucher plans, the government provides a set amount of public funding per student to help cover tuition at private or out-of-district public schools. Overwhelmingly, students obtaining vouchers enroll in sectarian schools. Until recently, only a few publicly-funded voucher plans had been implemented. But voucher use seems likely to increase in light of the Supreme Court's recent decision in *Zelman v. Simmons-Harris* [536 U.S. 639 (2002)], which upheld Cleveland's voucher plan against an Establishment Clause challenge.

Id.

[5] *Id.* at 1395 ("Rather than government withdrawal, the result is a system of public-private collaboration, a 'regime of mixed administration' in which both public and private actors share responsibilities.").

[6] The arguments presented here for and against applying increased state regulations to private schools because of voucher programs should not be read as advocating or protesting the existence or use of vouchers as a general concept. That argument is outside the scope of this article and deserves a proper long-form discussion.

[7] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[8] *Id.* at 534-35.

may be made subject to some degree of State regulation narrowly tailored to satisfy the State's regulatory interest in the employment of the school's staff and the education of its students.[9] However, the amount of regulation has always been ruled to be far below the amount allowed in public education, which, as a creation of the State, may be fully regulated. Private schools maintain a degree of separation as a result of their private status.[10]

This disparity is more pronounced when discussing parochial or religiously based schools. Once religion is introduced into the arrangement, the State must begin to grapple with both the Free Exercise Clause and the Establishment Clause in any regulation they seek to enforce.[11] As the vast majority of private schools have some form of religious affiliation, the impact of these clauses on private school regulation is of utmost importance.[12] The Court has long held that the imposition of government into religion is inherently harmful to both the Church and the State.[13] In analyzing these cases under the Establishment Clause, *Lemon v. Kurtzman* affords the most useful analytical framework.[14] There the Court clearly lays out the test for determining whether a state regulation unduly acts in concert with religion. The *Lemon* test includes three prongs. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[15] The first prong analyzes whether the State's interest in the regulation is of a valid and secular nature.[16] The second prong analyzes whether the actual effect of the statute would result in the State advancing or inhibiting religion.[17] The third prong requires, "that the regulation in question not result in excessive entanglement of the government with matters of religion."[18] In a simplified form, the test requires balancing the State's secular interest in the regulation

---

9 *See* Runyon v. McCrary, 427 U.S. 160, 177 (1976); Norwood v. Harrison, 413 U.S. 455, 461-62 (1973); Wisconsin v. Yoder, 406 U.S. 205, 239 (1972) (White, J., concurring).

10 Metzger, *supra* note 1, at 1400.

11 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .").

12 *Id.*

13 Lee v. Weisman, 505 U.S. 577, 609 (1992) (Blackmun, J., concurring) ("We have believed that religious freedom cannot exist in the absence of a free democratic government, and that such a government cannot endure when there is a fusion between religion and the political regime.").

14 Lemon v. Kurtzman, 403 U.S. 602 (1971).

15 *Id.* at 612-13 (citations omitted).

16 *Id.*

17 *Id.*

18 DeGroff, *supra* note 2, at 375; *see also Lemon*, 403 U.S. at 612-13.

(assuming the interest truly is secular and not a deliberate interference with religion), taking into account other regulatory alternatives to achieve the same interest, with the amount of interference with or endorsement of religion that will result, which the court may not seek alternatives for.

The *Lemon* test, and the freedom of religion clauses in the First Amendment in general, are not designed to fully segregate the State and the Church.[19] Instead, it is designed to ensure, "that no religion be sponsored or favored, none commanded, and none inhibited."[20] The test thus acts to allow the State to breach the wall of separation only in those cases where the State's actions impede religious freedom and religious establishment, and only to the extent necessary.[21] A functionally identical test was created in *Wisconsin v. Yoder*[22] regarding the Free Exercise Clause cases, which, quoting a summary from the later case of *Catholic High School Association v. Culvert*,[23] requires a balancing of, "whether: (1) the claims presented were religious in nature and not secular; (2) the State action burdened the religious exercise; and (3) the State interest was sufficiently compelling to override the constitutional right of free exercise of religion."[24] However, the Court decision in *Employment Division v. Smith*[25] has served to negate the impact of *Yoder*.[26] *Smith* held that any facially neutral state regulation in regards to its impact on free exercise, irregardless of the burdens it imposes on free exercise, is constitutional.[27] It is important to keep in mind the *Yoder* balancing test, due to the intense lack of comfort the Court has shown with the *Smith* bright-line test. In the case of *Church of Lukumi*

---

[19] N.Y. State Employment Relations Bd. v. Christ the King Reg'l High Sch., 682 N.E.2d 960, 965 (N.Y. 1997).

> The Supreme Court has made it clear, when discussing the Establishment Clause, that "total separation is not possible in an absolute sense, [for s]ome relationship between government and religious organizations is inevitable." The [Second Circuit Court of Appeals] further explained that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending upon all the circumstances of a particular relationship."'

Id. (citations omitted).

[20] Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970); DeGroff, *supra* note 2, at 374.

[21] DeGroff, *supra* note 2, at 377 ("Legislation that unduly burdened the exercise of religious beliefs was considered unconstitutional unless the state could demonstrate 'a compelling state interest in the regulation of a subject within the state's constitutional power to regulate.'" (citing Sherbert v. Verner, 374 U.S. 398, 403 (1963)).

[22] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[23] Catholic High Sch. Ass'n v. Culvert, 753 F.2d 1161, 1165 (2d Cir. 1985).

[24] *Id.* at 1169; *see also* Yoder, 406 U.S. at 221.

[25] Employment Div. v. Smith, 494 U.S. 872 (1990).

[26] *See id.* at 890.

[27] *Id.*

Babalu Aye v. City of Hialeah,[28] the dicta of the various Justices (including Justice Scalia, who wrote *Smith*) indicates a strong desire to move away from the *Smith* test in the future.[29] If the Court were to break with *Smith*, a test like that created in *Yoder* is a likely starting point for the creation of a new balancing test.

In discussing the application of these tests to the expansion of state regulations on private schools, it is difficult to fully decide how the courts will come out in any particular case, as the decisions are often split amongst the circuits. Yet some general tenets do tend to hold steadfast. Courts have almost always granted that the State has a sufficient interest in private education such that it can extend *some* forms of regulation based solely on the State's interest in ensuring that a school's students are receiving a sufficient education.[30] For this singular interest, the State can require basic accreditation and educational standards compliance.[31] However, these accreditation standards must be of a minimal character, narrowly tailored to accomplish only the State's interest in ensuring a basic level of education.[32] When Ohio issued a more stringent accreditation requirement on religious schools, the state supreme court, in *State ex rel. Nagle v. Olin*,[33] ruled that the requirement was overly burdensome and thus unconstitutional.[34] With

---

[28] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

[29] *Id.* at 559 (Scalia, J., concurring). Scalia stated,

> Nor, in my view, does it matter that a legislature consists entirely of the purehearted, if the law it enacts in fact singles out a religious practice for special burdens. Had the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), they would nonetheless be invalid.

Id.

[30] DeGroff, *supra* note 2, at 379-80 ("States have a substantial interest in ensuring that all children receive an adequate education. They, therefore, have the right to regulate the manner in which private schools perform their basic educational function, and may require such schools to meet certain minimum standards . . . . No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught and that nothing be taught which is manifestly inimical to the public welfare."). *Id.* (citation omitted); *see e.g.*, Wolman v. Walter, 433 U.S. 229, 240 (1977); Levitt v. Comm. for Pub. Educ., 413 U.S. 472, 479 (1973).

[31] DeGroff, *supra* note 2, at 381.

[32] Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

[33] State *ex rel.* Nagle v. Olin, 415 N.E.2d 279 (Ohio 1980).

[34] *Id.* at 288

> [U]ntil such time as the State Board of Education adopts minimum standards which go no further than necessary to assure the state's legitimate interests in

this basic framework, the following examples should be illustrative of the distinctions and the disparities that exist between public and religious schools.

A. Unionization and Collective Bargaining

Private employees are currently protected statutorily in their collective bargaining actions under the National Labor Relations Act ("NLRA"). The Supreme Court has ruled that—the NLRA or comparable statutes notwithstanding—workers are permitted by the freedom of assembly clause to form unions.[35] However, without some form of statutory provision, an employer is not required to engage in any form of bargaining with the union.[36] The NLRA requires private employers to participate in good faith collective bargaining with all employees. Most states have adopted a rule for public employees based on the NLRA to some degree, requiring good faith bargaining about select issues, though the State has significant authority to limit the scope of the negotiations.[37] However, for the most part, a state cannot mandate a decision or resolution in a collective bargaining dispute, it may only require that the two parties sit down in good faith.[38]

In most states, public school teachers receive something less than the NLRA basis of employment rights, with the actual degree of bargaining power varying from state to state. Religious school teachers receive virtually no protection through federal law, though recent state decisions have actually served to bolster their protection to be nearly

---

> the education of children in private elementary schools, the balance is weighted, *ab initio*, in favor of a First Amendment claim to religious freedom.

DeGroff, *supra* note 2, at 382.

[35] *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1676 (1984) ("When Congress enacted the National Labor Relations Act (NLRA) in 1935, it exempted public employers—governments and their agencies—from the obligation to engage in collective bargaining."); *see, e.g.*, Smith v. Ark. State Highway Employees, Local 1315, 441 U.S. 463, 464-65 (1979) (per curiam); Elfbrandt v. Russell, 384 U.S. 11, 15-17 (1966).

[36] *Developments in the Law—Public Employment*, *supra* note 35, at 1617; *see, e.g.*, *Smith*, 441 U.S. at 465 ("[T]he First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.").

[37] *Developments in the Law—Public Employment*, *supra* note 35, at 1617. The subject matter most often restricted by these statutes relate to terms and conditions outside the matters of wages and hours.

[38] *See* Catholic High Sch. Ass'n v. Culvert, 753 F.2d 1161, 1167 (2d Cir. 1985) ("It is a fundamental tenet of the regulation of collective bargaining that government brings private parties to the bargaining table and then leaves them alone to work through their problems."); N.Y. State Employment Relations Bd. v. Christ the King Reg'l High Sch., 682 N.E.2d 960, 965 (N.Y. 1997).

equal to that of other private school teachers.[39] Under federal law, religious school teachers may unionize through their constitutional right to assemble, but their employer has no statutory duty to pay attention to their requests, making collective action virtually ineffective.

In *NLRB v. Catholic Bishop of Chicago*,[40] the Supreme Court held that the National Labor Relations Board ("NLRB") could not assert jurisdiction over a private parochial school to require the school to engage in collective bargaining with the school's lay teachers' union.[41] In making this determination, the Court ruled that allowing the NLRB to assert jurisdiction under the National Labor Relations Act in dealing with a religious institution violated the Establishment Clause of the First Amendment.[42] The Court did not go into depth in explaining its determination in this case; it simply held that allowing jurisdiction would go against prior precedent concerning both the NLRB and the First Amendment.[43]

Catholic Bishop, though never overturned by the Supreme Court, has been roundly criticized and marginalized by state courts. In *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School*,[44] New Jersey ruled that *Catholic Bishop* was a case of statutory interpretation, not constitutional analysis; thus,, under New Jersey state law, the New Jersey version of the NLRB could assert jurisdiction under the New Jersey version of the

---

[39] *See, e.g., Catholic High Sch.*, 753 F.2d at 1167; S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709, 714 (N.J. 1997); Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 862 (Minn. 1992).

[40] NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

[41] *Id.* at 504. The religious school teachers referenced throughout this article are restricted to lay teachers and their interests. Members of the clergy who also act as teachers are subject to much lower protections and pose issues outside of the scope of the immediate discussion.

[42] *Id.* at 500.

[43] *Id.* at 499.

> The Board thus recognizes that its assertion of jurisdiction over teachers in religious schools constitutes some degree of intrusion into the administration of the affairs of church-operated schools. Implicit in the Board's distinction between schools that are "completely religious" and those "religiously associated" is also an acknowledgment of some degree of entanglement. Because that distinction was measured by a school's involvement with commerce, however, and not by its religious association, it is clear that the Board never envisioned any sort of religious litmus test for determining when to assert jurisdiction. Nevertheless, by expressing its traditional jurisdictional standards in First Amendment terms, the Board has plainly recognized that intrusion into this area could run afoul of the Religion Clauses and hence preclude jurisdiction on constitutional grounds.

Id.

[44] *St. Teresa*, 696 A.2d 709 (N.J. 1997).

NLRA to engage in exactly the kind of intervention barred in *Catholic Bishop*.[45] The *St. Teresa* court stated that the United States Supreme Court in *Catholic Bishop* specifically avoided the constitutional issues implicit in State regulation of religious institutions and, in so doing, left the analysis completely under existing constitutional doctrine.[46] On both counts, which were based on the Free Exercise and Establishment Clauses, the court found, under the respective balancing tests, that the school's prior practices of granting some collective bargaining rights to teachers could be used as evidence to show that the religious interests of the school were not substantially harmed by the regulation requiring collective bargaining.[47] In analyzing the claims, the court noted that the regulations were generally applicable to all employees, and did not infringe on the rights of religious employers any more than other secular employers; thus the regulations fell within the same secular compelling governmental interest of insuring the usage of collective action by employees.[48] Similarly, in *Catholic High School Association v. Culvert*,[49] the Second Circuit held that so long as the assertion of jurisdiction only "has an indirect and incidental effect on employment decisions in parochial schools involving religious issues, this minimal intrusion is justified by the State's compelling interest in collective bargaining."[50]

Lastly and most notably, in *Hill-Murray Federation of Teachers v.*

---

[45] *Id.* at 714.

Defendants' reliance on *Catholic Bishop* is misplaced. That case was decided strictly on statutory interpretation grounds. The Court ruled that in the absence of "an 'affirmative intention of the Congress clearly expressed'" that teachers in church-operated schools should be covered by the NLRA, the NLRB did not have jurisdiction to "require church-operated schools to grant recognition to unions as bargaining agents for their teachers."

Id. (citations omitted).

[46] *Id.*

[47] *Id.* at 716-17.

The Diocese's past history of collective bargaining with lay high-school teachers strongly suggests that bargaining over some secular terms and conditions of employment can be achieved without either advancing or inhibiting religion. . . . Indeed, the agreement between the Diocese and the elected representative for the lay high-school teachers preserves the Bishop's exclusive right to structure the schools and their philosophies. Thus, bargaining collectively over similar secular terms and conditions of employment for lay elementary school teachers would not inhibit defendants' religion by interfering with issues of structure and indoctrination.

Id.

[48] *Id.* at 721-22.

[49] Catholic High Sch. Ass'n v. Culvert, 753 F.2d 1161, 1167 (2d Cir. 1985).

[50] *Id.* at 1171.

Hill-Murray High Sch.,[51] the Minnesota Supreme Court held that, because the Minnesota Labor Relations Act contained a list of exclusions, the fact that religious school teachers were not included in that list indicated a desire for the statute to include them in its protections.[52] The *Hill-Murray* court went on to state:

> [T]he right to free exercise of religion does not include the right to be free from neutral regulatory laws which regulate only secular activities within a church affiliated institution. . . . [The religious school] receives limited public funds, is incorporated under state laws, and is subject to governmental regulation of fire codes, zoning ordinances, and compulsory student attendance. In analyzing an excessive entanglement claim, the "character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority" is scrutinized. . . . The [F]irst [A]mendment wall of separation between church and state does not prohibit limited governmental regulation of purely secular aspects of a church school's operation.[53]

Thus, *Hill-Murray* seems to expand the question of undue interference with the free exercise of religion beyond pure statutory construction and into the realm of analyzing the functional effects of the religious interference in the form of a balancing test, comparing the State's secular interest in a regulation to the level of interference with the free exercise of religion. The State, under this test, having a regulatory interest in the secular aspect of insuring free and fair collective bargaining in the private sector, must balance any possible religious interferences stemming from the regulation.[54] In striking this balance, the court judges the nature of the religious doctrine the regulation arguably interferes with and makes a determination on the materiality of the actual conflict between the regulation and the religious doctrine.[55]

---

[51] Hill-Murray Federation of Teachers v. Hill-Murray High School, 487 N.W.2d 857 (Minn. 1992).

[52] *Id.* at 862.

[53] *Id.* at 863-64.

[54] *Id.*

[55] *Id.* at 865.

> [W]e take note that the Catholic Church has a long history of support for labor unions and the right of workers to organize for the purposes of collective bargaining. We do not believe that Hill-Murray is arguing that recognition of labor unions is against Catholic doctrine. What Hill-Murray is essentially arguing is that the separation of church and state prohibits the state, via the Bureau, from telling Hill-Murray what to do vis-à-vis their employees. The separation of church and state is a constitutional liberty that is subject to balancing by compelling state interests; "the liberty of conscience . . . shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state." MINN. CONST. art. I., § 16.

This indicates a significant move towards a more functional view of accidental governmental interferences with religion, far removed from the formal line drawing of *Catholic Bishop*. The courts are now able to actually make determinative judgments on the value of religious doctrine when construing the free exercise impact of facially secular state regulations.[56] In *Hill-Murray*, the Minnesota Supreme Court asserted its independent power to determine a religious institution's view of its own religious doctrine, and then balance that view with the court's conception of the secular interest in the regulation.[57] This is particularly worrisome on First Amendment grounds, but for the purposes of the discussion at hand, it indicates a shift away from hard and fast rules regarding arguably secular statutory schemes and their impact on religious organizations.

In comparison, public school teachers are not covered by the NLRA and are thus not under the jurisdiction of the NLRB.[58] This is due to an express exemption in the NLRA for public employees.[59] However, each state has enacted some form of statutory framework under which public school teachers can be protected for their collective bargaining actions and union activities.[60] The rationale behind exempting public employees is the fear that public employees engaged in collective bargaining will either harm the independent decision making powers of the government, or engage in general strikes of such a character as to be inherently harmful to the public interest.[61] These restrictions were significantly lessened once it became clear that the benefits of responsible collective action, such as ensuring fair treatment and conditions for workers, far outweighed the fears of irresponsible collective action.[62] However, it still remains the law in all states that public school teachers do not possess a

---

Id.

[56] *Id.* at 865-66.

[57] *Id.* at 857, 867 ("The state's interests in promoting the peace and safety of industrial relations, the recognition of the statutory guarantees of collective association and bargaining, and the first amendment protection of the right of association outweigh the minimal infringement of Hill-Murray's exercise of religious beliefs.").

[58] *Developments in the Law—Public Employment*, *supra* note 35, at 1676 ("When Congress enacted the National Labor Relations Act (NLRA) in 1935, it exempted public employers—governments and their agencies—from the obligation to engage in collective bargaining.").

[59] *Id.*

[60] *Id.* at 1677; *see, e.g.*, 5 U.S.C. § 7101(a) (1982); N.J. STAT. ANN. § 34:13A-2 (West Supp. 1983-1984); OR. REV. STAT. § 243.656 (1981); Pa. Labor Relations Bd. v. State Coll. Area Sch. Dist., 337 A.2d 262, 266 (Pa. 1975); *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977) ("The desirability of labor peace is no less important in the public sector.").

[61] *Id.* at 1676-77.

[62] *Id.* at 1677.

general right to strike with legal protections.[63] Most states that grant public sector bargaining still restrict the scope of acceptable bargaining subjects to specific topics that are generally related directly to wages and employment circumstances.[64]

Ensuring that teachers have an avenue to petition their schools for better wages, hours, and conditions (which may include educational resources and lower class sizes) is of the utmost importance to the public school system. The best schools are those that employ the best teachers who are placed in the best circumstances to perform their jobs. Teachers' unions and additional labor protections serve both of these prongs: (1) the protection and support of the union can help create a situation where the prospect of public school teaching becomes a more attractive employment option for more qualified individuals and (2) a union's judicious use of the power of collective action and bargaining can exert sufficient pressure on school boards and public opinion, and consequently serve to compel better conditions for both teachers and students. Without this pressure to improve, it is quite possible that public education could digress even further into the deadlock of mediocrity, forcing the government to seek means to revitalize the entire public school body.

B. Teacher Certification

A public school board can institute basically any form of certification requirement for its teachers, though most states have statutory requirements that a public school teacher must meet. These statutory requirements do not, for the most part, apply to private educators. The Court in *Pierce* ruled that the State does have a sufficient regulatory interest to implement *some* regulations on private teacher certification but failed to state exactly what restrictions those may be, other than to say the State may require, "that teachers shall be of good

---

63 *Id.* at 1701.

64 David J. Strom & Stephanie S. Baxter, *From the Statehouse to the Schoolhouse: How Legislatures and Courts Shaped Labor Relations for Public Education Employees During the Last Decade*, 30 J.L. & EDUC. 275, 292-94 (2001). For example,

> [A Michigan statute allowed bargaining], but it also limited the scope of bargaining in nine areas. Among the most significant restrictions were prohibitions on bargaining over: [1] subcontracting for non-instructional support services; [2] the beginning of the school year and the length of the school day; [3] the use of volunteers in the schools; and [4] decisions concerning the use of experimental or pilot education programs including staffing and the use of technology in such programs. As a result of these amendments, any contract provision containing a prohibited subject of bargaining would be unenforceable.

Id.

moral character and patriotic disposition."[65] Later courts have consistently held that this state regulation must be less stringent than that utilized to ensure proper certification of public school teachers, and instead that the decision of what qualifications make teachers acceptable must be, to a large extent and beyond a fairly low regulatory floor, left up to the particular private institution.

In *New Life Baptist Church Academy v. East Longmeadow*,[66] the United States Court of Appeals for the First Circuit held that a city ordinance, requiring all parochial schools to provide functionally equivalent secular education as public schools, was constitutional. The ordinance required both a showing that the schools' teachers were properly qualified to provide education and a report by the school to show that their secular curriculum was in proper compliance.[67] In so holding, the court stated that, because the State had a compelling interest in ensuring proper secular education of all students,[68] a regulation governing only the secular aspects of the education could be held constitutional, assuming the regulation is the least restrictive means to achieve the compelling interest.[69]

Similarly, in *Fellowship Baptist Church v. Benton*,[70] the United States Court of Appeals for the Eight Circuit held constitutional an ordinance requiring all children to be placed, until eighth grade, in a public school or one offering an equivalent secular education, with private schools having to submit reports to ensure their compliance with the equivalency requirements and to ensure that their teachers were properly certified.[71] The court held that, regarding the ordinance's interference with parochial schools, "[there is] clear authority, [and] even a duty, for some state intervention into private religious schools to ensure the State's interests are being met."[72] The court applied the *Yoder* accidental interference balancing test, finding that the reporting requirements and the mandate for functionally equivalent secular education constituted only a minor interference with religious exercise but comprised a substantial interest to the State.[73]

---

[65] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925); *see also* Farrington v. Tokushige, 273 U.S. 284 (1927); DeGroff, *supra* note 2, at 387.

[66] New Life Baptist Church Acad. v. E. Longmeadow, 885 F.2d 940 (1st Cir. 1989).

[67] *See generally id.*

[68] *Id.* at 945.

[69] *Id.* at 946-47.

[70] Fellowship Baptist Church v. Benton, 815 F.2d 485 (8th Cir. 1987).

[71] *See generally id.*

[72] *Id.* at 491.

[73] *Id.*

> While there may be some debate over the precise language to be used in defining the standard of review in free exercise cases, we have no difficulty

C. Employment Discrimination

Public schools do not fall under any statutory exceptions to Title VII[74] and may be held liable for discrimination on the basis of age, sex, race, and disability under the normal procedures afforded to private employees.[75] Additionally, public schools must act to protect the First Amendment rights of its teachers, within the reasonable limits imposed by their contractual relationship with the State.[76]

In addition to possessing the power to set lower standards for inclusion in the school as an educator, private schools generally maintain almost full discretion in deciding the identity, character, and behavior of its student body and faculty. Unless the school has an explicit contract to the contrary, private institutions are under no obligation to protect any student or faculty member's First Amendment or other constitutional rights. It may fire a teacher or discipline a student purely for their religious beliefs or political speech.[77] In *Rendell-Baker v. Kohn*, a private school teacher was fired for stating her opinions in a dispute over staff hiring decisions.[78] The Court found that such a discharge was legal, as the private school did not extend First Amendment protections to its employees.[79]

There are significant restrictions on discrimination in religious schools, but only through basic statutory discrimination on employment grounds, where the interference with religion is deemed to be outweighed by the State's interest in preventing specific forms of discrimination. For example, in *Dole v. Shenandoah Baptist Church*, the Fourth Circuit found that a religious school's teacher salary provision, which granted additional "head-of-household" bonuses to all male teachers (regardless of marital status), violated the Fair Labor Standards Act ("FLSA").[80] The court rejected the argument of the religious school that the imposition of the FLSA would interfere with the

---

> upholding the reporting requirements in this case. As the district court determined, the burden on plaintiff principals' religious beliefs—if one exists at all—is very minimal and is clearly outweighed by the state's interest in receiving reliable information about where children are being educated and by whom.

Id. (citations omitted).

74 42 U.S.C. § 2000e (2005).

75 *Id.*; *see, e.g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977).

76 *See, e.g.*, Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415-16 (1979); Perry v. Sindermann, 408 U.S. 593, 597 (1972); Shelton v. Tucker, 364 U.S. 479, 485-86 (1960).

77 Metzger, *supra* note 1, at 1403 ("While public schools must respect the First Amendment rights of teachers and students, private schools theoretically can fire employees and expel students who question how the school is run.").

78 Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

79 *Id.* at 837-38.

80 Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1392 (4th Cir. 1990).

institution's free exercise of religion.[81] In making this determination, the court reviewed the record of the evidence and the statement of school administrators to determine that:

> The pay requirements at issue do not cut to the heart of Shenandoah beliefs. Although Shenandoah's head-of-household pay supplement was grounded on a biblical passage, church members testified that the Bible does not mandate a pay differential based on sex. They also testified that no Shenandoah doctrine prevents Roanoke Valley from paying women as much as men or from paying the minimum wage.[82]

Much like the decision in *Hill-Murray*, it seems worrisome to allow judges to make determinations of a religious nature, though at least here the determination was basically made through direct evidence of the unfounded nature of the policy.[83] Thus, it appears that substantive employment requirements do apply directly to religious employers.

However, religious employers are directly excluded from liability from Title VII under Title VII § 702.[84] In *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,[85] the Supreme Court upheld § 702 even though the religious institution in this case fired an employee for failing to show that he was a member of the church the institution was connected to.[86] In holding the statute constitutional, the Court noted that providing exceptions and exclusions to religious employers did not inherently conflict with the Establishment Clause.[87] Instead, this exception served only to unburden the free exercise of religion from statutory restrictions, and thus advanced a constitutional interest through which the Court could act.[88]

III. AN ANALYTICAL SURVEY OF THE POTENTIAL IMPACT OF SCHOOL VOUCHERS ON STATE INTERFERENCES WITH PRIVATE RELIGIOUS SCHOOLS

The introduction of school vouchers impacts the public/private distinction in school regulation to a profound extent. *San Antonio Independent School District v. Rodriguez* stands for the proposition that

---

81 *Id.* at 1393.

82 *Id.* at 1397.

83 *Id.*

84 42 U.S.C. § 2000e-1(a) (2005); *see e.g.*, Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

85 Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

86 *Id.* at 334.

87 *Id.*

88 *Id.* at 335-37 ("A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence.").

there is no fundamental constitutional right to a public education.[89] The case and its holding are generally deemed to be historical curiosities, with the case being functionally overturned.[90] Both the cases surrounding and including *Brown v. Board of Education* make it clear that not only is a proper free public education a service the State is compelled to provide to its citizens, but it actually is one of the most important requirements for the preservation and growth of our nation.[91] The case of *Goss v. Lopez* holds that when a state imposes a compulsory attendance statute and a requirement for provision of public education (as almost all states have done), all students affected by that statute are entitled to due process and equal protection under the Fourteenth Amendment.[92] Therefore, once a state provides a guarantee of education to children by statute, it is under a constitutional duty to provide the same protection of that grant to each and every student, or face a violation of equal protection.[93]

When private schools are genuinely private, the state interest in ensuring a proper education is comparatively low. Arguably, the basic act of attending a private school is in effect opting out of the proffered public education of the State in favor of an education provided by a private institution.[94] The private school students may be designated as a class that has chosen to voluntarily exempt themselves from their statutory and constitutional rights under the State's created duty to provide a public education.[95] Thus, the only real regulatory interest in the private institution is to ensure that they comply with other private

---

89 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 1 (1973).

90 *Id.* at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

91 Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id.

92 Goss v. Lopez, 419 U.S. 565 (1975).

93 *Id.*

94 Metzger, *supra* note 1, at 1395.

95 *Id.*

business statutes and that their graduates are educated in such a way as not to dilute the opportunities of public school students. There is no constitutional duty to ensure that these private school students are receiving an adequate education. The belief is that the educational interests are served to a sufficient degree by the free marketplace, since only by offering a qualitatively equal, if not superior, education will parents choose to pay tuition so that their children attend a private school over the free public education offered by the State. While the State can impose the minor regulations on private education expressed previously, in this context there is really only a negligible state regulatory interest to be promoted and no express duty on the State to compel their protection of students.

Once the issue of vouchers in any form enters the picture, the State's regulatory interest is dramatically shifted. Instead of parents choosing private education as an opt out of the State's public education plan, the State is giving money to parents to use private school as an alternative to the public schools.[96] Thus it may be argued that, by issuing vouchers to attend qualifying private schools, the State is promising that the education the private school provides is to the standard required by the State's duty to provide a free public education; in effect privatizing a portion of the State's educational duties.[97] If this is the case, all aspects of the educational process in the voucher school fall under an increased state regulatory interest, approaching the state interest inherent in the public education system.[98] At that point, the state interest moves into ensuring that the actual education provided by the private institution is up to the standards required in providing Court mandated public education.[99] In so doing, this may trigger a situation where "courts may hold that such nominally private action in fact constitutes state action for constitutional purposes. More frequently, the actions described may run afoul of legislative, regulatory, or contractual requirements, and the government may itself police the conduct of its private partners to ensure they adhere to constitutional prohibitions."[100]

---

[96] Price, *supra* note 3, at 438.

[97] This is to be distinguished from the phenomenon of charter schools, which act as privately run public schools. Charter schools operate as a private entity outside the rules of the school board as the result of a contract with the state or county. While there are certainly corollary issues affecting both forms of schools in a similar manner, this article does not address this issue directly. Metzger, *supra* note 1, at 1389.

[98] Some would argue that this increased interest exists even without vouchers. DeGroff, *supra* note 2, at 391 ("[Some] have suggested that private schools perform an essentially public function in educating children, and that the state therefore has a substantial interest in determining what is taught.").

[99] Metzger, *supra* note 1, at 1403-04.

[100] *Id.* at 1404 (footnote omitted).

For nonreligious private schools, the imposition of additional regulatory schemes is a simple life, liberty, or property restriction on private action, which requires a highly deferential rational basis test. This test would be clearly met by the State's interests in ensuring the proper education of private school students, which is being promoted by the imposition of increased teacher certification requirements. Also, the test would be met by the State's interest in preventing discrimination in public accommodations, which is served by prohibiting discrimination by private schools who receive state funded vouchers.

The issue becomes increasingly muddled as it relates to religious teachers in private religious schools. At what point does a state certification requirement impede a private religious organization from freely exercising their religion in allowing for their preferred speakers to speak to the children attending the religious school? Does the State's creation and support of a certification requirement give de facto authorization to the school's religious purpose in its teaching and thus become a violation of the Establishment Clause? These are difficult questions to answer, especially in light of the increased state interest through vouchers.[101] Generally, the State has been required to stay out of the business of regulating who can and who can not act as clergy or religious instructors in churches.[102] In that private capacity, it makes perfect sense to exclude the State from interfering in this most necessarily insulated of endeavors.[103] However, once the State's interest shifts as a result of the delegation of education to these religious institutions, it becomes a contentious issue regarding whether the State can impose facially neutral, but potentially forceful, regulations, such as educational qualifications and certification requirements of teachers acting as both agents of the State for public education and private agents for a religious entity.[104]

Analogous situations are rare and it is difficult to foresee how the Court will apply existing standards to accommodate this new situation and new State interest. However, a crude attempt to apply the *Lemon* balancing test lends itself to an interesting discussion and perhaps the most illuminating example of the complications inherent in this new

---

[101] *See generally* DeGroff, *supra* note 2, at 379-80.

[102] David J. Overstreet, Note, *Does the Bible Preempt Contract Law?: A Critical Examination of Judicial Reluctance to Adjudicate a Cleric's Breach of Employment Contract Claim Against a Religious Organization*, 81 MINN. L. REV. 263, 264 (1996).

[103] *Id.* at 291 ("[T]he relationship between clergy and religious organizations is so highly ecclesiastical that any governmental intrusion would result in an intolerable level of contact between church and state.").

[104] *See generally* Goss v. Lopez, 419 U.S. 565 (1975); Sean T. McLaughlin, *Some Strings Attached? Federal Private School Vouchers and the Regulation Carousel*, 24 WHITTIER L. REV. 857, 888 (2003).

aspect of the interaction between the conflicting and overlapping interests of the State, private enterprise, and religious institutions. *Lemon* concerned direct state aid to parochial schools, which the Court held to be an unconstitutional establishment of religion, unless the aid is narrowly tailored to accommodate the secular regulatory interest of the governing state.[105] Here, the concern is whether applying direct regulations on a parochial school may also be deemed to violate the Establishment Clause of the First Amendment.

In functional analysis, the *Lemon* test serves to first balance the State's nonreligious interest in imposing the regulation, considering any regulatory alternatives that impose lower interferences with religion against the current scheme's interference with religion.[106] The State's nonreligious regulatory interest here may be extremely high. The State will likely be under a duty to insure the proper education of voucher students as quasi-public school students, notwithstanding the religious nature of the private school. Assuming the voucher system itself is valid, the regulatory alternatives to ensure proper education are virtually nonexistent. If it is shown that the State has a duty to ensure the quality of the education at the schools it provides vouchers for, the State's interest may likely rise to a degree representing a compelling governmental interest. The actual aid to the religious organization by imposing these regulations is simply the fear that doing so represents the State providing implicit support to the religious message represented by the school. In comparison with the state interest in education (and avoiding the imposition of liability), this Establishment Clause complaint would probably fail. There is an additional possible challenge under the case of *Hunt v. McNair*,[107] which found that some "institutions are, 'pervasively sectarian' [and] that any aid to them, even when limited to a secular function of the organization, would nevertheless constitute an Establishment Clause violation because any aid, no matter how limited, would nevertheless support the pervasive sectarian function."[108]

Whatever the case is that implicates the First Amendment issue, it all becomes moot unless a party is able to show that the imposition of the vouchers themselves represent a state action upon which a plaintiff can sue the State for the actions of the private voucher school, placing the school under a duty to ensure that the private voucher school maintains

---

[105] Price, *supra* note 3, at 469 ("The *Lemon* test thus incorporates the Court's prohibition of all state aid or support of religion by permitting only aid to parochial schools which supports or benefits the secular purpose or functions of the school.").

[106] *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[107] Hunt v. McNair, 413 U.S. 734 (1973).

[108] Price, *supra* note 3, at 470 (quoting *McNair*, 413 U.S. at 743).

a specific standard of educational care.[109] The test for state action has two distinct prongs:

> [F]irst, whether "the [challenged] deprivation . . . [was] caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible[;]" and second, whether "the party charged with the deprivation . . . [is] a person who may fairly be said to be a state actor."[110]

Courts have rarely found that government contracts create state action, but here, where the State is expressly delegating through contract its own constitutional duty, it is easy to imagine a different outcome.[111] It is illustrative to see how the imposition of vouchers into the analytical equation can shift the State's regulatory interest in the aforementioned areas.

A. Unionization and Collective Bargaining

As stated, many state courts have held that the compelling governmental regulatory interest in protecting collective bargaining can overcome a First Amendment claim so long as the statute is genuinely secular in nature and narrowly tailored to protect the State's interest with the minimum possible interference or support of religious institutions. The Supreme Court, though, has not explicitly altered its formalistic stance from *Catholic Bishop*. However, assuming that the current trend holds, a future holding by the Supreme Court would likely adopt a more functional analysis of the issue, and expand the NLRA to encompass religious school teachers. If this is the case, it appears likely that the Court will adopt a balancing test of the regulatory interest versus the interference with religious institutions and beliefs.

It seems likely that given the situation and duties created by vouchers, the Court will find that the regulatory interest of the State is extremely high and thus would have to balance that with the interference caused by the specific statute. The NLRA has been the basic framework of the state statutes allowed in *Culvert*, *Hill-Murray*, and *St. Theresa*, and thus the actual interference exhibited with religious beliefs under the NLRA would likely be deemed to be minor. This is especially likely since cases such as *Hill-Murray* have allowed the Court to make its own determinations as to the contrasting religious interest, which may or may not conform with the stated religious interests and beliefs of

---

[109] *See* Metzger, *supra* note 1, at 1412 (discussing Supreme Court analysis of state action doctrine).

[110] *Id.* (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

[111] *Id.* at 1419-20 ("No doubt, the Supreme Court will clamp down when it perceives an effort by government to evade its constitutional obligations.").

the religious institution.[112] It is thus likely that the Court, in a modern voucher case, would find that the newly heightened state interest would serve to overcome the minor to moderate imposition on religious interests.

B. Teacher Certification

Foremost among the concerns regarding the increased State interest created by vouchers is the potential for imposition of greater regulation on the issuance of teacher certifications to private school educators. The current requirements for private school teachers are sufficient to satisfy the relatively low governmental interest in insuring that students in private schools, obtaining state high school diplomas, are sufficiently educated to maintain the value and esteem of the State's public school graduates.[113] In the newer voucher systems, the State's interest arguably shifts to ensuring that the private educators are of the same caliber as that required by public educational institutions, and that the entire State sponsored educational system provides a functionally similar education, both in terms of content and quality.

Some have argued that the cases of *Benton* and *New Life Baptist Church* seem to allow states using voucher programs to institute more stringent teacher certification requirements, so long as the requirements are narrowly tailored to the secular purpose of ensuring effective education in voucher schools.[114] In these two cases, a state regulation to require functionally equivalent education in private parochial schools was held to be valid under the compelling governmental interest test.[115] The courts in both cases indicated that so long as the statute actually served to equalize the secular education received among private and public schools, the states had compelling interests in ensuring education.[116]

The Supreme Court has never directly addressed the issues created by these appellate level decisions and has never said that ensuring an adequate education for all private students falls within the narrow confines of the compelling governmental interest test. However, the state regulatory interests in question are directly affected by the introduction of vouchers. If it is the case that states are delegating public education to

---

[112] Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992).

[113] *See* State *ex rel.* Douglas v. Faith Baptist Church of Louisville, 301 N.W.2d 571, 597 (Neb. 1981) ("[I]t goes without saying that the State has a compelling interest in the quality and ability of those who are to teach its young people.").

[114] McLaughlin, *supra* note 104, at 890-91.

[115] New Life Baptist Church Acad. v. E. Longmeadow, 885 F.2d 940, 944-45 (1st Cir. 1989); Fellowship Baptist Church v. Benton 815 F.2d 485, 490-91 (8th Cir. 1987).

[116] *See New Life Baptist Church*, 885 F.2d at 940; *Benton*, 815 F.2d at 485.

private actors by providing vouchers, it seems only logical that the most likely issues that would fall under an expanded compelling governmental interest would be those that most directly effect the educational quality of private educational institutions, which would include the requirements aimed at insuring that educators are properly qualified to provide education. In light of this duty, and the balancing tests of *Yoder* and *Lemon*, which require the narrow tailoring of any regulation to address the secular interest without unduly interfering with religious practices, a teacher certification requirement seems like the most logical regulation. It is directly addressed to the secular interest in question and, properly drafted, can serve to address the State's regulatory interest with the least possible interference with religion. Requiring all teachers to have a specific level of qualification should not serve to unduly interfere with the free exercise of religion, and a court utilizing the *Hill-Murray* means of analyzing religious beliefs would very likely find that there exists no religious dogma that speaks against having properly educated educators.[117]

C. Employment Discrimination

There is no more troubling issue in discussing voucher programs than discrimination in schools. The fight for equal treatment in public education was so hard-fought and so painful to the nation that the idea of fighting such a war again, especially in the context of religion, is genuinely worrisome. At the same time, because we as a society have fought so stringently for equality in education and educational employment, there is a strong desire to maintain that which we have earned.

The difficulty here is that freedom of religion is a systemic value of American society, arguably behind only the freedom to vote and freedom of speech in importance. Thus, any regulation combating discrimination is going to face a far more stringent interference element of a balancing test than the other issues discussed above. As state courts have held, religious values have relatively little to say about the morality of collective bargaining with employers over wages and employment conditions.[118] On the other hand, religious principles have a great deal to say about whom one chooses to hire to perform a job. This is the basis for the general Title VII exclusion for religious employers and it is not likely to vanish in the near future, as all challenges to its validity have fallen on deaf ears in the Supreme Court.[119] However, religious values have a

---

[117] Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 863-64 (Minn. 1992).

[118] *See id.* at 865.

[119] *See* Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints

great number of fundamental tenets that weigh strongly upon the legal definitions of discrimination.

In *Kohn*, the Court held that a school's firing of a teacher for exercising speech was constitutional under the First Amendment despite the fact that the religious school in question was almost entirely funded through public government monies.[120] The Court considered this form of payments to be analogous to a government contract, which carries no First Amendment burdens.[121] *Kohn*'s holding has not permeated to other holdings, but it still does not seem to be the case that the State's interest in protecting the full First Amendment free speech rights of teachers would be encompassed by its duty to provide an adequate public education. It is one thing to protect the right of employees under the NLRA to petition their employers for more favorable working conditions. That serves simply to ensure that teachers are given adequate considerations in improving the entire school community, thus assisting the State regulatory interest of education. It is quite another thing for the State to step into a religious institution and require compliance with every tenet of free speech as a condition of their voucher contract. That would appear to create substantial interferences with the institution's free exercise rights under the *Yoder* test.[122] The State has only a de minimus interest in fully protecting the speech of teachers; thus, in a balancing test, such a requirement would likely be found to be unconstitutional.

IV. A SHORT DISCUSSION OF THE OBJECTIVES OF SCHOOL VOUCHERS AND THE IMPACT OF STATE ACTION ON VOUCHER PROGRAMS

Acting under a presumption that a state issuing vouchers can impose additional regulations on private schools, the question immediately becomes whether the State *should* exert this power. Just because a state has the power to impose a law does not mean that enacting such a law is the best course of action. The immediate concern for any state seeking to impose these regulations is the almost certain deluge of lawsuits to protest its passage. This is a significant impediment both in terms of cost and time for the State. Assuming that the State is willing to consider such regulations notwithstanding the threat of litigation, such regulations should still be looked at extremely critically because there is the alternate source of regulation through imposition of the Court. If, as discussed previously, the courts were to find that the State has a duty to ensure the same level of educational

---

v. Amos, 483 U.S. 327, 334 (1987).

120 Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

121 *Id.*

122 Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

quality and opportunities in qualifying voucher schools, the State may be compelled to enact these regulations to fulfill their duty. In that case, the State must take the same issues into consideration in deciding the scope of the proposed regulation to fulfill its duty.

The basis for utilizing vouchers to fund current public school students transferring to private educational institutions is based on the real or perceived crisis of American public education. It is currently perceived by the public at large and by numerous politicians that the American public education system is in shambles and cannot adequately compete with the educational systems present in competing nations. Such a belief is certainly not unfounded. One need only look at the situation surrounding Ohio's voucher system–where a state court found that the Cleveland schools were in such poor shape that the school district was ordered to effectively shut down–to understand that this nation has some public schools in dire need of assistance and some students whose educational needs cannot be met by these schools. The use of vouchers is designed to allow a private institution to provide a better education option to parents and students who feel their public school is unable to perform its educational duties as well as a private school.[123] It is commonly perceived[124] that private schools are far more effective in their educational mission.[125] As the public schools are run and regulated by the State, the question arises why the same entity that has been unable to successfully administer public schools should be in the business of regulating private enterprises that are performing to a higher standard. Thus, it may be argued that any additional imposition of the State into private educational institutions would be destructive; such an imposition may fundamentally harm the continued success of private schools.[126]

---

[123] Giacomucci v. Se. Delco Sch. Dist., 742 A.2d 1165, 1167 (Pa. Commw. Ct. 1999). In adopting the Plan, the School District identified the following reasons for the Plan: "Whereas, we believe that parents have a fundamental right to control the education of their children, and that to more fully exercise this right, parents should be given more direct, individual control over their education dollars. We believe that school choice plays an essential part in improving the quality of education for *all* Southeast Delco students. It will empower parents and help them choose the school that *they* feel is best for their children. The resulting increased competition to attract and keep students will spur school improvement in both the public and private sectors and benefit the entire community."

Id. (citation omitted).

[124] Some statistics tend to bear out this perception, though not to the degree commonly spoken of when vouchers are invoked in public discourse as a recommended option.

[125] Of course, they had better be, or parents would not choose to pay the tuition fees when public schools are available for basically free.

[126] Price, *supra* note 3, at 457-58 ("'The freer schools are from external control—the

The opposing argument would state that because vouchers have the ability to fundamentally shift what private education stands for in qualifying institutions, state regulation may become required to supply the type of education needed to adequately fulfill the State's duties. Private schools, as they existed prior to vouchers, are a select group of interested individuals. The parents usually are more active in the education of their children, which is only logical as they want to ensure their investment is warranted. If the school is religiously based, the religious institution is interested in the education of its students to ensure that the alumni are able to go forth and succeed in the outside world and to help the faith. Whether or not the school is religiously based, the administration is always interested in the educational achievements of its students, since it is concerned with ensuring that the school continues to attract paying students.[127] These groupings of interested parties serve to ensure that the private school maintains and perhaps improves upon its educational mission by exerting constant pressure on teachers and students.

Absent these forces, it is unknown how a private school will be affected. Will the parents, divested of an economic investment, forgo some of their personal involvement?[128] Without the type of interests that separate public education from private education, will private schools begin to deteriorate in the same manner that some public schools have? Just as public schools have the potential to fall to the bottom levels of compliance with laws because of the lack of strong incentives, it may be that private schools will also lose their incentive to ensure academic excellence. In that situation, it is possible that the education provided by private religious schools will dip below a constitutional baseline, requiring states to enact regulations to ensure that they do not become exposed to liability for failure to provide a constitutionally required public education under the Fourteenth Amendment.

---

more autonomous, the less subject to bureaucratic constraint—the more likely they are to have effective organizations.'" (quoting JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 187 (1990))).

[127] "[D]ecisions about educational content and quality become a personal rather than collective responsibility, thereby creating schools that, in essence, are private communities of like-minded families." Metzger, *supra* note 1, at 1392 (discussing public charter schools, but the basic principle is exactly the same).

[128] This should in no way be read as an indictment of public school parents. Instead, it is simply a reflection of the fact that a higher percentage of private school parents are intimately involved with their child's education than public school parents. It is only logical that much of this has some connection with the economic investment. An alternate explanation is that parents willing to pay this money are already more concerned with their child's education and would be just as active in a public school setting. However, the question of what happens when a new set of parents are introduced through vouchers is mostly unaffected by the previous analysis.

Another interesting argument suggests that once private schools begin to look more like public institutions some of the benefits to society that stem from their private status will begin to evaporate. For example, private entities are subject to tort liability for damages, while public schools are generally not liable for damages.[129] Thus, it may be beneficial to maintain some aspect of voucher schools' private aspects to provide recourse to potential plaintiffs seeking redress.[130]

Additionally, it is unknown exactly how the introduction of competition into the provision of public education will affect public education as we know it. More notably, many proponents of public education worry that the amount of funding for public education will decrease, and this will almost certainly limit the potential for public schools to improve.[131] While this is a strong argument against the imposition of vouchers, it is also an argument in support of the proposition that, if the government is going to create and allow vouchers, it must keep itself involved to ensure that the private institutions are performing to the standards expected of them.

It does not take much foresight to see the basic impetus for seeking a voucher system. Allowing private enterprises to compete for government monies takes advantage of the benefits of the free market system of innovation and expertise, while allowing the State to spend its resources on making a better public school system for the remaining students.[132] It also forces the public school system to compete in that marketplace, for good or for ill, as discussed above. The belief is that by imposing a competitive element into education, the providers of both

---

[129] Metzger, *supra* note 1, at 1404 ("[P]reserving a private actor's nongovernmental status arguably better ensures accountability because it offers more opportunities for individuals to recover money damages, from which public entities and employees are frequently immune.").

[130] *Id.*

[131] Strom & Baxter, *supra* note 64, at 275.

> Rather than improve the existing public education system, proposals for vouchers and tax credits simply provide a means to leave the system altogether. Further, although charter schools are generally public schools, a charter school still operates outside the existing public school system and its impact on public school employees may be similar to situations where work is sub-contracted to a private entity. Many state legislatures attempt to place the blame for failing schools on teachers and as such, they enact laws restricting bargaining rights and altering tenure protection. To the extent that many of these 'reforms' have been legislative, education employees, like other workers, have had to fight union dues initiatives that attempt to radically restrict the extent to which employees and their unions participate in the political process.

Id.

[132] Metzger, *supra* note 1, at 1408 ("Privatization holds the potential to yield more efficient and innovative government programs, by allowing the government to harness private expertise, flexibility, and market competition to its advantage.").

public and private schools will be forced to innovate and excel in order to survive.[133] As other proposed and tested methods of reversing the steady decline of public education, such as increased funding, have failed,[134] the implementation of this proven successful educational system stands out as an attractive option to investigate.[135]

However, religious schools typically oppose additional state regulations on the premise that such regulations inherently serve to impede and restrict the religious organization's freedom to direct and control its religious mission.[136] Additionally, the current trend in several states is directed at reducing the government's role in regulating private education.[137] With the overall success rates in terms of graduation and college attendance of students from private education, the need for regulation at this juncture seems tenuous at best. Moreover, states would certainly prefer to avoid the extensive contests that are sure to result from any intrusion on private schools without at least having a sufficient regulatory interest to justify the regulation. Only about half of the states have a mandatory accreditation policy for private educational institutions, and many of those states provide an exemption for religious

---

[133] Price, *supra* note 3, at 438.

[134] *Id.* at 445-46.

> *[E]mpirical* evidence collected over the last twenty years clearly demonstrates that simply pouring more money into the educational system does not improve educational performance. 'Much of the current concern about the performance of our schools is motivated by the fact that student performance has actually fallen during a period in which we have continually increased our spending on schools . . . . Real expenditures per pupil have risen steadily and dramatically over the past two decades. Specifically, after allowing for inflation, expenditures per pupil more than doubled between 1966 and 1989; this corresponds to a 3.5% compound annual growth rate. At the same time, performance as measured by Scholastic Aptitude Test ('SAT') scores fell to a level significantly below the mid-1960's levels.

Id. (footnotes omitted) (quoting Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 426-28 (1991)).

[135] *Id.* at 486 ("Such [policies] would allow the public schools to adopt the internal organizational and management changes that could make them effective competitors and would force them to compete with private schools in a system where all parents have a choice among all schools.").

[136] DeGroff, *supra* note 2, at 387.

> Religiously affiliated schools, especially the smaller evangelical Christian schools, typically oppose mandatory certification, both because of its perceived impact on key mission-driven personnel decisions and because of the practical difficulties of finding and attracting teachers whose views are harmonious with the church and whose qualifications are acceptable to the state.

Id.

[137] *Id.* at 395-96.

schools.[138] Even granted the introduction of voucher policies, the general trend toward allowing the free market to take its course is unlikely to cease unless the State develops a strong interest in reinserting itself into the situation. As vouchers are a fairly recent innovation, it seems wise for the State to avoid significant interference until it becomes clear that vouchers cannot achieve their designated goals without stronger governmental action in the regulation of voucher schools.

[138] *Id.* at 398.

REBUILDING THE FOUNDATIONS OF IRAQ: COMPARISONS TO THE REVIVAL OF DEMOCRACY IN CENTRAL EUROPE

Christopher S. Crago[*]

I. INTRODUCTION

The daunting task before the United States and the United Nations is the reformation of a country and the creation of a working democracy in Iraq. An Iraqi democracy must reflect the image of its ethnically diverse population and stand as a clear vision and represent the strong foundations required for the establishment of a unifying constitution. An Iraqi democracy must For a society to begin the journey towards a developed democracy, "there is a need first to have a constitution, to have a government, to re-establish Iraq as the Iraqi people would like to have it."[1] The constitution *must* be supported by a legitimate representative government with enforceability power, or, like the constitutions of so many nations, it will be worth nothing more than the paper it is printed upon. The challenge is to form a government for the people of Iraq that will restore faith in the political process and unify a nation currently in flux with competing minorities. Such a task is complicated but imperative to return stability to the Middle East.

The movement towards freedom and democracy is already progressing as the United States presses for the eventual creation of a three-hundred member National Assembly in Iraq.[2] The assembly should be endowed with the power to draft a new constitution, re-invigorate a beleaguered judiciary, and empower a free market of trade.[3] While the United States delayed the institution of actual policies and procedures for creating an Iraqi National Assembly, the Coalition Provisional Authority, prior to national elections, formed a temporary governing

---

* Christopher S. Crago received his J.D. from Gonzaga University School of Law, class of 2005, with a concentration in Business Law and currently attends the University of Washington School of Law Graduate Program in Taxation where he is a candidate for LL.M., class of 2006. Chris expresses his gratitude to Father Robert J. Araujo, S.J., Pontifical Gregorian University, and Ann Murphy, Associate Professor of Law, Gonzaga University.

1 *See generally Is the Price, in Blood and Money Too High*, ECONOMIST, Aug. 9, 2003, at 38.

2 *Out of the Ashes*, ECONOMIST, May 10, 2003, at 37.

3 *Id.*

council represented by the country's various political, ethnic, and sectarian demographics.[4]

At the same time, the governing council sought to restore order in Iraq, following the United States' overthrow of Saddam Hussein. They face not only fear of possible reprisals against themselves,[5] but also must mend the fractured rifts between the ethnic and sectarian groups.[6] In addition to resolving past differences between the minorities, the new government must adhere to the essential elements of a prosperous democracy by ensuring that both economic and political reforms are developed equally towards the eventual goal of creating a national government of the people, driven by a free market economy.[7]

Following the fall of communism in 1989, Sir Ralf Dahrendorf[8] expressed that reformation of Central Europe would be a difficult task. He believed that "[i]t will take six months to reform the political systems, six years to change the economic systems, and sixty years to effect a revolution in the peoples' hearts and minds."[9] The situation in Iraq is a more tenuous task, and time is not a luxury. However, due to the resurgence of democracy in Central Europe, the world has access to a working model from which to draw its experience.

Reformation is difficult to accomplish but not impossible to achieve. It would be wise for the world to not only unite in support of a free Iraq, but also to utilize the Central European models to define the structures and institutions necessary to rebuild the foundations of an independent nation. However, considering the volatile political and religious climate often recognized in the Middle East, its progress will be varied from the Central European reformation and, therefore, must be advanced with utmost care. Should the newly elected government ignore this fact, there is a strong possibility that it will dissolve into a regime of elected

---

[4] *The New Men, and Women in Charge*, ECONOMIST, July 19, 2003, at 19. The governing council, composed mostly of exiled former leaders, includes many of the political trends and religious affiliations of Iraq and includes both men and women from all demographic groups. *Id.*

[5] *Cursed by Crime and Numbers*, ECONOMIST, Sept. 27, 2003, at 44.

[6] *The Rise of a Radical*, ECONOMIST, Oct. 18, 2003, at 45.

[7] *See Rebuilding Iraq*, ECONOMIST, Apr. 19, 2003, at 9.

[8] Sir Ralf Dahrendorf, a sociologist and distinguished academic, was born in Hamburg, Germany in 1929. As a social democrat during Nazi Germany, he was sent to a concentration camp in 1933. After his release from the camp, Sir Ralf fought with the resistance. After the war, he authored many books and theoretical essays on social democracy and political theory. Interview by Harry Kreisler with Sir Ralf Danhrendorf, Warden of St. Anthony's College, Oxford, England (Apr. 4, 1989), *in* Conversations with History: Straddling Theory and Practice, http://globetrotter.berkeley.edu/Elberg/Dahrendorf/dahrendorf1.html.

[9] Vojtech Cepl, *The Transformation of Hearts and Minds in Eastern Europe*, 17 CATO J. 229, 229-30 (Fall 1997).

officials who will ignore "constitutional limits on their power and deprive[d] their citizens of basic rights," thus repeating the historical agony of the region but, this time, under the guise of democracy.[10]

II. BRIEF POLITICAL HISTORY OF IRAQ

At the conclusion of the First World War, under a mandate from the British government, the kingdom of Iraq was established.[11] Accompanying the development of the kingdom, British state builders instituted a political system that included a monarchy, a parliament, a Western-style constitution, and a standing military.[12] However, the British were also responsible for creating many of the current problems faced by Iraqis today, including an in-state minority dilemma and border disputes with neighboring states, primarily because their governmental policies were established in an indecisive manner.[13] Due to a lack of enforcement power delegated to the Iraqi government, after the British left the territory, the process of decolonization left the Middle East with a nation suffering from an undefined political identity; weakened by a destabilized and diverse population, which failed to assimilate itself into a cohesive political community.[14]

Following the foundation of the Iraqi state in the 1920's, conflicts arose over the political ideals of various leaders desiring to control the future of Iraq.[15] The political command structure shifted during the period of transformation following the British mandate, resulting in power being passed from tribal sheikhs under the initial democracy, to Arab nationalists, to the Iraqi Communist Party, to Kurdish leaders, and finally to the Ba'thist regime of Saddam Hussein.[16] Each group within the country had different visions for the future of Iraq and sought to assert dominant control over the entire population with disastrous results.[17] These visions each reveal the path that various internal ethnic groups sought to self-identify by attempting to gain complete control over the state and eventually resulting in one community's assertion of supremacy and power over another.[18] Throughout its existence, Iraq has experienced a "powerful tendency for politics to be seen mainly as a way

---

[10] FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD 17 (2003).

[11] *See* Arab.net, http://www.arab.net/iraq/iq_british.htm (last visited Oct. 11, 2005).

[12] PHEBE MARR, THE MODERN HISTORY OF IRAQ 29 (2d ed. 2003).

[13] *Id.*

[14] *Id.* at 5.

[15] CHARLES TRIPP, A HISTORY OF IRAQ 1-2 (2d ed. 2002).

[16] *Id.* at 2.

[17] *Id.* at 1-2.

[18] *Id.* at 3.

of disciplining the population in order to ensure conformity with the rulers' vision of social order."[19]

III. ETHNICITIES WITHIN IRAQ

While a significant majority of the Iraqi population is Shi'a,[20] they have never been able to define themselves as a single political community. The Shi'a leadership is restricted by the *mujahids*,[21] whose views generally differ regarding the various economic and social foundations of the state. These conflicting viewpoints create a split within the Shi'a community. Some leaders choose to identify with the ideals found in theoretical Arab nationalism.[22] Arab nationalism is founded on the belief that by supporting the Arabs such actions may eventually lead to obtaining more rights and, ultimately, bridge the gap between the Sunni Arabs and the Shi'as.[23] However, other factions of Shi'a leaders oppose Arab nationalism and demonstrate a need to strive for a self-identification of sectarianism.

The dominant culture of ethnic Arab nationalism has effectively widened the gap between idealists by forcing the populous to choose between supporting the respectful leadership of the *mujahids* or following the path towards the creation of a unified Iraqi state.[24] The underlying issue for the Shi'a, and for most other Iraqis, is that the choice has never been theirs to make. Rather, in the past, such a decision was forced upon them to accept the wishes of the dominant power or face the fear of death or retribution.

The defining split within Iraqi politics and social groups is caused by the strength of influential authoritarianism, the ability of the dominant powers to exploit the fractured relations of the populous, and by the immense distrust Iraqis have in political officials. This allows for the status quo of fear and societal suspicions to exist on a grand scale in Iraqi society. The mere fact that these elements are allowed to survive under the guise of a totalitarian society would tend to be the logical reasoning behind why a strong political and social movement towards gathering the people into a unified society has taken so long to develop. Any new attempts by the Democratic government to break the cycle of fear must first seek to dissolve patrimonialism, or allowing those in

---

[19] *Id.* at 2.

[20] Shi'as represent fifteen million, or sixty percent, of the entire population of Iraq. *The Rise of a Radical*, *supra* note 6, at 44.

[21] A *mujahid* is an Islamic Fighter or "someone who is active and fights for Islam." Islamic Glossary, http://www.usc.edu/dept/MSA/reference/glossary/term.MUJAHID.html (last visited Oct. 11, 2005).

[22] TRIPP, *supra* note 15, at 3.

[23] *Id.*

[24] *Id.* at 5.

power to change the belief that supporters of a régime must share the inevitable fate of the leaders they choose to follow.[25] Otherwise, the cycle of ruthless violence will continue to persist, becoming a mainstay in Iraqi political culture.

The manufacturing of fear as a tool of dominance within the society has resulted in the elite ruling class's ability to forge the foundations of a civilized Iraq under a demented notion of political order. The use of violence to suppress the dissident factions of a fractured community has left Iraq with an opposition whose influence has been silenced and left a nation lacking a voice of opposition loud enough to effectuate change amongst the various political groups.[26]

The rising emergence of pan-Arabism amongst the Arab speaking community has led to a successful attempt by the Sunnis to unify an Arab identity by creating a connection with the region's glorious past that seems to transcend the new national borders of Iraq.[27] However, pan-Arabism failed to have the same effect on the Kurdish community, which still harbors ambitions of nationalism. Additionally, the Shi'a continue to challenge the core significance of pan-Arabism by following their system of complex sectarianism.[28]

The Shi'a majority called for the formation of an electorate, rather than the American appointed Governing Council, to draft a new Iraqi constitution.[29] Shi'a clerics declared that nothing less than an elected National Assembly would carry enough legitimacy with the people to draft a suitable constitution.[30] Legitimacy must be won in an election in order for the people to accept the representatives who will define the future of their nation and individual rights.[31] However, the ethnic minority Kurds are fearful of nationwide elections, stating that "[d]emocracy does not mean that Arabs should decide the fate of the Kurds."[32] The fear being that, should the Shi'as mobilize politically, they could effectively gain a super majority in the proposed electorate, thus drafting the constitution in a manner denying fundamental rights to minority populations.[33]

---

[25] *Id.* at 6.

[26] *See id* at 275.

[27] JOSEPH BRAUDE, THE NEW IRAQ 38 (2003).

[28] *Id.* at 39.

[29] *First Give Them Power of a Kind, Then Let's Discuss Democracy*, ECONOMIST, Nov. 22, 2003, at 43.

[30] *The Rise of a Radical*, *supra* note 6, at 44.

[31] *The New Men and Women in Charge*, *supra* note 4, at 19.

[32] *Can Kurds and Arabs Be Reunited?*, ECONOMIST, Sept. 20, 2003, at 45.

[33] *Cursed By Crime and Numbers*, *supra* note 5, at 44.

IV. REUNIFICATION AND THE KURDS

One major problem with the unification of Iraq is the relationship between the Kurdish population in Northern Iraq and the rest of the country. Following the Iran-Iraq war, Saddam Hussein turned his attention to the dissident Kurdish communities of the north, launching the infamous *anfal*,[34] or spoils of war.[35] During this period of conflict, the assault on the Kurdish people became an action of genocide,[36] which, with the aide of chemical weapons, led to the murder of over 100,000 people.[37] The end result of the *anfal* was the displacement of hundreds of thousands of Kurds from their homes and villages, all in the name of Arabization.[38] The Arabization of Northern Iraq aided in the dominant control by the Ba'thist government because "when an individual is deprived of his private property, he loses his economic independence and so is more easily and completely controlled and oppressed by the state."[39]

The current situation, with respect to the relationship of the Kurds and the newly elected Iraqi government in Baghdad, is a complex one. Many Kurds consider the territory that they were forced to flee to as a newly formed nation of "Kurdistan."[40] In fact, "Kurdistan" maintains the basis of a quasi-nation, which observes a culture vastly different from what would be considered Iraqi.[41]

While some Kurds sought independence from a unified Iraq, others had a significant power base in the provisional governing council because they were the most organized ethnic group within Iraq.[42]

---

[34] *Anfal* is the name given by the Iraqis to a series of military actions, ordered by Saddam Hussein following the Iran-Iraq war, which lasted from February 23 until September 6, 1988 against the Kurdish population in Northern Iraq. Kahaled Salih, *Anfal: The Kurdish Genocide in Iraq*, 4 DIGEST OF MIDDLE EAST STUDIES 2, 24-39 (Spring 1995), *available at* http://www.xs4all.nl/~tank/kurdish/htdocs/his/Khaledtext.html.

[35] BRAUDE, *supra* note 27, at 40.

[36] G.A. Res. 96 (I), at 188-89, U.N. Doc. A/64/Add. 1 (Dec. 11, 1946).

> Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscious of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

Id.

[37] BRAUDE, *supra* note 27, at 40.

[38] *First Give Them Power of a Kind, Then Let's Discuss Democracy*, *supra* note 29, at 44.

[39] Vojtech Cepl, *The Road Out of Serfdom*, 12 VERA LEX 4, 6 (1992).

[40] *We've Never Had It So Good*, ECONOMIST, Aug. 9, 2003, at 38.

[41] *Id.* The Kurds actually speak another language, live underneath a different flag, and trade in an alternative currency. *See First Give Them Power of a Kind, Then Let's Discuss Democracy*, *supra* note 29, at 44.

[42] BRAUDE, *supra* note 27, at 44.

However, it is unclear whether the Kurds will seek democratic unity with Iraq or demand independence. Many Kurds are disturbed by the lack of stability in the South, thus questioning the creation of a future democratic state of Iraq.[43] However, the reclamation of property lost during the *anfal* seems to be proceeding in a promising matter as Kurds are seeking restitution from the courts, rather than with Kalashnikovs.[44]

V. FEDERALISM

A relevant question for the future of Iraq, as was the case in Central Europe,[45] is whether the concept of federalism will prove to be a source of irreconcilable conflict between the various political factions. Federalism is a way to limit the dissention in a divisive state in favor of cooperation between the majority and the minority with the intended result being unification. Ultimately, federalism allows for "fuller satisfaction of separate tastes."[46] However, should the gap between the majority and the minority become too vast, the possibility of tyrannical action resulting in the confiscation or denial of ordinary civil rights against the minorities increases.[47] Even though federalism is an acceptable option for a society's transition into a democracy, it is not the "perfect solution when the number of [minority] groups within a nation is increased to three or more [as in Iraq], because the problems of local oppression and domination do not disappear simply because more groups are subject to a common federal government."[48]

The difficulties faced by European nations following communism in relation to federalism were similar because even though the territories were small, "the racial, linguistic, and national diversity within their tight boundaries" were high in many instances.[49] In the United States, the problems related to federalism were limited to instances of "regionalism within a common language and a common culture."[50] "Even the prospects for geographical separation within a federation are limited" because minorities are often found "nested within minorities, or widely diffused throughout a larger population, so that short of a

---

[43] *Id.* at 45.

[44] *Id.*

[45] Vojtech Cepl, *Constitutional Reform in the Czech Republic*, 28 U.S.F. L. REV. 29, 32-33 (1993).

[46] Richard A. Epstein, *All Quiet on the Eastern Front*, 58 U. CHI. L. REV. 555, 566 (1991).

[47] *Id.* at 556-57.

[48] *Id.* at 567.

[49] *Id.* at 566.

[50] *Id.* at 565.

migration, any set of boundaries will leave at least some group[s] exposed to the depredations of its historical enemies."[51]

The difficulties in Iraq that differ from the application of federalism within the United States and Eastern Europe are such that Iraq has no dominant culture or single language to serve as a unifying theme for the opposing parties to build from.[52] As with the division of Eastern Europe, Iraq has similar problems relating to the critical lines of division between the ethnic populations, namely the border conflicts between the Kurds and the Turks. This border conflict was artificially created during the initial declaration of an Iraqi nation-state, at the hands of the Europeans as they sought to carve up the world as they deemed proper following the First World War.[53] However, if the situation in Iraq is not resolved in a peaceful manner, it could deteriorate into another Yugoslavian conflict,[54] which resulted from World Powers defining borders and forcing the cohabitation of historically ethnic enemies.

VI. ECONOMIC INEQUALITY

Beginning in August of 1990 and continuing after the First Gulf War, the United Nations imposed economic embargos upon Iraq,[55] which drastically affected its national economy. The embargos lead to an extreme deterioration of Iraqi society, increasing poverty and causing widespread hunger throughout the civilian population.[56] The embargos were initially viewed to be in compliance with the United Nations guidelines, however, upon seeing the plight of the Iraqi people, the nations of the world agreed to specific terms, which would allow Iraqi government to exchange oil for food.[57] While Saddam Hussein counted on the world's dependence on oil, he bypassed the embargos by developing

---

[51] *Id.* at 566.

[52] *Id.*

[53] *See* World War I and the British Mandate, http://reference.allrefer.com/country-guide-study/iraq/iraq15.html (last visited Oct. 11, 2005).

[54] The creation of Yugoslavia left a nation with eight distinct minorities forced to exist in cohabitation. Epstein, *supra* note 46, at 567. Following the death of Tito, the former Yugoslavia deteriorated into a civil war of ethnic cleansing between Croats, Bosnian Serbs, and Muslims where hundreds of thousands died. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 198 (2d ed. 2001). During the conflict Serbian aggressors forcibly raped Muslim women with the intent of genocide, whereby Serbian babies would be born, rather than Muslims. *Id.* at 43.

[55] BRAUDE, *supra* note 27, at 40.

[56] *See* TRIPP, *supra* note 15, at 269. After 1990, the Iraqi population suffered from the United Nation backed sanctions.

[57] In 1996, the United Nations, under Security Council Resolution 986, allowed for the exchange of oil for food in the amount of two billion dollars every six months, until UN SC Resolution 1153 in 1998, increased the amount to $8.3 billion. *Id.* at 262.

trade relations with other countries in the Gulf, the eastern-Mediterranean region, Russia, China, and France.[58]

During this period of embargos, Ba'th party elites were able to defy the international sanctions and increase their own accounts while the rest of the country and its populous continued to live in poverty.[59] Thus, the Ba'thist's were able to increase their hold on the population because "[i]f the great majority of a society's wealth is controlled by a single group, that group can easily dominate society."[60] The differential between the elite and the impoverished in Iraq during the years of international pressure created an atmosphere in which the elites of the Saddam regime feared that a loss of power could result in a backlash of bloody proportions.[61] This fear of a revolt by an immense lower class population increased the frequency of terror initiated by Ba'th party apparatchiks and intelligence service enforcers, who felt that terrorizing the population would control its social direction and avoid the possibility of revolution.

VII. DISTRUST OF THE REGIME

The totalitarian rule of Saddam Hussein and Ba'th party elites subjected Iraqis to nearly four decades of "brutally enforced silence."[62] Under the Ba'thist regime, Hussein successfully inhibited the people from participation in the governmental decision-making process, denying them self-determination and preventing the population from developing the necessary social skills that are essential for the advancement of a modern civilization.[63] Thus, the years of tortured silence, poverty, and isolationism have left a nation of brutalized and humiliated citizens who remain scarred and distrustful of government control.[64] After the Ba'th party took power in 1968, the intelligence community grew to include over 500,000 government collaborators.[65] The Ba'th party regime kept detailed records of their security and intelligence apparatus, which included a complex "web of serial snitches" in an organization known as the *Mukhabarat*.[66] These secret officials assisted internal security

---

58 *Id.* at 279.

59 *See* BRAUDE, *supra* note 27, at 52.

60 Cepl, *supra* note 39, at 6.

61 *Ferment of Freedom, Fear and Fantasy*, ECONOMIST, Apr. 26, 2003, at 38.

62 *Id.*

63 IRIS MARION YOUNG, INCLUSION AND DEMOCRACY, 156 (2000).

64 *Id.*

65 *See* BRAUDE, *supra* note 27, at 48. The 500,000 collaborators were within five principle government agencies: special security, general security, general intelligence, military intelligence, and military security.

66 *Id.* at 58. The Iraqi Intelligence Service ("IIS"), also known as the *Mukhabarat*, is the "most notorious and possibly the most important arm of the state security system." It is

officials, civil police authorities, and the Special Security Organization[67] by spying on government officials, tracking down "enemies of the state," and freely imprisoning and torturing anyone in the population outside the power and protection of the authoritative government.[68] During the decades in which the Ba'th party controlled the Iraqi government, it instituted two youth programs: the *tala'i'* and the *futuwwa*. These youth groups were founded on a system which awarded its young members for turning in community leaders, oftentimes including their own parents, who criticized the Saddam regime, even within the privacy of their own home.[69]

The Ba'th party's terror network was primarily located in the larger territories, providing for the greatest coercive power and intimidation to be levied upon the areas of dense population.[70] Under the control of the Ba'th party, many families, at the hands of party elites, were victims of theft or lost loved ones who were kidnapped in the middle of the night never to be seen again.[71] During the Shi'a uprising in 1991, several rebels were able to experience first-hand the extent of which the torture was carried out against Iraqi citizens:

> As I wandered around the jail, I saw some of the instruments that were used to torture people, with instruction manuals posted on the wall. I saw huge, human meat grinders that fed into a septic tank. I saw chemical pools in which people were dissolved. I saw rooms for sexual abuse, and human ovens. The smell in these rooms was putrid, smell only decades of torture can create.[72]

The power to inflict terror was also applied against government informants who feared that they too would be turned in and subjected to the same fate of torture, or even death.[73] This deep rooted element of fear and distrust within the Iraqi psyche has many Iraqis fearing that certain elements of the former regime will not be rooted out and that these actions will continue to reside in the pillars of any new government.[74]

---

the main state intelligence responsible for political and security problems. "It is the equivalent of the CIA and the FBI rolled into one." Global Security Agency, Explaining the Iraqi Intelligence Service, http://www.globalsecurity.org/intell/world/iraq/mukhabarat.htm (last visited Oct. 11, 2005).

[67] *See* BRAUDE, supra note 27, at 48-49. The Special Security Organization is an elite Iraqi information institution headed by Quasy Hussein, son of Saddam Hussein, which specialized in beatings and executions.

[68] *Id.*

[69] *Id.* at 47.

[70] *Out of the Ashes*, *supra* note 2, at 37.

[71] BRAUDE, *supra* note 27, at 57.

[72] Interview with Zainab a-Suwaij, Executive Director of the American Islamic Congress, Cambridge, MA (February 2003), *in* BRAUDE, *supra* note 27, at 58.

[73] *Id.* at 49.

[74] *Id.* at 58.

Concerns arise because moles from the *Mukhabarat* will inevitably exist within the government offices of the new Iraqi republic, and something must be done to ensure that this does not occur.

The new democratic authority must regain control of the population not only through political and economic reform, but through the individualized trust of a people scarred from years of lacking faith not only in the government, but in each other. Essentially, in the grander scheme of developing a unified nation, the new government must "transform the hearts and minds" of the Iraqi people from a deeply seeded hatred to an acceptance of all Iraqis.

VIII. TRANSFORMATION

The "transformation of hearts and minds" of a citizenry refers to the societal doctrine that governs human conduct or values.[75] In order for Iraq to successfully transfer power, it must repair the societal community or "social capital," which is the cornerstone of any modern civilization.[76] Social capital is a community-based support system which facilitates mutual cooperation for the benefit of the larger group through the rules of basic human conduct.[77] The rules of basic human conduct consist of customary norms existing in the minds of the people and standing as the derivation of their behavioral patterns and shared values.[78] This standard of behavior is the foundation for informed self-thought as to "what is right and wrong, proper and improper, appropriate and inappropriate in particular situations, or even what they must do to get by in life."[79]

The importance of a civilization to overcome past distrust of a government, and society in general, is of great importance for the creation of a new structural government because it teaches the population that without the support and trust of another, failure exists as a possible result. David Hume further explains the need for social capital in his use of the parable of the two farmers:

> Your corn is ripe today; mine will be so tomorrow. 'Tis profitable for us both, that I should labour with you today, and that you should aid me tomorrow. I have no kindness for you, and know you have as little for me. I will not, therefore, take any pains upon your account; and should I labour with you upon my own account, in expectation of a return, I know I should be disappointed, and that I should in vain depend upon your gratitude. Here then I leave you to labour alone; You treat me in

---

75 Cepl, *supra* note 9, at 229-30.

76 *See* Robert D. Putnam, *The Prosperous Community: Social Capital and Public Life*, 13 THE AMERICAN PROSPECT 1 (Spring 2003).

77 *Id.*

78 Cepl, *supra* note 9, at 230.

79 *Id.*

> the same manner. The seasons change; and both of us lose our harvests for want of mutual confidence and security.[80]

When the farmer above sought the aid of another in his community, he sought a trust that had never existed before, but that farmer was denied the support he desired out of a deep-rooted communal distrust of others. However, after the other farmer viewed the existence of a potential benefit that would outweigh his distrust, his interest in social capital drove him towards acceptance. In Iraq, similar events will occur as the people slowly move further away from the distrust that was the result of many years of government supported divisiveness, and more towards supporting the existence of social capital in their local communities. However, this will only occur if the nation is opened to the "marketplace of ideas" for free speech and the spontaneous interaction between the citizens towards acceptance of each other.

Societal norms develop and are internalized gradually in an evolutionary fashion after many years of unimpeded social interaction between the people.[81] In order for actual change to be accomplished, there must be a true change in the actual lives of the people, such as a political democracy replacing a totalitarian regime, but for some, no matter how massive a transformation occurs, old habits of normal life are difficult to break.[82] Habits become increasingly difficult to break depending on the amount of time the prior regimes existed in a dominant position of control over the people. Eastern Europe, for example, remained under the control of the communist powers for only two generations, leaving a large portion of the people under the age of fifty without any knowledge of life without a dominant government.[83] However, because the communist system rose to power following the Nazi occupation of Eastern Europe, those over the age of fifty understood the differences and benefits associated with a democratic tradition of government and could easily aid communities in returning to the former societal norms.[84]

Time is an important factor when establishing such a sweeping change in government, as is currently occurring in Iraq, because, should the change not occur rapidly, the risk of the population returning to the normal patterns of behavior under the prior regime increases. Should

---

[80] DAVID HUME: A TREATISE OF HUMAN NATURE, VOL. II, BOOK III: OF MORALS 288 (T.H. Green & T.H. Grose eds., 1898).

[81] Cepl, *supra* note 9, at 230.

[82] *Id.*

[83] *Id.* at 231.

[84] *Id.* Unfortunately, countries such as the Baltic states (Estonia, Latvia, and Lithuania), had a more challenging time during the transfer of sovereignty in the 1990s because communism had been the norm for seventy-five years, leaving a population with little or no understanding of a prior free traditional government. *Id.*

this happen, the new government risks losing all legitimacy in the creation of a new democratic state. In order to adapt a society to a large change in government, the transformation of social order must also be advanced to coincide with the revolutionary ideals of a democratic government. Thus, because the rules of human conduct are learned by observing societal behavior and social interactions, rather than by the development of laws, the government must develop a legal system that allows for self-enhancement, rather than forced modification.[85]

Therefore, a short discussion on the various legal theories is warranted. Essentially, "[l]aws in their most general signification, are the necessary relations arising from the nature of things."[86] As such, laws are dependent on the theoretical ideal a nation chooses to adopt for their legislation. The basic ideals of a legal society based on the structure of laws are predicated on the belief that two fundamental structures of law exist. These theories are best known as legal positivism and natural law.[87]

Iraq, under the Ba'thist regime, chose to follow the theory of legal positivism. The theory of legal positivism is based on the belief that law is the order of an expression of the ruler.[88] Thus, such a policy places the entire authority of legislative lawmaking and enforcement in the hands of a single individual, such as a king, or, in this situation, a dictator, similar to Saddam Hussein. Some believe that positivist laws represent a choice of vice over virtue and that such law is "not founded on the general constitution of human nature, but purely on the will of the legislature."[89] The positivist line of legal tradition follows the concept of *lex dura sed lex*,[90] which increases the possibility of a corruptible and totalitarian regime to imprison an entire population under the demented visions of one individual. For "[a]ny societal institution which gives an individual or body of men an advantage of which others are deprived therefore violates the rights of natural equality."[91]

---

[85] *Id.*

[86] DAVID W. CARRITHERS ET AL., MONTESQUIEU'S SCIENCE OF POLITICS: ESSAYS ON *THE SPIRIT OF LAWS* 49 (2000).

[87] *Id.* at 41.

> [I]t makes sense to speak of natural, that is to say of a law that which defines an immutable and universal standard of justice by which all positive laws should be judged, or whether in fact there is no such thing as natural law (at least not in the sense of moral law) and that positive laws are simply to be seen as a matter of convention.

Id.

[88] *See generally id.*

[89] *Id.* at 44-45.

[90] Latin translation: A bad law is still law.

[91] CONDORCET, CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY 267 (Iain McLean & Fiona Hewitt eds., trans. 1994).

The opposing view, natural law, espouses the belief that when "[m]en have joined together in order to preserve their natural rights, and their rights are the same for all, society must therefore ensure that everyone has an equal enjoyment of these rights."[92] Natural law is the theoretical understanding that our notions of the difference between right and wrong are derived from a belief in a higher power or from learned behavior resulting from the interactions of people living in coexistence, or a combination of the two. The social interactions between people create a learned understanding of right and wrong through trial and error resulting from the spontaneous development of human conduct, believing in the principle of *lex injusta non est lex*.[93] "[People] know when they are bound to keep their promises, [and] when it is appropriate to ignore a legally prescribed rule."[94]

Natural law principles are predicated on the essential foundation of allowing criticism of the existing political and economic status to effectuate legitimate change, and in a situation where "profound changes in a society are carried out, such [principles] are justified . . . ."[95] By simply employing natural law as the background for a new society in Iraq, which has known only totalitarian rule for the past four decades, "it will be possible to give perspective to a people who have known only one specific system" and allow the new leaders to persuade the people that a new constitution in Iraq is required or else the efforts towards creating a new society were for nothing.[96] Such a belief allows for the people to establish their own sense of inner justice and morality without the forced interference of a solitary dictator.

The theoretical legal principles, combined with the intent of the population to effectuate change in behavioral patterns, must work in tandem to ensure that the transformation of the hearts and minds of the people of Iraq allow for unification behind a new democratic nation. The most efficient manner to create such change in the hearts and minds of the population is through three banner principles: condemnation of the former regime, lustration of the new government, and restitution of those wronged as a result of the former regime.[97]

---

[92] *Id.* "In the state of nature indeed, all men are born equal; but they cannot continue in this equality: society makes them lose it, and they recover it only by the protection of the laws." CARRITHERS ET AL., *supra* note 86, at 52 (citation omitted) (quoting CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF LAWS, VIII, 3 (Thomas Nugent, trans., 1750)).

[93] Latin Translation: An unjust law is not a law. "A good law should be good for all men, just as a true proposition is true for all." CARRITHERS et al., *supra* note 86, at 58.

[94] Cepl, *supra* note 9, at 230.

[95] Cepl, *The Road Out of Serfdom*, *supra* note 39, at 4.

[96] *Id.*

[97] Cepl, *supra* note 9, at 230.

IX. CONDEMNATION

Often the motivation for political change in society, such as the overthrow and collapse of Saddam's Ba'thist regime, is a desire for revenge rather than an actual revolution. However, in order to transform a society, what was wrong must be changed, and those responsible must be named and condemned before the eyes of the people. Responsibility and accountability must be public and can manifest under many different procedures, such as show trials or truth commissions.[98] One proper manner to condemn a totalitarian regime is with the use of televised Nuremberg style war crimes trials. A full-scale trial allows a newly formed democracy to publicly condemn, before the eyes of the masses who suffered greatly at the bottom of the society, those responsible for the years of torture and torment under the former regime. Such action is best utilized following a totalitarian regime because criminal responsibility ultimately belongs to one person.

Condemnation helps to prevent people from claiming at sometime in the future that Ba'thist principles are somehow compatible with newly identified democratic principles.[99] "The punishment of crimes committed under [a totalitarian regime] helps deter the possib[ility] of such outrageous behavior in the future."[100] The Iraqi Governing Council took the first steps toward condemnation by announcing a decision to cancel all public holidays previously celebrated under the former regime and by declaring April 9th[101] a new national holiday.[102]

Following the capture of Saddam Hussein on December 13, 2003, the people and the new government of Iraq are finally able to seek retribution against the man who directly caused their agony.

> This is a great day in Iraq's history. For decades, hundreds of thousands of you suffered at the hands of this cruel man. For decades he threatened and attacked your neighbors. Those days are over forever. Now it is time to look to the future, to a future of hope, to your future of reconciliation. Iraq's future, your future has never been more full of hope. The tyrant is a prisoner. The economy is moving forward. You have before you the prospect of a sovereign government in a few months. With the arrest of Saddam Hussein, there is a new opportunity for the members of the former regime, whether military or civilian to end their bitter opposition. Let them now come forward in a spirit of reconciliation, and hope, lay down their arms, and join you in

---

98 *See* RATNER & ABRAMS, *supra* note 54, at 154-55.

99 Cepl, *supra* note 9, at 233.

100 *Id.*

101 The date of the momentous occasion in which the citizens toppled a bronze statue of Saddam Hussein, with the aid of United States Army vehicles, to the ground in Ferdous Square, Baghdad.

102 *The New Men, and Women in Charge*, *supra* note 4, at 18.

> the task of building the new Iraq. Now is the time for all Iraqis–Arabs and Kurds, Sunnis, Shi'as, Christian and Turkomen–to build a prosperous and democratic Iraq, at peace with itself and with its neighbors.[103]

For the government, this arrest symbolizes the resolve of the new government, and his eventual conviction will result in the public condemnation of not only Saddam Hussein, but all of the ranks of the former regime, and gives the new democratic government a legitimacy that it so desires from the people. Furthermore, such action serves as a political message to demonstrate to remaining Ba'thist supporters, hiding within the new Iraqi authority, that the former regime no longer retains any semblance of power.[104]

X. LUSTRATION

Perhaps the most logical path to follow when purging a new political system of an anti-freedom workforce produced by the former regime, would be to establish a lustration[105] certification process.[106] This process of elimination would be aided by the lustration models used in the national reconciliation of former communist countries. During the reconciliation of East Germany in the 1990s, the newly established government declared that *all* citizens deserved the opportunity to view their files in the *Stasi*[107] headquarters.[108] This allowed people to learn of

---

[103] Paul Bremer, Address Briefing the Iraqi People on the Capture of Saddam Hussein (Dec. 14, 2003), http://news.bbc.co.uk/1/hi/world/middle_east/3317861.stm (follow "Watch and Listen" video hyperlink).

[104] *See id.*

[105] Derived from the Latin term *lustro*, lustration refers to laws, which when enacted; serve to discharge the influence of the former political structures upon entering a new era of democracy. Roman David, *Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland 1989–2001*, 28 LAW & SOC. INQUIRY 387-88 (Spring 2003).

[106] "*Lustration law* is a special public employment law that regulates the process examining whether a person holding certain higher public positions worked or collaborated with the repressive apparatus of the communist regime." *Id.* at 388.

[107] Cold War: Espionage, CNN Special Report, http://edition.cnn.com/SPECIALS/cold.war/experience/spies/spy.files/intelligence/stasi.html (last visited Oct. 11, 2005).

> East Germany's Ministry for State Security, known as the Stasi, featured probably the most comprehensive internal security operation of the Cold War. The Stasi built an astonishingly widespread network of informants—researchers estimate that out of a population of 16 million, 400,000 people actively cooperated. The Stasi kept files on up to 6 million East German citizens–one-third of the entire population.

Id.

[108] BRAUDE, *supra* note 27, at 63.

their accusers, confront them, and to ultimately have a chance to forgive them.[109]

However, during the Czechoslovakian transformation, the government initially sought to publicly name those responsible as collaborators during the Communist era and allow the people of the country to have the opportunity to forgive and forget the past transgressions. However, after it was discovered that many collaborators and officials of the secret police remained as high officials in the newly created democratic government and had already positioned themselves in a manner to block proposed democratic changes, President Vaclav Havel adopted a policy of no tolerance, initiating the era of lustration.[110] Immediately following Havel's mandate, the Czech Republic government instituted the Act on Lawlessness of the Communist Regime,[111] condemning the former communist government, its actions, and the principles that motivated it.[112] The lustration certification requirement applied to all former officials, agents, and collaborators who held a relationship of any kind with the former regime.[113]

Advocates of lustration point out that such a declaration allows a new government the ability to regain control over the state apparatus by blocking old networks from forcing a return to old ways under the former regime.[114] This "declaration of values is far more effective than any detailed and precisely worded legal provisions [found] in a statute, [because] it speaks more directly to [the needs and desires of] the

---

[109] *Id.*

[110] *See* David, *supra* note 105, at 390-91.

> We had free elections . . . then we elected a free parliament, we have a free press, we have a democratic government. Yet . . . [t]here still exist and work the powerful structures of the former regime . . . . Many places are governed by the same people as before. They are connected to managers of industrial enterprises. There exist immense bureaucratic colossuses that preclude rational economic behavior of individual enterprises and firms. The old bureaucracy persists at all levels.

Id. (citing Vaclav Havel, *Vyroci okupace Ceskoslovenska vojsky Varsavskeho paktu (Anniversary of the Occupation of Czechoslovakia by the Warsaw Pact Armies* (1990)).

[111] The Act on Lawlessness of the Communist Regime and Resistance to It, Act No. 198/1993 Sb.

> An individual, who holds, applies, or stands for a position specified by the act, is required to submit both a certificate issued by the Ministry of the Interior about her work for, or collaboration with, the secret police, and an affidavit that she did not belong to other groups specified in the act (§§ 4[1] and 4[3]). If an individual belongs to any group specified in the act, the organization is required to terminate her employment contract or transfer her to a position that is not specified by the act (§ 18(2)).

Id.

[112] *Id.*

[113] *See* David, *supra* note 105, at 388.

[114] *Id.* at 393.

people."[115] Thus, the people derive a feeling of closeness through an understanding of the national principles intended to be expressed in the new constitution. "People [begin to] develop an allegiance to [new governmental] principles when they better understand that the [policies are intended to bring] the rule of law [towards the peoples'] own values."[116] "As a result, the people feel more confidence that their leaders are not merely mouthing democratic ideal[s] while surreptitiously undermining the foundations of democracy."[117] However, such a declaration creates a conundrum for a new democratic society by forcing those in the population who fall under the desired effect of the statute to prove their innocence by not being afforded the presumption of innocence.[118]

The objective of lustration in former communist countries was to exclude known communists from holding political office because they lacked the trust of the people to exercise authority consistent with newly desired democratic principles.[119] In Iraq, as in the former communist countries, lustration must not only apply to political officials but, in addition, concentrate on the re-establishment of a fair judicial system—one that is purged of justices who strongly believe in the former concept of law. Judicial power is so essential to a functioning democratic society and is "a dangerous weapon which can easily be used against the citizens and which, if it is not placed in honest and impartial hands, may pose more of a threat to their safety than particular crimes from which it is designed to protect them."[120]

In Iraq, the process of lustration will be aided by the millions of detailed reports[121] that exist from the hundreds of thousands of informants responsible for the societal terrorism perpetrated against the Iraqi people, resulting in a breakdown of trust. Such documents and reports can be utilized as clear and convincing evidence against the Ba'thist supporters who ravaged a nation with fear. However, the new government must be careful not to lustrate citizens who supported the former regime out of fear, but truly back the foundations of a new society. Therefore, the new government must look equally to both the

---

115 Cepl, *supra* note 9, at 232.

116 *Id.*

117 *Id.*

118 "Society has no right to deprive an individual of what nature has provided for his own good." CONDORCET, *supra* note 91, at 258.

119 Cepl, *supra* note 9 at 232.

120 CONDORCET, *supra* note 91, at 258.

121 *See* BRAUDE, *supra* note 27, at 58-59. The United States and its allies confiscated 2.4 million documents in northern Iraq, and believe that many more such reports exist in the intelligence nerve centers of the old regime.

merit and character of a citizen facing lustration as opposed to focusing only on their actions.

The principle of merit relates to the fact that the Iraqi workplace will be equalized by lustration, forcing out the slacking employees from the former regime and replacing them with "conscientious civil servants" intent on proving their worth to the new society.[122] The second principle deals with the character of ex-Ba'thist who demonstrate a defiance to the ideals of the former regime and accept the defining characteristics of the new society.[123] By "[h]oning [the] group dynamic[] in Iraq's public sector" towards the ideals of establishing camaraderie,[124] a government is able to return the workers to a belief of confidence in each other's abilities.

Perhaps the most important factor lustration adds to democracy is a period of time during which public support is at its maximum and the provisional government can plant the seed of a new society without a fear of reprisals from a former regime since they have been completely removed from any position of power. Since this period of peace must occur, it is fundamental that "[a]ny . . . change in . . . society . . . must be[] accompanied by a replacement of the ruling elite."[125] The proper balance is only re-established by removing the wrongdoers, punishing them, and re-establishing the status quo.[126] This "reestablishment of a normal situation in society is closely related to the task of healing the rift between the government and the people who are alienated from it."[127]

XI. RESTITUTION

The ownership of property not only denotes a position of status, but also represents to the owner a sense of community and closeness to governmental polices. In a sense, ownership of a small parcel of land can be considered ownership in a nation. Thus, when property is forcibly removed, restitution becomes an actionable response by the government to rectify its past misdeeds and return what it stole from the populous. "Restitution involves the return of the actual piece of property confiscated from people without compensation, or which people forfeited as [a] result of one of the [Ba'thist] laws."[128] The importance of the actual deed is not the return of property, but that the government is acknowledging its "past wrongs and [attempting] to do its best to correct

---

122 *Id.* at 62.

123 *See id.*

124 *Id.*

125 Cepl, *supra* note 9, at 233.

126 *Id.*

127 *Id.* at 232.

128 *Id.*

them."[129] If the government makes no effort in the direction of restitution, it confirms to the people that the prior regime is still alive, and, in the minds of the citizenry, a great deal of legitimacy is lost towards the new democratic principles.

"[R]estitution, as well as other privatization routes," has the ability to cause the greatest "psychological change[] in the people" because it creates a community of "small property-holders and capitalists."[130] The practical motivations for returning property to the hands of the people effectively begins the transformation of an economy into one of free trade.

The priority in Iraq, regarding restitution, should be to return the property taken under the guise of nationalization and Arabization to its rightful owner. Restitution is not complete without the return of private ownership because "only this makes possible the true operation of a market, that is, the exchange of goods between free and independent actors."[131] However, restitution alone will not bring about sufficient change to adapt to a free market society; it is also "dependent on [the] gradual development . . . of human experience . . . [and] is created through the long-term development of social customs and rules of behaviour."[132]

XII. CONCLUSION

The process of transformation within an Iraqi state must develop a similar path to that of Central Europe where the governments acted promptly to develop strong political and economic influence. The importance of creating a free market economy is rivaled only with the need to establish a government the population can trust. Only then can the citizenry, with the aide of a supportive government, voice concerns and debate the policies which shape and define a modern democratic nation. Iraq must be allowed to have the opportunity to foster itself into a free-thinking society outside of a tyrannical marketplace of ideas.

Re-establishing a normal relationship between the people and the government, signals the end of the Ba'thist regime and the process of condemnation, lustration, and restitution will have specific and practical effects on the psyche of the Iraqi people. "The most elusive, invisible part of transformation, the [adaptation] of [a] moral culture, is [generally] considered [to be] secondary, if . . . thought [of] at all. People who say it is better to draw a line and start . . . from scratch [fail to realize] the

---

[129] *Id.* at 233

[130] *Id.*

[131] Cepl, *The Road Out of Serfdom*, *supra* note 39, at 6.

[132] *Id.* at 7.

proper lessons from" a post-communist experiment in reconstruction.[133] After the period of transformation, condemnation, lustration, and restitution, the rebuilding of Iraq may truly begin as a legitimately newly elected government moves towards the adoption of a fundamentally accepted constitution and a government established for the people.

[133] Cepl, *supra* note 9, at 234.

A CLASS-ACTION LAWSUIT AGAINST ASPARTAME MANUFACTURERS: A REALISTIC POSSIBILITY OR JUST A SWEET DREAM FOR TORT LAWYERS?

I. INTRODUCTION

Over the years, there have been numerous class-action products liability suits filed in America. Claims were filed over numerous injuries, real or imagined, inflicted upon unwary consumers. The longtime efforts of plaintiff litigators finally came to fruition with the widely publicized tobacco settlements of the late 1990's. Most recently, and some would say not surprisingly, some products liability litigators are switching their focus from the tobacco industry to fast food, claiming that fast food companies should be held liable for the terrible health suffered by some of their customers. Given these efforts by products liability attorneys, especially in recent years, one cannot help but wonder where their efforts will be focused next.

Most people have heard whispers and rumors over the years about the artificial sweetener known as aspartame (or NutraSweet®). Depending upon what person or what source one is consulting, this artificial sweetener is either completely harmless or potentially deadly. Given the trends of products liability litigation in recent years, as well as the persistent perception that aspartame is dangerous, could a wave of products liability litigation against the aspartame industry be possible?

This Comment will examine the feasibility of successful products liability lawsuits being brought against the aspartame industry. These lawsuits will be collectively referred to as "aspartame litigation." Part II will examine the history and assorted legal claims of tobacco litigation which may serve as a model for aspartame litigation. Part III will scrutinize potential parallels with fast food litigation. Part IV will determine the likelihood of success in aspartame litigation by examining different legal claims that could be brought and by drawing upon the lessons learned from tobacco and fast food.

II. THEORIES OF LIABILITY FROM TOBACCO LITIGATION

Many of the distinguishing characteristics of the tobacco litigation saga, especially in its earliest years, would parallel fledgling aspartame litigation more than one would initially believe. Thus, an examination of the legal theories, litigation strategies, and public opinion shifts that have defined the progression of this dynamic area of tort law are highly relevant.

As has been stated by many commentators, tobacco litigation has existed in three distinctive waves,[1] each with its own unique drama. For our purposes, the focus shall be placed upon those legal theories and societal events which would likely be paralleled in aspartame litigation.

A. The First Wave: Something is Definitely Wrong Here

Breach of implied warranty was one of the most prominent claims alleged in the "first wave" of tobacco liability.[2]

Breach of implied warranty was first raised in *Green v. American Tobacco Co.*[3] Green, who had smoked Lucky Strike cigarettes for about thirty years, claimed the defendant's product caused him to develop cancer in his left lung.[4] His son, who was substituted as plaintiff after his father's death, claimed a breach of implied warranty.[5] The Fifth Circuit held that a manufacturer or dealer would not be held liable for breach of implied warranty when it neither had knowledge, nor could have acquired such knowledge through reasonable foresight, of the potentially harmful effects of its product.[6] Thus, foreseeability was the lynch-pin for determining breach of implied warranty.[7] This twisting of warranty law was characteristic of judges' attitudes during this "first wave." The Fifth Circuit later confirmed this approach to implied warranty liability in *Lartigue v. R.J. Reynolds Tobacco Co.*[8]

---

[1] There are numerous articles that provide an in-depth account of tobacco litigation. *See, e.g.*, Ingrid L. Dietsch Field, Comment, *No Ifs Ands or Butts: Big Tobacco Is Fighting for Its Life Against a New Breed of Plaintiffs Armed with Mounting Evidence*, 27 U. BALT. L. REV. 99 (1997); Tucker S. Player, Note, *After the Fall: The Cigarette Papers, the Global Settlement, and the Future of Tobacco Litigation*, 49 S.C. L. REV. 311 (1998); Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992); Marcia L. Stein, *Cigarette Products Liability Law in Transition*, 54 TENN. L. REV. 631 (1987).

[2] *See* Field, *supra* note 1, at 100-01.

[3] Green v. Am. Tobacco Co., 304 F.2d 70 (5th Cir. 1962).

[4] *Id.* at 72.

[5] *Id.* at 71.

[6] *Id.* at 76.

[7] The Fifth Circuit certified the question of whether foreseeability was necessary for liability in breach of implied warranty cases to the Florida Supreme Court. *Id.* at 86. The UCC had not been adopted by Florida at this time. The Florida Supreme Court held foreseeability to be completely irrelevant in determining liability for breach of implied warranty. Green v. Am. Tobacco Co., 154 So. 2d 169, 170 (Fla. 1963). In spite of this, the Fifth Circuit later held tobacco to be a merchantable product, which effectively ended any potential victory that could have come from the Florida Supreme Court's decision. *See* Green v. Am. Tobacco Co., 409 F.2d 1166 (5th Cir. 1969) (affirming the judgment of the lower court based on the rationale of Judge Simpson's dissenting opinion in Green v. Am. Tobacco Co., 391 F.2d 97 (5th Cir. 1968)).

[8] Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963). The Fifth Circuit later found tobacco to be a merchantable product based in large part on of RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965). *Green*, 391 F.2d at 110.

Another claim made by plaintiffs during this period was breach of express warranty. One classic example was *Pritchard v. Liggett & Myers Tobacco Co.*,[9] which also persisted through multiple appeals over many years.[10] For over fifty years, the plaintiff had smoked roughly one carton of Chesterfield brand cigarettes per week.[11] The plaintiff claimed that express warranties had been made in a series of advertisements that contained such declarations as, "Chesterfields Are As Pure As The Water You Drink And The Food That You Eat," and "Nose, Throat, and Accessory Organs Not Adversely Affected By Smoking Chesterfields."[12] The advertisements "contained assurances that the affirmations were based upon extensive research and the opinions of medical specialists."[13] By the advertisements, the plaintiff was led to believe the cigarettes had no adverse effects upon one's health.[14]

Each time this case went before the court of appeals, the court was willing to take very pro-plaintiff approaches in evaluating whether the advertisements served as an inducement to purchase the cigarettes.[15] Unfortunately, due to depleting their legal resources, the plaintiff had to abandon the claim and never recovered any damages.[16]

Toward the end of this "first wave," three major events occurred outside the courtroom that would shape the next thirty years of tobacco litigation: publication of the *Report to the Surgeon General on Smoking* ("Report"),[17] publication of *Restatement (Second) of Torts § 402A* ("Restatement"),[18] and the enactment of the Federal Cigarette Labeling and Advertising Act.[19] These events formed the defense that would

---

[9] Pritchard v. Liggett & Myers Tobacco Co., 370 F.2d 95 (3d Cir. 1966), *cert. denied*, Liggett & Myers Tobacco Co v. Pritchard, 386 U.S. 1009 (1967).

[10] Rabin, *supra* note 1, at 862.

[11] *Pritchard*, 350 F.2d at 482.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Rabin, *supra* note 1, at 862.

[16] *Id.*

[17] U.S. DEP'T OF HEALTH, EDUC., & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964), *available at* http://www.cdc.gov/tobacco/sgr/sgr_1964/sgr64.htm. [herinafter *1964 Report*]. This report represented a formal finding, by a highly reputable source, that smoking tobacco was injurious to human health.

[18] RESTATEMENT (SECOND) OF TORTS § 402A (1965). "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . . ." *Id.*

[19] Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) [hereinafter *1965 Act*]. This Act was subsequently amended in 1969 to require a warning to appear on each package of cigarettes, with the states unable to require any other type of labeling language on the packages. Public Health Cigarette Smoking Act of

render the tobacco companies seemingly undefeatable: assumption of risk.[20]

Although the Third Circuit had earlier held that assumption of the risk was a viable defense to breach of implied warranty claims,[21] such a defense was inapplicable, as the harmful effects of tobacco, if any, were deemed unknown to the general public.[22] However, the Attorney General's well-publicized report combined with the warning label placed on cigarette packages by the Labeling Act effectively put the public on notice of the potential harm caused by tobacco.[23] Section 402A of the Restatement seemed, at first, to give the plaintiffs an advantage by imposing liability for harm caused by products which were "in a defective condition unreasonably dangerous."[24] However, there was great debate in the American Law Institute (ALI) as to how this language would affect the vitality of the tobacco industry.[25] The Restatement drafter's opinion was that tobacco itself caused health problems, not the manner in which cigarettes were made.[26] Hence, there was no reason tobacco manufacturers and dealers should be blamed for a characteristic of their product over which they had no control.[27] This led to the insertion of comment i, which immunized the tobacco industry from strict liability for its product by stating tobacco was not unreasonably dangerous:

> The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristic. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely

---

1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331-36, 1338-40) [hereinafter *1969 Act*].

[20] Meaning the "voluntary exposure to an obvious or known danger which negates liability." Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479, 484 (3d Cir. 1965).

[21] *Id.* at 485.

[22] *Id.*

[23] These were not the first inklings the public received that tobacco was potentially harmful. Numerous reputable publications, such as Time, Newsweek, and Reader's Digest, spoke out about the health hazards of smoking. Franklin E. Crawford, Note, *Fit for Its Ordinary Purpose? Tobacco, Fast Food, and the Implied Warranty of Merchantability*, 63 OHIO ST. L.J. 1165, 1181 (2003). This journalistic scrutiny of the tobacco industry may have played a role in bringing about the Surgeon General's study.

[24] *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 18.

[25] Crawford, *supra* note 23, at 1181-82.

[26] *See id.* at 1182.

[27] *Id.*

> because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.[28]

In addition to these three major events, there were three other factors in the "first wave" which deserve some consideration: the mistakes made by the courts, the scientific knowledge regarding the effects of tobacco on human health, and the litigation strategies employed by the tobacco companies.

The general rule of implied warranties focuses on causation, not foreseeability, in determining liability.[29] Nevertheless, it seems that the courts of that era were not ready to impose strict liability upon merchants.[30] Had the courts properly applied the rule of law, causation would likely have been the sole question for the courts to resolve.[31] Yet even if the focus had been upon causation, the health consequences of smoking, as shown through credible scientific data, would still have been necessary.

Although it may seem laughable in hindsight, science could give no definite answer (at least prior to the Surgeon General's 1964 Report)[32] to the question of tobacco's effects on health. This was evidenced in the *Green* decision, where eight "eminent" medical doctors testified for each side and were in "sharp disagreement" over whether scientific knowledge had advanced to the point that tobacco companies could know smoking was injurious.[33] In fact, the *Lartigue* decision made reference to "the great-cancer smoking debate."[34] It seemed that each side of this "debate" could acquire medical testimony to reinforce its own position, without either side's experts prevailing. Yet, were it not for the initial lawsuits filed against the tobacco companies and the steady diet of anti-smoking commentary from the media,[35] the Surgeon General's study might not have been done. At the least, it likely would not have been done until many years later.

---

28 RESTATEMENT (SECOND) OF TORTS § 402A CMT. I (1965).

29 *See supra* note 7.

30 Rabin, *supra* note 1, at 861.

31 Prosser and Keeton note that courts during this era struggled to avoid applying contract law principles to warranties in the case of physical injury because contract law was so intertwined with the idea of the warranty. Thus, when there was no contract between the manufacturer and the injured consumer (as found in the tobacco cases), the courts had a difficult time finding any basis for liability. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 690 (5th ed. 1984). Perhaps this explains the negligence-like emphasis on foreseeability, rather than strict liability-like emphasis on causation.

32 *See supra* note 17.

33 Green v. Am. Tobacco Co., 304 F.2d 70, 72 (5th Cir. 1962).

34 Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19, 39 (5th Cir. 1963).

35 Crawford, *supra* note 23, at 1181.

Another factor, which impacted the outcome of tobacco litigation during this time, was the strategy used by the tobacco lawyers. Using arguably the oldest tricks in the book, the tobacco representatives would use their considerable financial means to file every pre-trial motion, to challenge every procedure, to propound lengthy interrogatories, and to do anything else that would postpone or prolong the litigation in an attempt to exhaust the often limited financial resources of the plaintiffs.[36] This strategy resulted in only ten out of approximately 150 filed cases being brought to trial during this period, without one plaintiff victory.[37]

B. The Second Wave: New Roads Lead to the Same Place

With the close of the "first wave" of tobacco litigation, the tobacco industry seemed unshakeable. Plaintiff attorneys appropriately tried other theories of recovery, including strict liability and failure to warn. Additionally, the general public attitude towards smoking began to change during this time, though not in the plaintiffs' favor.

As a result of Restatement § 402A, tobacco was not viwed as unreasonably dangerous; this view was expanded by the courts to mean that cigarettes were merchantable.[38] Due to the foreseeability problems encountered during the "first wave" cases, plaintiffs' lawyers saw that a continued assault by way of warranty liability would be useless.[39] With the advent of economic analysis, plaintiffs' lawyers now attempted to invoke a risk-utility analysis in order to circumvent the foreseeability problem.[40] This risk-utility analysis suggested that manufacturers should bear the health costs of tobacco—even when there was no safer design available and the warning was adequate—in a strict liability sense if the health-related costs of the tobacco products—including such broad elements as the number of people who died each year from tobacco use—outweighed the individual benefits derived from their use.[41] In addition, there was a possibility that fault-based defenses such as assumption of risk would not apply under a risk-utility analysis.[42] This approach had some potential since courts were using such economic analysis more and more regularly.[43]

---

36 Rabin, *supra* note 1, at 857-59.

37 Field, *supra* note 1, at 101.

38 *See supra* note 7.

39 Rabin, *supra* note 1, at 866.

40 *Id.*

41 Player, *supra* note 1, at 315.

42 Rabin, *supra* note 1, at 867.

43 *Id.*

To combat this approach, tobacco lawyers used numerous methods, including zealously emphasizing comment i of section 402A.[44] The tobacco industry argued that a risk-utility analysis should not be used because no safer design had been shown for tobacco products.[45] This argument was effective in many courts,[46] but the most effective argument remained assumption of the risk.[47] The tobacco lawyers vigorously maintained that the tobacco industry should not be held liable if the consumer public continued to use their product despite the known risks involved.[48]

Failure to warn was also a lost cause to smokers due to the standard warning label now placed on each cigarette package. Now even the smokers who only gave a cursory glance to the news could not claim they were ignorant of the health problems tobacco could cause. However, the question still remained whether such a claim could be brought on behalf of those who had smoked or contracted smoking-related health problems before the warning labels were standard. This question was answered in *Cipollone v. Liggett Group, Inc.*[49] Rose Cipollone had smoked since 1942 and eventually died of lung cancer.[50] There was a question of whether the 1965 and 1969 Acts[51] preempted Cipollone's state law claims. The Supreme Court of the United States granted certiorari to answer that question.

In a plurality decision, the Court found that the 1965 and 1969 Acts were primarily concerned with state regulation of cigarette warnings, not common law damage actions.[52] The 1969 Act was found to broaden the 1965 Act.[53] However, the phrase "no requirement or prohibition," found in the 1969 Act, made no distinction between state regulation and state common law claims.[54] Thus, some state common law claims may be preempted as well.[55] Certain common law claims could still be brought provided the claims were analyzed with a "strong presumption against

---

44 Player, *supra* note 1, at 316.

45 *Id.*

46 *Id.*

47 *Id.* at 317.

48 *Id.*

49 Cipollone v. Liggett Group, Inc., 505 U.S. 504, 504 (1992) (plurality opinion).

50 *Id.* at 508.

51 *See* 1965 Act and 1969 Act, *supra* note 19.

52 *Cipollone*, 505 U.S. at 521 n.19.

53 *Id.* at 520-21.

54 *Id.* at 521.

55 *Id.* at 523.

preemption."[56] Among the common law claims which could be brought were failure to warn and breach of express warranty.[57]

As during the "first wave," there were events other than court decisions that shaped the "second wave." Foremost was the unsympathetic attitude of juries during this period. Jurors had little sympathy for plaintiffs who had smoked for years despite the common knowledge of its adverse health effects.[58] Smokers were now seen by jurors as having weak character.[59]

Of course, many plaintiffs did not even make it to the jury. The tobacco companies continued the "first wave" strategy of exhausting the plaintiff's resources by filing every discovery motion, oral deposition, and everything possible to exhaust the plaintiff's war chests.[60]

C. The Third Wave: Surprise Revelations

After years of litigation and no success, the "third wave" of tobacco litigation brought victory to the tune of roughly $246 billion dollars.[61] This triumph was due to Medicaid lawsuits and class-action lawsuits.[62]

The Medicaid lawsuits were premised on the idea that tobacco companies should reimburse the state Medicaid funds for the billions of dollars spent treating tobacco-related healthcare problems.[63] Recall that the tobacco industry had heretofore repelled every action brought against it by claiming the consumer had assumed the risk of whatever damages were at issue. Plaintiffs now claimed the Medicaid agencies were "damaged" by tobacco through no fault of their own (they had no choice but to incur the costs of such health problems), which made the Medicaid agencies "blameless" victims.[64] For the plaintiffs, this was a

---

[56] *Id.*

[57] *Id.* at 524-27. Failure to warn claims could be brought to the extent such claims were based upon "testing or research practices or other actions unrelated to advertising or promotion." *Id.* at 524-25. Breach of express warranty claims had been brought by Cipollone based on different statements made in cigarette advertisements. *See* Cipollone v. Liggett Group, Inc., 893 F.2d 541, 574-76 (3d Cir. 1990); Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487, 1497 (D.N.J. 1988). These claims were not preempted because they were based on contractual duties. *Cipollone*, 505 U.S. at 525-27.

[58] *Id.* at 317.

[59] Rabin, *supra* note 1, at 864.

[60] *Id.* at 867.

[61] *See* Barry Meier, *Lawyers in Early Tobacco Suits to Get $8 Billion*, N.Y. TIMES, Dec. 12, 1998, at A1; *46 States Agree to $206 Billion Tobacco Settlement*, LIABILITY WK., Nov. 13, 1998, at 1, available at 1998 WLNR 3654580. Minnesota, Mississippi, Texas, and Florida reached individual settlements—exceeding $40 billion—bringing the total settlements the tobacco companies paid out among the states to $246 billion. *See id.*

[62] Bryce A. Jensen, Note, *From Tobacco to Health Care and Beyond - A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1343-47 (2001).

[63] *Id.* at 1344.

[64] *Id.*

wonderful status which deprived the tobacco companies of their previously impenetrable defense: assumption of the risk.[65] Soon there were Medicaid suits being filed by states all over the country.[66] Settlements totaling $40 billion were reached with Mississippi, Florida, Texas, and Minnesota prior to trial.[67] In November of 1998, realizing other states were likely to file Medicaid suits as well, the tobacco industry agreed to an unprecedented $206 billion settlement to be paid over twenty-five years to the remaining forty-six states.[68] Thus, success finally came to the plaintiffs' lawyers.

Another change seen during the "third wave" was the use of the class-action suit. During the prior waves, tobacco suits had been brought by solo practitioners who often buckled quickly against the superior financial resources of the tobacco industry lawyers. This changed with *Castano v. American Tobacco Co.*,[69] in which over 60 law firms represented plaintiffs from across the nation.[70] Even though the Fifth Circuit later dismissed the case due to concerns over group certification,[71] the use of class-action suits in tobacco cases had been established.

Outside of the courtroom, the most startling development in the history of tobacco litigation occurred during this wave. In 1994, an anonymous source known only as "Mr. Butts" shipped thousands of Brown & Williamson Tobacco Corporation documents to Professor Stanton Glantz of the University of California at San Francisco.[72] These documents shockingly revealed that Brown & Williamson, as well as other tobacco companies, had known about the harmful effects of tobacco for over thirty years.[73] In addition, they showed that the tobacco companies knew that nicotine had addictive effects upon smokers.[74] To make matters even worse, the documents revealed how the tobacco companies purposely manipulated nicotine levels in its product[75] so that

---

65 *Id.*

66 Richard L. Cupp, Jr., *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 U. KAN. L. REV. 465, 476 (1998).

67 *See* Jensen, *supra* note 62, at 1343-47..

68 *Id.*

69 Castano v. American Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995), *rev'd* 84 F.3d 734 (5th Cir. 1996).

70 Field, *supra* note 1, at 115.

71 *Castano*, 84 F.3d at 752.

72 Field, *supra* note 1, at 120.

73 *Id.* at 120-21.

74 *Id.*

75 Player, *supra* note 1, at 322.

smokers would presumably continue to buy more and more cigarettes.[76] While the medical community had no positive knowledge of tobacco's effects prior to the Surgeon General's report, the tobacco industry's knowledge of the effects its product had on human health (it was, after all, their creation) was far ahead of its time.[77] After having asserted for years that nicotine was not addictive and that smoking had not been shown to cause health problems,[78] the tobacco industry was now seen as a deceptive, even evil, industry which tricked its customers into purchasing a harmful product. This was especially damaging during the "third wave" lawsuits.

III. FAST FOOD LITIGATION

In July of 2002, America was both shocked and amused when a lawsuit commenced against the McDonald's Corporation for, of all things, causing obesity in children. In *Pelman v. McDonald's Corp.*,[79] the petitioners (consisting of minor children and their parents) claimed that they had become morbidly obese, in addition to a multitude of other health problems, as a result of McDonald's business practices.[80] In effect, the plaintiffs asserted that McDonald's caused their obesity by creating unhealthy food and encouraging them to eat it. McDonald's predictably filed a motion to dismiss.[81] Although there is still debate as to whether this new genre of products liability will take off,[82] there is no denying that it is a theory that has come in the wake of tobacco liability. Additionally, some of the claims and policy theories could be implemented in aspartame litigation.

A. The Causes of Action from Pelman

The plaintiffs in *Pelman* consisted of two extremely overweight children and their parents.[83] In charging that McDonald's was responsible for their terrible obesity, two claims were made which are of particular relevance for our purposes: McDonald's food is unreasonably dangerous, and McDonald's failed to warn of the dangers present in its product.[84]

---

[76] *Id.*

[77] Field, *supra* note 1, at 120-21.

[78] *Id.* at 121.

[79] Pelman v. McDonald's Corp., 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

[80] *Id.* at 519.

[81] *Id.*

[82] *See generally* Samuel J. Romero, *Obesity Liability: A Super-Sized Problem or a Small Fry in the Inevitable Development of Product Liability*, 7 CHAP. L. REV. 239 (2004).

[83] *Pelman*, 237 F. Supp. 2d at 519.

[84] *Id.*

1. Unreasonably Dangerous Product

An allegation was made by the plaintiffs that McDonald's food was unreasonably dangerous due to the high levels of cholesterol, fat, salt, and sugar.[85] McDonald's countered that the public was well aware of such elements in fast food, meaning McDonald's could not be liable for such inclusion.[86] McDonald's, in the tradition of the tobacco companies preceding it, cited Restatement 402A, comment i.[87] McDonald's also emphasized section 402A's statement that "[a] seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized."[88]

Because the potential that continual fast food consumption may lead to poor health was found by the court to be public knowledge,[89] the plaintiffs had to allege "either that the attributes of McDonalds products are so extraordinarily unhealthy that they are outside the reasonable contemplation of the consuming public or that the products are so extraordinarily unhealthy as to be dangerous in their intended use."[90] Because the plaintiffs failed to demonstrate either claim, no liability attached to McDonald's for failure to warn of its products' content.[91]

In addition, McDonald's pressed for the dismissal of this allegation due to the lack of proximate cause.[92] Beyond mentioning that they ate McDonald's food at least three to four times per week,[93] the plaintiffs were unable to establish that consumption of McDonald's food was a substantial cause of their morbid obesity. The question remained whether a host of other factors might have contributed to their weight, such as heredity, eating at other restaurants, and physical activity (or lack thereof).[94] Despite eating such gargantuan amounts of fast food, there was still a possibility that the plaintiffs' excessive weight, and all the negative repercussions therefrom, could have been caused by something else.[95]

---

85 *Id.* at 531.

86 *Id.*

87 *Id.* at 531-32. *See supra* note 28 and accompanying text.

88 RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965).

89 *Pelman*, 237 F. Supp. 2d at 532-33.

90 *Id.* at 532.

91 *Id.*

92 *Id.* at 537.

93 *Id.* at 538 n.28.

94 *Id.* at 537 n.27. *See also id.* at 538-39.

95 *Id.*

2. Failure to Warn

The plaintiffs further alleged that McDonald's had a duty to warn them of the negative consequences that could come from over-consuming McDonald's food.[96] The court made a final observation that liability should not attach to a manufacturer unless there is a withholding of information, other than common knowledge, necessary for the consumer to make an informed choice whether to use the product.[97] Under New York law, a manufacturer has a duty to warn of unintended misuses of its product that are reasonably foreseeable.[98] A manufacturer's failure to warn must be the proximate cause of the injury, but a finding of proximate cause is precluded where the risk is open and obvious to the user.[99] Because the plaintiffs failed to demonstrate that McDonald's products were dangerous in any respect other than that which was open and obvious (*i.e.*, the common knowledge that eating a lot of fast food is bad for your health), this count was dismissed as well.[100]

B. Developing Product Liability as a Result of this Case

Although fast food litigation has nothing close to the history, congressional involvement, and court precedent that tobacco litigation does, there has, nevertheless, been a great deal of pontificating about this fledgling area of products liability law. Among the most interesting observations, for our purposes, are those advocating the liability of the fast food industry and advising a means to successfully impose that liability.

Obesity (a condition where thirty percent or more of total body weight is composed of fat) has been described as America's new epidemic, with an estimated 300,000 deaths attributed to it annually.[101] There is no denying that fast food is eaten by Americans in enormous quantities.[102] Inspired by the successful Medicaid litigation against the tobacco industry,[103] one theory looks to hold fast food companies liable for the billions of dollars spent by taxpayers for treating health problems related to obesity.[104] These opinions are obviously inspired by the

---

96 *Id.* at 540.

97 *Id.* at 540-41.

98 *Id.* at 540.

99 *Id.* at 541.

100 *Id.* at 541-42.

101 Jeremy H. Rogers, *Living On The Fat of the Land: How to Have Your Burger and Sue it Too*, 81 WASH. U.L.Q. 859, 862 (2003).

102 *See* Romero, *supra* note 82, at 270.

103 Rogers, *supra* note 101, at 883.

104 John Alan Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 WIDENER L.J. 103, 106 (2003).

successful Medicaid lawsuits brought against the tobacco industry by the states. Whether such a maneuver would be successful against the fast food industry, given that eating fast food is not quite as vilified as smoking, is anyone's guess.

It has been proposed by some commentators that the best path to success for fast food litigation would be class-action lawsuits, rather than individual lawsuits.[105] The thought is that massive lawsuits against the fast food industry could most readily be brought by the states in order to offset the massive healthcare expenses incurred by their Medicaid programs due to fast food related health problems.[106] While one may question whether this is a wise course of action to take, it is a maneuver which has already proven effective in the tobacco lawsuits.[107]

Another strategy that has been encouraged by the proponents of this fledgling area of products liability law is to bring more suits. As the idea that the fast food industry should be held liable for creating such a product is repeatedly stated like a mantra, the public will be more and more inclined to believe it. According to Professor Banzhaf, a major advocate of fast food litigation, "[I]nitial suits have real difficulties because the public has real problems accepting new ideas and concepts. . . . It took us many years to get us to the point of educating juries about tobacco, [but] now they are."[108]

On the other hand, recall that the turning point in the attitudes of juries toward tobacco litigants came after the revelations about the tobacco industry's knowledge were made. While the fast food industry is obviously not going to advertise that a person could develop poor health from consuming its products, it has made no attempts to discount or counteract such assertions. Thus, it would seem that repeatedly claiming the fast food industry should be held responsible for the bad health of its customers gives an impression of indoctrination more than education.

IV. FEASIBILITY OF ASPARTAME LITIGATION

At this point, the American public is no doubt growing weary of products liability suits being filed over what many people consider to be a lack of common sense. As Judge Sweet[109] said, "Where should the line

---

[105] *Id.*

[106] *Id.*

[107] *See* discussion *supra* Part II.C.

[108] Geraldine Sealey, *Obese Man Sues Fast-Food Chains: Fast Food Chains Blamed for Obesity, Illness*, ABCNEWS.COM, July 26, 2002, http://abcnews.go.com/US/story?id=91427&page=1 (reporting class-action lawsuit filed against McDonald's, Burger King, Wendy's, and KFC by Caesar Barber over illness he claimed to suffer due to fast food).

[109] Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 515 (S.D.N.Y. 2003).

be drawn between an individual's own responsibility to take care of herself, and society's responsibility to ensure that others shield her?"[110]

It seems that almost everyone has heard the whispers and rumors about aspartame. Beliefs abound, though few can articulate their source, that aspartame is somehow harmful to the human body. Two questions immediately present themselves: are these rumors true, and, if so, can any action be brought?

To answer these questions, let us examine a brief history of aspartame, the effects it is said to have on health, and the applicability of litigation and individual strategies from both the tobacco and fast food litigation.

A. The Creation and FDA Approval of Aspartame

Aspartame, also known as NutraSweet,[111] was discovered in 1965 by G.D. Searle and Company while researching amino acids in an attempt to develop a treatment for ulcers.[112] A researcher licked his thumb while working in the Searle research lab and found the substance to be incredibly sweet.[113]

The FDA approval of aspartame was riddled with consumer demands, lawsuit saber-rattling, and new FDA review methods.[114] In 1974, Searle gained FDA approval to use aspartame in "dry" use (meaning it would be used to sweeten foods).[115] However, questions were raised about the safety of aspartame by Dr. John Olney (a psychiatrist at Washington University in St. Louis),[116] James S. Turner (author of *The Chemical Feast*[117] and co-founder of the Center for Study of Responsive Law)[118] and Legal Action for Buyer's Education and Labeling ("LABEL").[119] As a result, the FDA stayed the aspartame approval in 1975 and prepared to have an evidentiary hearing.[120] Additionally, an FDA audit of Searle clinical methods revealed what the FDA described

---

[110] *Id.* at 516.

[111] The NutraSweet Company, What is aspartame?, http://www.nutrasweet.com/articles/search.asp?Id=35&srch=aspartame. (last visited Oct. 22, 2005) (explaining the history of aspartame).

[112] The NutraSweet Company, NutraSweet Overview, http://www.nutrasweet.com/company.asp (last visited Oct. 22, 2005) (explaining the history of NutraSweet).

[113] *Id.*

[114] For an in-depth discussion of this process, *see* Todd R. Smyth, Note, *The FDA's Public Board of Inquiry and the Aspartame Decision*, 58 IND. L.J. 627 (1983).

[115] 21 C.F.R. § 121.1258 (1975). Code section was changed to its current designation, § 172.804, in 1977.

[116] Smyth, *supra* note 114, at 633.

[117] JAMES S. TURNER, THE CHEMICAL FEAST (1976).

[118] Smyth, *supra* note 114, at 633.

[119] *Id.* at 634 nn.70-72.

[120] *Id.* at 634 n.73.

as "sloppy" research methods performed on aspartame.[121] FDA Commissioner Dr. Alexander Schmidt stated the FDA had:

> "found different discrepancies of different kinds. Some favored the product (Aspartame) and some [did not]." In some cases, the numbers in animal-test results didn't add up correctly. . . . In some other cases, the agency had questions over the animal-testing plan itself, and in other circumstances . . . pathologists . . . had differing interpretations of animal data.[122]

Olney, Turner, and LABEL waived their right to a full evidentiary hearing in exchange for a hearing before a public board of inquiry ("Board"). This was one of the first times the FDA had ever used such a method.[124] The FDA's acting director selected a panel to serve on the Board from a list of nominees submitted by Olney, Seale, and the Bureau of Foods.[125] The Board was established in 1979[126] and conducted hearings in 1980.[127] Any decisions by the Board would become final unless the petitioning parties (Olney, Turner, and LABEL) filed exceptions, in which case the FDA Commissioner would make his own determination.[128] The questions before the Board were:

1. [W]hether the ingestion of aspartame, either alone [sic] or together with glutamate, poses a risk of contributing to mental retardation, brain damage, or undesireable effects on neuroendocrine regulatory systems.
2. [W]hether the ingestion of aspartame may induce brain neoplasms in the rat.
3. Based on answers to the above questions,
   (a) Should aspartame be allowed for use in foods, or, instead should approval of aspartame be withdrawn?
   (b) If aspartame is allowed for use in foods, i.e., if its approval is not withdrawn, what conditions of use and labeling and label statements should be required, if any?[129]

The Board, evaluating the research done by Searle, concluded that aspartame did not increase the risks of brain damage or endocrine dysfunction.[130] However, the Board was concerned that aspartame might

---

[121] *Id.* at n.72.

[122] *Id.*

[124] Smyth, *supra* note 114, at 627.

[125] *Id.* at 634.

[126] *Id.* at 634.

[127] *Id.* at 635.

[128] *Id.*

[129] Aspartame: Commissioner's Final Decision, 46 Fed. Reg. 38,285, 38,286 (July 24, 1981).

[130] Smyth, *supra* note 114, at 635.

cause cancer.[131] The FDA Commissioner and the Board differed greatly on that issue.[132] The Board was only able to consider three studies, all of which were done by Searle.[133] The studies, performed on lab rats, were troubling to the Board because they felt the studies indicated an unusually high incidence of brain tumors and a possible dose-effect relationship between the tumors and the aspartame.[134] The Board accordingly decided aspartame should not be marketed until further safety testing could be done.[135] All petitioning parties filed exceptions.[136]

Meanwhile, Searle had already invested millions of unrecoverable dollars into production and distribution facilities for aspartame.[137] Rumors that Canada might approve aspartame and take a large share of the fledgling market in the process added to Searle's worries.[138] The culmination of these pressures was the threat of a lawsuit against the FDA, in order to force a final decision in Searle's favor.[139] The commissioner overruled the board,[140] overruled the objections of the parties, and approved the marketing of "dry" use aspartame on July 18, 1981.[141]

The following year, Searle requested approval for the "wet" use (flavoring liquids) of aspartame in carbonated beverages.[142] The FDA very quickly approved the new use.[143] When numerous parties voiced objections to this speedy approval, the FDA denied their requests for a hearing.[144] Searle was acquired by the Monsanto Company in 1985[145]

---

131 *Id.*

132 *Id.*

133 *Id.* at 635-36.

134 *Id.* at 636.

135 *Id.* at 635.

136 *Id.*

137 *Id.* at 634 n.72.

138 *Id.*

139 *Id.* at 635 n.85.

140 Sidney A. Shapiro, *Scientific Issues and the Function of Hearing Procedures: Evaluating the FDA's Public Board of Inquiry*, 1986 DUKE L.J. 288, 311-12 (1986). The commissioner believed the Board had misinterpreted the results of some tests conducted by Searle. *Id.* at 312. Recall that the Board felt that one of the three studies, in which some test animals developed brain tumors, implied a causal relationship between the tumors and aspartame. Because the commissioner had now announced that he believed these results were misinterpreted, the objections were dismissed and a causal relationship was deemed to not exist. *Id.*

141 Smyth, *supra* note 114, at 635.

142 G.D. Searle & Co.: Filing of Food Additive Petition, 47 Fed. Reg. 46,140 (Oct. 15, 1982).

143 21 C.F.R. § 172.804(c)(6) (1984).

144 *See* Food Additives Permitted for Direct Addition to Food for Human Consumption; Aspartame, 49 Fed. Reg. 6672 (1984).

and was later acquired by J.W. Childs Equity Partners II L.P. in May 2000.[146]

B. The Rumors about Aspartame: Sweet Nothings or Bitter Reality?

As is stated on the NutraSweet website, aspartame is composed of two ingredients: phenylalanine and aspartic acid.[147] Aspartame is used in a variety of different foods and drinks.[148] The NutraSweet Company has loudly proclaimed that aspartame is not harmful to the human body in any way. In fact, on its website the NutraSweet Company states:

> Aspartame's safety has been documented in more than 200 objective scientific studies. The safety of aspartame has been confirmed by the regulatory authorities of more than 100 countries, including the U.S. Food and Drug Administration (FDA) and Health Canada, as well as expert committees such as the European Commission's Scientific Committee on Food and the United Nations' Food and Agricultural Organization and World Health Organization Joint Expert Committee on Food Additives.[149]

The site also provides hyperlinks to numerous organizations claiming to have studied aspartame and found it safe for human consumption; however, many of these studies are either no longer posted or out of date.[150] The FDA link provided on the NutraSweet Company's website contains a statement released in 1996.[151] That statement largely relies upon the 1981 FDA approval of aspartame to legitimize the continued approval of the substance, though it states the agency would be "ready to act if credible scientific evidence" were presented.[152] The FDA recently released another statement about aspartame, but it also

---

[145] Special to the New York Times, *Consumer Division of Searle for Sale*, N.Y. TIMES, Sept. 18, 1985, at D5.

[146] Jessica Madore Fitch, *NutraSweet Takeover Complete*, CHI. SUN-TIMES, May 31, 2000, at Financial, p.71.

[147] The NutraSweet Company, Statements, What is aspartame made of?, http://www.nutrasweet.com/articles/article.asp?Id=36 (last visited Oct. 22, 2005) (describing the makeup of aspartame)

[148] The NutraSweet Company, What is aspartame? *supra* note 111.

[149] The NutraSweet Company, Statements, Is Aspartame Safe?, http://www.nutrasweet.com/articles/article.asp?Id=45 (last visited Oct 22, 2005) (describing the various sources which assert that aspartame is safe).

[150] The NutraSweet Company, http://www.NutraSweet.com (last visited Oct. 22, 2005) (providing numerous studies under the "links" section which supposedly support the company's claims of safety).

[151] FOOD AND DRUG ADMIN., U.S. DEPT. OF HEALTH AND HUMAN SERV., FDA TALK PAPER: FDA STATEMENT ON ASPARTAME (1996), http://www.fda.gov/bbs/topics/answers/ans00772.html (containing a study which reaffirms the FDA approval of aspartame). *See also* John Schwartz, Report Linking Sweetener to Brain Cancer is Disputed, FDA Finds No Reason to Question Aspartame's Safety, WASH. POST, Nov. 19, 1996, at A2.

[152] *FOOD AND DRUG ADMIN., supra* note 151.

relied upon the 1981 FDA approval to establish that aspartame is still safe for consumption.[153]

If any damage is being caused by aspartame, it obviously starts after the substance enters the body. The NutraSweet Company explains:

> Upon digestion, aspartame breaks down into its components-the amino acids, aspartic acid and phenylalanine, and methanol–which are then absorbed into the blood. These components are used in the body in exactly the same ways as when they are also obtained from common foods and beverages. Neither aspartame nor its components accumulate in the body over time.[154]

The FDA reports that the acceptable daily limit of aspartame is fifty milligrams per kilogram of body weight, which basically means that "a 150 pound person would have to consume sixteen 12-ounce cans of a beverage containing aspartame to reach this level of intake."[155] Even then, the FDA reports that nothing adverse would happen provided that level of consumption was only occasional.[156]

An internet search will reveal numerous websites purporting to explain the dangers of aspartame consumption. Most of these sites lack any indicia of credibility due to their outlandish claims. One website, for example, blames the FDA's supposed unwillingness to re-examine aspartame on Donald Rumsfeld[157] and claims that O.J. Simpson was suffering from aspartame-induced dementia when he allegedly murdered his wife.[158]

Other organizations, however, are much more credible. The American Academy of Pediatrics expresses concern that certain women who have undiagnosed Phenylketonuria ("PKU") may be at risk for birth defects caused by aspartame.[159] PKU is a genetic disorder which

---

[153] Is Aspartame Safe?, http://www.cfsan.fda.gov/~dms/qa-adf9.html (last visited Oct 22, 2005).

[154] The NutraSweet Company – Statements, How is aspartame handled by the body?, http://www.nutrasweet.com/articles/article.asp?Id=37 (last visited Oct. 22, 2005) (describing the manner in which aspartame is processed by the human body).

[155] David G. Hattan, Letters to the Editor: Aspartame Limits, FDA Consumer, May-June 2002, http://www.fda.gov/fdac/departs/2002/302_ltrs.html (FDA response updated 2004) (describing the FDA assessment of aspartame safety).

[156] *Id.*

[157] Aspartamekills.com, http://www.aspartamekills.com (last visited Oct. 22, 2005) (explaining how Donald Rumsfeld supposedly used his political muscle to get aspartame approved and is responsible for the neurological disorders people have reportedly suffered ever since). Donald Rumsfeld was the CEO, President, and Chairman of the Searle company from 1977 to 1985. The White House, Secretary of Defense Donald Rumsfeld, http://www.whitehouse.gov/government/rumsfeld-bio.html (last visited Oct. 22, 2005).

[158] Aspartamekills.com, *supra* note 157.

[159] Committee on Genetics, *Newborn Screening Fact Sheets*, 98 PEDIATRICS 473, 490 (Sept. 1996), *available at* http://www.medicalhomeinfo.org/screening/Screen%20Materials/newbornfactsheets.pdf.

prevents a person's body from properly converting phenylalanine, causing the substance to build-up in the bloodstream and brain tissue. That build-up can cause mental retardation and different nervous system problems.[160] If this condition is treated soon after a child's birth, most of the potential problems from this disorder can be avoided.[161] However, this is not much of a concern since the FDA, recognizing the danger faced by individuals with PKU, required warning labels (directed at people with this condition) to be placed on aspartame-infused products.[162]

Other sources worry about the effects of aspartame in all individuals.[163] They claim aspartame is not safely processed by the body after digestion. After digestion, the substance is broken down into its two components: phenylalanine and aspartic acid.[164] The amino acids, which are found along with phenylalanine in normal foods, are not found in aspartame, which means, similar to individuals with PKU, phenylalanine does not break down in the safe manner it normally would.[165] Rather, it is claimed, the phenylalanine accumulates in the bloodstream and the brain tissue, leading to a host of health problems, both physical and cognitive. For these reasons, many commentators strongly urge pregnant women to stay away from aspartame.[166]

Keeping in mind the acceptable daily consumption of aspartame established by the FDA,[167] a person would have to weigh about nine pounds in order to consume more than a safe dose of aspartame from a single 12 ounce can of Diet Coke®, for example. The most likely candidate would therefore be a child still in its mother's womb. Given that a child in its mother's womb shares everything its mother eats and drinks, the maximum daily dosage of aspartame could easily be exceeded by having two cans of aspartame-sweetened beverages. This amount is

---

[160] MyWebMD, What is Phenylketonuria (PKU)?, http://my.webmd.com/hw/raising_a_family/hw44747.asp (last visited Oct. 22, 2005) (describing PKU, its effect on the brain, and how to lessen its impact).

[161] *Id.* This condition is estimated to occur in one out of every 14,000 to 20,000 live births per year in the United States. *Id.*

[162] 21 C.F.R. § 172.804(e)(2) (1975). This provision is currently found in § 172.804(d)(2).

[163] Focus-on-Nutrition, Aspartame—is it safe?, http://www.focus-on-nutrition.com/aspartame.shtml (last visited Oct. 22, 2005) (containing a report by Dr. Christine Lydon, MD concerning the effects she believes aspartame to have on the human body); Mercola, Aspartame: Aspartame Disease: An FDA-Approved Epidemic, http://www.mercola.com/2004/jan/7/aspartame_disease.htm (last visited Oct. 22, 2005) (containing numerous studies which claim aspartame causes numerous physical and neurological problems).

[164] *Id.*

[165] *Id.*

[166] *See supra* note 163.

[167] *See supra* note 151 and accompanying text.

increased even more if the mother consumes other food or beverage items containing aspartame. As mentioned above, there is concern that the aspartame could accumulate in the fetal tissue and lead to all manner of health problems for the child. Dr. H.J. Roberts, a notable researcher, compiled over 1,000 pages of research that purportedly points to conclusions such as these.[168]

A group of scientists in Scotland urged the Food Standards Agency to conduct new investigations into aspartame, in light of numerous reports that the sweetener was causing a host of neurological problems.[169] In Europe, the growing suspicion over aspartame has prompted numerous questions about the sweetener[170] and even prompted Kings College of London to begin a formal research study, which will be completed by approximately 2007.[171]

Most of the published scientific studies on aspartame have not indicated a negative effect on health. However, many of these studies are many years old.[172] Is it unreasonable to believe that scientific knowledge could have progressed over the twenty years since aspartame's approval? Whatever the case, it is likely that research by a credible, independent organization will have to be produced before there is any hope of plaintiff victory against the aspartame industry.

C. Aspartame Litigation: Could Some Liability Theories Succeed Where Tobacco and Fast Food Liability Failed?

The claims brought against the aspartame industry would likely be very similar to those brought against the tobacco and fast food industries. However, cases filed against the aspartame industry have not advanced far enough to parallel the tobacco and fast food litigation. The earliest aspartame case involved an attempt to compel the FDA to reconsider its approval of aspartame in 1985, which ended in failure because it failed to raise any new objection to the FDA approval.[173] Two more recent cases were brought by individuals who claimed to suffer from aspartame-related injuries.

---

[168] *See generally* DR. H.J. ROBERTS, ASPARTAME DISEASE: AN IGNORED EPIDEMIC (2001).

[169] Kirsty Mcluckie, *Leaving A Bad Taste*, THE SCOTSMAN, Aug. 31, 2000, at 11.

[170] Jonathan Leake, *Top Sweetener Condemned By Secret Report*, TIMES NEWSPAPERS LTD., Feb. 27, 2000, at 1.

[171] Miriam Stoppard, *Are Low-Calorie Drinks a Danger?*, THE MIRROR, Sept. 20, 2004, http://www.mirror.co.uk/sexandhealth/miriam/tm_objectid=14661867%26method=full%26siteid=94762-name_page.html (last visited Oct. 22, 2005).

[172] *See supra* note 151 and accompanying text.

[173] Cmty. Nutrition Inst. v. Novitch, 773 F.2d 1356 (D.C. Cir. 1985).

In the first case, *Ballinger v. Atkins*,[174] the plaintiff claimed to suffer from "neurological and physical ailments, including tachycardia, dizziness, anxiety, panic attacks, blurred vision, inability to concentrate, loss of memory, and shooting pains in his left arm."[175] He claimed these symptoms began after he started consuming aspartame in puddings, desserts, and liquids as part of the Atkins diet.[176] Because one expert witness did not have the appropriate research background, and the other had not done adequate testing to establish the presence of neurological disorders in the plaintiff, the NutraSweet Company's motions to exclude testimony were granted.[177] The litigation proceeded no further after these expert witnesses were excluded.

The plaintiff in the second case, *Ross v. Altria Group Inc.*,[178] alleged that Altria used aspartame to manufacture Crystal Light without warning consumers of the possible health risks associated with aspartame.[179] The plaintiff also alleged fraud and breach of warranty.[180] Although the analysis of these claims would have been very interesting, the case was dismissed due to a lack of personal jurisdiction over the defendant.[181]

Despite their dismissal due to various technicalities, those two cases would effectively be the first cases to be categorized as "aspartame litigation" ("aspartame litigation"). Given the persistence of the belief in aspartame as a health hazard, there is a good chance more cases will be filed in the future; however, plausible scientific proof will be necessary to give such cases wings. Beyond that, their success will be contingent upon the legal arguments and social stratagems employed by either side. This Comment will now examine some of those legal theories and predict the success of each under the assumption that some credible scientific evidence of aspartame's harmful effects could be presented in each case. Social and strategic considerations that could or should occur while pursuing aspartame litigation will then be considered.

---

[174] Ballinger v. Atkins, 947 F. Supp. 925 (E.D. Va. 1996).

[175] *Id.* at 926.

[176] *Id.*

[177] *Id.* at 927-29.

[178] Ross v. Altria Group Inc., No. C 04-01453 SI, 2004 U.S. Dist. LEXIS 18558 (N.D. Cal. Sept. 3, 2004).

[179] *Id.* at *2.

[180] *Id.*

[181] *Id.* at *17.

1. Legal Claims for Aspartame Recoveries

a. Implied Warranty of Merchantability

Presently, a claim for breach of the implied warranty of merchantability would likely be brought under section 2-314 of the *Uniform Commercial Code* ("UCC"), which states:

> (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
> (2) Goods to be merchantable must be at least such as
> (a) pass without objection in the trade under the contract description; and
> (b) in the case of fungible goods, are of fair average quality within the description; and
> (c) are fit for the ordinary purposes for which such goods are used; and
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
> (f) conform to the promise or affirmations of fact made on the container or label if any.
> (3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.[183]

Obviously, there has been no attempt by the aspartame companies to exclude implied warranties of merchantability,[184] nor is there any concern over whether an aspartame manufacturer would be considered "a merchant with respect to goods of that kind."[185] Thus, a plaintiff would need only to establish that the aspartame was not merchantable.[186] Although the UCC does not provide an absolute definition of "merchantable," it could be fairly assumed that such a definition would encompass not causing health problems for a consumer.

Assuming hypothetically that a claim based on the above legal theory were brought today, this claim would give plaintiffs two major advantages which plaintiffs in the "first wave" of tobacco litigation did not have. First, courts today would most likely not hesitate to impose

---

[183] U.C.C. § 2-314 (1977).

[184] *Id.* § 2-314(1).

[185] *Id.*

[186] *Id.* § 2-314(2).

liability upon an entire industry.[187] Second, unlike the "first wave" of tobacco litigation, today's courts would be unlikely to excuse the aspartame industry from their breach even if the industry claimed they had no scientific knowledge that their product caused health problems.[188]

However, in the hypothetical case above, there are two main defenses to the breach of implied warranty of merchantability: assumption of the risk and the four year statute of limitations.[189] Assumption of risk could be overcome because common knowledge of aspartame's harmful effects[190] does not presently exist. The statute of limitations defense is more likely to be used, as the aspartame industry could argue that the statute of limitations had expired prior to the commencement of the suit. On the other hand, the plaintiffs could argue that a specific intake of aspartame within the past four years was the lynchpin dose that caused the onslaught of poor health.[191] This is an issue which would have to be determined early on by the courts, but it seems likely that this cause of action would be successful in aspartame litigation.

Recall that the defense used most successfully by the tobacco industry during the "first wave" of tobacco litigation was a complete ignorance of adverse health effects caused by smoking.[192] While foreseeability plays no role in modern implied warranty jurisprudence, the aspartame industry litigators would not hesitate to emphasize their supposed ignorance of aspartame's injurious nature to juries in an effort to save themselves from liability. Plaintiff litigators will have to be sure to reinforce the fact that foreseeability should not be considered in evaluating breach of implied warranty of merchantability.

b. Express Warranty of Merchantability

An express warranty is much more particular than an implied warranty. According to UCC section 2-313:

(1) Express warranties by the seller are created as follows:

---

[187] *See supra* note 30 and accompanying text.

[188] Green v. Am. Tobacco Co., 304 F.2d 70, 72 (5th Cir. 1962).

[189] U.C.C. § 2-725 (1977).

[190] Again, for the purposes of this section we are assuming that positive, credible research indicating the harmful effects of aspartame has been produced.

[191] *See* Ward v. Desachem Co., 771 F.2d 663 (2d Cir. 1985) (holding same); Howard v. Huxley Dev. Corp., No. 80-3298, 1981 U.S. App. LEXIS 14453 (6th Cir. Apr. 9, 1981) (holding the statute of limitations, in cases of harmful exposure to asbestos, began running on the date of last exposure to the substance). *But see* Bendix v. Stagg, 486 A.2d 1150 (Del. 1984) (holding the statute of limitations began running when the harmful effects of the gradual exposure first manifested).

[192] *See* discussion *supra* Part II.A.

> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.[193]

Although the aspartame industry does not regularly advertise its product by way of radio, television, and billboard advertisements with the same regularity which the fast food industry (and to a lesser extent, the tobacco industry) does, it could still be claimed that the aspartame industry has made express warranty promises to its customers. On its official website,[194] the NutraSweet Company provides web-links to numerous studies which proclaim that NutraSweet has no negative side effects (with the exception of people with PKU).[195] In addition, the website makes numerous positive affirmations about aspartame, including: "Aspartame's safety has been documented in more than 200 objective scientific studies;" "[u]pon approval of aspartame, the FDA concluded that it was safe for the general public including children, pregnant and nursing women, and diabetics;" and "[h]ealth organizations, such as The American Medical Association's Council on Scientific Affairs, the American Diabetes Association and the American Dietetic Association have reviewed research on aspartame and found the sweetener to be safe."[196]

Just as in *Pritchard*, these statements could be viewed as "an affirmation of fact or promise made" to the customers by the seller that aspartame is completely safe for use.[197] In effect, it could be argued that

---

193 U.C.C. § 2-313 (1977).

194 http://www.NutraSweet.com.

195 *See supra* notes 158-165 and accompanying text.

196 *See supra* note 149.

197 *See* Pritchard v. Liggett & Myers Tobacco Co., 370 F.2d 95 (3d Cir. 1966), *cert. denied*, Liggett & Myers Tobacco Co v. Pritchard, 386 U.S. 1009 (1967).

this particular company is promising the customers viewing the website that the sweetener will not cause any adverse health problems. Plaintiffs could argue that such promises served as an inducement to purchase products sweetened by aspartame, effectively becoming a basis of the bargain.[198] Once the plaintiffs established aspartame was the underlying cause of their health problems, their case would be won.

On the other hand, the aspartame industry could argue that the website was meant to be informational rather than an advertisement. They could buttress this claim by the fact that there is no massive marketing campaign underway to promote their product amongst the general public. Yet such a claim would likely be defeated by pointing to such statements as: "[A]spartame offers one more simple step to help people move closer to achieving a more healthful diet."[199] Such statements could arguably be said to target consumers rather than just provide disinterested scientific analysis. Such a defense could definitely be defeated if discovery proceedings revealed internal memorandums desiring such a website to serve as a promotional tool to stimulate demand.

Another possible defense by the aspartame industry could be to claim the statements made on their website are merely their opinion (or, in the case of the web-links to the different studies, the opinions of other organizations) of the goods and do not create a warranty.[200] Of course, for this defense to work, it would have to be shown that the statements were meant to be the opinion of the company rather than an affirmation of fact. The difficulty the defense would have in establishing that the listing of studies reporting the safety of aspartame (as well as the statements maintaining that the use of aspartame was more wholesome than other sweeteners) was not meant as an affirmation of fact (*i.e.*, that aspartame is safe for consumption) is obvious.

c. Unreasonably Dangerous Product

Plaintiffs suffering from aspartame-related illnesses would likely have no trouble claiming aspartame is unreasonably dangerous. Assuming credible research were to establish a causal connection between aspartame and certain health problems, plaintiffs would be

---

[198] *See* Pake v. Byrd, 286 S.E.2d 588 (N.C. Ct. App. 1982) (holding that the buyer's decision to purchase was based on assurances the seller made prior to sale).

[199] The NutraSweet Company, Healthcare and Nutrition Professionals, http://www.NutraSweet.com/professionals/index.asp (last visited Oct. 22, 2005).

[200] *See* Boud v. SDNCO, Inc., 54 P.3d 1131 (Utah 2002) (holding that stating a yacht is the best in its class, and similar statements of opinion, does not create an express warranty).

developing health problems simply by eating and drinking everyday foods.

Under Restatement § 402A,[201] the aspartame industry would be liable to the consumers. The chance that the aspartame could ultimately be digested by these consumers is absolutely foreseeable to the manufacturers, as that is the reason this artificial sweetener is being produced.

The aspartame industry could argue that the aspartame is being changed from its original form when it is placed into food and beverage products. This could potentially free them from liability under section 402A, since the aspartame would arguably be reaching the consumers with a substantial change from that in which it was sold. On the other hand, the plaintiffs could just as easily argue that the aspartame was not substantially changed when it was placed into the food and beverage products; this leaves a question of fact for the jury to decide with the aid of expert testimony. Assuming the argument over whether aspartame was changed from its original substance was decided in the plaintiff's favor, the claim for an unreasonably dangerous product would likely be decided in the plaintiff's favor as well.

d. Failure to Warn

As was stated in *Pelman*,[202] manufacturers have a duty to warn their customers of potential harm that could result from reasonably foreseeable misuse of their product.[203] This failure to warn must also be the proximate cause of the injury to the plaintiffs.[204]

Plaintiffs could argue that the aspartame industry could reasonably have foreseen the harm which could be caused by their product due to the consumption guidelines of the FDA (as those warnings would apply to unborn babies).[205] On the other hand, the reasonable foreseeability requirement could work in the aspartame industry's favor. The aspartame industry could rely on the fact that all the studies it relied upon had shown aspartame to be safe, even at huge levels of consumption. Reliance upon the FDA's longstanding approval of aspartame could also serve to establish that the aspartame industry had no way of foreseeing any harm caused by the consumption of their product. This would render moot the question of whether the failure to warn was a proximate cause of the plaintiff's injury and would settle this claim in the aspartame industry's favor.

---

[201] *See supra* note 18.

[202] Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 540 (S.D.N.Y. 2003).

[203] *See supra* note 98 and accompanying text.

[204] *See supra* notes 99-100 and accompanying text.

[205] *See supra* note 163 and accompanying text.

e. Strict Liability

One final claim that could be made is strict liability based upon a risk-utility analysis, though this would likely be a claim of last resort given that it met with no success in the tobacco litigation.[206] The basic theory behind a risk-utility analysis is that the manufacturer should bear the burden of liability if the benefits gained from the use of its product are outweighed by the burden of the health problems its product causes.[207]

The plaintiffs could argue that the benefits gained from aspartame (such as allowing thousands of diabetic individuals to enjoy food items which they could not if regular sugar was used to sweeten them) are outweighed by the physical and cognitive problems experienced by people of every walk of life who ingest aspartame. On the other hand, the aspartame industry could assert that the benefits received by diabetics and by those individuals who do not consume a harmful level of aspartame[208] far outweigh those individuals who were harmed by the artificial sweetener. This argument could go either way depending on which judge or jury hears the arguments.

Of course, given that this is a highly theoretical argument that has no basis in law and met with no real success during the "second wave" of tobacco litigation, there is no reason to believe this claim would bring victory to the plaintiffs.

2. Social and Strategic Considerations for Aspartame Recovery

While clever and carefully coordinated legal arguments will be essential to the success of future aspartame litigation, the efforts made outside the courtroom to shape public opinion and out-maneuver the opposing side could potentially be even more critical.

a. Efforts of the First Lawsuits

Undoubtedly, the success of one, or a few, lawsuits against the aspartame industry would be the spark that would set the forest on fire. Once the initial efforts of massive aspartame litigation yield plaintiff victories, a flood of litigants suffering from aspartame-related illnesses

---

[206] Recall that this theory was argued unsuccessfully during the "second wave" of tobacco litigation. *See supra note* 40 and accompanying text.

[207] Rabin, *supra* note 1, at 866-67. *See also* O'Brien v. Muskin Corp., 463 A.2d 298 (N.J. 1983) (holding that evidence regarding alternative designs was relevant as to whether the risk posed by a product outweighed its utility).

[208] Again, this question would depend in large part upon the findings of the credible scientific data which irrefutably establish a certain level of aspartame intake in order to cause health problems. This level would likely be lower than what is currently believed by the FDA.

(real or imagined) will come out of the woodwork seeking similar damages. But first, those initial victories must be won.

As Professor Banzhaf asserted,[209] the first several lawsuits will undoubtedly fail, either because the public does not believe aspartame is truly to blame for the plaintiffs' maladies or just isn't ready to accept the idea that a sweetener used in so many products is harmful. Of course, one advantage would be that jurors would likely not associate weakness of character with aspartame use, as was characteristic of juries during the "second wave" of tobacco litigation. Still, these initial lawsuits would have to be pursued with vigor in order to infuse into the public psyche the awareness of aspartame-induced illnesses.

Unlike the public education Professor Banzhaf advocated, the initial lawsuits against the aspartame industry would likely serve as a teaser. They would encourage the public to take a closer look at aspartame and question its effect on human health. Such inquiries could convince many people (and many jurors) that aspartame is harmful. Alternatively, such attention could encourage more independent and updated research to be performed on aspartame, which could lead to more evidence that aspartame is harmful. Either way, more lawsuits should and must be brought if aspartame litigation is ever to make it off the ground.

b. Pre-trial Maneuvers

Aspartame is estimated to be at least a several hundreds of million dollar a year industry.[210] Whether the threat to this industry is from a few massive class-action lawsuits or a flood of individual suits, the potential loss is enormous. That being the case, it is very likely that the aspartame industry will use its considerable financial resources to stretch out pre-trial discovery, take lengthy depositions, file every possible motion, and challenge every motion made by the plaintiffs; a similar scheme did avert almost all the lawsuits during the "first wave" of tobacco litigation.[211] One might even say that future plaintiffs received a foretaste of this maneuver in *Ballinger*.[212]

The most logical approach, therefore, is to make initial thrusts at the aspartame industry by use of massive class-action lawsuits, such that the collective financial might of the plaintiffs would at least allow the suit to make it to trial. Many lawyers may be hesitant to undertake an effort of this magnitude unless there is a reasonable chance of victory. Moreover, the aspartame industry is likely to contest the results of any

---

[209] *See supra* note 108 and accompanying text.

[210] *See supra* note 145.

[211] *See* discussion *supra* Part II.A.

[212] Ballinger v. Atkins, 947 F. Supp. 925 (E.D. Va. 1996).

research used by the plaintiffs, much like the tobacco industry did with the early independent research findings in the 1950's.[213] These considerations underscore the importance of having credible scientific evidence to the success of aspartame litigation.

c. Other Miscellaneous Considerations

Other than the use of the class-action lawsuit, much of the success in tobacco litigation came about as a result of confidential disclosures and Medicaid "blameless" victim lawsuits.[214] Although it seems unlikely that plaintiffs would have to travel the road of Medicaid reimbursement, the possibility of confidential disclosures should be considered by plaintiffs. With the release of scientific evidence clearly demonstrating a causal connection between aspartame and certain health problems, some of the potential reverberations could be congressional review of the FDA approval decision[215] and the tests performed by Searle.[216]

Given that most of the research relied upon by the FDA in the initial approval of aspartame was performed by a company that had already sunk millions of dollars into production of this sweetener,[217] it is possible the industry already had knowledge of its adverse effects (if any) on health. If it can be proven that the industry knew of the harmful effects of aspartame for years, yet kept it from the public, it has great potential to sway jury opinion in favor of the plaintiffs. The aspartame industry, just as the tobacco industry before it, could be portrayed as a cold-hearted industry which could not care less about its customers health.

V. CONCLUSION

The trend in products liability law is clearly leaning toward imposing liability on entire industries for their products' cause of health problems in their customers. In some cases, such as fast food, it is debatable whether placing liability on the industry is appropriate given the common knowledge of the products' potential to cause health problems.

Whether aspartame triggers bad health is largely unknown. Though there are many older studies claiming there is no risk associated with aspartame consumption, the unproven belief that aspartame is noxious to a person's health refuses to go away. However, at this point in time, the odds are in favor of the aspartame industry. With the FDA's

---

213 Player, *supra* note 1, at 323.

214 *See* discussion supra Part II.C.

215 *See supra* note 144.

216 *See supra* notes 133-35 and accompanying text.

217 *See supra* note 137 and accompanying text.

approval, the aspartame industry is in a position to deflect any claims brought against it.

Aspartame litigation can only progress once reliable scientific research, conducted and approved by a credible organization, establishes a clear and highly plausible causal connection between aspartame consumption and health problems. If or when such scientific findings are presented, an organized class-action lawsuit could be brought against the aspartame industry. Class-action lawsuits would be the wisest course of action since the industry would likely use their full financial resources to resist any legal action.

Once the lawsuits have made it to the courtroom, the likelihood for victory would be best with a claim for breach of implied warranty, though there are several other legal theories that could be used. Aspartame litigation is certainly a plausible new genre of products liability law, and it would certainly be in good company alongside tobacco and up-and-coming fast food litigation. However, this is a crusade that is unlikely to enter the courtroom until scientific inquiries firmly link this artificial sweetener to bad health.

*David Ellender**

---

* I dedicate this Comment to my grandparents, Joseph and Billie-Mae Kiker. Without their help, I would never have made it through law school. Professor Douglas Cook of Regent University School of Law deserves enormous credit and thanks for his patient guidance on substantive law and editing. I would also like to thank Joseph Farah, editor of World Net Daily, who provided the inspiration for this Comment.

GIVE IT AWAY: A RESPONSE TO THE TRANSFER TAX

I. INTRODUCTION

Death and Taxes. Those two words do not exactly conjure up positive emotions. Death taxes. Put them together and they become downright negative, summoning feelings of unfairness in 85% of Americans.[1] As the popular saying goes, death and taxes are two things that one cannot avoid. There are those, however, who are trying to make it possible to avoid death taxes. Conflict surrounding the passage of wealth from one generation to the next has been a part of our human makeup since Jacob stole Esau's birthright.[2] Just as beneficiaries have tried to receive their share, those leaving their worldly wealth have had a desire to pass it to their heirs.[3]

Hand-in-hand with this desire to pass wealth has been a desire by the government to tax the transfer of it.[4] The desire to use wealth transfer as a revenue generator, coupled with the unfavorable attitude most Americans have toward taxes, has caused much debate between those who believe that the taxes on wealth transfer are necessary[5] and those who believe that the taxes are unnecessary and burdensome.[6] The passage of The Economic Growth and Tax Relief Reconciliation Act of 2001 ("Tax Act of 2001")[7] has perpetuated this friction by repealing the Transfer Taxes[8] in 2010 for only one year and by adding to the mix the

---

1 Mark Bernstein, *Should Governments Play Robin Hood? The Effects of the Repeal of the Estate Tax on Wealth Apportionment*, 12 CARDOZO J. INT'L & COMP. L. 187, 191 (2004). In response to the feelings of unfairness, United for a Fair Economy begs the question, "Unfair compared to what?" United for a Fair Economy, *America's Wealth Gap and the Case for Preserving the Estate Tax*, 8 (2004).

2 *Genesis* 27:1-35 (all Bible verses cited in this comment are taken from the New International Version).

3 *See Proverbs* 13:22 ("A good man leaves an inheritance for his children's children . . . .").

4 *See* Mary R. Wampler, *Repealing the Federal Estate Tax: Death to the Death Tax, or Will Reform Save the Day?*, 25 SETON HALL LEGIS. J. 525, 528 (2001) ("Although Emperor Caesar Augustus is usually credited with developing the first death tax, the Egyptians were actually the first civilization to institute [a Transfer Tax].") (footnote omitted).

5 *See* discussion *infra* Part III B.

6 *See* discussion *infra* Part III A.

7 *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 [hereinafter Tax Act of 2001] (codified as amended in scattered sections of 26 U.S.C.).

8 *Id.* § 901(a)(2), 115 Stat. at 150 (repealing the taxes in 2010 for one year). Transfer Taxes commonly refer to estate, gift, and generation-skipping taxes; however, in this comment Transfer Tax is exclusively used in reference to the estate tax. Gift and generation-skipping taxes are beyond the scope of this comment.

question of whether to make this repeal permanent.

By creating a federal government, our founding fathers created a need to raise revenue to operate that government. Having a federal government is not free. It takes money to operate a government.[9] In the words of Oliver Wendell Holmes, "Taxes are what we pay for civilized society."[10] The main thrust of this paper is not to debate the amount of money needed to effectively run the federal government[11] but, rather, to examine the use of Transfer Taxes to help fund our government and, more specifically, the impact on charitable giving. While the Transfer Tax is not a significant source of revenue for the government,[12] revenue collection is only one part of the policy behind taxing wealth transfers at death; another part of the policy is to help redistribute[13] wealth in America so that it is not concentrated in the hands of a few, thus preventing an aristocracy of the wealthy.[14]

One avenue that Americans have used to avoid paying Transfer Taxes is the use of charitable bequests to reduce the amount of the

---

[9] Since 1960, the revenue collected by the federal government has averaged 18.1% of the gross domestic product (GDP). CONGRESSIONAL BUDGET OFFICE, REDUCING THE DEFICIT: SPENDING AND REVENUE OPTIONS 327 (1997), *available at* http://www.cbo.gov/ftpdocs/0xx/doc6.pdf. That percentage skyrocketed to 20.6% of the GDP in 2000 and is predicted to reach 20.7%, the highest percentage since World War II, in 2001. CONGRESSIONAL BUDGET OFFICE, BUDGET OPTIONS 375-76 (2001), *available at* http://www.cbo.gov/ftpdocs/27xx/doc2731/ENTIRE-REPORT.pdf.

[10] Compania General De Tabacos De Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

[11] There is no doubt that the federal government could run on less revenue. While the choices of what to cut may not be easy or popular, there is little doubt that this great nation could continue to function as the greatest nation on Earth if it adhered to a budget. This comment's purpose is not to debate how much money the government actually needs. Therefore, this comment does not look at the percentage of GDP, nor the amount of money generated. Instead, it looks at the sources as they relate to Transfer Taxes and the effect changes will have on the status quo without taking into account the notion that our government could actually function on less money.

[12] DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE DATA BOOK 2003 9, *available at* http://www.irs.gov/pub/irs-soi/03databk.pdf. In 2003, the Transfer Tax accounted for about $2.3 billion, or 1.2% of the revenue collected. *Id.*

[13] *See* Stephanie A. Weber, *Re-thinking the Estate Tax; Should Farmers Bear the Burden of a Wealth Tax?*, 9 ELDER L.J. 109, 114-15 (2001). She writes:

> Modern liberal economists and supporters of the estate tax agree with Roosevelt's conviction that large concentrations of wealth should be collected and redistributed by the government. As a result, the estate tax is one of the highest taxes imposed upon American citizens. . . . The estate tax was targeted toward the riches of the rich and it is certainly hitting its mark in that respect.

Id. (citations omitted).

[14] *See* United for a Fair Economy, *supra* note 1, at 3 (quoting Louis Brandeis, "We can have democracy in this country, or we can have great wealth concentrated in the hands of a few, but we can't have both.").

decedent's gross estate.[15] The combination of charitable bequests and charitable contributions[16] amounted to nearly $201 billon in 2003.[17] However, giving is not fueled only by a desire to avoid taxes; there are also moral obligations that compel Americans to give to charities.[18] A concern with any reformation or repeal of the Transfer Tax is the impact it will have on these contributions to charity.[19]

This paper will look first, in Part II, at the history of the Transfer Tax in America. Part III will examine the arguments surrounding the Transfer Tax, discussing arguments for its total repeal, for keeping it, or for modifying it. Part IV will explore charitable giving in America by, first, looking at the background to giving and the current status of giving; second, by addressing the effect of repealing or reforming the Transfer Tax; and third, by discussing the ability of charitable giving to rely on altruistic motives, as well as the role of giving and tithing by those in the church. Finally, in Part V, I will conclude by arguing that the Transfer Tax should not be totally repealed, but reformed, in order to continue encouraging American families to give to charity.

II. HISTORY OF THE TRANSFER TAX

"War, what is it good for?"[20] Answer: the beginning of the Transfer Tax in 1797.[21] When the Transfer Tax made its debut, it was actually a "stamp tax on inventories of decedents."[22] The revenue generated by this stamp tax was directed to the United States Navy to help sustain the Navy during a "strained relationship with France."[23]

---

15 I.R.C. § 2055 (2000).

16 Charitable bequests are gifts given to charities after the donor has died. Charitable contributions are gifts given to charities during the life of the decedent.

17 CONGRESSIONAL BUDGET OFFICE, THE ESTATE TAX AND CHARITABLE GIVING 1 (2004) [hereinafter CHARITABLE GIVING] ("Nearly 90 percent of [charitable] giving occurs during donors lives . . . ."); *available at* http://www.cbo.gov/ftpdocs/56xx/doc5650/07-15-CharitableGiving.pdf. The studies that produced this data did not explore the possibility, or amount, of charitable contributions that were predicated on the same desire as charitable bequests: to avoid Transfer Tax.

18 *See, e.g.*, *Luke* 6:38 ("Give and it will be given to you.").

19 Forty-five percent of all charitable contributions in 2000 were made by families with an adjusted gross income in the top 5% of all Americans. CHARITABLE GIVING, *supra* note 17, at 2. This concern will be further explored in Part IV, pp. 11-19.

20 BRUCE SPRINGSTEEN, *War, on* LIVE 1975-1985 (Columbia Records 1986).

21 Agnes C. Powell, *Hocus-Pocus: The Federal Estate Tax—Now you see it, now you don't*, NAT'L B. ASS'N MAG., Sept.-Oct 2001 at 21.

22 *Id.* The widow and issue of the decedent did not pay the stamp tax, and although repealed by Congress, many states continued to use the stamp tax as a revenue source. Wampler, *supra* note 4, at 529-30.

23 Powell, *supra* note 21, at 21.

Beginning with the Declaration of Independence, the natural law's[24] impact on the formation of this country is evident.[25] However, "[m]any influential jurists and political thinkers" during the founding of our country, including Thomas Jefferson, did not find the right to transfer wealth at death in the natural law; rather, they "regarded it as positivist in character."[26] Thomas Jefferson further argued that although "the use of property was a natural right, . . . [the] property ownership ended at death."[27] William Blackstone held similar beliefs even before Thomas Jefferson. Blackstone argued that "if [a man] had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for . . . ages after him; which would be highly absurd and inconvenient."[28]

These views towards limiting a decedent's ability to freely transfer property and assets upon death, helped to shape a view toward the taxation of wealth transfers upon death. This led to the initial tax on a decedent's estate, which helped to strengthen the Navy in 1797.[29] After its debut in 1797, the Transfer Tax was repealed in 1802, after the war.[30] Following its repeal, the stamp tax lay dormant until financing of the Civil War was needed in 1862.[31] Once again, after the war, the tax became unnecessary and was repealed in 1870.[32] Resurrected again due to the Spanish-American War in 1898, the tax survived until the war's end in 1902.[33]

In 1916, once again requiring revenue, Congress tapped into the resources of the American people by enacting both the modern income tax and the first official Transfer Tax.[34] The Transfer Tax was officially birthed in 1916, "in part, to finance World War I . . . ."[35] To avoid this new tax, most people gave their money away during their lifetimes.[36]

---

[24] Natural law refers to the inner knowledge possessed by all men because they are created in the image of God.

[25] DOUGLAS W. KMIEC ET AL., THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, & PHILOSOPHY 93 (2004).

[26] J.D. Trout & Shahid A. Buttar, *Resurrecting "Death Taxes": Inheritance, Redistribution, and the Science of Happiness*, 16 J.L. & POL. 765, 769 (2000).

[27] *Id.* at 772 (quoting Barry W. Johnson & Martha Britton Eller, *Federal Taxation of Inheritance and Wealth Transfers, in* INHERITANCE AND WEALTH IN AMERICA 63 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998) (internal quotations omitted)).

[28] *Id.* (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *10 (quotations omitted).

[29] *See* Powell, *supra* note 21, at 21.

[30] *Id.* at 25 n.5.

[31] *Id.* at 21.

[32] *Id.*

[33] Wampler, *supra* note 4, at 530-31.

[34] *Id.* at 531.

[35] Powell, *supra* note 21, at 21.

[36] Wampler, *supra* note 4, at 531; *see also* I.R.C. § 2522.

This penchant for lifetime giving undercut the Transfer Tax, causing it to be a source of little revenue.[37] Not to be outdone, Congress countered by enacting the gift tax in 1926.[38] As taxpayers continued to find ways to avoid the estate and gift taxes, Congress again countered, in an effort to collect the maximum amount of revenue possible, by unifying the estate and gift taxes into one system in 1976.[39] Even though the Transfer Tax has officially existed for almost ninety years, Congress has been bent on its repeal.[40] Their most successful effort has come in the form of the Tax Act of 2001.

The Tax Act of 2001 calls for the maximum tax rates to decrease from 49% in 2003 to 45% in 2009.[41] During the time that the rates are decreasing, the Tax Act of 2001 also increases the amount excludable from the decedent's estate from $1 million in 2002 to $3.5 million in 2009.[42] The tax is repealed in 2010.[43]

As the total repeal of the Transfer Tax looms on the horizon, the battle over whether to extend the 2010 repeal is starting to reach its crescendo.[44]

---

[37] Wampler, *supra* note 4, at 531.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 533 n.55 ("After World War I some members of Congress wanted to leave the Transfer Tax in place, while others sought to repeal the 'socialistic' tax. Congress compromised by keeping the tax, but reducing rates." (citations omitted)). The most current pending legislation to repeal the Transfer Tax is the Death Tax Repeal Permanency Act of 2005 ("2005 Act"). http://thomas.loc.gov/cgi-bin/query/D?c109:3:./temp/~c109KmPCUn::. The 2005 Act was passed by the House on April 14, 2005, and was read for a second time and placed on the Senate's calendar on April 20, 2005. *Id.* The 2005 Act would prohibit the sunset provision of the Tax Act of 2001, which would keep the 2010 repeal of the Transfer Tax permanent. *Id.*

[41] IRC § 2001(c)(2)(B) (Supp. 2001).

[42] *Id.* § 2010(c).

[43] See *supra* note 8 and accompanying text.

[44] While most of the debate centers on whether to make the repeal permanent, little debate has been over the Tax Act of 2001's elimination of the step-up basis. The basis of property is the price that was paid when it was purchased. This amount is then used when the property is sold to calculate a gain or loss for payment of income tax. Currently, when a decedent leaves property, the beneficiary taking the property does not keep the same basis as the decedent; rather, the amount of the basis is "stepped up" to the fair-market value. Whether the beneficiaries are unfairly penalized by forcing them to bear the burden of the tax upon disposition of the inherited property is one issue revolving around the step-up basis. Another question is whether it is more equitable to have the estate bear the burden of any tax rather than pass potential tax burdens to the beneficiary who may or may not have the ability to pay such a tax. Further, the step-up in basis allows for potential income by the beneficiary to go untaxed. These questions are intriguing, but beyond the scope of this comment.

III. ARGUMENTS SURROUNDING THE TRANSFER TAX

A. Arguments for Repealing the Transfer Tax

Opponents of the Transfer Tax mockingly refer to it as the "death tax."[45] However morbid this title is, their jest is an attempt to point out the absurdity of taxing someone for dying.[46] There are several reasons behind attributing such a shocking title to the Transfer Tax. The opponents' mockery is partially driven by the extreme unpopularity of this particular tax.[47] Approximately 85% of the population supports the repeal of the Transfer Tax, even though only the wealthiest of Americans actually pay the tax.[48] Coinciding with its extreme unpopularity,[49] opponents of the Transfer Tax argue that the tax is inefficient due to the cost of its enforcement.[50] Some critics argue that the Transfer Tax may actually be running in the red due to the combination of administration costs by the IRS and compliance costs to tax payers.[51] Opponents claim that the IRS spends about as much in administrative and enforcement costs as the Transfer Tax generates in revenue each year.[52] Furthermore, the cost of the tax is not limited to the public arena. Private costs associated with the Transfer Tax are also disproportionately high. Unlike most income tax returns, the preparation of Transfer Tax returns are not usually done by the individual, but by experts.[53] The use of experts can be costly.[54]

---

45 Bernstein, *supra* note 1, at 191.

46 *Id.* at 191 n22.

47 Richard Schmalbeck, *Does the Death Tax Deserve the Death Penalty? An Overview of the Major Arguments for Repeal of Federal Wealth-Transfer Taxes*, 48 CLEV. ST. L. REV. 749, 764 (2000).

48 Bernstein, *supra* note 1, at 191.

49 *See, e.g.*, United for a Fair Economy, *supra* note 1, at 5. Critics claim that once "voters hear all of the facts about the [Transfer Tax], 67% support reforming the tax, while only 27% support repealing it." *Id.*

50 Schmalbeck, *supra* note 47, at 754.

51 Tye J. Klooster, *Repeal of the Death Tax? Shoving Aside the Rhetoric to Determine the Consequences of the Economic Growth and Tax Relief Reconciliation Act of 2001*, 51 DRAKE L. REV. 633, 643 (2003).

52 Bernstein, *supra* note 1, at 191. Critics rebut this point by noting that in 2003 the entire budget for the IRS was approximately $10 billion, and the revenue raised by the Transfer Tax was approximately $20 billion. United for a Fair Economy, *supra* note 1, at 12.

53 Christopher E. Erblich, *To Bury Federal Transfer Taxes Without Further Adieu*, 24 SETON HALL L. REV. 1931, 1941 (1994).

54 *Id.* While opponents of the Transfer Tax have estimated the private cost of estate planning at $32.3 billion, a more realistic estimate is closer to $8 billion. Schmalbeck, *supra* note 47, at 766. The $8 billion is based on estate planning every three years, constituting roughly forty hours of work by the planning expert at an average of $250 per

Hand-in-hand with the inefficiency of the Transfer Tax is the issue of the tax not raising adequate revenue.[55] When first initiated in the form of a stamp tax, the Transfer Tax's intent was not only to provide a vehicle to redistribute the wealth in America, but also, to be a source of revenue. The revenue generated by the Transfer Tax has recently diminished to 1.1% of the total tax revenue and has "rarely exceeded two percent" since World War II.[56] By contrast, in 1992, the excise tax on alcohol and tobacco generated more revenue than the Transfer Tax by $1 billion.[57]

Another arrow in the quiver of opposition is the Transfer Tax's "offensive[ness] to capitalism."[58] Since capitalism allows those who are "more intelligent, more frugal, more innovative, more motivated, or greedier than others . . . to earn, save and accumulate more money than other people who value consumption and idleness,"[59] opponents of the Transfer Tax argue that it "seem[s] wrong to take money from the people who devoted their lives to earning and accumulating that wealth and give the money to those that chose not to pursue the same goals."[60] This tends to discourage saving and investing. By discouraging saving and investing, the Transfer Tax violates the neutrality principle.[61] Furthermore, discouraging savings and investing causes a reduction in capital accumulation, which leads to a reduction in wages and employment, and ultimately lowers the GDP.[62]

---

hour. *Id.* This has led critics to conclude "private compliance costs have been grossly exaggerated." *Id.*

55 *See* Bernstein, *supra* note 1, at 191. The Transfer Tax raised "an estimated $32.3 billion in fiscal year 2001." Schmalbeck, *supra* note 47, at 762. If repealed, distributing the $32.3 billion to all income tax payers would increase the average income tax burden by $323 annually. *Id.*

> There can be little doubt that these revenues can be sacrificed without catastrophic losses of governmental services.
>
> . . . [B]ut you can not expect to find $30 billion lying under the cushions of the federal couch; some pain will have to be inflicted somewhere else in the tax system to permit this relief.

Id. at 762-63.

56 Klooster, *supra* note 51, at 642-43.

57 *Id.* at 643.

58 Bernstein, *supra* note 1, at 192.

59 *Id.* at 193.

60 *Id.* "In a capitalistic regime where citizens are equal under the law, it is difficult to accept that people are actually not all created with equal abilities and earning power." *Id. But see Romans* 12:4-8 (stating that we are all members of Christ's body and were given different gifts).

61 Erblich, *supra* note 53, at 1945. "The principle of economic neutrality states that an ideal tax system should interfere with private economic decisions as little as possible." *Id.*

62 *Id.* One model predicts that eliminating the Transfer Tax would

Finally, opponents argue that the Transfer Tax is a double (or even triple) tax,[63] and its oppressiveness tends to break up family farms and other small businesses.[64] The need to raise cash to pay the Transfer Tax was one reason cited by 98% of respondents to a survey when asked "why family businesses fail."[65] When asked what they would do if the Transfer Taxes were due tomorrow, 37% of farms polled stated that they would have to liquidate to meet the demands of the tax.[66] The Transfer Tax itself is not the only burden on the family farm and small business. To plan for the Transfer Taxes, these entities spend an average of $33,000.[67] One proposal, backed by the Farm Bureau to relieve the small farms and businesses but still tax owners of big corporate farms, is to increase the excluded amount to $5 million.[68]

As evidenced by the Farm Bureau's proposal, opponents of the Transfer Tax do not always advocate a total repeal, leaving a void where the Transfer Tax once stood; they point to alternatives to the current taxation of estates.[69] Investigation of these alternatives is beyond the scope of this comment.

B. Arguments for Retaining or Reforming the Transfer Tax

Surprisingly, many of America's wealthy have come out against the

---

> (1) increase Gross Domestic Product by $79 billion more by the year 2000 than it would be with the tax; (2) increase the stock of capital by $639 billion more than the amount projected for the year 2000; and (3) create 228,000 more jobs than if the [Transfer Tax] remained (through the labor productivity enhancing effect of a larger stock of capital).

Id. (using a model from RICHARD E. WAGNER, THE CENTER FOR THE STUDY OF TAXATION, FEDERAL TRANSFER TAXATION: A STUDY IN SOCIAL COST (1993)).

[63] Schmalbeck, *supra* note 47, at 760. The argument that the Transfer Tax imposes a double tax is based on the individual paying tax on the money during his lifetime and the remaining value being taxed again at death; thus, creating a double tax (triple if the money was generated through a corporation). *Id.* However, "multiple taxation is the rule rather than the exception." *Id.* at 761. One example is in the purchase of real estate, where the government taxes the income used to purchase the property, and subsequently the government continually taxes the property via the annual property tax. *Id.*

[64] Weber, *supra* note 13, at 127.

[65] *Id.* at 118.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 135. The $5 million credit also coincides with critics who question whether we should be worried about "someone with $5 million in farm or small business assets [being] able to pass only $3.5 million or so to the next generation [because] the individuals in that generation will still be wealthier than all but a tiny fraction of the population." Schmalbeck, *supra* note 47, at 767.

[69] *See* Wampler, *supra* note 4, at 542-48 (listing the taxation of capital gains at death, elimination of the stepped-up basis at death, and inclusion of the inheritance as income to the recipient as alternatives to the current Transfer Tax).

abolition of the Transfer Tax. Responsible Wealth[70] has issued a public statement, entitled Call to Preserve the Transfer Tax, which some of America's wealthiest people have signed.[71] One reason espoused by proponents of the Transfer Tax is that it helps to re-distribute the wealth in America.[72] As stated earlier in this comment, the redistribution of wealth[73] to prevent a wealth aristocracy was part of the policy reasoning behind implementation of the Transfer Tax.[74] In addition to the fear of creating a wealth aristocracy, there is an economic rationale behind keeping the Transfer Tax: it "is the least damaging of all our taxation because it does not interfere with wealth creation."[75] It "does not prevent a person from earning, saving, or consuming lavishly, . . . it merely prevents . . . children from automatically reaping the benefits of their predecessors."[76] Reaping a substantial inheritance would produce laziness by encouraging the beneficiary to drop out of the work force.[77]

Additionally, proponents argue against the abandonment of the Transfer Tax because it raises revenue that is necessary in the current debt crisis.[78] The proponents look beyond the $20 billion raised by the Transfer Tax in 2003 to the estimated $1 trillion that would be lost over the next two decades.[79] In addition to the revenue raised, proponents allege that the Transfer Tax helps to keep our overall tax system

---

[70] Responsible Wealth, http://www.responsiblewealth.org (last visited Sept. 5, 2005) ("Responsible Wealth is a national network of businesspeople, investors and affluent Americans who are concerned about deepening economic inequality and are working for widespread prosperity.").

[71] Responsible Wealth, Signers of the Call to Preserve the Estate Tax, http://www.responsiblewealth.org/estatetax/ETCall_Signers.html (last visited Sept. 5, 2005). Signers include William H. Gates, Sr., Paul Newman, Ted Turner, and Bill Joy. *Id.*

[72] *But cf.* Klooster, *supra* note 51, at 640 (stating that nearly half of all wealth accumulations are by inter vivos gifts and bequests, and the taxing of these wealth transfers has been ineffective in breaking up wealth concentrations).

[73] *See supra* Part III.A. Critics dispel this policy argument by pointing to the percentage of wealth held by the top 0.5% increasing from 25% to 28.8% despite the Transfer Taxes. Erblich, *supra* note 53, at 1965.

[74] *See* Schmalbeck, *supra* note 47, at 753. "Wealth concentration can create pressures on democratic institutions, especially within the framework of the American democracy, where free speech considerations have made it difficult to constrain the ability of the wealthy to use their wealth to influence the outcome of political contests."

[75] Sarah Laitner, *The Americas & International Economy—Soros Warns on Estate Tax Repeal*, FIN. TIMES, Jan. 14, 2003, at P8. (quoting George Soros).

[76] Bernstein, *supra* note 1, at 194; *cf. 2 Thessalonians* 3:10 ("If a man will not work, he shall not eat.").

[77] Wampler, *supra* note 4, at 540-41. Critics argue the opposite. They feel that "the desire to pass on money to one's children is a strong incentive to work." *Id.* at 541 (citation omitted).

[78] Erblich, *supra* note 53, at 1956.

[79] United for a Fair Economy, *supra* note 1, at 12.

progressive.[80]

As an alternative to a total repeal, proponents of the Transfer Tax advocate reforming the current system by increasing the marginal rates of the Transfer Tax or raising the decedent's excludable amount. Proponents point out that even if the current Transfer Tax were modified so that the highest marginal rate was increased to as high as 75%, "[t]here is the argument that anyone inheriting an exorbitant sum could afford to pay 75% and still inherit substantial wealth."[81] Additionally, immediately raising the amount excludable from the decedent's estate to $3.5 million would still keep the Transfer Tax, and it would exempt approximately 88% of the estates currently paying the Transfer Tax.[82]

Some purport that the Transfer Tax helps "churn the economy . . . [by making] society more open to economic opportunity . . .,"[83] and prevents a person's birth from determining his economic status; allowing "those of modest means an incentive to become wealthy . . . ."[84] Furthermore, the Transfer Tax signals to the entire population that the wealthy are being taxed, which is "essential to taxpayer morale."[85]

Proponents of the Transfer Tax, mindful of their moral obligation to help the poor,[86] are also concerned about the effect repealing the Transfer Tax will have on charitable giving.[87] "Do not accepted moral principles call for continuing and strengthening the death tax system?"[88] Those moral principles are coupled with a call for increasing incentives toward charitable giving by the recent support of the Transfer Tax by "George Soros, William H. Gates, David Rockefeller, and Warren

---

[80] Erblich, *supra* note 53, at 1961-62. The small amount of revenue generated and the few taxpayers that are affected by the tax are reasons why critics feel that the Transfer Tax does not affect the progressivity of the tax system. *Id.* at 1962.

[81] Bernstein, *supra* note 1, at 194.

[82] United for a Fair Economy, *supra* note 1, at 5.

[83] Erblich, *supra* note 53, at 1966. Critics argue that the evidence shows the taxes have almost no effect on the concentration of wealth in America, and that the Transfer Tax doesn't churn the economy, rather it creates a disincentive to work. *Id.*

[84] *Id.*

[85] *Id.* at 1963. Opponents of the tax feel that a taxpayer may become disheartened by perceptions that the wealthy avoid taxes, or even illegally evade the taxes, causing decreased taxpayer compliance. *Id.* at 1964.

[86] *Id.* at 1967; *see also James* 1:27 ("[L]ook after the orphans and widows in their distress . . . .").

[87] *See* Alana J. Darnell, *Toward an Integrated Tax Treatment of Gifts and Inheritances*, 34 SETON HALL L. REV. 671, 687-88 (2004).

[88] Erblich, *supra* note 53, at 1967 (quoting William Pedrick, *Through the Glass Darkly: Transfer Taxes Tomorrow*, 19 INST. ON EST. PLAN. 1900, 1903.3 (1985), *reprinted in* REGIS W. CAMPFIELD ET AL., TAXATION OF ESTATES, GIFTS AND TRUSTS 1991–1993 (1991)).

Buffet."[89] The moral obligation to help the poor is an obligation of all Americans, not only the wealthy.[90] However, the wealthy are right to be concerned with their moral obligation to help the poor because they are held to a higher standard due to the blessings that they have been given.[91] That concern, regarding the effect a repeal of the Transfer Tax would have on charitable giving, is the focus of this comment and will be examined next.

IV. CHARITABLE GIVING

A. Background and Current Status of Giving

To quote the psalmist David, "The earth is the Lord's, and everything in it, the world, and all who live in it . . . ."[92] When approaching the subject of giving our wealth away, it is important that we realize that when we enter this world we bring nothing with us, and likewise, when we leave this world we take nothing with us.[93] As we realize that we take nothing with us when we depart from this earth, our desire is to transfer any wealth that we have accumulated to those natural objects of our bounty. If this desire to transfer wealth upon death were problem free, this paper would not have been written. A major stumbling block to that transfer of wealth is the Transfer Tax. One mechanism that reduces the amount of the taxable estate is charitable giving.[94]

Charitable giving is not always a decision made merely for tax avoidance. Often, the donor realizes that man has been given a moral charge to bestow charity on certain members of society.[95] Because of the

---

[89] Carolyn C. Jones, *The Moral Hazard of the Estate Tax*, 48 CLEV. ST. L. REV. 729, 747 (2000).

[90] *Proverbs* 22:9 ("A generous man will himself be blessed, for he shares his food with the poor.").

[91] *Luke* 12:48 ("From everyone who has been given much, much will be demanded . . . .").

[92] *Psalms* 24:1.

[93] *Job* 1:24 ("Naked I came from my mother's womb, and naked I will depart.").

[94] References to charities are those charities that are recognized by the IRS under § 501(c)(3).

[95] 2 *Corinthians* 9:6-7 ("Whoever sows sparingly will also reap sparingly, and whoever sows generously will also reap generously. Each man should give what he has decided in his heart to give, not reluctantly or under compulsion, for God loves a cheerful giver."); *Deuteronomy* 15:7-8 ("If there is a poor man among your brothers in any of the towns of the land that the Lord your God is giving you, do not be hardhearted or tightfisted toward your poor brother. Rather be openhanded and *freely lend him whatever he needs*.") (emphasis added); *Galatians* 2:10 ("All they asked was that we should continue to remember the poor, the very thing I was eager to do."); *Leviticus* 23:22 ("When you reap the harvest of your land, do not reap to the very edges of your field or gather the gleanings of

moral obligation to give, charities and foundations that play an integral role in bringing aid to those in need should not be forgotten. Giving to those charities and foundations is one responsibility that we should not abrogate to the federal government, expecting them to pick up the slack. Realizing this, Americans have traditionally been givers. For example, the level of giving by Americans compared with that of our Canadian neighbors reveals that Americans have given more to nonprofit organizations over the past thirty years.[96] Past numbers aside, the moral basis for giving will only provide us with some of the motivation to continue giving. Although some research suggests that tax savings are not generally the motivating factor behind charitable gifts,[97] other analysis of IRS data shows otherwise. Taxpayers who were allowed to take a deduction for their charitable gifts gave more than taxpayers who could not deduct the gift; regardless of income level.[98] Congress encourages us, with regard to our responsibility to give to charity, by allowing charitable gifts to be deducted from both income tax and from the gross estate used to determine the Transfer Tax.[99] Furthermore, the current deductibility of gifts to charity works as a tax expenditure.[100] In this situation, Congress uses the tax expenditure to advance the social policy of giving to charities so Congress does not need to raise additional funds to provide services currently provided by charities.

In 2003, Americans gave an estimated $201 billion to charities.[101] The giving was not limited to a few wealthy families, as nearly 90% of American families gave that $201 billion.[102] Furthermore, a breakdown between the two different types of gifts, charitable gifts[103] and charitable bequests,[104] revealed that "nearly 90 percent of . . . giving occurs during [a] donor's [life]."[105] One could argue that gifts given by the donor during

---

your harvest. Leave them for the poor and the alien. I am the Lord your God."); *see also* I.R.C. §§ 2055, 2522 (2000).

[96] Klooster, *supra* note 51, at 659. Some attribute the American superiority in giving to the lack of tax deductions that Canadians are allowed for charitable gifts. *Id.*

[97] *Id.*

[98] Independent Sector, *Fact Sheet: Giving in America*, http://www.independentsector.org/media/factsheet.html (last visited Aug. 27, 2005).

[99] *See* I.R.C. § 170 (providing a deduction for charitable contributions up to 50% of adjusted gross income); *id.* § 2055 (2000) (unlimited deduction for transfers to charities allowed in determining the value of the taxable estate).

[100] A tax expenditure is a tax deduction or credit whose rationale lies in encouragement of some social policy.

[101] CHARITABLE GIVING, *supra* note 17, at 1.

[102] Independent Sector, *supra* note 98.

[103] Gifts given to charity during the lifetime of the donor.

[104] Gifts given to charity from the donor's estate. BLACK'S LAW DICTIONARY 123 (7th ed. 2000).

[105] CHARITABLE GIVING, *supra* note 17, at 1.

his or her lifetime can be indirectly related to escaping the payment of Transfer Tax upon death. This paper limits its analysis to the actual amount given to charity upon death in avoidance of Transfer Tax.[106]

While the overall giving to charities is shouldered by nearly 90% of the population, it is a different story when solely examining the charitable bequests. Looking at the charitable bequests made in 2001, a mere 5% of all Transfer Tax filers accounted for 64% of all bequests.[107] Additionally, the Survey of Consumer Finances, conducted by the Congressional Budget Office, which found that the wealthiest 0.2% of all American families gave approximately 85% of the contributions to charity.[108] Looking at the year 2000, just before the passage of the Tax Act of 2001, nearly 17% of estates that filed Transfer Tax returns left something to charity.[109] Those bequests to charity were heavily concentrated in the wealthiest estates: estates worth more than $3.5 million accounted for over 70% of the bequests;[110] estates worth over $7 million contributed over 60%; and estates worth over $20 million accounted for 40%.[111] Those numbers, at least anecdotally, show that the higher the Transfer Tax burden, the greater the gift. In light of the enactment of the Tax Act of 2001, the question that needs to be

---

[106] By giving inter vivos gifts to charities, the taxpayer not only reduces the amount in the current estate, but also eliminates any potential growth from the transfer. (e.g. If donor transfers stock to a charity, not only is the value of the stock removed from the estate, but the estate will also not accumulate the growth in value of the stock.) Furthermore, there is at least anecdotal evidence that deductibility of charitable gifts does inspire the taxpayer to avoid as much tax as possible. "History indicates that enabling all givers to claim a charitable deduction stimulates giving. In 1986, when the tax code allowed nonitemizers to claim a deduction for the full amount of their charitable gifts, charitable contributions by nonitemizers increased by 40% or $4 billion from the previous year." Independent Sector, *supra* note 98 (emphasis omitted).

[107] United for a Fair Economy, *supra* note 1, at 11.

[108] CHARITABLE GIVING, *supra* note 17, at 2.

Families' Wealth and Their Contributions to Charity

Net Worth	Millions of Families	Percentage of Families Giving at Least $500	Average Contribution from Families Giving at Least $500
< $0.5 M	90.79	32	$2,300
>$0.5 M to $1 M	8.26	73	$3,000
>$1 M to $3 M	5.21	82	$5,900
>$3 M to $5 M	0.93	90	$19,200
>$5 M to $50 M	1.28	95	$37,500
$50 M or More	0.02	95	$391,400

Id.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 2-3.

answered then is: What will charitable giving look like if the Transfer Tax is repealed?

As proponents of the Transfer Tax argue, its repeal will decrease the amount given to charities, but opponents argue it will have no effect and may even allow for an increase in giving. One thing is sure: there is no consensus regarding how a total repeal of the Transfer Tax will impact charitable giving.[112]

B. Effect of Total Repeal of the Transfer Tax

The Tax Act of 2001 raises the level of the excludable amount from $1 million to $3.5 million before the total repeal of the Transfer Tax in 2010.[113] As this happens, the number of estates experiencing a tax-free transfer of wealth will rise. Proponents of repeal argue that this will put more money in the pockets of wealthy Americans, which in turn may actually increase charitable contributions.[114] Although a windfall to America's wealthy may induce charitable giving, "[o]ne study found that for every thousand dollars of *earned* wealth, an entrepreneur will give $4.56 to charity. For every thousand dollars of *inherited* wealth, an heir will give only 76 cents." [115] Furthermore, charitable bequests would be more costly to the decedent's estate. Since there is no longer a tax advantage to the gift,[116] any giving at this point would raise the cost of the bequest to 100% of the amount given, necessitating giving for reasons other than tax avoidance.[117]

A total repeal of the Transfer Tax in 2000, the year before the Tax Act of 2001 started to affect Transfer Taxes, would have caused a total estimated decrease in combined charitable gifts and bequests between $13 billion to $25 billion.[118] These numbers are given even more weight in light of the fact that even a reduction of $10 billion would eliminate

---

[112] Klooster, *supra* note 51, at 660.

[113] I.R.C. § 2010(c) (Supp. 2001).

[114] Wampler, *supra* note 4, at 542. "If the government truly wants to meet a moral obligation to help the poor, then it need only step aside and let the free market work." Erblich, *supra* note 53, at 1967.

[115] UNITED FOR A FAIR ECONOMY, *supra* note 1, at 11.

[116] When the donor gives the gift to lower the tax burden, the cost of the gift to the donor is the percentage equal to the tax rate paid by the estate. Once Congress repeals the Transfer Tax, the gift would then cost the donor 100% since the tax rate is zero. To illustrate, suppose a donor gives $100 to a charity. If that donor is taxed at 45% then the $100 gift only costs the donor $55 since $45 would have gone to taxes regardless of the gift. If that same donor is not taxed, then the gift costs the donor the entire $100 since none would have been going to pay for any tax.

[117] CHARITABLE GIVING, *supra* note 17, at 3.

[118] DAVID KAMIN, CTR. ON BUDGET & POLICY PRIORITIES, NEW CBO STUDY FINDS THAT ESTATE TAX REPEAL WOULD SUBSTANTIALLY REDUCE CHARITABLE GIVING 1 (2004), http://www.cbpp.org/8-3-04tax.pdf.

the equivalent of all the grant-making that is currently done by America's 110 largest foundations.[119] Who would fill the void? Congress? Allowing Congress to fill that void would be forgetting the personal moral obligation to help those in need. Furthermore, waiting idly by as Congress fills the void left by our failure to give does not account for the fact that the money will have to come from somewhere. That place is most likely taxes paid by all taxpayers rather than the charitable giving currently done by the wealthiest of Americans.

Reformation of the Transfer Tax will also impact giving to charities; however, it will be at much lower levels. If the Transfer Tax in 2000 had an excludable amount of $2 million, as it will in the years 2006-2008,[120] the combined total amount of charitable gifts and bequests would still be reduced by about $6.4 billion.[121] Raising that exemption to $3.5 million would have had a similar impact.[122]

To offset those losses, proponents of a repeal propose using the income tax system to provide the necessary incentive for charitable giving. Proponents of repeal offer that the increase of capital from repealing the Transfer Tax would help create more jobs, which would benefit the poor and place more income into the economy.[123] This argument is only persuasive if those benefiting from the influx of income into the economy, due to the repeal of the Transfer Tax, are taxpayers who itemize deductions on their income tax returns. Taxpayers who itemize give 37% more to charity; yet over two-thirds of all taxpayers do not itemize, placing the burden of making up the loss in charitable giving on those taxpayers who itemize.[124] Any downturn in the economy would further influence the giving to charities. Half of all Americans would discontinue giving to charity if the economy were to worsen.[125]

---

[119] United for a Fair Economy, *supra* note 1, at 11.

[120] I.R.C. § 2010(c) (Supp. 2001).

[121] CHARITABLE GIVING, *supra* note 17, at 8. The total amounts collected in 2000 were $196 billion in charitable gifts and $16 billion in charitable bequests. *Id.* at 1-2.

Estimated Effects on Charitable Bequests in 2000 from Changes in the Transfer Tax

Alternative Tax Law	Percent Change
$ 2 Million Exemption	-8 to -14
3.5 Million Exemption	-8 to -15
Repeal of the Transfer Tax	-16 to -28

Id.

[122] *Id.*

[123] *See* Erblich, *supra* note 53, at 1967; Klooster, *supra* note 51, at 659.

[124] Independent Sector, *Report Details Influence of Tax Itemizing Status on Charitable Giving* (Apr. 15, 2003), http://www.independentsector.org/media/deductingPR.html.

[125] *Id.*

C. Reliance on Altruistic Motives for Charitable Giving

Proponents of repeal advocate that the majority of decisions to give to charitable organizations are not borne of the desire to escape a tax burden; rather they are initiated by "one's desire to give."[126] If this is a valid argument, then the reduction in charitable giving due to the repeal of the Transfer Tax will be made up by taxpayers' altruistic motives. This will be particularly important to religious organizations, as collectively they receive the largest share of the gifts to charity; over one-third of all charitable donations go to such organizations.[127]

In light of the large amount of charitable giving currently directed toward religious organizations, a good measure of the validity of reliance on altruistic motives to generate the current level of charitable giving is to look at giving to places of worship. Approximately 63% of all households reflect their altruistic motivation by giving some money to their place of worship.[128] It would speak well for altruistic motives if a majority of that 63% held to their altruistic motivations to the point of tithing[129] 10% of their income ("tithing"); yet, only 5% of American households tithed in 2003.[130] What is even more telling about our inability to rely on altruistic motives to fill the void in charitable giving caused by the repeal of the Transfer Tax is the response to tithing by those who should be leaders when it comes to altruistic motives: born-again Christians.[131] Surprisingly, this group could not even claim 10% born-again adult tithers; they fell short with only 7% of all households tithing in 2003.[132]

Clearly relying on our own altruistic motives is a risky proposition to say the least. Additionally, half of all Americans would cease giving to charity if the economy made a turn for the worse.[133] Furthermore, those that ascribe to following the Bible, arguably the best basis of altruistic motives, fail to break into double digits in the arena of tithing. In

---

[126] Klooster, *supra* note 51, at 659.

[127] Press Release, Am. Ass'n of Fundraising Council, Americans Give $241 Billion to Charity in 2003 (June 21, 2004), http://www.aafrc.org/gusa/Masterkit.pdf.

[128] Press Release, The Barna Group, Giving to Churches Rose Substantially in 2003 (Apr. 13, 2004), http://www.barna.org/FlexPage.aspx?Page=BarnaUpdate&BarnaUpdateID=161.

[129] *Malachi* 3:10 (Bring the whole tithe into the storehouse, that there may be food in my house. Test me in this . . . and see if I will not throw open the floodgates of heaven and pour out so much blessing that you will not have room enough for it.").

[130] The Barna Group, *supra* note 128.

[131] Born-again Christians are persons "who have made a significant personal commitment to Jesus Christ and who believe they will experience eternal life because of their confession of sins and acceptance of Jesus Christ as their savior." *Id.*

[132] *Id.*

[133] Independent Sector, *supra* note 98.

addition to our moral obligation to give, which in theory should not need tax deductibility as a means of motivation, increasing charitable giving can potentially decrease the tax burden on all taxpayers—not a bad deal when the wealthiest Americans are providing relief for the rest.[134]

D. Need for Charitable Giving

On January 29, 2001, President George W. Bush created the Faith-Based and Community Initiative ("FBCI") by his executive order.[135] The purpose behind the FBCI was to "help the Federal Government coordinate a national effort to expand opportunities for faith-based and other community organizations and to strengthen their capacity to better meet social needs in America's communities . . . ."[136] President Bush felt that these organizations were "indispensable in meeting the needs of poor Americans and distressed neighborhoods."[137] The "White House Office of Faith-Base and Community Initiatives ("White House OFBCI") was formed within the Executive Office of the President" to help in the coordination of providing funding to the many faith-based and community organizations.[138] The White House OFBCI is composed of seven different agencies.[139] The federal government distributes the money either directly or through grants to the states.[140] The states set up there own rules for distributing over $50 billion to "grassroots and other organizations."[141] A comparison of fiscal year 2002 and fiscal year 2003 revealed that the Department of Health and Human Services increased its grants to faith-based organizations 41%.[142] That increase in grants accounted for a 19% budget increase—from $477 million to $568

---

[134] This decrease in tax burden is based on the weak assumption that as the level of charitable contributions increase, and charities are able to provide more services that are currently being provided by the federal government, our governmental leaders would have the wherewithal to decrease the budget accordingly.

[135] Exec. Order No. 18,199, 3 C.F.R. 752 (2001), *reprinted in* 3 U.S.C.S. prec. § 101 (LexisNexis 2005).

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, FEDERAL FUNDS FOR ORGANIZATIONS THAT HELP THOSE IN NEED 3 (2004), *available at* http://www/whitehouse.gov/government/fbci.GrantCatalogue2004.pdf. The agencies are: Department of Justice, Department of Labor, Department of Health and Human Services, Department of Housing and Urban Development, Department of Education, Department of Agriculture, and Agency for International Development. *Id.*

[140] *Id.* at 2.

[141] *Id.*

[142] The White House, Fact Sheet: Compassion in Action: Helping America's Charities Serve Those Most in Need (March 3, 2004), http://www.whitehouse.gov/news/releases/2004/03/20040303-2.html.

million.[143] Similarly, the Department of Housing and Urban Development reported a budget increase of 11% for the same period.[144] President Bush has also pledged at least an additional $350 million to various programs that provide grants to faith-based and community organizations for the fiscal year 2005.[145] The grants provided to the various faith-based and community organizations represent money that is going to provide much needed help to those who are in need. However, this money has to come from somewhere. That place is from current tax revenue. Even with the current level of charitable giving, the federal government is planning to increase its role in giving. If charitable giving goes down, as anticipated by a repeal of the Transfer Tax, then revenue streams that charities are currently relying on will dry up and they will be forced to turn to the White House OFBCI. This will necessitate an increase in funding to the agencies involved, which in turn will mean that the overall tax burden will increase for all Americans.[146] However, if charitable giving can be increased, it could, theoretically, relegate the federal government's involvement to zero.[147] If the federal government's involvement in providing grant monies to faith-based and community organizations becomes nonexistent, then the tax burden on all taxpayers would theoretically decrease.[148]

E. Ways to Increase Charitable Giving

Charitable giving can be increased in a number of ways: 1) retain or reform the Transfer Tax; 2) allow a deduction for charitable giving for all tax payers, not just those who itemize; 3) eliminate or increase the income tax's 50% ceiling on charitable giving; or 4) use of a tax credit for charitable gifts.

First, the Transfer Tax may or may not be achieving its purported goal of wealth distribution; however, the study done by the Congressional Budget office indicates that elimination of the Transfer Tax will decrease the amount given to charity by up to 28%.[149] Retaining the Transfer Tax, or only slightly modifying it, will help to avoid this loss. Furthermore, by retaining the Transfer Tax, an incentive remains for the donor to give contributions to charities during his or her lifetime,

---

[143] *Id.*

[144] *Id.*

[145] The White House, Fact Sheet: Compassion for Americans in Need (Aug. 3, 2004), http://www.whitehouse.gov/news/releases/2004/08/20040803-6.html.

[146] By contrast, half of all revenue generated by the Transfer Tax is generated by taxes on the top 0.14% of Americans. United for a Fair Economy, *supra* note 1, at 7.

[147] I say theoretically because history has shown that lawmakers have a unique way of turning any surplus into yet another opportunity to experience greater debt.

[148] *Id.*

[149] CHARITABLE GIVING, *supra* note 17, at 8.

as this still reduces the assets that will be subject to the Transfer Tax when the donor passes away.[150]

Second, taxpayers who are able to itemize their deductions, and thus incorporate their charitable deductions into their tax return, give 37% more to charities.[151] Allowing all taxpayers to deduct their charitable contributions has the potential to substantially increase tax revenue. In 1986, all taxpayers, not just those who itemized, were permitted a charitable deduction on their tax return. That deduction increased the charitable contributions by taxpayers who could not itemize by 40%, resulting in a $4 billion increase in charitable gifts. [152] The moral call to give, combined with a realistic opportunity to alleviate the necessity of the White House OFBCI to provide funding to faith-based and community organizations, makes increasing gifts to charity a worthy goal.

Third, increases in charitable giving can be achieved by increasing or eliminating the current ceiling on imposed income tax returns for deductible charitable gifts. As shown in the preceding paragraph, taxpayers will increase charitable giving when given tax advantages to do so. Anecdotally, an argument could be made that taxpayers would also increase their charitable giving if it was made more advantageous by increasing the current ceiling on the deductibility of charitable gifts from 50%.[153] This would encourage those with the greatest income, and hence, the highest marginal tax rate, to give even more since they reap the most tax benefit for each dollar given to charity.[154]

Alternatively, a credit could be given for charitable gifts. This credit could be given on both income tax and Transfer Tax returns to create an incentive to give to charity. As shown by the lack of tithing by born-again Christians and echoed by the entire population's penchant to stop giving in the face of an economic downturn, altruistic motives alone are not enough to sustain charitable giving.

V. CONCLUSION

The Transfer Tax should not be repealed. Rather, it needs to be retained in some form to provide the necessary incentive to keep Americans giving to charity.

The Transfer Tax has been a source of controversy from its humble beginnings as a stamp tax used to finance the Navy. Most desire to work

---

150 *Id.* at 3.

151 Independent Sector, *supra* note 98.

152 *Id.*

153 I.R.C. § 170(b)(1)(A) (2000).

154 For every dollar given to charity, the taxpayer reaps a benefit equal to their marginal tax rate. For example, if a taxpayer has a marginal rate of 35%, every $1 given to charity only costs the taxpayer $.65 because $.35 would go to taxes anyway.

hard and then pass their wealth to their loved ones, usually their family. As a major roadblock to those desires, the Transfer Tax is looked upon with much disdain.

Both sides of the argument surrounding the Transfer Tax state numerous reasons in support of their respective positions, stating why it should be retained in some form or repealed completely. Both sides predictably look at the effect the Transfer Tax has on wealth distribution from diametrically opposed stances. Additionally, both sides contradict each other as to the effect that the Transfer Tax has on charitable gifts. Wealth distribution aside, charitable giving is an important part of our national economy.

Our moral obligation is clear. We are to give to those in need. Charitable organizations provide many services to those who need it most. The federal government has recently recognized the exemplary job that faith-based and community organizations do in providing services to the needy, and it has responded by creationing the White House OFBCI. Although providing money to worthy organizations, the White House OFCBI has to get its funding from some source. That source is the American taxpayer.

Retaining the Transfer Tax, in some form will provide a vehicle to alleviate some of the burden currently on all taxpayers. The wealthiest Americans currently pay the lion's share of the Transfer Taxes. Elimination of these taxes will cause a depletion in the giving to charity, which will force charities to turn to the White House OFBCI for more grant money to provide services to those in need. This has the potential to raise taxes on all Americans.

More importantly, altruistic motives will not provide the necessary incentives to keep Americans giving to charity. Past actions by taxpayers have shown that deductibility of gifts is a major motivating force behind charitable giving. Furthermore, if less than 10% of those professing faith in the Bible offer a tithe to their church, how can the population-at-large be expected to give more generously?

We need as much help as we can get to prompt us to give the way we should be giving. Congress should keep the Transfer Tax, in some form, because it helps to provide a great incentive to prompt giving.

*Aric D. Burch**

* I would like to thank my wife, Molly, for her unwavering love, support, and devotion; and my children, Alex, Ana, and Ian, for their hugs and kisses good-bye each day as I leave for the library. We are almost done!